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UNITED STATES REPORTS

VOLUME 216

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1909

UNITED STATES
SEP 2 1910
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CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER,[2] Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM,[3] Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIAM HENRY MOODY,[4] Associate Justice.
HORACE HARMON LURTON,[5] 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 Brewer died at his home in Washington, D. C., on March 28, 1910, while the court was in recess. He was buried at Leavenworth, Kansas. The proceedings on his death will appear in Vol. 218 U. S. Reports.

[3] 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, 215 U. S. Reports.

[4] Mr. Justice Moody was absent from the court on account of illness and did not take his seat upon the bench during October Term, 1909, nor did he participate in the decision of any of the cases reported in this volume which were argued or submitted during October Term, 1909.

[5] 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.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1909.

WESTERN UNION TELEGRAPH COMPANY *v.* THE STATE OF KANSAS EX REL. COLEMAN, ATTORNEY GENERAL.

UNITED STATES
SEP 2 1910
SENATE LIBRARY

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 4. Argued March, 17, 18, 1909.—Decided January 17, 1910.

COMMITTEE COPY

A statute of Kansas provided among other things, that before a corporation of another State, even one engaged in interstate business, should have authority to do local business in Kansas, it should pay "to the State Treasurer, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent of its authorized capital, upon the first $100,000 of its capital stock, or any part thereof; and upon the next four hundred thousand dollars or any part thereof, one-twentieth of one per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars, $200." The Western Union Telegraph Company, a New York corporation, engaged in commerce among the States and with foreign countries, and seeking to do local business in Kansas, had a capital stock of $100,000,000. The fee demanded of it as a condition of its right to do local business in Kansas, was $20,100. It refused to pay the required fee, and continued, as it had done for many years before to do local or intrastate business in Kansas. Thereupon, the State brought a suit in one of its own courts against the Telegraph Company and sought a decree ousting and restraining the company from doing any local business in Kansas. The state court gave the relief asked. *Held* that:

The right to carry on interstate commerce is not a privilege granted

by the States, but a constitutional right of every citizen of the United States and Congress alone can limit the right of corporations to engage therein. *Crutcher* v. *Kentucky*, 141 U. S. 47.

The power of Congress over interstate commerce is as absolute as it is over foreign commerce.

The rule that a State may exclude foreign corporations from its limits or impose such terms and conditions on their doing business therein as it deems consistent with its public policy does not apply to foreign corporations engaged in interstate commerce; and the requirement that the Telegraph Company pay a given per cent of all its capital, representing all its business, interests and property everywhere, within and outside of the State, operated as a burden and tax on the interstate business of the company in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the State, which it could not tax consistently with the due process of law enjoined by the Fourteenth Amendment.

Such a requirement imposed a condition on the Telegraph Company forbidden by the Constitution of the United States and violative of the constitutional rights of the company.

The Telegraph Company was no more bound to assent to the condition required of it in order that it might do local business in Kansas, than to a condition requiring it to waive its right to invoke the benefit of the constitutional provision forbidding the denial of the equal protection of the laws or of the provision forbidding the deprivation of property without due process of law.

The disavowal by a State enacting a regulation of intent to burden or regulate interstate commerce cannot conclude the question of fact of whether a burden is actually imposed thereby; and whatever the purpose of a statute it is unconstitutional if, when reasonably interpreted, it does, directly or by necessary operation, burden interstate commerce.

In determining whether a statute does or does not burden interstate commerce the court will look beyond mere form and consider the substance of things.

Consistently with the due process clause of the Fourteenth Amendment a State cannot tax property located or existing permanently beyond its limits.

A court could not give the relief asked by the State without recognizing or giving effect to a condition that was in violation of the Federal Constitution.

75 Kansas, 609, reversed.

THIS action was brought by the State of Kansas in one of its courts against the Western Union Telegraph Company, a New York corporation, to obtain a decree ousting and restraining that corporation from doing, in Kansas, any telegraphic business that was wholly internal to that State, and not pursuant to some arrangement or to meet its contracts with, or obligations to, the Government of the United States. Upon the petition of the Telegraph Company the case was removed to the Circuit Court of the United States for the District of Kansas. But it was thereafter remanded to the state court where, upon a demurrer to the answer, a final decree was rendered prohibiting and enjoining the Telegraph Company from transacting intrastate business in Kansas as a corporation, the decree, however, not to affect the company's duties to or contracts with the United States. From that decree the present writ of error was prosecuted.

The State contends that the decree is in exact conformity with certain provisions of the Kansas statutes to be found in the General Statutes of that State of 1901, Title, Corporations, p. 280, and the General Statutes of 1905, p. 284. Those provisions, or the ones directly involved here, originated in an act known as the Bush Act, passed at a special session of the Legislature in 1898. Laws of Kansas, Special Session, p. 27.

The issues raised by the pleadings arise out of the above statutes. Under those statutes a State Charter Board was organized and its powers defined. That Board was authorized to receive applications from corporations of other States, Territories or countries seeking permission to engage in business as foreign corporations in Kansas. Any such corporation was required in its application to set forth a certified copy of its charter or articles of incorporation, the place where its principal office or place of business was to be located, the full nature and character of the business in which it proposed to engage, the names and addresses of its officers, trustees or directors and stockholders, with a detailed statement of its assets and liabilities, and such other information as the Board might require in

order to determine the solvency of the corporation. The statute further provided that the application should be accompanied by a fee of twenty-five dollars, to be known as an application fee, and that it should be a condition precedent to obtaining authority to transact business in the State that the corporation should file in the office of the Secretary of State its written consent, irrevocable, that actions might be brought against it in the proper court of any county in the State, (in which the cause of action arose, or in which the plaintiff resided), by service of process on the Secretary of State, and stipulating that such service should be valid and binding as if due service had been made upon the president or chief officer of the corporation. Every foreign corporation then doing business in the State was required, within thirty days from the taking effect of the act, to file with the Secretary of State the specified written consent. Gen. Stat. Kansas, 1901, § 1261. If the Charter Board determined that the foreign company seeking to do business in the State was organized in accordance with the laws under which it was created, that its capital was unimpaired, and that it was organized for a purpose for which a domestic corporation might be organized in Kansas, then the Board was directed to grant the application, and by its secretary issue a certificate, setting forth the granting of the application to engage in business in the State, as provided in the statute. *Ib.*, § 1263.

Then come these important sections: "Each corporation which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, *for the benefit of the permanent school fund*, a charter fee *of one-tenth of one per cent. of its authorized capital* upon the first one hundred thousand dollars *of its capital stock, or any part thereof;* and upon the next four hundred thousand dollars, or any part thereof, *one-twentieth of one per cent.;* and for each million or major part thereof over and above the sum of five hundred thousand dollars, *two hundred* dollars. . . . In addition

to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to *foreign* corporations *seeking to do business in this state*, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the state, territory or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner and to the same extent as is herein provided for the chartering and organizing of new corporations." "Any corporation organized under the laws of another state, territory or foreign country and authorized to do business in this state shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state." *Ib.*, §§ 1264, 1267.

By another section it is made the duty of each corporation doing business for profit in Kansas, except banking, insurance and railroad corporations, annually, on or before August 1st, "to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the postoffice address of each, and the number of shares held and paid for by each. 6th. The names and postoffice addresses of the officers, trustees or directors and mana-

ger elected for the ensuing year, together with a certificate of the time and manner in which such election was held. . . . And such failure to file such statement by any corporation doing business in this state and *not organized under the laws of this state* shall work a forfeiture of its right or authority to do business in this state, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper. . . . No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section have been properly made." Section 1283 (L. 1898, c. 10, § 12, as amended by L. 1901, c. 125, § 3).

Under this statute the Western Union Telegraph Company made application to the Charter Board for permission to engage in business in Kansas as a foreign corporation stating that the amount of its capital stock, fully paid up in cash, was one hundred million dollars. With that application the company deposited with the Secretary of State the specified fee of twenty-five dollars, and also its written consent, irrevocable, in the prescribed form, as to suits brought against it, in the courts of the State, by service of process on that officer. In reference to that consent the company, in its answer, said: "It made such written submission to service and paid such application fee voluntarily and *ex gratia* and out of a desire to avoid the appearance of not complying with the reasonable regulations of the State of Kansas made with reference to its own corporations; but denies that said payment and that said written submission were obligatory upon it or were necessary or essential as a condition precedent to its continuing to transact business within the State of Kansas, both state and interstate."

The Charter Board granted the application of the Telegraph Company, but its order to that effect, made April 5th, 1905, recited that the application be granted and the applicant au-

thorized and empowered to transact the business of receiving and transmitting messages by telegraph within the State of Kansas and transacting within the said State its business of a telegraph company, provided that the order should not take effect and no certificate of authority should issue or be delivered to the company "*until* such applicant shall have paid to the State Treasurer of Kansas, *for the benefit of the permanent school fund,* the sum of twenty thousand one hundred dollars ($20,100), *being the charter fee provided by law necessary to be paid by a foreign corporation having a capital of* $100,000,000. It is further understood, ordered and provided that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction by the said applicant of its interstate business nor its business for the Federal Government; but that this grant of authority and requirement as to payment relate only to the business transacted wholly within the State of Kansas." The above fee of $20,100 was the specified per cent. *of* the *authorized capital* of the company which the statute required it to pay before doing or continuing to do any local business in Kansas.

The company refused to pay the fee thus required, and continued, as before, to do telegraph business of all kinds in Kansas. Thereupon the present action was brought, the sole ground of complaint being that in consequence of the failure of the Telegraph Company to pay the charter fee of $20,100 it was without authority to continue doing any *intra*state or local business in Kansas. The relief sought by the State, as shown by the prayer of its petition, was that the defendant be required to show by what authority it exercised within Kansas the corporate right and power of receiving, transmitting and delivering telegraphic messages within its limits and receiving compensation therefor; that it be adjudged by the court that the defendant had no authority of law for the performance of such corporate acts and the exercise of such corporate powers and franchises and the carrying on of said corporate business within the State; and that it be decreed and adjudged that the

defendant "be ousted of and from exercise within the State of Kansas of the said corporate rights and franchises of receiving, transmitting and delivering within the State of Kansas of telegraphic messages and communications and of receiving compensation therefor."

The reasons given by the Telegraph Company for its refusal to pay the required fee are set forth in its answer, to which a demurrer was sustained, and may be summarized as follows: 1. That the company had the right to transact both interstate and local business in Kansas without paying the fee of $20,100. 2. That by the laws of Kansas, enacted while it was a Territory and after it became a State, telegraph companies were invited to come into it and do both domestic and interstate business there, and in consequence of such invitation the company had established between eight hundred and nine hundred offices in Kansas at great expense, all of which was done in the full faith that it would receive the equal protection of the laws under the Constitution of the United States. 3. That it had been doing a general telegraph business in Kansas ever since its organization as a Territory. 4. That on the seventh day of June, 1867, it duly accepted the conditions of the act of Congress of July 24th, 1866, c. 230, 14 Stat. 221, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes" (Rev. Stat., §§ 5263 *et seq.*), whereby it became and is now an instrument of interstate commerce and an agency of the United States for the transaction of public business, and subject to all the duties imposed and entitled to all the rights, benefits and privileges conferred by said act of Congress. 5. That its lines were originally constructed in the Territory of Kansas by the authority of an arrangement made with the Secretary of the Treasury in conformity with certain acts of Congress, one of which was enacted June 16th, 1860, c. 137, 12 Stat. 41, and was entitled "An act to facilitate commerce between the Atlantic and Pacific States by electric telegraph," the other, enacted July 2d, 1864, c. 220, 13 Stat. 373, entitled

"An act for increased facilities of telegraphic communication between the Atlantic and Pacific States and the Territory of Idaho;" and the Telegraph Company, therefore, "has always been in the State of Kansas rightfully for the purpose of the transaction of governmental business and for the public generally, and that it cannot be now excluded therefrom." 6. That the company's lines of telegraph within Kansas are upon the public domain and upon military and post roads of the United States and are part of the postal system of the United States, and that the defendant has, therefore, under the Constitution and laws of the United States, the power and is under the duty and obligation to transmit all messages for the Government and for the public generally just as much and as fully with respect to messages between points within Kansas as to interstate messages. 7. That the enforcement of the statute of Kansas would seriously affect and cripple the company's efficiency as an instrument of interstate commerce and as an agency of the Government for transacting both interstate and domestic business in that State, because the receipts derived from interstate and governmental business alone would, in many offices in Kansas, not be equal to the expense of keeping such offices open, and that the closing of them on that account would be detrimental to the governmental service, as well as to interstate commerce. 8. That by the statutes in question "any corporation, including telegraph companies, organized in the State, is authorized to do business in Kansas upon paying a charter fee based on the actual capital of such corporation *employed in the State of Kansas*, whereas, in respect to the defendant company, the Charter Board requires, and is attempting to exact from the defendant company, by this proceeding, a charter fee based upon the defendant's *entire capitalization*, to wit, one hundred million dollars, which one hundred million dollars *represents the property and lines of telegraph of the defendant company in the forty-five States of the American Union, in the Dominion of Canada, and lines under the Atlantic and Pacific Oceans and in foreign countries.*" 9. That such tax is

upon property and rights outside of Kansas and, therefore, *beyond its jurisdiction for purposes of taxation*. 10. That "by laws passed relating to private corporations, and especially by laws having reference to telegraph companies, some enacted by the Legislature of the Territory of Kansas and many since the creation and organization of the State of Kansas, telegraph companies, including the Western Union, were invited to come into the State of Kansas and build and construct their lines therein and to connect said lines with other telegraph lines then or thereafter constructed, and to do a general telegraph business, both domestic and interstate, throughout the State of Kansas and to thereby place the citizens of the State of Kansas, wherever the lines reached, in direct telegraphic communication with all parts of the United States; that said telegraph companies, including the Western Union Telegraph Company, were by the laws of the State of Kansas authorized to go upon the public highways of the State and thereon place their poles and wires; that in pursuance of such invitation and before the admission of the State of Kansas to the Union the Western Union Telegraph Company entered the State of Kansas and extended its lines to all points where the same might be needed, and subsequent to the admission of the State, by construction and purchase, lines of the Western Union Telegraph Company were extended to all parts of the State of Kansas and between eight hundred and nine hundred offices established for the use and convenience of the public; that there had been expended by the defendant at the time of the enactment of the so-called Bush Corporation Act, under which the present proceeding is brought, many thousands of dollars in the construction of lines and wires and in the other appurtenances of the telegraphic business and in the establishment of offices; that all of this money was expended in full faith and confidence in the laws already enacted by the State of Kansas for the furtherance and encouragement of telegraphic business, and also in the full faith that said company would have the equal protection of the laws of the State of Kansas, and the fair,

equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it." 11. That the statute in question, so far as it prevents the company from using its property in the State, for all purposes of its business, would operate as a taking of such property without due process of law. 12. That the statute is in contravention of the power of Congress to regulate commerce among the several States, and with foreign countries, with its power to establish post-offices and post roads, and with its authority to pass all laws necessary and proper to carry into execution the powers vested in the Government of the United States.

Mr. Rush Taggart and *Mr. Henry D. Estabrook,* with whom *Mr. John F. Dillon, Mr. George H. Fearons* and *Mr. Charles Blood Smith* were on the brief, for plaintiff in error:

The Bush Act violates the contract under which the Telegraph Company entered Kansas, constructed its lines and maintained its business in that State and the tax amounts to taking its property without due process of law.

The purpose of the act is to compel a foreign corporation, as a condition precedent to continuing to do business, to pay an additional fee after the State has invited it to come within its limits and construct its plant. This cannot be done. *American Smelting Co.* v. *Colorado,* 204 U. S. 103.

The State compels all telegraph companies to maintain offices in all county towns. The act is practically a confiscation of property. 3 Clark & Marshall on Corp., § 845; *United States* v. *Cruikshank,* 92 U. S. 542, 555; *Seaboard Air Line* v. *Alabama R. R. Comm.,* 155 Fed. Rep. 792, 802; *Railway Co.* v. *Ludwig,* 156 Fed. Rep. 152, 159; *People* v. *Fire Association,* 92 N. Y. 311, 325; *S. C.,* aff'd 119 U. S. 110.

As to the rights of the Telegraph Company in Kansas see *United States* v. *Central Pacific R. R.,* 118 U. S. 235; *St. Louis* v. *Western Union Tel. Co.,* 148 U. S. 103; *New Orleans* v. *Telephone Co.,* 40 La. Ann. 41. See also, as to vested rights

of corporations under franchises, *Monongahela Co.* v. *United States*, 148 U. S. 329; *Montgomery County* v. *Bridge Co.*, 110 Pa. St. 54, 68; *Walla Walla* v. *Water Co.*, 172 U. S. 1; *Pearsall* v. *Great Northern Ry.*, 161 U. S. 661. Even if no new investment had been made the operation of its lines by the Telegraph Company gave it contractual rights. *City Railway* v. *Citizens' Railroad*, 166 U. S. 587; *Powers* v. *Detroit & G. H. Ry. Co.*, 201 U. S. 544.

The fact that no money was paid to the State does not make the contract void for want of consideration, *Dartmouth College Case*, 4 Wheat. 637; *Erie R. R. Co.* v. *Pennsylvania*, 153 U. S. 628.

The Bush Act denies the Telegraph Company equal protection of the laws by discriminating between it and existing domestic corporations who do not have to pay the tax in order to continue to do business. *American Smelting Co.* v. *Colorado*, 204 U. S. 103; *Yick Wo* v. *Hopkins*, 118 U. S. 369; 3 Clark & Marshall on Corp., § 845; *Rock Island R. R.* v. *Swanger*, 157 Fed. Rep. 783.

A State cannot exact from a foreign corporation engaged in interstate commerce, as a condition precedent to its doing business in that State, a tax or license fee based on its entire capital when the greater part of such capital is in use elsewhere than in that State.

A State may exclude foreign corporations; it may impose terms reasonable or unreasonable, but if admitted at all, the terms of admission must not violate the Federal Constitution. Judson on Taxation, § 169; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Insurance Co.* v. *French*, 18 How. 404; *St. Clair* v. *Cox*, 106 U. S. 350, 356; *Barron* v. *Burnside*, 121 U. S. 186, 200; *Norfolk & Western R. R.* v. *Pennsylvania*, 136 U. S. 114.

The power of a State to exclude, or prescribe the terms of admission of, a foreign corporation is no greater than its general inherent power to tax property within its limits. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 106, 203; *McCulloch* v. *Maryland*, 4 Wheat. 319, 429.

When a State attempts to impose a tax on capital stock representing instrumentalities of interstate commerce for the privilege of doing intrastate business it violates the commerce clause of the Constitution, and also attempts to tax property beyond its geographic limits which would amount to deprivation of property without due process of law. Cases *supra* and see also *Fargo* v. *Hart*, 193 U. S. 490; *Ashley* v. *Ryan*, 153 U. S. 436; *Union Transit* v. *Kentucky*, 199 U. S. 194.

In no case where this court has sustained privilege, license or occupation taxes has the burden been upon capital stock employed in interstate commerce outside the State such as in *Cotting* v. *Stockyards Co.*, 82 Fed. Rep. 850; *United States* v. *Swift*, 122 Fed. Rep. 529; *Kehrer* v. *Stewart*, 197 U. S. 60; *Armour* v. *Lacey*, 200 U. S. 236.

While a State may, as in *Paul* v. *Virginia*, 8 Wall. 168, exclude or prescribe conditions, the exceptions to this rule have always been stated to be corporations engaged in interstate commerce, *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 98 U. S. 1; or those engaged in employ of the General Government. *Stockton* v. *B. & N. Y. R. R. Co.*, 32 Fed. Rep. 9; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. In fact no conditions repugnant to the Federal Constitution can be imposed. *Insurance Co.* v. *Morse*, 20 Wall. 445, 457; *Barron* v. *Burnside*, 121 U. S. 186, 200.

A tax on capital stock of a corporation is a tax on the property of the corporation. Cases *supra* and *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; Gray on Limitations of Taxing Power; *Postal Tel. Co.* v. *Adams*, 155 U. S. 588, 696; *Colorado* v. *Pullman Co.*, Riner, J., 1905, U. S. Cir. Ct., unreported.

The court will look to substance rather than form, and unless the tax is limited to what is actually within the jurisdiction of taxing power will strike it down. Cases *supra* and *Railway Co.* v. *Texas*, 210 U. S. 217; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64, 73; *Insurance Co.* v. *New York*, 134 U. S. 194. In *Maine*

v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Powers* v. *Michigan*, 191 U. S. 379, the tax was confined to mileage proportion within the State.

Protection from state interference with interstate commerce ceases to be of force if the State can do indirectly what it cannot do directly. *Brown* v. *Maryland*, 12 Wheat. 419; *Insurance Co.* v. *New York*, 134 U. S. 194, 198; *Gibbons* v. *Ogden*, 9 Wheat. 1. And see also *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Robbins* v. *Taxing District*, 120 U. S. 489; *Leloup* v. *Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenbergh* v. *Hennick*, 129 U. S. 141; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western* v. *Pennsylvania*, 136 U. S. 114; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *Pembina Co.* v. *Pennsylvania*, 125 U. S. 181; *Emert* v. *Missouri*, 156 U. S. 296; *Hopkins* v. *United States*, 171 U. S. 578, distinguished in *Schollenberger* v. *Pennsylvania*, 171 U. S. 23. And see *Brennan* v. *Titusville*, 153 U. S. 289; *Bateman* v. *Milling Co.*, 1 Tex. Civ. App. 931, 952.

As to the distinction between corporations doing an interstate business and having a *quasi*-public character and those conducting a strictly private business, see *New York* v. *Roberts*, 171 U. S. 658, 664, and as to the right to tax instrumentalities only when subject to jurisdiction by reason of location see cases *supra* and *St. Louis* v. *The Ferry*, 11 Wall. 423; *Louisville Ferry* v. *Kentucky*, 188 U. S. 385; *Adams Express Co.* v. *Ohio*, 165 U. S. 194.

If one State, other than the home State, can tax instrumentalities of commerce used in other States each State may do the same and the actual burden would become so great as to amount to a prohibition against those corporations which, like the Western Union Telegraph Company and the Pullman Company do business in all the States, and which Congress alone can control. Cases *supra* and *Hayes* v. *Pacific Mail*, 17 How. 596; *Morgan* v. *Parham*, 16 Wall. 471; *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119; *Wabash* v. *Illinois*, 118 U. S. 573.

Taxes have been sustained on intrastate business in *Pullman Co.* v. *Adams*, 189 U. S. 420, and other cases, on the ground that the company taxed could abandon its local business; but in *Norfolk & Western* v. *Pennsylvania*, 136 U. S. 114, 120, a tax on ticket office was held to be a burden on the entire business and void. And the Bush Act amounts equally to such a tax.

The judgment of the state court deprives the corporation of its rights granted by Congress under the Post-Road Act of 1866.

Mr. Frank B. Kellogg, with whom *Mr. Charles Blood Smith*, *Mr. Francis B. Daniels* and *Mr. Gustavus S. Fernald* were on the brief, for plaintiff in error, the Pullman Company, in case No. 5, argued simultaneously herewith.[1]

The Bush Act is not a regulation of intrastate commerce of foreign corporations and the judgment of the Supreme Court to that effect cannot make the act such a regulation, nor is the Bush Act an exercise of the police power of the State, nor in a case like this is this court bound by the construction of the statute by the state court. *Spraigue* v. *Thompson*, 118 U. S. 90; *Yick Wo* v. *Hopkins*, 118 U. S. 366; *Stearns* v. *Minnesota*, 179 U. S. 232. This act must be construed as passed by the state legislature and not as amended judicially by the courts. The act relates both to interstate and intrastate business and as such is unconstitutional.

The State cannot exact from a foreign corporation as a condition precedent for doing business in the State a license fee or tax based on capital stock the greater part of which represents property employed outside the State in interstate commerce. Judson on Taxation, § 169; *Insurance Co.* v. *French*, 18 How. 404; *St. Clair* v. *Cox*, 106 U. S. 350; and cases cited in brief for plaintiff in error in No. 4.

The Bush Act is unconstitutional because it impairs the obligation of contracts, deprives the corporation of its prop-

[1] For decision in this case, see *post*, p. 56.

erty without due process of law and denies it the equal protection of the laws.

The Pullman Company had lawful contracts with railroad companies in existence when the Bush Act was passed, all of which will be impaired by its exclusion from the State. *Green* v. *Biddle*, 8 Wheat. 1; *Van Hoffman* v. *Quincy*, 4 Wall. 535; *Fletcher* v. *Peck*, 6 Cranch, 87; *Bronson* v. *Kenzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608; *Barton* v. *Van Ripper*, 16 N. J. L. 7, 11; *Woodruff* v. *State*, 3 Arkansas, 285; *Bank* v. *State*, 12 Mississippi, 439.

A State cannot invite a corporation to come into its territory, build up a business and then expel the corporation by unequal taxation. Its right to exclude may be waived. *Seaboard Air Line* v. *Commission*, 155 Fed. Rep. 792; *Railway Co.* v. *Ludwig*, 156 Fed. Rep. 152.

Mr. C. C. Coleman, with whom *Mr. Fred S. Jackson*, Attorney General of the State of Kansas, was on the brief for defendant in error in this case and in No. 5, argued simultaneously herewith:

The granting of franchises to corporations is entirely within the control of the State and may be accompanied with such conditions as the legislature thinks suitable for the public policy and therefore this case presents no Federal question as the state court has declared that the Bush Act relates only to local business and that construction controls in this court. *Smiley* v. *Kansas*, 196 U. S. 447.

The act applies to all foreign corporations and so there is no discrimination. As to the right of the State to impose conditions on foreign corporations, see *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *People* v. *Roberts*, 171 U. S. 661; *Minot* v. *Railroad Co.*, 18 Wall. 206.

The action of *quo warranto* is proper. *State* v. *Wilson*, 30 Kansas, 665.

The fact that the corporation was already in the State does not deprive the State of the right to require this license fee.

No vested right had been acquired to remain in the State. *State* v. *American Book Co.*, 65 Kansas, 847; *Postal Tel. Co.* v. *City*, 43 S. E. Rep. 207.

The fact that the statute causes inconvenience does not render it unconstitutional. *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92; *Postal Tel. Co.* v. *Baltimore*, 156 U. S. 210; *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 427; *People* v. *Squire*, 145 U. S. 175; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 7, 30; *Lumberville Co.* v. *Commissioners*, 26 Atl. Rep. 711.

The license fee is not a burden on the interstate business of the objecting corporations. It is a local police regulation on local business only, and as it affects only intrastate business falls under *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Western Union Tel. Co.* v. *New York*, 38 Fed. Rep. 352; *Minn. & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Sandford* v. *Poe*, 69 Fed. Rep. 546; *Delaware R. R. Tax*, 18 Wall. 206; *Ashley* v. *Ryan*, 153 U. S. 436; *Honduras Com. Co.* v. *State Board*, 54 N. Y. 278; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Ferry Co.* v. *Kentucky*, 183 U. S. 385; *Pembina Co.* v. *Pennsylvania*, 125 U. S. 181, 190; *Postal Tel. Co.* v. *Charleston*, 153 U. S. 692; *Postal Tel. Co.* v. *Norfolk*, 43 S. E. Rep. 297; and see cases cited in opinions below, 75 Kansas, 609, 664.

No grounds exist for the claim that a contract existed between the corporations and the State, or for the assumption that the present law impaired the obligation of any contract between themselves and the State, or between themselves and their patrons. No foreign companies having been admitted to the State prior to the passage of the Bush law, a claim of discrimination under the terms of that law against such corporations seeking to comply with its terms and domestic corporations is clearly without foundation. Foreign companies are given the dignity and privileges of domestic corporations exactly upon the same terms that the same things are granted to domestic corporations. The State

maintains: That the construction of the state statutes is a question for the state courts alone: That the records in these cases present no color of any attempt to deprive the defendants of any of their constitutional rights in the State of Kansas: That the Bush law does not interfere with any duties or obligations of the plaintiffs in error to the Federal Government.

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

The above extended statement would seem to be justified by the importance of this case.

The contentions of the company, to which particular attention will be directed, are, in substance, that the requirement that it pay, for the benefit of the permanent school fund of the State, *a given per cent of its authorized capital*, wherever and however employed, as a *condition* of its right to continue to do domestic business in Kansas, is a regulation which, by its necessary operation, directly burdens or embarrasses interstate commerce, and, therefore, is illegal under the commerce clause of the Constitution; further, that such a requirement involves the taxation not only of the company's interstate business everywhere, but equally the property employed by it beyond the limits of the State, a thing which could not be done consistently with the due process of law enjoined by the Fourteenth Amendment.

It will be well to inquire, at the outset, as to the state of the law in respect of local regulations that materially burden and interfere with the freedom of commerce among the States. A review of some of the cases will throw light on the questions now before us, and enable us the better to ascertain the scope and effect of the statute.

In *McCall* v. *People of California*, 136 U. S. 104, 109, a municipal ordinance of San Francisco imposing a license tax of a specified amount upon "every railroad agency" was held to be violative of the commerce clause of the Constitution

when applied to an agent in San Francisco of a railroad company which had its principal place of business in Chicago, and operated a continuous line between Chicago and New York. That agent, conducting his business in San Francisco city and county, solicited there passengers who proposed to travel from Chicago to New York to use the railroad he represented. The court said: "The object and effect of his soliciting agency were to swell the volume of the business of the road. It is one of the '*means*' by which the company sought to increase and doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it therefore was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple." At the same time, in *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114, the court held that a license tax exacted by Pennsylvania upon a railroad corporation of another State, engaged in interstate commerce, for keeping an office in Philadelphia, was a tax on such commerce, and invalid.

A leading authority on the general subject, and which has an important bearing on more than one question in the present case, is that of *Crutcher* v. *Kentucky*, 141 U. S. 47, 51, 57, 59, 62. That case involved the constitutional validity of a statute of Kentucky regulating the agencies of foreign express companies. The statute made it unlawful for the agent of a foreign express company to set up, establish or carry on the business of transportation in Kentucky without first obtaining a license from the Auditor of Public Accounts to carry on such business, and that officer was forbidden to issue the license until the copy of the express company's charter was filed with him, and a statement, verified by oath, showing its assets and liabilities, the amount of its capital stock and how paid, of what its assets consisted, the amount of its losses due and unpaid, and that the company was possessed of an actual capital of at least $150,000, either in cash or safe investments, exclusive of stock

notes. Any person carrying on any business in the State for a transportation or express company, *not incorporated in Kentucky*, without having obtained the required license, was subject to be fined not less than $100 nor more than $500, at the discretion of the jury. The statute specified the fee to be paid for the license, also a certain fee for filing a copy of the company's charter, and still another fee for filing an original or annual statement. The fees prescribed were on account of the company's business in Kentucky, *no discrimination being made between interstate and domestic business done there*. Without obtaining the required license Crutcher acted as agent in Kentucky of the United States Express Company, which was organized under the laws of New York, and was engaged in both interstate and domestic commerce. For acting as such agent without the required license from the State he was indicted, convicted and fined $100. The highest court of Kentucky sustained the conviction and held the statute to be constitutional. Among other things it said: "There is no discrimination made between corporations doing a like business; and the State, although the appellant's company is a foreign company, has the right to license the business and calling of this agent as it would that of the lawyer or merchant whose business is confined to the State alone." The judgment of the Kentucky court was reversed by this court.

Speaking by Mr. Justice Bradley, this court, among other things, said (p. 56): "The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the state law. . . . If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the

province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation,—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steamship Co.* v. *Tinker,* 94 U. S. 238"—citing *Telegraph Co.* v. *Texas,* 105 U. S. 460; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 205, 211; *Phila. Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, 342; *McCall* v. *California,* 136 U. S. 104, 110; *Norfolk & Western Railroad* v. *Pennsylvania,* 136 U. S. 114, 118. Again: "As was said by Mr. Justice Lamar, in the case last cited, 'It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, *or impose any burdens upon such commerce* within its limits.'

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it"—citing *Pickard* v. *Pull-*

man Southern Car Co., 117 U. S. 34; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Leloup* v. *Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114. Further, in the *Crutcher case* (p. 59): "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection." The decisions, the court said (p. 62), "are clear to the effect that neither licenses nor *indirect taxation of any kind*, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void. And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the Court of Appeals must be reversed."

The court had previously adjudged in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204, 211, that a statute of Pennsylvania, requiring both domestic and foreign corporations doing business in that Commonwealth to pay an annual tax rated by the dividends declared and imposed upon *the capital stock of the corporation at a named rate for every dollar of*

such stock, was invalid so far as corporations engaged in interstate commerce were concerned. In that case, the court, speaking by Mr. Justice Field, said (p. 204): "Nor does it make any difference whether such commerce is carried on by individuals or by corporations. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile* v. *Kimball*, 102 U. S. 691." Again, in the *Gloucester Ferry case* (p. 211): "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or inter-State commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce." This language was quoted approvingly in *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 343, 344, which held that a tax by Pennsylvania upon the gross receipts of one of *its own corporations*, derived from interstate and foreign commerce, was a regulation of interstate and foreign commerce that was inconsistent with the power of Congress under the Constitution. In *Phila. Steamship Co.* v. *Pennsylvania*, the court, referring to the *Gloucester Ferry case*, said (p. 344): "It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce."

In *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645, the court, speaking by Mr. Justice Bradley, said (p. 645): "The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to an-

other and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24th 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

"Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

In the recent case of *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 227, which involved the validity of a Texas statute imposing an annual tax "*equal to* one per cent *of* its gross receipts" on each railroad *lying wholly within that State*. The railroads there concerned lay wholly within Texas, but, this court said, they connected with other lines, and a part, and in some instances much the larger part, of their gross receipts, were derived from the carriage of passengers and freight coming from, or destined to, points without the State. The contention by the railroad company was that the tax was a burden on interstate commerce, and invalid, so far as it was *based on* or was measured by receipts derived from interstate transportation. That view was sustained. The court said: "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Asbell* v. *Kansas*, 209 U. S. 251, 254, 256.

"We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'

"Of course, it does not matter that the plaintiffs in error are domestic corporations *or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State.*"

So in *Brennan* v. *Titusville,* 153 U. S. 289, 303, which involved the validity of an ordinance imposing a license tax on those engaged in the business of soliciting orders on behalf of manufacturers of goods, the court said (p. 303): "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it." Again, in *Ashley* v. *Ryan,* 153 U. S. 436, 440, the court said (p. 440): "Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate com-

merce clause of the Constitution of the United States, or involved the assertion of the right of a State to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction." To the same effect is *Caldwell* v. *North Carolina*, 187 U. S. 622.

The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a State for purposes of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State, and to be respected until Congress covers the subject by legislation. *Cooley* v. *Port Wardens*, 12 How. 299, 320; *Sherlock* v. *Alling*, 93 U. S. 99, 104; *Morgan's Louisiana & T. R. & S. S. Co.* v. *Board of Health*, 118 U. S. 455, 463; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 100; *N. Y. & N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628, 631, 632; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 297. We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a "fee," or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made "dependent

in fact on the value of its property *situated within the State.*" *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 696; *Leloup* v. *Mobile*, 127 U. S. 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, *on account* of *such business.*

But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show.

In *Henderson &c.* v. *Mayor*, 92 U. S. 259, 268, which involved the question whether a statute of New York was in any real sense a regulation of commerce with foreign nations, the court said that in whatever language a statute may be framed, its purpose must be determined by its natural and

reasonable effect. In *Mugler* v. *Kansas*, 123 U. S. 623, 661, it was said that the courts, when determining whether a statute is consistent with the fundamental law, must not deem themselves "bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." In *Lyng* v. *Michigan*, 135 U. S. 161, 166, it was adjudged that a State could not lay a tax on interstate commerce, "in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress." In *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497, it was attempted to support a local regulation about drummers upon the ground that no discrimination was made between domestic and foreign drummers—that they were all taxed alike. But that device or form of taxation did not prevail, the court saying: "That does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State." In *Minnesota* v. *Barber*, 136 U. S. 313, 319, 326, the particular statute there assailed as repugnant to the Constitution of the United States was not saved by the fact that it was applicable to citizens of all the States, including citizens of the State which enacted it. This court said (p. 319): "There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." It was further said in that case (p. 326)

"that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."

In *Brimmer* v. *Rebman*, 138 U. S. 78, 81, the question arose as to the validity of a Virginia statute making it unlawful to offer for sale, within the limits of that State (p. 80) "any fresh meats (beef, veal, or mutton) which shall have been slaughtered one hundred miles or over from the place at which it is offered for sale, until and except it has been inspected and approved" as provided in the statute. The preamble of the statute recited that unwholesome meats were being offered for sale in Virginia. Such recital was held not to conclude the question as to the conformity of the statute with the Constitution. Despite the avowal by the State that its object, by the statute, was to prevent the offering of unwholesome meats for sale in Virginia, this court adjudged it to be unconstitutional, saying (p. 81): "Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer." "The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and 'a discriminating tax imposed by a State, operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States.' *Walling* v. *Michigan*, 116 U. S. 446, 455. Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of

all the States, including Virginia; for, 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced."

Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the State*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State. The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the state statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that State. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a *condition* of the telegraph

company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere.

In *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 549, 552, a tax nominally upon the shares of the capital stock of the company was held to be in effect a tax only on property owned and used by the company in Massachusetts, because and *only because* the basis established for the ascertainment of the value of such property was *the proportion of the company's lines in the State to their entire length throughout the whole country*. Such a tax was held not to be forbidden by the Constitution, because *based* on the company's stock representing only its business and its property inside the State. In *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411, it was held that a single tax on the receipts of a telegraph company, some of which were derived from interstate commerce and some from *intra*state commerce, but capable of separation, was invalid *to the extent that the receipts were derived from interstate commerce*. The court was confronted with the same situation in *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647, which case involved the validity of a city ordinance imposing, generally, a specified license tax, "on telegraph companies." The ordinance was held invalid because the tax had reference to the entire business of the Telegraph Company, interstate and domestic, without any distinction being made between the different kinds of business. It was urged in that case that a portion of the Telegraph Company's business was wholly internal to the State and, therefore, was taxable by the State. To this view the response of the court was: "But that fact does not remove the difficulty. The tax *affects* the *whole business without discrimination*. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company." So, in the case now before us, the exaction,

as a condition of the privilege of continuing to do or doing local business in Kansas, that the Telegraph Company shall pay *a given per cent of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business or on the privilege of doing interstate business; for, the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business that the Telegraph Company should submit to taxation upon both its interstate *and* intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the State as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported, *Brown* v. *Maryland*, 12 Wheat. 419, 444; or that a tax on the stock of the United States is a tax on the contract under which it was issued, and a tax on the power to borrow money on the credit of the United States, *Weston* v. *Charleston*, 2 Pet. 449, 467, 468; or that a tax on the salary of an officer of the United States would be a tax on the means employed by the government of the Union to execute its constitutional powers, *Dobbins* v. *Erie County*, 16 Pet. 435, 449; or that a tax on an ordinary bill of lading for property taken out of a State would be a tax on the property covered by that instrument, *Almy* v. *California*, 24 How. 169; or that a tax on the amount of sales made by an auctioneer would be a tax on the goods sold, *Cook* v. *Pennsylvania*, 97 U. S. 566, 573. But, as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the State has not chosen to ascertain and declare. It has seen proper to exact a specified per cent *of* the authorized capital of the Telegraph Company, representing, necessarily, all its business, interstate and intrastate, and all

its property interests in and out of the State. It is important here to observe—indeed, the contrary could not be asserted—that the Telegraph Company lawfully entered Kansas, with the consent of both the Territory and State, for the purposes of its business of every kind long before, and was legally there when, the Bush Act was passed. The State concedes its right to continue in such business in Kansas, if it will comply with the statute in question, and pay the fee demanded; and only because of such refusal it seeks the aid of the court to oust the company from the State, so far as local business is concerned, unless it shall, by paying such fee, contribute—that is the proper word—a given per cent of all its capital for the support of the schools of the State. The State knows that the Telegraph Company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying the "fee" in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public—a right lawfully acquired from the United States when Kansas was a Territory, and exercised, consistently with the statutes of the State for many years after Kansas was admitted as a State of the Union.

But it is said to be well settled that a State, in the exercise of its reserved powers, may prescribe the *terms* on which a foreign corporation, whatever the nature of its business, may enter and do business within its limits.

It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce. In *Paul* v.

Virginia, 8 Wall. 168, which sustained the power of the State to exclude foreign insurance companies from its limits, or to impose conditions upon their entering the State for purposes of its business, the court said (p. 182): "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. . . . The defect of the argument lies in the character of their business. *Issuing a policy of insurance is not a transaction of commerce.* . . . Such contracts are not inter-state transactions, though the parties may be domiciled in different States." In *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 12, 13, the case of *Paul* v. *Virginia* was referred to and the above extract made from its opinion. And the court, speaking by Chief Justice Waite in the *Pensacola case*, said (p. 12): "We are aware that, in *Paul* v. *Virginia* (8 Wall. 168), this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art. 4, sect. 2. *That was not, however, the case of a corporation engaged in inter-state commerce;* and enough was said by the court to show, that, if it had been, *very different questions would have been presented.*"

Whatever may be the extent of the State's authority over intrastate business, was it competent for the State to require that the Telegraph Company—which surely had the right to enter and remain in the State for interstate business—as a *condition* of its right to continue doing domestic business in

Kansas should pay, in the form of a fee, a specified per cent *of* its capital stock representing the interests, property and operations of the company not only in Kansas but throughout the United States and foreign countries? Is such a regulation consistent with the power of Congress to regulate commerce among the States, or with rights, growing out of such commerce, and secured by the Constitution of the United States? Can the State, in this way, relieve its own treasury from the burden of supporting its public schools, and put that burden, in whole or in part, upon the interstate business and property of foreign corporations? Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing intrastate business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws? In *Lafayette Ins. Co.* v. *French et al.*, 18 How. 404, 407, the court, speaking by Mr. Justice Curtis, said (p. 407): "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State, 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, *provided they are not repugnant to the Constitution or laws of the United States.*" In *Southern Pacific Company* v. *Denton*, 146 U. S. 202, 207, the court considered the question of the validity of a Texas statute relating to foreign corporations desiring to transact business in that State. That statute provided that the application of the corporation to do business in the State should contain a stipulation that the permit be subject to certain provisions of the statute, one of which was that the permit should become null and void if the corporation, being sued in a state court, should remove the case into a court of the United States upon the ground of the diverse citizenship of the parties or of local prejudice against such corporation. Dealing

with that point this court, speaking by Mr. Justice Gray, said (p. 207): "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, *to surrender a right and privilege secured to it by the Constitution and laws of the United States*, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions"—citing *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Texas Land Co.* v. *Worsham*, 76 Texas, 556. See also to the same effect *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 684; *St. Clair* v. *Cox*, 106 U. S. 350, 356; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 110, 111. In the above case of *Barron* v. *Burnside* (which was cited with approval in the *Denton case*), this court, speaking by Mr. Justice Blatchford, unanimously held (p. 200): "As the Iowa statute makes the right to a permit *dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.* . . . In all the cases in which the court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted *that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States.*" So in *Barrow Steamship Co.* v. *Kane*, 170 U. S., above cited, Mr. Justice Gray, delivering the unanimous judgment of the court, said (p. 111): "Statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold and delivered in a State, should, in addition, solicit orders for goods manufactured in and to be brought from another State for delivery, could the former State make it a *condition* of the right to engage in local

business within its limits that the corporation pay a given per cent of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition.

We repeat that the statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a "fee" for the privilege of doing local business. To hold otherwise is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall

not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land.

We need not stop to discuss at length the specific question whether the State can by any regulation make the property of the company, outside of Kansas, contribute directly to the support of its schools; such being the effect of the requirement that it pay into the state treasury, for the benefit of the state school fund, a given per cent of all its capital stock as a condition of its doing local business in Kansas. It is firmly established that, consistently with the due process clause of the Constitution of the United States, a State cannot tax property located or existing permanently beyond its limits. *Louisville &c.* v. *Kentucky*, 188 U. S. 385, 398; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209.

It is said that the conclusions here announced are not in harmony with some cases heretofore decided by this court. This suggestion is one of serious import, and cannot be passed without consideration, although the careful examination of the cases may greatly extend this opinion. In support of the view just stated reliance is placed particularly on *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Palace Car Co.*, 191 U. S. 171; and *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 248.

What was the case of *Osborne* v. *Florida?* A certain statute of that State made it a misdemeanor for one to act as agent in the State of an express company doing business there without the payment of a license tax, *the amount of which depended upon the number of inhabitants in the city, town or village* where the

business was *conducted.* Osborne, without obtaining such a license, and having acted as agent, in Florida, of a Georgia corporation engaged in interstate as well as intrastate business, was proceeded against criminally under the statute. He contended that the statute was invalid, in that it assumed to regulate interstate commerce. The Supreme Court of Florida held that the statute had no application to interstate commerce, and affected only the business done in the State that was "local" in its character. And this court, upon writ of error to the Supreme Court of Florida, held that the company could "conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State." As thus construed, the statute was held not to be a regulation of interstate commerce. This court recognizing the principle announced in *Crutcher* v. *Kentucky,* said that "so long as the regulation as to license or taxation *does not refer to* and *is not imposed upon the business of the company which is interstate,* there is no interference with that commerce by the State statute." Let it be observed that the license taxes prescribed by Florida were such as to make it clear that its statute applied, and was intended to be applied, only to domestic business within Florida, as measured by *the number of inhabitants of the city or town where the business was conducted.* It was not imposed on any basis that had reference either to the interstate business or to the property of the company outside of the State. It imposed no burden whatever on interstate business, nor put any obstacle in the way of doing such business; whereas, the statute here involved prohibits a foreign corporation from doing any local business in Kansas unless such corporation first pays into the State's school fund a tax, or, which is the same thing, a fee, in the form of a given *per cent of all its capital, representing all of its business, property and interests everywhere.* The Florida case is somewhat similar in principle to that of *Western Union Tel. Co.* v. *Massachusetts,*

above cited, in which it was held that a state tax on the capital stock of the Telegraph Company was valid when measured, as it was in that case, not by its entire capital, but by the proportion of the company's lines in the State to their entire length throughout the entire country. So, in *Osborne* v. *Florida* the tax was not imposed on the basis of the business of the company, interstate and intrastate, or either separately, but was made to depend alone on the number of inhabitants in the particular city or town where its agency was established. It is manifest that what has been said in the present case is in perfect harmony with the decision in the *Osborne case.*

As to *Pullman Co.* v. *Adams*, 189 U. S. 420, 429, we perceive nothing in the judgment in that case that conflicts with what is herein said. That case involved the validity of a tax of a certain amount imposed by Mississippi on *each* sleeping and palace car company carrying passengers "from one point to another *within the State,*" and so many cents per mile "for each mile of railroad track over which the company runs its cars *in this State.*" It was contended that this tax was an interference with commerce among the States. It is stated in the opinion that the sleeping cars of the Pullman Company, an Illinois corporation, "were carried by various railroad companies, and all of them were carried into the State from another State, or out of the State to another State, or both. But such cars in their passage also carried passengers from point to point within the State, and a specific fare was collected by the servants of the Pullman Company." It was contended by the company that the state constitution made it a common carrier, and, in effect, compelled it to assume the burden of carrying local passengers, although its receipts from purely local business were less than the expense incurred in carrying it on. But the State Supreme Court held that view of the state constitution to be fallacious. And this court said: "If the clause of the State constitution referred to were held to impose the obligation supposed and to be valid, we assume, without discussion, that the tax would be invalid. *For then it*

would seem to be true that the State constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in Crutcher v. *Kentucky,* 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne* v. *Florida,* 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax. As the validity of the tax is thus bound up with the effect of the section of the State constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act is invalid. But we assume that the opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the Supreme Court was correct for the reason sufficiently stated above." So, that what was actually decided in the *Adams case* was that the company was under no obligation to take local passengers, but if it chose to do that kind of business the privilege for doing it could be taxed by the State. The court did not hold that the State could, in any form, directly burden interstate commerce. It really held to the contrary.

The *Adams case* differs from the present one in this, that while the Mississippi code imposed no other condition upon the Pullman Company doing local business in that State than that it should pay a certain license tax on that account—which tax, it may be observed, is not at all disproportioned to such local business and, therefore, not to be regarded as a mere device to reach or burden the interstate commerce of the company—the statute of Kansas forbids the doing of local business within its limits by a corporation of another State or foreign country, except subject to the condition that such corporation first pay to the State a given per cent of its entire capitalization representing the value of all its business, property and interests within and without the State, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the State for purposes of taxation. That the Western Union Telegraph Company is engaged in both interstate and intrastate commerce is no reason, in itself, why Kansas may not, in good faith, require it to pay a license tax strictly on account of local business done by it in that State. But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall *first* pay to the State a given per cent of all its capital stock, representing all of its property, wherever situated, and all its business in and outside of the State.

Nor is there any conflict between the views we have expressed and the decision in *Allen* v. *Pullman Palace Car Co.*, 191 U. S. 171, 178, 179. One of the questions in that case was as to the constitutional validity of a Tennessee statute, passed in 1887, which required every company operating sleeping cars and doing business in that State to pay, as a privilege tax, "on each car, per annum, $500." The Pullman Car Company operated sleeping cars in Tennessee under a contract with railroad companies traversing the State. The gross receipts of the companies from lines running into the State were, annually, about $500,000, and only about $25,000 annually from pas-

sengers carried locally in Tennessee. The cars actually used on these lines during each year numbered over one hundred. The court in that case referred to *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, which involved the validity of a Tennessee act of 1877 imposing a license tax privilege of $50 annually, for each sleeping car or coach used on railroads in the State and said (p. 178): "It was held [in the *Pickard case*] that the tax was a burden upon interstate commerce and void because of the exclusive power of Congress to regulate commerce between the States. Unless the statute now under consideration can be distinguished from the one then construed, the *Pickard case* is decisive of the present case. Both taxes were imposed under the power granted by the constitution of Tennessee to lay a privilege tax. This power is held by the Supreme Court of the State to give a wide range of legislative discretion. Any occupation, business, employment or the like, affecting the public, may be classed and taxed as a privilege. *K. & O. Railroad* v. *Harris*, 99 Tennessee, 684. In the act of 1877 the running and using of sleeping cars on railroads in the State, when the cars are not owned by the railroads upon which they are run, is declared to be a privilege. Under the act of 1887, the tax is specifically imposed upon a privilege. Under the act of 1877, the tax imposed was fifty dollars for each car or coach used or run over the road. Under the act of 1887, each company doing business in the State is required to pay five hundred dollars per annum for the same privilege. The distinction, except in the amount of annual tax exacted, is without substantial difference. Under the earlier act the tax is required for the privilege of running and using sleeping cars on railroads, not owning the cars. In the later act it is exacted for the privilege of doing business in the State. This business consists of running sleeping cars upon railroads not owning the cars and is precisely the privilege to be paid for under the first act, neither more nor less. *In neither act is any distinction attempted between local or through cars or carriers of passengers.* The railroads upon which the cars are run are lines traversing

the State but not confined to its limits. The cars of the Pullman Company run into and beyond the State as well as between points within the State. The act in its terms applies to cars running through the State as well as those whose operation is wholly *intra*-state. It applies to all alike, and requires payment for the privilege of running the cars of the company regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State." "The statute now under consideration requires payment of the sum exacted for the privilege of doing any business when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature in the terms of the act impose upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the State to impose a burden upon interstate commerce." Again, in the same case, the court sustained the validity of a Tennessee act of 1889, which applied "strictly to business done [by sleeping-car companies] in the transportation of passengers taken up at one point in the State and transported wholly within the State to another point therein." This court, while recognizing as former cases had done, the exclusive right of Congress to regulate interstate traffic, said that "the corresponding right of the State to tax and control the internal business of the State, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness"—citing *Osborne* v. *Florida*, 164 U. S. 650. It would seem to be too clear to admit of doubt that the principles in the *Allen case* are substantially those herein announced. Indeed, we could not hold otherwise than we do in the present case without overruling or materially modifying the principles announced in the *Allen case*. In the *Allen case* the license tax there in question under the Tennessee act of 1887 was imposed generally on account of each sleeping car used on railroads traversing the State, *without any discrimination being made be-*

tween cars transporting interstate passengers and those transporting local passengers. On that ground the tax was held to be void. In the present case the State of Kansas demands, in the form of a fee, a given per cent of all the capital of the foreign corporation, without any discrimination between the capital representing the business and property of the Telegraph Company outside of the State and the capital representing such of its business and property as are wholly local to the State. And it seeks the aid of the court to oust the Telegraph Company from continuing to do business in the State, so far as local business is concerned, because and only because it will not surrender its immunity from state taxation in reference to its interstate business and its property outside of Kansas.

We come now to the case of *Security Mutual Life Insurance Co.* v. *Prewitt,* 202 U. S. 246, 257, which case, it is contended, necessarily determines the present question in favor of the State of Kansas. In the *Prewitt case* this court sustained the constitutional validity of a Kentucky statute providing, among other things, that if a foreign *insurance* company should bring a suit in a Federal court against a citizen of Kentucky, or being itself sued in a state court should remove the suit to the Federal court, without the consent of the other party, any permit previously granted to it to do business in Kentucky should be forthwith revoked by the State Insurance Commissioner and the fact of such revocation published in some newspaper of general circulation in the State. No other question was determined. The court regarded the question as concluded in favor of the State by the decision in *Insurance Company* v. *Morse,* 20 Wall. 445. It said (p. 257): "As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial." The vital difference between the *Prewitt case* and the one now before us is that the business of the

insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the Telegraph Company was primarily and mainly that of interstate commerce. A decision, such as was rendered in the *Prewitt case*, that a State could, with or without reason and without violating the Constitution, revoke its permit to a foreign *insurance* company to do business of a domestic character within its limits, cannot be cited as authority for the proposition, upon which the Kansas statute rests, that a State may prescribe such regulations as to corporations of other States engaged in both interstate and local business, as will require them, as a condition of their doing local business, that they shall contribute a given amount, out of their capital stock, representing all its business, interstate and domestic, wherever done, and all its property, wherever located, in or outside of the State, for the support of the State's schools. The *Prewitt case* by no means recognized any uncontrollable power in a State to prohibit all foreign corporations, in whatever business engaged, from doing business within its limits. On the contrary, this court said in that very case that "a State has the right to prohibit a foreign corporation from doing business within its borders, *unless such prohibition is so conditioned as to violate some provision of the Federal Constitution*"—citing various adjudged authorities, among them the case of *Hooper* v. *California*, 155 U. S. 648, 652, 653. In the latter case the court recognized, as long settled, the general principle that the right of a foreign corporation to engage in business within the State depended solely on the will of such State. But it took especial care to say that the interstate business of a foreign corporation was a business of an exceptional character and was protected by the Constitution against interference by state authority. The cases referred to in support of that view are the same as those hereinbefore cited in this opinion. If it be true that the statute of Kansas, by its necessary operation, imposes a burden on the interstate business of the Tele-

graph Company, and subjects its property and business outside of that State to taxation, then the constitutional validity of the statute, in the particulars adverted to, may be here adjudged without any reference whatever to the judgment in the *Prewitt case* and without reëxamining the grounds upon which that judgment rested. The court did not intend by its judgment in the *Prewitt case* to recognize the right of Kentucky, by any regulation as to foreign insurance companies, to burden interstate commerce or to tax property located and used without its limits. It could not have done so without overruling numerous decisions of this court on that subject. On the contrary, as we have seen, the court in that case distinctly recognized the principle that a State could not make any prohibition whatever as to a corporation doing business within its limits that would be in violation of the Federal Constitution. In respect of the point actually decided in it we leave the *Prewitt case* and the objections urged against the doctrine it announces wholly on one side and go no further now than is indicated in this opinion.

It results that a decree of ouster, such as the State asks, could not be granted without recognizing the validity of and giving effect to the unconstitutional requirement that the Telegraph Company, as a *condition* of its being allowed to do intrastate business in Kansas, should pay into the state school fund a given per cent of its authorized capital in the form of a fee based, as in effect it is, on all its property, business and interests everywhere, including both its interstate and intrastate business and property. Such a decree is asked on the ground that the company has refused to pay such fee. The state court ought to have refused the affirmative relief asked and dismissed the petition upon the ground that the condition sought to be enforced by a decree of ouster was in violation of the commerce and due process clauses of the Constitution and of the company's rights under that instrument. The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to

depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution.

There are other aspects of the case involving constitutional questions that might be considered, and which, it is contended, would lead to the same conclusion as is herein indicated. But it is unnecessary to pass on any of the grounds urged by the Telegraph Company in its defense other than those made the basis of the decision now rendered. In order to dispose of this case we need not now go further than to hold, as we do, that for the reasons stated the State was not entitled to the aid of the court in this case; that the affirmative relief asked by it could not have been granted without practically compelling the Telegraph Company as a condition of its doing local business in Kansas that it should surrender rights belonging to it under the Constitution of the United States and secured by that instrument against hostile state action; that any such condition was unconstitutional and void; and that the right of the Telegraph Company to continue doing business in Kansas is not and cannot be affected by that condition.

MR. JUSTICE MOODY heard the argument in this case, participated in its decision, and approves the opinion of the court.

The judgment of the Supreme Court of Kansas is reversed and the cause remanded for such proceedings as may be consistent with this opinion.

Reversed.

MR. JUSTICE WHITE concurring.

It is shown that the Telegraph Company, many years ago, went into the State of Kansas, constructed its lines, established

its offices, etc., and has since been engaged in business, both interstate and local. It is not disputed that there was no law in the State forbidding the company from doing as it did. From this it results that the corporation went into the State, constructed its plant, and carried on its business, on the implied invitation, or at least with the tacit consent of the State. No one questions that the tax which is here in dispute, imposed by the law of Kansas upon the corporation, is repugnant to the Constitution of the United States because wanting in due process, and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious, there is, of course, no attempt to sustain its validity on its intrinsic merits. The sole contention is that although the tax is void, the Telegraph Company may not invoke the protection of the Constitution of the United States, because it is in a position where it is not entitled to avail itself of the fundamental safeguards which it was the purpose of the Constitution to secure to all. The reasoning by which it is thus sought to sustain the right of the State to exert a power prohibited by the Constitution of the United States, and to outlaw the corporation by depriving it of the protection afforded by that instrument, is this: The State, it is insisted, has the right to prevent a foreign corporation from coming into its jurisdiction and engaging there in local business, and this power, in the nature of things, must include the right to affix such conditions to the privilege of coming in as the State chooses to impose. Under these circumstances, the argument proceeds, it becomes immaterial to consider the character of the condition annexed by the State to the enjoyment of the right to come in, since, although such conditions be repugnant to the Constitution of the United States and destructive of the most obvious and sacred rights, as the condition only becomes operative provided the corporation elects to come in, therefore the condition is not obligatory but is voluntarily assented to by the corporation and, hence may not be by it questioned. But even if, for the sake of the argument only,

the general correctness of the proposition be conceded, it has no application to the case here presented. Such is the case, since this cause is concerned, not with the power of the State to prevent a corporation from coming in for the purpose of doing local business and to attach conditions to the privilege of so coming in, but involves the right of the State to confiscate the property of the corporation already within the State and which has been there for years, devoted to the doing of local business as the result of the implied invitation or tacit consent of the State arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a State may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a State may take its property within the State without compensation upon the theory that the corporation is not in the State and has no property right therein which is not subject to confiscation. The difference between the premise upon which the proposition contended for rests and the situation here presented seems to me self-evident. I say this because my mind fails to perceive how the doctrine of election or voluntary assumption of an unconstitutional burden can have any possible application to a case like this. Let me illustrate. The Telegraph Company has expended in the State large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the State. It has been invested therein for the very purpose of doing local as

well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place.

Nor, I submit, is there force in the suggestion that under the facts here disclosed the company cannot be heard to complain, because, as it was in the State without express authority, it must be assumed to have gone into the State and made its investment subject to the exertion by the State of its authority. I concede the proposition to be sound in so far as it includes the right of the State to exert its lawful powers. That is to say, I concede that the corporation in going in and investing its property within the State did so subject to the right of the State to exert, as to the property thus in the State, all lawful powers which might be called into play as to property so situated, of the character of that under consideration. But I cannot assent to the correctness of the contention in so far as it asserts that the State may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the State may treat the corporation as if it had never come in and its property within the State as if it were wholly out of the State, and despoil the corporation of its rights and property upon such false assumption.

It is to be observed that the view taken by me does not deprive the State of power to exert its authority over the corporation and its property in the amplest way subject to constitutional limitations. It simply prevents the State from driving out the corporation which is in the State by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the State, and that the illegal exactions are the price of the privilege of allowing it to come in.

Resting, as I do, my concurrence in the decree in this case upon the grounds just previously stated, it becomes unnecessary for me to say anything concerning the wider ground upon which the opinion of the court proceeds, but I do not wish to be understood as dissenting in any respect from the fundamental principle which the opinion of the court embodies and applies.

MR. JUSTICE HOLMES, with whom concurred THE CHIEF JUSTICE and MR. JUSTICE MCKENNA, dissenting.

I think that the judgment of the Supreme Court of Kansas was right, and it will not take me long to give my reasons. I assume that a State cannot tax a corporation on commerce carried on by it with another State, or on property outside the jurisdiction of the taxing State, and I assume further that for that reason a tax on or measured by the value of the total stock of a corporation like the Western Union Telegraph Company is void. But I also assume that it is not intended to deny or overrule what has been regarded as unquestionable since *Bank of Augusta* v. *Earle*, 13 Pet. 519, that as to foreign corporations seeking to do business wholly within a State, that State is the master, and may prohibit or tax such business at will. *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 249. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28. *Paul* v. *Virginia*, 8 Wall. 168. I make the same assumption as to what has been decided twice at least since I have sat on this Bench, that the right to prohibit, regulate or tax foreign corporations in respect of business done wholly within a State is not taken away by the fact that they also are engaged there in commerce among the States. *Pullman Co.* v. *Adams*, 189 U. S. 420. *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171.

If it should be said that the corporation had a right to enter the State for commerce with other States, and being there had the same right to use its property as others, I reply that this begs the question, if the premises be granted. If the corporation has the right to enter for one purpose and the State has

a right to exclude its entry for another, the two rights can coexist. To say that the disappearance of the latter is an incident of the ownership of property there is to declare that what is allowed only for a limited purpose must have general results. I think it more logical and more true to the scheme of the Union to recognize that what comes in only for a special purpose can claim constitutional protection only in its use for that purpose and for nothing else. That, at all events, has been decided in the cases to which I have referred.

Now what has Kansas done? She has not undertaken to tax the Western Union. She has not attempted to impose an absolute liability for a single dollar. She simply has said to the company that if it wants to do local business it must pay a certain sum of money, just as Mississippi said to the Pullman Company that if it wanted to carry on local traffic it must pay a certain sum. It does not matter if the sum is extravagant. Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way. I hardly can suppose that the provision is made any the worse by giving a bad reason for it or by calling it by a bad name. I quite agree that we must look through form to substance. The whole matter is left in the Western Union's hands. If the license fee is more than the local business will bear it can stop that business and avoid the fee. Whether economically wise or not, I am far from thinking that the charge is inherently vicious or bad.— If the imposition were absolute, or if the attempt were to oust the corporation from the State if it did not pay, the arguments that prevail would be apposite. But the State seeks only to oust the corporation from that part of its business that the corporation has no right to do unless the State gives leave.

Of course the suggestion on the other side is that this is an attempt by indirection to break the taboo on the Telegraph Company's business with other States. The local and the interstate business may be necessary each to the other to make the whole pay. Or the Telegraph Company might carry on the

local business at a loss, for the sake of popularity or other indirect sources of gain. In the last case the fee would come out of earnings that the State has no right to touch. But these considerations do not reach their aim. To deny the right of Kansas to do as it chooses with the local business is to require the local business to help to sustain that between the States. If the latter does not pay alone that is no reason for cutting down powers that up to this time the States always have possessed. If the Telegraph Company chooses to pay the fee out of its other earnings that is its affair. It is master of the situation and can stop if it sees fit. Exactly this argument was pressed in *Pullman Co.* v. *Adams*, 189 U. S. 420, 421, and was rejected without dissent. See *Ashley* v. *Ryan*, 153 U. S. 436, 444.

What I have said shows, I think, the fallacy involved in talking about unconstitutional conditions. Of course, if the condition was the making of a contract contrary to the policy of the Constitution of the United States, the contract would be void. That was all that was decided in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202. But it does not follow that, if keeping the contract was made a condition of staying in the State, the condition would be void. I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a State has absolute arbitrary power. This court was equally unable to understand it in *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 315. In that case it was said: "Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital."

The consequence is the measure of the condition. When the only consequence of a breach is a result that the State may bring about directly in the first place, the condition cannot be unconstitutional. If after this decision the State of Kansas,

without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there or from doing local business until it has paid $20,100, I shall be curious to see upon what ground that legislation will be assailed. I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision, *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246.

Finally, in the absence of contract, the power of the State is not affected by the fact that the corporation concerned already is in the State or even has been there for some time. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28. *National Council of the Junior Order of United American Mechanics* v. *State Council of Virginia*, 203 U. S. 151, 163. Whatever the corporation may do or acquire there is infected with the original weakness of dependence upon the will of the State. This is a general principle illustrated by many cases. Thus a water company cannot take away the power of a city to establish rates by making contracts with its customers. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 438. Private individuals cannot cut down the police power by their arrangements together. *Manigault* v. *Springs*, 199 U. S. 473, 480. A city cannot limit the power of the legislature over property by making a lease. *Browne* v. *Turner*, 176 Massachusetts, 9, 15. Or, to pass at once to the most recent and most conspicuous example, the power of Congress to regulate a commerce among the States cannot be affected by the acquisition of property or growth of values dependent upon the continuance of its assent. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 405, 406. In that case an enormous amount of property had been built up under direct encouragement from the States in which it was situated, and was saved from destruction only by the restricted meaning given to the act of Congress. The unrestricted power of Congress was affirmed in strong terms. See also *Union Bridge Co.* v. *United States*,

204 U. S. 364, 394. In *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, the corporation showed by its answer that it had employed part of its capital in manufacturing in New York. It had got into the State and was at work there, yet it was held liable to pay a percentage of its entire capital, although the greater part was outside the State.—But furthermore it is a short answer to this part of the argument that in the present case, according to decisions relied upon by the majority, the State could not have prevented the entry of the corporation, because it entered for the purpose of commerce with other States.

THE CHIEF JUSTICE and MR. JUSTICE MCKENNA concur in this dissent.

The late MR. JUSTICE PECKHAM took part in the consideration of the case and agreed with the minority.

PULLMAN COMPANY *v.* STATE OF KANSAS EX REL. COLEMAN, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 5. Argued March 17, 18, 1909.—Decided January 31, 1910.

The judgment of the court below reversed on the authority of *Western Union Telegraph Company* v. *Kansas*, *ante*, p. 1, and also *held* that:

A corporation organized in one State and doing an interstate business is not bound to obtain the permission of another State to transact interstate business within its limits, but can go into the latter, for the purposes of that business, without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort and convenience of the people which do not, in a real, substantial sense, burden or regulate its interstate business nor subject its property interests outside of that State to taxation.

The requirement that such a company, as a condition of its right to do intrastate business, shall, in the form of a fee, pay to the State a

specified per cent of its authorized capital, is a violation of the Constitution of the United States, in that such a single fee, based on all the property, interests and business of the company, within and out of that State, is, in effect, a tax both on the interstate business of that company, and on its property outside of that State, and compels the company, in order that it may do local business in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the State.

A State can no more exact such a waiver than it can prescribe as a condition of the company's right to do local business that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law.

A decree ousting and prohibiting a company from doing intrastate business within a State for refusing to pay such a tax should not be granted, but the aid of the court should be refused because a decree would, in effect, recognize the validity of a condition which the State could not constitutionally prescribe under the guise of a fee for permission to do intrastate business.

75 Kansas, 664, reversed.

THE facts, which involve the constitutionality of certain features of the Bush act, which was under consideration in the preceding case, are stated in the opinion.

Mr. Frank B. Kellogg, with whom *Mr. Charles Blood Smith*, *Mr. Francis B. Daniels* and *Mr. Gustavus D. Fernald* for plaintiff in error.[1]

Mr. Rush Taggart and *Mr. Henry D. Estabrook*, with whom *Mr. John F. Dillon*, *Mr. George H. Fearons*, and *Mr. Charles Blood Smith* were on the brief, for plaintiff in error in No. 4, argued simultaneously herewith.[1]

Mr. C. C. Coleman, with whom *Mr. Fred S. Jackson*, Attorney General of the State of Kansas, was on the brief, for defendant in error in this case and in No. 4, argued simultaneously herewith.[1]

[1] For abstracts of arguments see *ante*, pp. 11 to 18.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a proceeding in *quo warranto*, instituted by the State in the Supreme Court of Kansas against the Pullman Company, a corporation of Illinois, in which the State, by its petition, prays that the defendant be required to show by what authority it exercises within Kansas the corporate right and power of charging compensation for the use of reserved seats in its cars by day and sleeping berths during the night and of serving meals in its dining cars within the State of Kansas, such services, it is alleged, being rendered to and said fees being collected from passengers transferring upon railroads from places within the State to other places within the State; and that it be adjudged that the defendant has no authority of law for the performance of such corporate acts, powers, franchises and business in the State of Kansas, and be ousted of and from the exercise within the State of the said corporate rights and franchises and of receiving compensation therefor.

On the petition of the company the case was removed to the Circuit Court of the United States, but that court remanded it to the state court, where the defendant filed an answer resisting the relief asked on various grounds, one of which was that such relief could not be granted consistently with the power of Congress to regulate commerce among the several States, or with rights belonging to the defendant under the Constitution of the United States. A demurrer to the answer was sustained, and a decree rendered by which it was adjudged that the Pullman Company be ousted, prohibited, restrained and enjoined from transacting, as a corporation, any business of a domestic or intrastate character within the State of Kansas. The decree declared that it should in nowise affect or restrict the interstate business of the company, nor affect any of its contracts, obligations or corporate duties with or to the Government of the United States.

The business of the Pullman Company, under its charter,

was that of furnishing sleeping, parlor and tourist cars on railroads, the company reserving to itself the right to charge a certain price for the use of reserved seats in such cars during the day time and sleeping berths during the night. The company's business extended throughout the United States, where any trunk line railroad was operated. It is not necessary to go into detail as to the mode in which that business was conducted, further than to say that the business was and is principally that of interstate commerce.

This case arises under the statute of Kansas, which was examined in *Western Union Telegraph Company* v. *Kansas*, recently decided, *ante*, p. 1. Laws of Kansas, Special Session, 1898, p. 27; Gen. Stat. Kansas, 1901, Title, Corporations, p. 280; *Ib.* 1905, same Title, p. 284. The only provisions of that statute which need be recalled for the purposes of this opinion are these: "Each corporation which has received authority from the [State] charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, *for the benefit of the permanent school fund*, a charter fee *of one-tenth of one per cent of its authorized capital*, upon the first one hundred thousand dollars *of its capital stock, or any part thereof;* and upon the next four hundred thousand dollars, or any part thereof, *one-twentieth of one per cent;* and for each million or major part thereof over and above the sum of five hundred thousand dollars, *two hundred* dollars. . . . In addition to the charter fee herein provided the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to *foreign* corporations *seeking to do business in this State*, except that, in lieu of their charter, they shall file with the

secretary of state a certified copy of their charter, executed by the proper officer of the State, Territory or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner and to the same extent as is herein provided for the chartering and organizing of new corporations." "§ 1267. Any corporation organized under the laws of another State, Territory or foreign country and authorized to do business in this State shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this State." *Ib.*, §§ 1264, 1267.

Proceeding under the statute of Kansas, the Pullman Company made written application to the Charter Board for permission to engage in business in that State. The application was granted, and the Board made the following order: "The board having under consideration the application of The Pullman Company, a foreign corporation organized under the laws of the State of Illinois, for leave to transact the business of a sleeping car company in the State of Kansas; and it appearing that said foreign corporation has, in due form of law, filed with the secretary of state a certified copy of its charter, executed by the proper officers of the State of its domicile, and the written consent, irrevocable, of said corporation that actions may be commenced against it in the proper court of any county in this State in which the cause of action may arise, accompanied by a duly certified copy of the resolution of the board of directors of said corporation authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that said application be granted, and that said applicant be authorized and empowered to transact the business of operating sleeping cars, dining cars, tourist cars and other cars within the State of Kansas, and receiving money for such services, and transacting within the State its business of a sleeping car and transportation company, *provided, that this order shall not take effect and no*

certificate of such authority shall issue or be delivered to said company until such applicant shall have paid to the State Treasurer of Kansas for the benefit of the permanent school fund the sum of fourteen thousand eight hundred dollars, being the charter fees provided by law, necessary to be paid by the corporation with a capital of $74,000,000, seeking to transact business within this State. It is further understood, ordered and provided that nothing herein contained shall apply to nor be construed as restricting in anywise the transaction, by said applicant, of its interstate business; but that this grant of authority and requirement as to payment relate only to the business transacted wholly within the State of Kansas."

We have seen, from the provisions of the statute, as set forth in *Western Union Telegraph Company* v. *Kansas, ante,* p. 1, that it is made a *condition* of the right of a foreign corporation, seeking to do local business in Kansas, that it should apply to the State Charter Board for permission to do so. It is also prescribed as a *condition* of the right of a foreign corporation to do intrastate business in Kansas that it shall pay not only an application fee of $25, but a charter fee "*of one per cent of its authorized capital* upon the first one hundred thousand dollars *of its capital stock or any part thereof;* and upon the next four hundred thousand dollars or any part thereof, *one-twentieth of one per cent;* and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars."

The Pullman Company is admittedly engaged, as it has been continuously for many years, in commerce among all the States of the Union, as well as in intrastate business in Kansas. The Charter Board, we have seen, gave it permission to engage in intrastate business in Kansas on *condition* that it should pay to the State Treasurer *for the benefit of the permanent school fund of the State,* as a charter fee, the sum of $14,800, which is the prescribed statutory per cent of the company's authorized capital, representing *all* of its property and interests everywhere, in and out of the State, and *all* its

business, both interstate and intrastate. It does not appear how much of the single "fee" demanded by the State is to be referred to the interstate business of the company nor how much to its property outside of the State, nor what part has reference to its intrastate business or to its property within the State.

The Pullman Company refused to pay the fee so demanded, upon the general ground, among others, that the State could not, consistently with the Constitution of the United States or with the company's rights under the Constitution, make it a condition of its doing intrastate business in Kansas, that the company should pay, in the form of a fee, a specified per cent of all its authorized capital; that such a fee necessarily operated as a burden on the company's interstate business as well as a tax on its property interests outside of the State, and was hostile to its constitutional right of exemption from local taxation in reference to its property beyond the jurisdiction of the State.

For the reasons, and under the limitations, expressed in the opinion delivered in *Western Union Telegraph Company* v. *Kansas*, *ante*, p. 1, and without expressing any opinion upon questions raised by the pleadings but not covered by this opinion, we hold, 1. That the Pullman Company was not bound to obtain the permission of the State to transact interstate business within its limits, but could go into the State, for the purposes of that business, without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort and convenience of the people which did not, in a real, substantial sense, burden or regulate its interstate business nor subject its property interests outside of the State to taxation in Kansas. 2. That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the State a specified per cent of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based

as it was on all the property, interests and business of the company, within and out of the State, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the State and contribute from its capital to the support of the public schools of Kansas; that the State could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law. 3. That a decree ousting and prohibiting the company from doing intrastate business in Kansas was improperly granted, the aid of the court should have been refused and the bill dismissed, because a decree such as the State asked would, in effect, have recognized the validity of a condition which the State could not constitutionally prescribe under the guise of a fee for permission to do intrastate business.

MR. JUSTICE MOODY heard the argument of this case, participated in its decision, and approves this opinion.

On the authority of *Western Union Tel. Co.* v. *Kansas*, *ante*, p. 1, and for the reasons and with the reservations therein set forth in the opinion in that case, the decree must be reversed and the cause remanded for such further proceedings as may be consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

It is not disputed that the Pullman Company many years ago entered Kansas and has since therein operated its cars for the purposes of interstate as well as local business. Although the cars, in passing in and out of the State, may not have been constantly the same, it was long ago settled (*Pull-*

man's Car Company v. *Pennsylvania*, 141 U. S. 18) that a proportionate number of the cars so used are to be considered as having a definite *situs* in the State, and therefore as property permanently therein, subject to the power of the State to tax. Taking this rule into consideration, in my opinion the case is controlled by the reasons given for my concurrence in *Western Union Telegraph Co.* v. *Kansas*, *ante*, p. 1. That is to say, as a due proportion of the cars of the Pullman Company used in the State of Kansas were there permanently, I am not able to conclude that the company or its property were not permanently in the State, and hence that such property can be taken by the State without due process of law, as a condition of the right to bring the property into the State and there carry on local business. To so hold without overruling *Pullman's Car Co.* v. *Pennsylvania* and the many cases which have followed it, would be to place the court in the position of saying on the one hand, for the purpose of upholding the State's lawful power of taxation, that the property of the company was permanently in the State, and on the other of deciding, for the purpose of enabling the State to impose an unconstitutional tax, that the company was outside of the State and had no property permanently employed in carrying on business therein. True it is, that my concurrence in *Western Union Telegraph Co.* v. *Kansas* was placed upon the ground that the company was in the State, and consequently was not subject to be dealt with upon the fictitious assumption that such was not the fact. However, it was also said that I did not dissent from the fundamental application which the court made of the commerce clause of the Constitution. As the reasons for this statement differed somewhat from those expressed by the court in its opinion, it seems to me, in view of the importance of the subject, that it is my duty now to state as briefly as possible my reasons for thinking that the tax in question is repugnant to the commerce clause of the Constitution, even under the assumption that the corporation and its property

were out of the State, and that the tax is a condition affixed to the privilege of coming in to do a local business, and may therefore be escaped by not doing such business.

The conflict of opinion as to the decisive effect of certain prior decisions of the court exacts that the principles which this case involves should be first definitely brought into view in order that the appositeness of the cases referred to may be determined in the light of the true doctrine by which the case should be controlled. I therefore at once summarily state certain dominant propositions which are to my mind not subject to be controverted, because whatever may be the differences of opinion as to some of them considered originally, they are all so conclusively established by the previous decisions of this court as to be now beyond dispute.

1. A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by which it is sustained.

2. Even though a power exerted by a State, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. *Darnell* v. *Memphis,* 208 U. S. 113; *Am. Steel & Wire Co.* v. *Speed,* 192 U. S. 500, and authorities there cited.

3. Subject to constitutional limitations, the States have the power to regulate the doing of local business within their borders. As a result of this power, and of the authority which government may exert over corporations, the States have the right to control the coming within their borders of foreign corporations. In cases where this power is absolute the States may affix to the privilege such conditions as are deemed proper, or, without giving a reason, may arbitrarily forbid such corporation from coming in. When, therefore,

in a case where the absolute power to exclude obtains, a condition is affixed to the right to come into a State and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because by accepting the privilege it has voluntarily consented to be bound by the condition. In other words, in such case the absolute power of the State is the determining factor and the validity of the condition is immaterial. This doctrine finds, in the decided cases, no terser and clearer statement than that expressed in the opinion in *Horn Silver Mining Company* v. *New York*, 143 U. S. 305. In that case, a manufacturing company, organized under the laws of Utah, was sought to be made liable for a tax on the franchise of carrying on in the State of New York a manufacturing business. It contested liability on the ground that the tax was repugnant to the Constitution of the United States. The court, in deciding that the constitutionality of the burden was an irrelevant consideration because of the absolute power of the State to impose it as a condition on the right of the corporation to come into the State and do a manufacturing, and therefore local business, said, speaking of the power of the State (p. 315):

"Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

And in a passage of the opinion previous to the one just quoted, concerning the right of a State, where its power to exclude was absolute, to impose such condition as it pleased, it was observed (p. 314):

"This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest."

In addition, the following cases either directly, express or by fair implication must be taken as sustaining the right of the State, where it has the absolute power to exclude, to affix whatever condition it deems proper to the right of a foreign corporation to come in, and the consequent inability of such corporation after accepting the privilege to assail the constitutionality of the condition: *Paul* v. *Virginia*, 8 Wall. 168; *Postal Telegraph Co.* v. *Charleston*, 153 U. S. 692; *Hooper* v. *California*, 155 U. S. 648; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171; *Security Mut. Ins. Co.* v. *Prewitt*, 202 U. S. 246; *National Council* v. *State Council*, 203 U. S. 151.

4. The absolute power of the State, as stated in the preceding proposition, does not include the right to exclude a foreign corporation from doing in a State interstate commerce business, since the regulation of such business is vested by the Constitution in Congress, and the States are impotent, as stated in the first and second propositions, to directly burden the right to do such business or to discriminate against those doing it. *Crutcher* v. *Kentucky*, 141 U. S. 47. And, indeed, by necessary implication, the want of power in the States to exclude corporations as well as individuals from carrying on within their borders interstate commerce results, by implication, from the decisions in the cases previously cited under proposition 3. This is aptly illustrated by the *Horn Silver Mining case*, where, after stating, in the clearest way, the absolute power of the State, generally speaking, to exclude a foreign corporation, it was declared (143 U. S. 314–315):

"Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in *Bank of Augusta*

v. *Earle*, 13 Pet. 519. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12. The other limitation on the power of the State is, where the corporation is in the employ of the General Government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton* v. *Baltimore & New York Railroad*, 32 Fed. Rep. 9, 14. As that learned justice said: 'If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the State.' *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 186."

Let me then test the question for decision by the light of these principles.

As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition. That is to say, the exerted power could not in the nature of things be wider than the authority in virtue of which alone it could be called into play. Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition 1. This follows, since the imposition on a corporation which has the right to do interstate commerce

business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business. It is not by me doubted that as a practical question the arbitrary prohibition against doing a local business imposed on one engaged in and having the right to engage in interstate commerce is to burden that business. But passing, for argument's sake, the considerations just stated, if a State in express terms enacted that all foreign corporations which availed of the right granted them by the Constitution of the United States to carry on interstate commerce within the State without the previous consent of the State should, as a penalty for not obtaining that consent, be deprived of all right to transact local business, it would not, I assume, be contended that such an enactment was not a discrimination against the corporations to which it applied because of their possession of a right conferred upon them by the Constitution of the United States. And yet such must be the direct and immediate result of applying an absolute act of exclusion to corporations who are not subject to such absolute exercise of power, because of the right bestowed upon them by the Constitution of the United States to carry on within a State an interstate commerce business. Nor is it an answer to say that, as a State may exclude a foreign corporation from doing local business, the exertion of its lawful power may not be prevented because a bad reason is given or an illegal condition imposed, since the power exerted is the test and not the reason which has been given for exerting the power. But the proposition in effect assumes the question at issue, since however controlling it may be conceded to be when applied to a case where the absolute power to exclude exists, it can have no application to a case where the power of the State is relative, because it may not extend to prohibiting the doing of an interstate commerce business. In such a case the limitation upon the power operates not only to forbid the exclusion, as the result of the express enactment

of an unconstitutional condition, but also in the nature of things prohibits the absolute exclusion, although the reason for the attempted exertion of such a power be not given. In other words, where the power to exclude is absolute no inquiry as to the reasons for its exertion need be resorted to in order to determine its constitutionality. But, where the power is only relative, because it may not be exerted under particular conditions and circumstances, the violation of the Constitution cannot be accomplished by a failure to express the reason for the exclusion, and thus absolute power be exerted where such power does not exist. The controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly.

It is to be observed that the conclusions just expressed take away from the States no lawful power. It leaves to the States the right to exert absolute authority where such power is possessed, and simply requires that where, as a result of the Constitution of the United States, the power is not absolute but is merely relative, not only the right of regulation but likewise the right to exclude must be exerted conformably to the requirements of the Constitution of the United States; that is, in such a manner as not, either directly by the expression of a condition, or indirectly by its non-expression, to deprive of rights secured by that instrument.

The principal cases relied upon to establish that the prior decisions support the right of the States to impose the unconstitutional tax here in question are reviewed in the opinion of the court, and I might well rest content with that review. But, in addition, it to me seems that none of the cases relied upon are apposite here, for two obvious reasons, because they either involved the exercise of state power concerning subjects over which the authority of the State was absolute or considered state burdens which were upheld as being in effect, neither direct burdens upon interstate commerce nor discriminatory against such commerce.

A very summary reference to the cases will be made for

the purpose of indicating why this is said. *Paul* v. *Virginia*, 8 Wall. 168, involved the validity of a state statute which prescribed certain conditions for the doing of the business of insurance within a State by a foreign insurance company, and it was held that such business was not commerce, and therefore was within the absolute regulating power of the States. *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, as previously shown, involved no question of interstate commerce, but the right of a foreign corporation to carry on in a State a manufacturing business without compliance with the laws of the State. And although the ruling of the court, as heretofore stated, was in express terms placed upon the absolute power of the State over the subject, the court was careful to point out that such power did not embrace the right to exclude a foreign corporation from doing an interstate commerce business in the State or extend to excluding a corporation chartered by the United States for governmental purposes. *Postal Telegraph Co.* v. *Charleston*, 153 U. S. 692, involved a tax concerning which the court said (p. 699): "The express terms of the ordinance restrict the tax to 'business done exclusively within the city of Charleston, and not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents.' " It is certain that the burden was sustained on its inherent merit as a purely lawful tax on a subject within the State's authority and not as an unconstitutional tax on interstate commerce, which, although void, was to be enforced because it was a mere condition for the privilege of doing local business, which privilege had been accepted. This is certain, since the court said (p. 695): "That this license is not a condition upon which the right to do business depends, but is a tax, is shown by the case of *Home Insurance Co.* v. *City Council*, 93 U. S. 116, 122." How the ruling thus made is applicable here my mind does not perceive. The distinction between this case and that is but the difference which exists between

the exertion of a lawful power and the attempt to violate the Constitution by doing that which it forbids to be done. The gulf which separates the case referred to from this, it may be, can be made plainer by observing that this case involves no issue as to the right of a State to lawfully tax the local business of corporations, whether domestic or foreign. That right is fully conceded. The only right here challenged is the authority of a State to impose an unconstitutional tax and validate the tax by making the payment of the unlawful tax a condition of the right to do a local business. And this upon the false assumption that absolute power to exclude exists; that is, to impose an unlawful tax and sustain it by another unlawful assumption of power, a process of reasoning which, to my mind, must rest on the proposition that in deciding questions of constitutional power it is to be held that two wrongs make a right. *Hooper* v. *California*, 155 U. S. 648, was a case involving only the right of a State to absolutely control the doing of insurance business within the State, and the doctrine of *Paul* v. *Virginia* was reiterated. The court, however, was sedulous to declare that as that particular subject was not commerce, the authority of the State was absolute and not relative, but it expressly pointed out the limitation upon the absolute power which would obtain where a right arose in favor of a corporation under the Constitution of the United States to engage within the State in interstate commerce. In *Waters-Pierce Oil Company* v. *Texas*, 177 U. S. 28, the oil company had accepted a permit from the State of Texas to engage for the period therein stated in local as well as interstate commerce within the State, upon the conditions therein set forth. No question was raised as to what would have been the rights of the company had it gone into the State for the purpose of transacting therein a purely interstate commerce business without the consent of the State. Indeed, the decision proceeded upon the theory that no such question was involved in the case, since it was assumed in the opinion that under the circumstances of the case the power

of the State was absolute and not relative. *Paul* v. *Virginia* and cases of that character were cited. *Hooper* v. *California* was referred to and the exception as to interstate commerce business which that case enunciated was pointed out. It was declared that the case could have been rested upon the *Hooper case* without saying anything further, a conclusion wholly incompatible with any other conception than that the right recognized was based upon the absolute power of the State and did not come within the exception based upon the right to do an interstate commerce business, even by a foreign corporation, which the *Hooper case* had announced and which the case of *Horn Silver Mining Company* had, in effect, treated as being as well established as the principle of absolute power. It is true that in *Pullman Co.* v. *Adams*, 189 U. S. 420, and *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171, the taxes which were assailed as invalid were treated as conditions imposed for the privilege of carrying on local business, and which were therefore considered to be optional, as the right to escape payment would result upon discontinuing the doing of the local business. But the taxes in question in those cases were not levied upon interstate commerce, either directly or indirectly, but only upon the business done within the State, and therefore substantially involved no question of the absolute right of the State to impose an unconstitutional condition where the power of the State was not absolute but only relative. No reference was made in the opinion to the distinction stated in the previous cases between the absolute power to exclude, generally considered, and the relative character of that power where the foreign corporation possessed the power to do an interstate commerce business, irrespective of the consent of the State. *Security Mutual Insurance Company* v. *Prewitt*, 202 U. S. 246, involved the right of the State to deal with the business of insurance, a matter purely of state concern, involving interstate commerce in none of its aspects; and the case of *National Council* v. *State Council*, 203 U. S. 151, also involved the right of a

State to control the doing within the State of a business purely local in character as distinct from an interstate commerce business.

Moreover, none of the cases referred to prevent me, in this case, from acting upon my independent convictions, even if it be conceded that expressions may be found in the opinions in some of the cases which, when separated from their context and apart from the subject-matter of the controversies which the cases presented, would tend to conflict with the views I have expressed. This is said because certain is it that in none of the cases is the slightest reference made to the distinction between the absolute and relative power which this case involves and the direct burden which must result to interstate commerce from the attempt to exert absolute power, where, as the result of the interstate commerce clause of the Constitution, relative power alone obtains. When first after the duty came to me of taking part in the work of the court the question arose of the right of a State in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous rulings of the court, however much as an original question I would have held a contrary view. But because my convictions were thus yielded in such a case affords no reason why I now should assent to extending the doctrine of the previous cases to conditions to which, in my opinion, they do not apply. And certainly this should not be done when the result of such extension of the previous cases would be to destroy the efficiency of the commerce clause of the Constitution, to restrict the powers of Congress conferred by that clause, and ultimately, by the doctrine to result from the unwarranted extension of the cases, to destroy the substantial powers of both Congress and the States and establish a system from which it would come to pass that, instead of living under a constitutional government, we would live under

a government of unconstitutional exactions, sanctioned by means of the exertion of arbitrary and absolute power, although the right to exert such power did not exist.

MR. JUSTICE HOLMES, with whom THE CHIEF JUSTICE concurred, dissenting.

As this case has received some further discussion beyond that in *Western Union Telegraph Co.* v. *Kansas*, I will contribute my mite. I do not care to add to what I said the other day as to the supposed accession of rights to a corporation because it already has property in the State. Argument from *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, is excluded by *New York Central Railroad* v. *Miller*, 202 U. S. 584, which shows that the question whether there is any necessary parallelism between liability to taxation elsewhere and immunity at home still is an open question, p. 598, and points out that in the earlier case the same cars were continuously receiving the protection of Pennsylvania, p. 597. In the present case it is alleged that the cars are taxed in other States as well as in Kansas, and that the property represented by the capital of the company has no *situs* in Kansas. If I thought it material I should say that on the declaration the cars were taxable at the Pullman Company's domicil more certainly than anywhere else. But I think it immaterial, for the reasons that I gave last week; and, furthermore, the argument drawn from the presence in the State of cars that can be and are rolled out of it at will cannot, I should think, be meant to be pressed.

I will add a few words on the broader proposition put forward that the Constitution forbids this charge, whether the corporation was established previously in the State or not. I do not see how or why the right of a State to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case

the power of the State is only relative, and in the sense that it is confined to the local business, I agree. But in the sense that it is not absolute over that local business the statement seems to me merely to beg the question that is to be discussed. I do not understand why the power is less absolute over that because it does not extend to something else. So again the proposition that a State may not subject all corporations that enter the State for commerce with other States to such conditions as it sees fit to impose upon local business, no matter how offensive the terms, seems to me a proposition not to be assumed but to be proved; or again that the arbitrary prohibition of local business is a burden on commerce among the States. I am quite unable to believe that an otherwise lawful exclusion from doing business within a State becomes an unlawful or unconstitutional burden on commerce among States because if it were let in it would help to pay the bills. Such an exclusion is not a burden on the foreign commerce at all, it simply is the denial of a collateral benefit. If foreign commerce does not pay its way by itself I see no right to demand an entrance for domestic business to help it out.

The distinction that I believe exists is sanctioned by many cases earlier than those referred to in my former dissent. That the local business of telegraph and railroad companies may be taxed by the States has been held over and over again, with full acceptance of the doctrine that *quoad hoc*, 'the power to tax involves the power to destroy,' *M'Culloch* v. *Maryland*, 4 Wheat. 316, 431, essentially the doctrine on which the power of the States to tax interstate commerce was denied. *Philadelphia & Reading R. R. Co.* v. *Pennsylvania* (*'Case of the State Freight Tax'*), 15 Wall. 232. Thus in *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472, it was held that the telegraph company could be taxed upon all messages carried and delivered wholly within the State, and the principle was stated by Mr. Justice Miller (p. 473) to be that this "class are elements of internal commerce solely within the limits and jurisdiction of the State, and therefore subject to its taxing

power." This was by a unanimous court, and followed the intimations and decisions of earlier cases. The above passage was cited and followed in *Postal Telegraph Co.* v. *Charleston City Council*, 153 U. S. 692, when a license fee or tax was exacted in respect of local business, and the previous decisions were cited and commented upon by Mr. Justice Shiras. One of the arguments repudiated was that the tax was a burden upon commerce among the States. I do not see how the reasoning that denies the power to tax one kind of commerce and asserts it with regard to the other can be reconciled with the denial of the power of the State to exclude the latter altogether, or to tax it for whatever sum it likes. The right to tax "in its nature acknowledges no limits." *Weston* v. *Charleston*, 2 Pet. 449, 466; *People ex rel. Bank of Commerce* v. *Commissioners of New York*, 2 Black, 620.

I think that the tax in question, for I am perfectly willing to call it a tax, was lawful under all the decisions of this court until last week. From other points of view, if I were at liberty to take them, I should agree that it deserved the reprobation it receives from the majority. But I have not heard and have not been able to frame any reason that I honestly can say seems to me to justify the judgment of the court in point of law.

THE CHIEF JUSTICE concurs in this dissent.

MR. JUSTICE MCKENNA also dissents.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY *v.* J. SLADE AND E. M. PLESS.

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

No. 79. Argued January 14, 1910.—Decided January 31, 1910.

Where the state court decides that, under the law of the State the constitutionality whereof is not attacked, the action of defendant in giving replevy bond and answering amounted to a general appearance and waiver of objection to jurisdiction based on a Federal ground, the ruling of general appearance rests on a non-Federal ground sufficient to sustain it and cannot be reviewed by this court.

Where plaintiff in error did not set up in the state court the contention that the contract of interstate shipment should be construed according to the act of Congress regulating interstate shipments instead of by the law of the State where made, but on the contrary, contended that it should be construed by the law of the State of destination and trial of the case, the record presents no Federal question properly set up in the court below that can be considered by this court.

Writ of error to review 3 Ga. App. 400, dismissed.

THE Cincinnati, New Orleans and Texas Pacific Railway Company—hereafter referred to as the railway company—is a corporation organized under the laws of Ohio, and operates lines of railroad in several States other than Georgia.

On May 14, 1907, Pless & Slade, a partnership, asserting a claim against the railway company, resulting from the alleged negligent carriage of a carload of horses and mules, received at a point in Kentucky, for through carriage to Pless & Slade, at Cordele, Georgia, procured an attachment to be issued from the City Court of Cordele, under which a box car belonging to the company was seized. The railway company gave "a replevy bond, or a bond to release the attachment, . . . and on the filing of such bond the attachment became dissolved." The railway company, specially entering its appear-

ance, moved to quash, first, upon the ground that it was a foreign corporation, and had no agent, office or place of business and transacted no business in the State of Georgia, and was not susceptible of being therein sued; and, second, because the box car came into the State under a contract of interstate shipment, and could not be attached in Georgia without imposing a direct burden upon interstate commerce, in violation of the laws of the United States regulating that subject. On July 26, 1907, the plaintiffs demurred to the motion to quash and filed an answer to the same, and on the same day filed their declaration in attachment. On August 3, 1907, the railway company, appearing only for that purpose, filed a formal plea to the jurisdiction of the court. In this plea, with great elaboration, the grounds previously asserted in the motion to quash were reiterated. The plaintiffs demurred to this plea, and also answered the same. Both demurrers, the one to the motion to quash and the other to the plea to the jurisdiction, were heard together. The demurrers were sustained, and exceptions were duly reserved. Thereupon the railway company both demurred to and answered the declaration in attachment. The demurrer challenged the sufficiency of the declaration to show jurisdiction in the court, because it was not averred that the railway company was transacting business or had an office, agent or place of business in the county where the suit was brought or in the State of Georgia; that it was not charged that the acts of negligence for which recovery was sought had been committed in the State of Georgia; and because, on the contrary, the contract relied upon in the declaration was stated therein to have been made in Kentucky. The answer, after reserving the benefit of the demurrer, traversed the declaration on the merits, and as a special defense again set up that the railway company had no line of road in the State or agent therein, and transacted no business in Georgia, and therefore was not subject to be therein sued. Concerning the box car which had been attached it was specially set up, that in order to save breaking bulk and re-

loading at connecting points, the railway company had an agreement with connecting carriers by which its cars, when loaded on its line with freight for points in Georgia, should not be unloaded at the terminus of the company's road, but should be transferred to the connecting carrier for delivery in Georgia, such carrier coming under an obligation to return the cars with all possible dispatch. It was alleged that the car in question was delivered under these circumstances, and was hence not subject to attachment in Georgia.

The demurrer was overruled. The court also sustained a demurrer filed on behalf of the plaintiffs to the special defenses set up by the railway company in its answer, to which we have previously adverted. To these rulings of the court exceptions were noted by the railway company and made part of the record. The case went to trial upon the merits, and at the close of the evidence the court directed a verdict for the plaintiffs. The case was taken to the Court of Appeals of Georgia, where the judgment was affirmed. *Cincinnati, N. O. & T. P. R. Co.* v. *Pless & Slade*, 3 Ga. App. 400. This writ of error to the Court of Appeals was allowed by the chief judge upon the ground that the Court of Appeals was the highest court of the State in which a decision in the suit could be had, and upon the averments made in the petition for the allowance of a writ of error, that grounds of Federal cognizance were presented by the record.

Mr. D. A. R. Crum, with whom *Mr. J. Gordon Jones* was on the brief, for plaintiff in error.

Mr. Joseph T. Hill for defendant in error.

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

In the trial on the merits it was shown that a shipment of live stock had been made from a point in Kentucky under a

contract with the railway company for delivery at Cordele, Georgia, the contract contemplating the movement of the shipment over the line of the railway company and the transfer by it of the car to connecting carriers for delivery at the point of destination. It was this contract of shipment out of which it was alleged the claim arose which was the basis of the attachment. The railway company offered in evidence the written contract, and then rested its defense. This contract of shipment contained various provisions limiting the common law liability of the railway company. Thereupon the record recites as follows:

"Mr. Hill offers in evidence for plaintiff section 196 of the constitution of the State of Kentucky, as follows:

"'Transportation of freight and passengers by railroad, steamboat, or other carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.'

"Mr. Jones [for railway company] objects, that the regulation as provided for in this section should accompany it, and unless it does it is irrelevant and inadmissible; that it is merely a paragraph of the constitution of the State giving the legislature and laws. He further objects to it on the ground that this suit is brought under the Georgia laws, and is not a suit on a Kentucky contract.

"Objection overruled.

"Plaintiff announces closed.

"Mr. Hill moves the court to direct a verdict for plaintiff for the amount sued for.

"Mr. Jones [for railway company] insists that the contract offered is a legal contract, and forms an issue for the jury to pass upon."

Concerning the questions of jurisdiction raised by the pleadings, the Court of Appeals, to which the case was taken, held as follows: 1st. That by the requirements of § 4575 of the Georgia Civil Code, and by the application of the law of the

State as expounded in repeated decisions of the Supreme Court, "the giving of the replevy bond was a general appearance by the defendant, dissolving the attachment and converting it from an action in rem into an action in personam." 2d. That under the law of the State, "the filing of a general demurrer or an answer not under protestation, and without expressly reserving the special appearance, waives the special appearance." Applying these general propositions, it was decided that "the defendant having, by filing a replevy bond, a demurrer, and an answer, submitted itself personally to the jurisdiction of the court, with the right to make only such defenses as it could have made if it had been personally served with process, and the surety on the replevy bond making no complaint against the judgment, it becomes immaterial whether the levy of the attachment was regular or not, or whether the property seized was subject to levy; and these questions are therefore not for decision. *King* v. *Randall*, 95 Georgia, 449. The defendant had the right to replevy irrespective of whether the property was subject or not subject to the levy. *Swift* v. *Tatner*, 89 Georgia, 660, 673." In affirming the judgment on the merits, the contract of shipment out of which the controversy arose was treated as a Kentucky contract. Certain limitations therein were held to be void under the laws of that State, and other provisions which were held not to be repugnant to those laws were decided not to exempt the railway company from liability.

The assignments of error are eleven in number, but when the reiterations which they contain are put out of view it is apparent on their face that, in their broadest aspect, they embrace only two questions of a Federal nature: First, that the trial court did not acquire jurisdiction over the railway company, as the levy upon the box car was a direct burden upon and at all events was repugnant to the legislation of Congress on the subject of interstate commerce; and, second, that a right under the same legislation to the benefit of the laws of the United States in construing the contract of shipment upon

which the cause of action arose was denied by the decision of the state court. But as we have previously shown, on the face of the record it is apparent that the Court of Appeals did not pass upon the question whether the levy of the attachment was regular or whether the property seized was subject to levy. It held, construing the statutes of Georgia relating to attachments and the decisions of the highest court of the State that it was unnecessary to decide those questions, because they had been waived by the conduct of the railway company in giving a replevy bond and answering &c., without protestation. It follows that no Federal question is presented as to the issue concerning jurisdiction, since the ruling below was based exclusively upon a non-Federal ground broad enough to sustain it without considering or referring to the alleged Federal question. It is besides to be observed that the plaintiff in error in argument does not question the correctness of the deductions drawn by the court below from the prior decisions of the Supreme Court of the State of Georgia. Indeed, there is nothing in the record showing that any question was raised below as to the repugnancy to the Constitution of the United States of the statute of Georgia concerning the giving of a bond to release attached property as construed by the Supreme Court of Georgia. See, in this connection, the cases of *York* v. *Texas*, 137 U. S. 15, 20; *Kauffman* v. *Wooters*, 138 U. S. 285, and *Mexican Central R. R. Co.* v. *Pinkney*, 149 U. S. 194, 205.

The second proposition is, that, as the court below construed the contract of shipment upon which the cause of action depended by the law of Kentucky where it was made instead of by the laws of the United States regulating interstate commerce, thereby a Federal right was denied. But this contention is at once disposed of by saying that the assertion of Federal right upon which it rests finds no support in the record, as it does not appear to have been urged below or called to the attention of or decided by the appellate court. On the contrary, as we have previously shown, the contention made at the trial by the railway company was not that the contract of

shipment was to be governed by the laws of the United States, but that it should be treated as a Georgia and not as a Kentucky contract.

From these considerations it results that the record presents no Federal question, and the writ of error is therefore dismissed for want of jurisdiction.

Dismissed.

CONLEY *v.* BALLINGER, SECRETARY OF THE INTERIOR.[1]

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

No. 77. Argued January 14, 1910.—Decided January 31, 1910.

There is no question as to the complete legislative power of the United States over the land of the Wyandotte Indians while it remained in their occupation, and parcels excepted from the general distribution under the treaty of 1855 continued under such legislative control for the benefit of the tribe.

While the United States maintains and protects Indian use of land and its occupation against others it is bound itself only by honor and not by law, and it will not be presumed to have abandoned at any time its attitude of protection towards its wards. Nor is its good faith broken by any change in disposition of property believed by Congress to be for the welfare of the Indians.

Even if a suit to enjoin disposition of property reserved by the treaty of 1855 with the Wyandottes for cemetery use is not a suit against the United States, a descendant of an Indian buried in such cemetery cannot maintain such an action to enjoin the disposition of the reserved property in accordance with an act of Congress.

In view of the circumstances of this case it is proper to dismiss the bill without costs under the provisions of the act of March 3, 1875, c. 137, § 5.

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[1] Docket title originally: Lyda B. Conley, Appellant, *v.* James R. Garfield, Secretary of Interior, Appellee. January 14, 1910, on suggestion of resignation of appellee and appointment of Richard A. Ballinger, substitution of latter ordered as party appellee.

THE facts are stated in the opinion.

Lyda B. Conley, appellant, *pro se.:*

The Circuit Court in dismissing the bill for want of jurisdiction with costs erred. If it has not jurisdiction it cannot give costs. 2 Bates' Fed. Eq. Pro. 873; *Inglee* v. *Coolidge*, 2 Wheat. 363; *Hornthall* v. *Keary*, 9 Wall. 566; *Blacklock* v. *Small*, 127 U. S. 96; May's U. S. Sup. Ct. Prac. 5; *Mayor* v. *Cooper*, 6 Wall. 247.

The Circuit Court has jurisdiction to enjoin the acts of individuals who invade constitutional rights under color of an unconstitutional act of Congress. Cooley's Const. Lim., 7th ed., 28; May's Prac. 102; *Tindel* v. *Wesley*, 167 U. S. 213; Cooley's Torts, 2d ed., 830; Black's Const. Law, 131, 417; Century Digest, under Courts, § 844½; Cooley's Principles, 136, 345; Sutherland's Notes, 78, 644; *Poindexter* v. *Greenhow*, 114 U. S. 273, 297; *Camp* v. *Holt*, 115 U. S. 620; *Board of Education* v. *Blodgett*, 115 Illinois, 441; *Eaton* v. *Railroad Co.*, 51 N. H. 504; Ordronaux on Legislation, 254; *Murray* v. *Hoboken Land Co.*, 18 How. 277; *Lowe* v. *Kansas*, 163 U. S. 85; *Lasere* v. *Rochereau*, 17 Wall. 438; *Orchard* v. *Alexander*, 157 U. S. 373; *State* v. *Tulow*, 129 Missouri, 163; Works' Courts & Jurisdiction; 1 Desty's Fed. Procedure, 9th ed., 42; *Leeper* v. *Texas*, 139 U. S. 462; *Union Trust Co.* v. *Stearns*, 119 Fed. Rep. 794.

The Circuit Court erred in holding that it did not have jurisdiction because only rights of persons and property and not political rights are subjects of judicial power. Judicial power covers every legislative act of Congress whether within or beyond its legislative power. *Ableman* v. *Booth*, 21 How. 506, 520; *Fifth Nat. Bank* v. *Long*, 7 Biss. 502; *Elliott* v. *Van Vorst*, 3 Wall., Jr., 299; *Cunningham* v. *Macon &c. R. R.*, 109 U. S. 446, 451; *Union Trust Co.* v. *Stearns*, 119 Fed. Rep. 793; Field's Fed. Courts, 113; *Osborn* v. *Bank*, 9 Wheat. 738; *Poindexter* v. *Greenhow*, 114 U. S. 291; *Smyth* v. *Ames*, 169 U. S. 518; Webster's Citizenship, 47; *Blair* v. *Silver Peak Mines*, 93 Fed. Rep. 335; Sutherland's Notes, defining citizenship, 569

and 610; *United States* v. *Cruikshank*, 92 U. S. 542; Story's Comm., § 1693; Cooley's Principles, 31, 163, 269, 367; 27 Century Digest, 150; Ordronaux, 478; Kansas Bill of Rights, Art. I, § 1; *Rison* v. *Farr*, 24 Arkansas, 168; Wells' Jurisdiction of Courts, 3; Cooley's Const. Lim., 7th ed., 131; Potter's Dwarris, 65, 351; Brown's Leg. Max. 34.

Treaty stipulations are subjects of judicial cognizance, and Congress cannot annul titles under treaties by subsequent legislation repealing the treaty. Sutherland's Notes, 484; *Chirac* v. *Chirac*, 2 Wheat. 277; *Reichart* v. *Felps*, 6 Wall. 166; *Wilson* v. *Wall*, 6 Wall. 83; Brown on Jurisdiction, 2d ed., 6, 86; Black's Const. Law, 50.

The question of jurisdiction does not depend on truth or falsity of the charge but upon the nature of it, and is determinable at the commencement and not at the conclusion of the inquiry. Brown's Constitutional Inquiries, 65; *Dartmouth College Case*, 4 Wheat. 519.

The judiciary is the only department of the Government to construe a treaty or statute. 1 Butler's Treaty Power, 145; *Society* v. *New Haven*, 8 Wheat. 464; 4 Fed. Stat. Ann. 281, and cases cited under Rev. Stat., § 629.

The Circuit Court had jurisdiction because this case arises under the Constitution and laws of the United States and the chancery court has jurisdiction of cases of charitable uses independent of the statute of 43 Elizabeth, Chap. 4; Tiedeman, Real Property, 906; Carter's Jurisdiction of Fed. Courts, 8; 1 Desty's Fed. Proc., 9th ed. 365; *Osborne* v. *Bank*, 9 Wheat. 818, 870; *Marbury* v. *Madison*, 1 Cranch, 137; Cooley's Principles, 31, 126; *Ableman* v. *Booth*, 21 How. 519; Black's Const. Law, 118; *Tennessee* v. *Davis*, 100 U. S. 257; Cooley's Const. Lim. 29; *Sawyer* v. *Concordia*, 12 Fed. Rep. 754; 1 Kent, 14th ed., 322; *United States* v. *Arredondo*, 6 Pet. 691, 738; Works on Jurisdiction, 430; *West. Un. Tel. Co.* v. *Andrews*, 154 Fed. Rep. 95; *Matter of Young*, 209 U. S. 123, 144; Sutherland's Notes, 481; 13 Century Digest, 540, cases under "Treaties"; 9 Fed. Stat. Ann. 34; *Head Money Cases*, 112 U. S. 598; 1 Bouvier's

Law Dict. 311; Ordronaux, 627; 2 Story's Eq. Jurisdiction, 12th ed., §§ 1171*a*, 1177; *Good* v. *McPherson*, 51 Missouri, 126; 2 Pingrey on Real Property, 1083; 2 Beach on Injunction, 1154; *Cincinnati* v. *White*, 6 Pet. 431; *Hunter* v. *Sandy Hill*, 6 Hill, 407; *Beatty* v. *Kurtz*, 2 Pet. 585; 1 Foster's Fed. Prac., 3d ed., 452; 13 Century Digest, §§ 797, 844; Black's Const. Prohibitions, 20.

Appellant shows by the cases cited that this case is not one against the United States; that the act of Congress involved interferes with her vested rights to her irreparable injury without due process of law and is not a proper exercise of legislative power under the Fifth Amendment to the Constitution; that Congress cannot interfere with vested rights under treaties and has no power to nullify titles confirmed many years before by the Government's authorized agents and that charitable uses are protected by the courts as required by equity and good conscience, and the court has jurisdiction to and should award the relief prayed for.

The Solicitor General and *Mr. Barton Corneau* for appellees, submitted:

The lower court was without jurisdiction as $2,000 was not involved and the act of February 6, 1901, 31 Stat. 760, authorizing suits by Indian allottees does not apply—and furthermore the suit is one really against the United States. *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Louisiana* v. *Garfield*, 211 U. S. 70.

It was not the purpose of the Treaty of 1855 in reserving this land as a public burying ground to create in appellant or other members of the former Wyandotte Tribe individual rights, legal or equitable, in the land. The United States took the land free at any rate from more than a mere moral obligation, which the act of June 21, 1906, amply meets. *Fleming* v. *McCurtain*, 215 U. S. 56.

The United States had the full right to administer, and in

the course of such administration to alter the use or application of the Indian tribal property, during the continuance of the tribal existence. It is not to be supposed that the Treaty of 1855, in making the cemetery reservation, contemplated a surrender of this power of the United States over the land after the tribe had been dissolved. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

The Wyandotte tribal authorities undoubtedly had power to terminate the use of this burial ground at its pleasure. By the cession the United States would have acquired like power, even if it had not possessed it already.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity to enjoin the Secretary of the Interior and Commissioners appointed by him from selling or disturbing an Indian cemetery. The bill was demurred to on the grounds, among others, that the matter in dispute was not alleged to exceed the value of two thousand dollars, and that the suit was a suit against the United States. The bill was dismissed for want of jurisdiction and an appeal was taken to this court.

The substance of the bill is as follows: The plaintiff is a citizen of the State of Kansas and of the United States and a descendant of Wyandotte Indians dealt with in the Treaty of January 31, 1855. 10 Stat. 1159. By Article 1 of that treaty the tribe of the Wyandottes was to be dissolved on the ratification of the treaty and the members made citizens of the United States, with exemption for a limited time of such as should apply for it. By Article 2 the Wyandotte Nation ceded their land to the United States for subdivision in severalty to the members, "except as follows, viz., The portion now enclosed and used as a public burying ground, shall be permanently reserved and appropriated for that purpose;" &c. The plaintiff's parents and sister are buried in this ground, and she alleges that she "has seizin, and a legal estate and vested

rights in and to" the same, and that although the land is worth $75,000, there is no standard by which to estimate the value of her rights. (It is set forth further that by a treaty of February 23, 1867, with the Senecas and others, Art. 13, 15 Stat. 513, 516, a portion of the Wyandottes were allowed to begin anew a tribal existence; but the bearing of this treaty upon the case does not appear.) The defendants are intending and threatening to remove the remains of persons buried as above to another designated place and to sell the burying ground; the proceeds after certain deductions to be paid to parties to the Treaty of 1855, or their representatives, in accordance with the Act of Congress of June 21, 1906, c. 3504. 34 Stat. 325, 348. This act is alleged to violate the constitutional rights of the plaintiff and to be void.

The record shows that the court left it open to the plaintiff to amend so as to avoid any technical objection that could be avoided by amendment, and as she conducted her own case, we go as far as we can in leaving such considerations on one side. For every reason we have examined the facts with anxiety to give full weight to any argument by which the plaintiff's pious wishes might be carried out. But if it is obvious that the bill could not be amended so as to state a case within the jurisdiction of the court, the judgment must be affirmed or the appeal dismissed, as the defect of jurisdiction turns out to be peculiar to courts of the United States as such, or one common to all courts.

The allegation of the plaintiff's interest plainly does not mean that she has taken possession of the whole burying ground and has acquired a seizin of the whole by wrong. As it does not mean that, it must mean simply a statement of the rights that the plaintiff conceives to have been conferred by the Treaty of 1855 upon those whom she represents. The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent

appropriation of the land in question as a public burying ground, that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill.

But we do not pursue the attempt to state the argument on that side because we are of opinion that it is plainly impossible for the plaintiff to prevail. There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565. When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical perhaps, but the principles concerned are not so. The Government cannot be supposed to have abandoned merely for a moment and for a secondary matter its general attitude toward the Indians as wards over whom and whose property it retained unusual powers, so long as they remained set apart from the body of the people. The very Treaty of 1867, cited in the bill, providing for the resumption of the tribal mode of life by the Wyandottes, shows that the United States assumed still to possess such unusual powers. It seems to us that the reasonable interpretation of the language as to the burying ground is not that the United States declares itself subject to a trust which no court could enforce against it, if against any one, (see *Naganab* v. *Hitchcock*, 202

U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60,) while on the other hand it stripped itself of any protecting power that otherwise it might have retained. It seems to us more reasonable to suppose that the words 'shall be permanently reserved and appropriated for that purpose,' like the rest of the treaty, were addressed only to the tribe and rested for their fulfilment on the good faith of the United States—a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians.

We are driven to the conclusion that even if the suit is not to be regarded as a suit against the United States within the authority of the cases cited, 202 U. S. 60 and 473, the United States retained the same power that it would have had if the Wyandotte Tribe had continued in existence after the treaty of 1855, that the only rights in and over the cemetery were tribal rights, and that the plaintiff cannot establish a legal or equitable title of the value of $2,000, or indeed any right to have the cemetery remain undisturbed by the United States.

We are of opinion that in view of the circumstances it is just that the bill should be dismissed without costs. Act of March 3, 1875, c. 137, § 5, 18 Stat. 472.

Decree reversed. Bill dismissed without costs.

KING *v.* STATE OF WEST VIRGINIA AND SPRUCE COAL AND LUMBER COMPANY.

SAME *v.* SAME AND MILLS.

SAME *v.* SAME AND BUSKIRK.

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

Nos. 445, 446, 447. Argued December 14, 15, 16, 1909.—Decided January 31, 1910.

When this court has determined the constitutionality of a state statute that question is not open, and cannot be made the basis of jurisdiction for a writ of error; and so held as to the statute of West Virginia involved in this case and sustained as constitutional in *King* v. *Mullins*, 171 U. S. 404.

On writ of error this court cannot deal with facts, and whether the land involved is within or without certain boundaries is for the state court to determine.

The construction and effect of, and rights acquired by, a decree of the state court are matters of state procedure. Nothing in the Federal Constitution prevents a state court from modifying a decree while the case remains in the court; nor is a beneficiary of a decree deprived of his property without due process of law, within the meaning of the Fourteenth Amendment, by the subsequent action of the court modifying or reversing the decree while the case is still pending therein.

The decision of the state court that the only portion of a statute which is unconstitutional is separable and inapplicable to the case is final.

Writs of error to review 64 W. Va. 545, 546, 584, 610, dismissed.

THE facts are stated in the opinion.

Mr. Hannis Taylor and *Mr. Maynard F. Stiles*, with whom *Mr. John G. Carlisle* was on the brief, for plaintiff in error.

Mr. William G. Conley, Attorney General of the State of

West Virginia, for defendant in error, State of West Virginia, submitted.

Mr. John F. Dillon and *Mr. C. W. Campbell*, with whom *Mr. Harry Hubbard*, *Mr. Edward C. Lyon*, *Mr. Malcolm Jackson* and *Mr. John A. Sheppard* were on the brief, for defendants in error, Mills and others.

Mr. Frank Cox, with whom *Mr. James F. Brown* and *Mr. William R. Lilly* were on the brief for defendants in error, Buskirk and others.

Mr. Justice Holmes delivered the opinion of the court.

These writs of error are taken in a suit by the State of West Virginia brought in May, 1894, for the sale of so much of a tract of 500,000 acres of land granted to Robert Morris in 1795 as is within the State and liable to be sold for the benefit of the school fund. See *State* v. *King*, 64 W. Va. 545; *Ib.* 546, 584; *Ib.* 610. The constitution of the State provides as follows: "It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State." Art. XIII, § 6 (W. Va. Code, 1906, p. lxxxv). By chap. 105 of the Code of the State, as amended by the act of February 23, 1893, c. 24 (W. Va. Acts, 1893, p. 57), a suit like the present is to be brought by the State for the sale of land so forfeited, and the former owner is to receive the surplus proceeds if he files a petition and proves title, or, if he prefers, may redeem. Further details are stated in *King* v. *Mullins*, 171 U. S. 404, where the validity of the system

created by the constitution and statute referred to was considered and maintained in a suit concerning this same tract. See also *King* v. *Panther Lumber Co.*, 171 U. S. 437. *Swann* v. *West Virginia*, 188 U. S. 739.

These provisions being in the interest of actual settlement in the country, the Constitution also provides that all titles of the State to forfeited lands, &c., not redeemed or redeemable, shall be vested in any person, other than the one in default, his heirs or devisees, for so much thereof as he shall have held for ten years under color of title, having paid taxes on the same for any five of the ten years, with ulterior provisions if there be no such person. The statute further provides for bringing in parties interested and enacts that land already sold under the statute, on which taxes since have been regularly paid, or land transferred by the Constitution, shall be dismissed from the suit, and thus exempts it both from sale in that suit and from the redemption incident to the proceedings for a sale. Section 6. The redemption allowed is only from the title still remaining in the State and does not affect titles under previous sales or the Constitution; the petitioner acquires no other title than that which was vested in him immediately before forfeiture. Section 17. By § 20 the bar of the final decree is limited in accord with these provisions of § 17.

After the bill in this case had been filed and several times amended, the plaintiff in error, King, answered, in June, 1896, setting up title to the 500,000 acres, charging that the statute which attempts to work out a forfeiture of land, &c., is contrary to the Fourteenth Amendment of the Constitution, but asking, "if it would be adjudged that said tract of land is forfeited to the State of West Virginia by reason of the non-assessment thereof," &c., that a decree be made allowing him to redeem. The answer also set out a very long list of claims to parcels of the tract, and charged that the persons making them should be made parties defendant to the bill. There were parties intervening at this stage, but they do not seem to need notice. The case was sent to a commissioner, who found,

among other things, that about 10,000 acres of the land was not subject to junior claims, and that the taxes and interest were $2,195.65. On this report coming in King paid $3,090.08 for taxes and costs, and thereupon, on September 30, 1897, a decree was entered declaring that King "has the right superior to all others to redeem said land so far as the record in this case shows," and that the portion of the land lying in West Virginia, "so far as the title thereto is in said State," which portion is adjudged to be bounded as set forth in the decree, "is hereby, by the said Henry C. King, fully redeemed; and all forfeitures of said land and taxes and interest heretofore charged or chargeable thereon are hereby released and discharged." "But it is provided that this redemption shall not affect the rights of any person not party to this suit may have, if any, under the provisions of section 3, Article 13, of the constitution of the State of West Virginia, such rights and claims not being in any manner adjudged or determined hereby." In fact, whatever it said, the decree could not grant a redemption affecting anybody's right but that of the State. The right of purchasers at court sales and transferees under the Constitution are protected by § 17 of the act of 1893, as pointed out by the Supreme Court of Appeals. 64 W. Va. 590, 599.

The State appealed in October, 1898, to the Supreme Court of Appeals, and on February 7, 1900, the decree "in so far as it allows the appellee, Henry C. King, to redeem the land described in this decree by reason of the payment of the sum of $3,090.08, costs, taxes and interest as fixed by the Circuit Court, and in so far as it ascertains such costs, taxes and interest," was reversed and in all other respects affirmed. The cause was ordered to be remanded with directions to permit King to amend his petition so as to carefully describe and accurately locate the portion of said land he desired to redeem. *State* v. *King*, 47 W. Va. 437. A little later in the same year (1900), the State submitted a fifth amended bill, making the persons mentioned in King's answer as having interest in the

tract parties, and asked the directions of the court, King now, contrary to his answer above stated, protesting, on the ground of the above-mentioned decree. The bill was ordered to be filed and in March, 1901, King filed an amended answer and petition, stating that he had not been able in the time allowed to define all the land, but that he did there give a careful description of certain portions upon which he desired to pay such future sum as was properly chargeable thereon. Schedules were set forth and the prayer was to be permitted to pay the sum properly chargeable upon the land above described and to be described in a supplemental petition.

In many instances the land claimed by the newly joined parties was dismissed without controversy from the suit as subject neither to sale nor to redemption under the Constitution and laws. In others the land claimed was within the boundaries established by the above-mentioned decree of September 30, 1897, but was alleged to be outside the true lines of the Morris grant, the correctness of the decree being denied. And again claims inconsistent with King's right to redeem, that were not admitted by him, were set up on the footing of purchases from the State. On July 5, 1901, the case was referred to a commissioner to report, among other things, the quantity, description and location of the portions of the Morris grant and other land concerned, to which the title then remained in the State and which was subject to sale. On July 14 King answered the answers of some of the new parties claiming portions of the land. In September he applied for a prohibition against the proceeding in the county court, which was denied on the ground that the court had jurisdiction, and that if it made a mistake it would be only error to be corrected in the usual way. *King* v. *Doolittle*, 51 W. Va. 91. The commissioner proceeded to take evidence, King being represented at the hearing, and this lasted until April 6, 1903, when the report was filed. On December 6, 1905, the court made a decree establishing very different boundaries from those fixed by the decree of September 30, 1897, and cutting down the Morris

grant to about 97,000, or, as the plaintiff in error says 90,000, acres. Meantime the State made a sixth, seventh and eighth amendment to its bill, bringing in new defendants, but these seem to need no further mention.

Motions had been made by Egbert Mills to dismiss a tract of 112 acres from the suit, and by the Spruce Coal and Lumber Company to dismiss a tract of 7,000 acres, and by others, on the ground that, as has been stated, by the statute under which the suit was instituted, whenever it should appear to the court that any part of the land in question had been sold by the State in former similar proceedings, &c., or was held under § 3 of Art. 13 of the state constitution, the bill should be dismissed as to such part.

On February 23, 1905, the act of 1893 was amended so as to allow defendant claimants to file deeds or certified copies of deeds made under an order of court in previous proceedings for the sale of school land, or patents from Virginia or West Virginia, purporting to convey any part of the land in suit; and it was enacted that if the State or some other claimant did not, within thirty days, allege and prove by a proper certificate that such part again had become forfeited since the date of the conveyance, the court should have no jurisdiction to sell such part or to permit redemption of it, but should enter an order dismissing the suit as to such part. (It was left an open question in *State* v. *King*, 64 W. Va. 594, whether this did not enlarge King's rights, in case of a second forfeiture.) It was enacted also that if it should appear that any part of the land had been held for ten years under color or claim of title and that taxes had been paid for five of the ten years, or if it should appear that the land had been held under color of title and taxes paid for five years since 1865, the suit should be dismissed as to such part. The court further was authorized to dismiss the suit in whole or in part if satisfied by report of the commissioner of school lands and inquiry that the whole or part of the lands was not liable to sale. Previous sales of school lands were validated so far as to pass the title of the State. After

this amendment new motions were filed on June 1, 1905, and subsequently, with copies of patents and deeds, if not previously filed. King objected on the ground that if § 3 of Art. 13 of the constitution was construed to apply to land forfeited after the constitution was adopted it was contrary to the Constitution of the United States, and that § 6 of chap. 105 was also, if construed not to permit King to redeem all the land described in his petition. Time was allowed until the first day of the next October term for the State or any other claimant to show any defences to these motions, and no defence appearing, on December 7, 1905, the day after the new boundary decree, and on later days, the motions were granted and the suit dismissed as to the tracts of land concerned.

The dismissals were on two grounds; that the tracts concerned were outside the Morris grant as bounded by the new decree, and that they were held under grants from the State, &c., and therefore were within c. 105, § 6, of the Code as amended and Art. 13, § 3, of the constitution. On December 3, 1907, King appealed to the Supreme Court of Appeals, but on December 22, 1908, the decrees were affirmed. It was held that the above-mentioned tracts claimed by Egbert Mills (No. 446 in this court) and the Spruce Coal and Lumber Company (No. 445 in this court), were outside the Morris grant. *State* v. *King*, 64 W. Va. 545. The new boundary was upheld in *State* v. *King*, 64 W. Va. 546. In that case it was decided that the defendants made parties after the first boundary decree of September 30, 1897, were not bound by it as partially affirmed, even if they had instigated and contributed to the appeal. Pages 559 *et seq.* See *Rumford Chemical Works* v. *Hygienic Chemical Company*, 215 U. S. 156. Finally in *State* v. *King*, 64 W. Va. 610, the court sustained a dismissal of land claimed by Buskirk (No. 447 in this court) on the ground that it had been sold as school land pending the present proceedings and so the right to redeem was gone, and moreover the sale was validated by the amendment of 1905 to the act of 1893, as above set forth. In 64 W. Va. at 584 is a separate opinion

discussing the amendment of 1905, and deciding that it merely made legitimate rules of evidence and changed no rights.

To complete the history of the case, even if not material, it may be added that petitions for rehearing were presented and disallowed, but that on January 21, 1909, it was decreed that the boundary decree of December 6, 1905, should be "so modified and limited in effect as not to affect or impair any right vested in any person by the decree entered herein by the Circuit Court of Wyoming County on the 30th day of September, 1897, as modified and partially affirmed by a decree entered by this court on the 7th day of February, 1900, and to the like extent the decree made and entered herein on the 22nd day of December, 1908, by this court, in so far as the same affirms said decree of December 6th, 1905, is hereby so modified and limited." The decrees as to the defendants in error were not modified, but still stand. Perhaps the meaning of this last decree is as contended for by some of the defendants in error, that as between the State and King on one side and the defendants brought in after September 30, 1897, on the other, the new boundaries shall prevail, but that as between those who were parties before September 30, 1897, the old boundaries still are to be taken as correct, so that if within the latter bounds there is land to which the State alone has title, King still may redeem. The court has indicated a tendency to believe that the old decree still bound the State, *King* v. *Mason*, 60 W. Va. 607, while it clearly holds that it does not bind parties afterwards introduced. *State* v. *King*, 64 W. Va. 546, 561. At all events, we are of opinion that this modification does not affect the cases before this court.

The present writs of error are for the purpose of reversing the decrees as to boundary and dismissal that have been mentioned. The defendants in error move to dismiss, and we are of opinion that the motion should be granted. The only serious question in the case, if we assume that King saved it, is whether the West Virginia constitution and statute are consistent with the Fourteenth Amendment. But that question

was answered in *King* v. *Mullins*, 171 U. S. 404. The construction of the state constitution by the state court as not confined in its operation to title vested and remaining in the State when the constitution went into effect (which of course is final), is the only natural construction and was to be expected; then, as now, it was obvious that the right to redeem under the statute would not exist in case part of the land had been sold to a junior purchaser, so that in that case there would not be a 'revestiture commensurate with the divestiture,' as it is argued that there should be; and to say the least, it is not surprising that it is held that the right may be lost by transfer pending the proceedings. The whole discussion upon this point is little more than an attempt in respectful form to reargue by unreal distinctions what was decided in the former case. The question is not open and we shall discuss it no more. It hardly is necessary to add that on a writ of error we do not deal with the facts, *Behn* v. *Campbell*, 205 U. S. 403, 407, and therefore the decision that most of the tracts in question are not within the boundaries of the Morris grant disposes of King's rights here.

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But an attempt is made to maintain that King got vested rights under the first boundary decree, September 30, 1897, and his payment of the sum fixed in that decree, coupled with the partial affirmance of the same. But the construction and effect of that decree, how far it bound the State and whether or not it bound parties subsequently coming in, were matters of state procedure alone. The cases remained within the jurisdiction of the state court, and if, by local practice, the lower or higher court had power to change an earlier decree in the cause by direct order or indirectly by construction, which latter we by no means intimate was done, it is a matter that cannot be complained of here. See *Patterson* v. *Colorado*, 205 U. S. 454, 460. It is said that the decree established the law of the case, but that phrase expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *Remington* v. *Central Pacific R. R. Co.*,

198 U. S. 95, 99, 100. See *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 343. In some States it is true that a stricter rule is applied, *Northern Pacific R. R. Co.* v. *Ellis*, 144 U. S. 458, but there is nothing in the Constitution of the United States to require it, or to prevent a State from allowing past action to be modified while a case remains in court. See *San Francisco* v. *Itsell*, 133 U. S. 65. The highest court of the State is the final judge of the powers conferred by the state laws in that regard. It was said by the Supreme Court of Appeals in this case that "the decree adds nothing to King's right." 64 W. Va. 599.

In view of what we have said, it hardly is necessary to consider the amendment of the Code, c. 105 and the act of 1893 by the act of 1905. It is argued that the state court misconstrued the statute, but we have nothing to do with that. Judge Brannon clearly shows, 64 W. Va. 584, 591 *et seq.*, that the amendment does not even change the burden of proof as to the validity or invalidity of other sales or conveyances set up. *Ib.* 594. The limitation of thirty days to overcome the effect of filing a deed or patent from the State is thought to be merely directory, and it is pointed out that in fact King was allowed five months, and that he did nothing. The limitation is held to be reasonable, and even if void to be separable from the rest of the act, another point on which the State's decision is final. Giving *prima facie* effect to the document cannot be questioned seriously. *Marx* v. *Hanthorn*, 148 U. S. 172. The other provisions of the act are shown to take no right from King that he had under the previous law, and are held to be consistent with the state constitution. In our opinion there was no question raised in these cases that properly could be brought before this court for review.

Writs of error dismissed.

BABBITT, TRUSTEE IN BANKRUPTCY, *v.* DUTCHER.

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

No. 39. Argued November 29, 1909.—Decided February 21, 1910.

Corporate records and stock-books of a corporation adjudicated a bankrupt pass to the trustee and, where there is no adverse holding, the bankruptcy court can compel their delivery by summary proceeding.

In a case in which the original court of bankruptcy can act summarily, another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction.

THE Randolph-Macon Coal Company was a Missouri corporation, and was duly adjudicated a bankrupt March 26, 1907, in proceedings instituted in the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri. Byron F. Babbitt was duly appointed trustee in bankruptcy for the corporation May 10, 1907, and duly qualified by giving bond on that day.

He thereafter made demand upon the president of the company for the delivery to him of the corporate records and stock books of the bankrupt company, which were kept in the office maintained by the company in New York city. This request was refused by letter of the president of the company, dated September 24, 1907, in which he says that he is advised "that such records and stock books are not documents relating to the property of the bankrupt, and therefore you, as trustee in bankruptcy, are not entitled to their possession."

Thereupon the trustee made application to the District Court in and for the Southern District of New York, by peti-

tion, for an order directing James T. Gardiner, the president, and Howard Dutcher, the secretary, of the company, or either of them, to deliver to him the stock-certificate book, the corporation minute book and the stock register of said company, together with all other records and documents belonging to said company in their possession or under their control. Gardiner and Dutcher were within the jurisdiction of the District Court for the Southern District of New York, and the books and papers referred to were within their custody there, and the trustee alleged that the stock-certificate book, the corporation minute book, and the stock register book were necessary to the trustee in his administration and settlement of the affairs of the company.

Thereafter a hearing was had on the petition, the order to show cause and return thereto, and the District Judge (Holt, J.) endorsed on the petition: "I am obliged to deny this motion on the authority of *In re Von Hartz et al.*, 142 Fed. Rep. 726," and ordered that the motion be denied on the ground that the court was without jurisdiction to entertain the proceeding, or to grant the relief prayed for, and the District Judge also certified that the order denying the motion and refusing to grant the relief was based solely on the ground that the court was without jurisdiction "to entertain proceedings instituted by a trustee in bankruptcy duly appointed in a bankruptcy proceeding pending in another district, to compel the officers of the bankrupt to deliver to such trustee the documents in their possession relating to the business of the bankrupt."

This appeal was then allowed and duly prosecuted.

Mr. William B. Hornblower, with whom *Mr. Morgan M. Mann* was on the brief, for appellant:

The title to all books and papers relating to the business of the bankrupt was vested in the trustee. Subd. 1, § 70, and subd. 13, of § 1 of the bankrupt act. See *Matter of Hess*, 134 Fed. Rep. 109; *Mueller* v. *Nugent*, 184 U. S. 1. And, as

held in that case, it is proper to resort to summary proceedings in the bankrupt court rather than to replevin in the state court.

The District Court in New York had jurisdiction to entertain this proceeding and grant the relief prayed for. The act of 1898 in this respect is similar to the act of 1867. And see *Lathrop* v. *Drake*, 91 U. S. 516; *Sherman* v. *Bingham*, Fed. Cas. 12,762; *Goodall* v. *Tuttle*, Fed. Cas. 5,533; *McGehee* v. *Hentz*, Fed. Cas. 8,794; *Re Tifft*, Fed. Cas. 14,034; *Payson* v. *Dietz*, Fed. Cas. 10,861; *Re Benedict*, 140 Fed. Rep. 55; *Re Peiser*, 115 Fed. Rep, 199; *Re Sutter Bros.*, 131 Fed. Rep. 654, distinguishing *Re Williams*, 173 Fed. Rep. 321, and *Re Nelson Co.*, 149 Fed. Rep. 590. See also Loveland on Bankruptcy, 3d ed., § 21. *Re Von Hartz*, 142 Fed. Rep. 726, to effect that ancillary jurisdiction does not exist, and which controlled the decision in this case, was erroneously decided by the Circuit Court of Appeals; nor does *Re Wood & Henderson*, 210 U. S. 246, apply. Denying ancillary jurisdiction renders the enforcement of the bankruptcy act difficult; in some cases it practically nullifies the act.

In two recent decisions, *Re Dunseath*, 168 Fed. Rep. 973, and *Re Dempster*, 172 Fed. Rep. 353, ancillary jurisdiction of the bankruptcy court was sustained and there is no decision of this court adverse to such jurisdiction. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *White* v. *Schloerb*, 178 U. S. 542; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, 184 U. S. 1; *Jaquith* v. *Rowley*, 188 U. S. 620; *Re Wood & Henderson*, 210 U. S. 246, do not hold that ancillary jurisdiction does not exist.

Mr. Henry W. Taft for appellee:

The trustee in bankruptcy has not the title to the books and cannot compel their delivery in summary proceedings even in the original district of the bankruptcy. The title of the trustee to the books is disputed.

The District Court has no ancillary jurisdiction on applica-

tion of a trustee in bankruptcy appointed by another District Court to compel by summary order the delivery to him of property of the bankrupt. *Foundry Co.* v. *Car Co.*, 124 Fed. Rep. 403; *Re Tybo Mining Co.*, 132 Fed. Rep. 697; *Re Benedict*, 140 Fed. Rep. 55; *Ex parte Martin*, 16 Fed. Cas. 874; *Re Richardson*, 20 Fed. Cas. 696; *Markson* v. *Heaney*, 16 Fed. Cas. 769; *Sherman* v. *Bingham*, 21 Fed. Cas. 1,270; *Goodall* v. *Tuttle*, 10 Fed. Cas. 579; *Lathrop* v. *Drake*, 91 U. S. 516; *Re Tifft*, 23 Fed. Cas. 1,213.

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

Subdivision 1 of § 70 of the bankruptcy act of 1898 provides that the trustee of the estate of a bankrupt shall be vested by operation of law, as of the date of the adjudication, with the title of the bankrupt (*a* 1) to all "documents relating to his property," and subdivision 13 of § 1 of the act provides that "'documents' shall include any book, deed, or instrument in writing."

Respondents, as officers of the bankrupt company, asserted no adverse claim, but denied that the corporate records and stock books were "documents relating to the property of the bankrupt," and asserted that therefore the trustee in bankruptcy was not entitled to their possession.

We have no doubt that the books and records in question passed, on adjudication, to the trustee, and belong in the custody of the bankruptcy court, and, there being no adverse holding, that the bankruptcy court had power upon a petition and rule to show cause to compel their delivery to the trustee. *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, 184 U. S. 1; *Louisville Trust Company* v. *Comingor*, 184 U. S. 18; *First National Bank* v. *Title & Trust Company*, 198 U. S. 280; *Whitney* v. *Wenman*, 198 U. S. 539.

This brings us to the real question in the case and upon which the decision was rendered, namely, whether the District

Court of the United States in and for the Southern District of New York had jurisdiction to entertain this particular proceeding and grant the relief prayed for.

In *Ex parte Martin*, 16 Fed. Cas. 874, decided in 1842, Mr. Justice Story, sitting on circuit, held that the equity jurisdiction of the District Courts, under the bankruptcy act of 1841, was not confined to cases originally arising and pending in the particular court where the relief was sought, and where a creditor living in Massachusetts commenced suits in several States other than Pennsylvania where proceedings were pending against the bankrupt for an adjudication, that an injunction would issue against the Massachusetts creditor enjoining him from proceeding in the suits. Mr. Justice Story said:

"The language of the sixth section of the act is: 'That the District Court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under the act,' the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity. The act then goes on to enumerate certain specific cases and controversies, to what the jurisdiction extends (which I deem merely affirmative, and not restrictive of the preceding clause); and then it extends the jurisdiction 'to all acts, matters and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.' Now, this language is exceedingly broad and general; and it is not in terms, or by fair implication, necessarily confined to cases of bankruptcy originally instituted, and pending in the particular District Court, where the relief is sought. On the contrary, it is not unnatural to presume, that as cases, originally instituted and pending in one district, may apply to reach persons and property situate in other districts, and require auxiliary proceedings therein to perfect and accomplish the objects of the act, the intention of Congress was, that the District Courts in every district should be mutually

auxiliary to each other for such purposes and proceedings. The language of the act is sufficiently comprehensive to cover such cases; and I can perceive no solid ground of objection to such an interpretation of it."

Section 1 of the bankruptcy act of 1867 and § 2 of the bankruptcy act of 1898 are substantially identical as to the jurisdiction of the District Courts sitting as courts of bankruptcy, as will appear from the following comparison:

Section 1 *of the Bankruptcy Act of* 1867:

"That the several district courts of the United States be, and they hereby are constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. . . .

"And the jurisdiction hereby conferred shall extend. . . .

"To the collection of all the assets of the bankrupt . . . and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the

Section 2 *of the Bankruptcy Act of* 1898:

"That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter

bankrupt, and the close of the proceedings in bankruptcy."

held, to . . . (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; . . .

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

In *Sherman* v. *Bingham*, Fed. Cas. No. 12,762; 21 Fed. Cas. 1,270, Mr. Justice Clifford, sitting on circuit, and construing the act of 1867, reversed the judgment of the District Court, which held that an assignee in bankruptcy of a person declared a bankrupt in one District Court could not maintain an action to recover moneys paid the defendants, residents of another district, in the District Court of such district. And Mr. Justice Clifford said:

"District Courts have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and the argument is, that inasmuch as the jurisdiction must be exercised in the district for which the district judge is appointed, the District Court, sitting as a court of bankruptcy, cannot exercise jurisdiction in any case except in the district

where the bankruptcy proceedings are pending; but § 1 of the bankrupt act contains no such limitation, nor does it contain any words which, properly considered, justify any such conclusion.

"General superintendence and jurisdiction of all cases and questions under the act are conferred upon the several Circuit Courts, except where special provision is otherwise made by the first clause of § 2 of the act; but the subsequent language of the same clause makes it clear that the jurisdiction conferred by that clause can only be exercised within and for the district 'where the proceedings in bankruptcy shall be pending.' No such limitation, however, is found in the clause of § 1, conferring jurisdiction upon the District Courts as courts of bankruptcy. Judges of the District Courts must sit undoubtedly in the districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases, is restricted to the territorial limits of the district; but the language of § 1 of the bankrupt act describing the jurisdiction of the District Courts, sitting as courts of bankruptcy, is, that they shall have original jurisdiction in their respective districts, 'in all matters and proceedings in bankruptcy,' showing unquestionably that they can only sit and exercise jurisdiction in their own districts; but the limitation that the proceedings in bankruptcy must in all cases be pending in that district, is not found in that clause of § 1 of the act. On the contrary, the same section provides that the jurisdiction conferred, that is, the jurisdiction of the several District Courts, shall extend to all cases and controversies arising between the bankrupt and any creditor, or creditors, who shall claim any debt or demand under the bankruptcy act, and also to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens, and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of all the different funds and assets, so as to secure the rights of all

parties, and the due distribution of the assets among all the creditors, and to all acts, matters and things to be done under and in virtue of the bankruptcy."

In *Lathrop* v. *Drake*, 91 U. S. 516, 517, the question of the ancillary jurisdiction of the District Court under the act of 1867 was considered, and the decision in *Sherman* v. *Bingham* approved. Mr. Justice Bradley, delivering the opinion, said:

"Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. There are, it is true, limitations elsewhere in the act; but they affect only the matters to which they relate. Thus, by § 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided, or carried on business, for the six months next preceding; and the District Court of that district, being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other District Courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other District Courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the nec-

essary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the First Circuit, in the case of *Sherman* v. *Bingham*, 7 Bank. Reg. 490; and we concur in the opinion there expressed, that the several District Courts have jurisdiction of suits brought by assignees appointed by other District Courts in cases of bankruptcy."

The same question was considered in *Goodall* v. *Tuttle*, Fed. Cas. No. 5,533; 10 Fed. Cas. 579, which arose under the act of 1867, and the same conclusion reached, as also in *McGehee* v. *Hentz*, Fed. Cas. No. 8,794; 16 Fed. Cas. 103, and *In re Tifft*, Fed. Cas. No. 14,034; 23 Fed. Cas. 1,213. On the authority of these decisions it must be and is conceded that under the bankruptcy acts of 1841 and 1867 ancillary jurisdiction, both in summary proceedings and in plenary suits, existed in all District Courts within their respective districts; and the question really is whether the provisions of the act of 1898 are to the contrary, or, as appellee's counsel puts it, show an intention on the part of Congress to restrict such jurisdiction so as to cut off the inferences drawn from the language of the earlier acts.

But neither the act of 1867, nor the act of 1898, expressly confers or expressly negatives ancillary jurisdiction in courts other than the court of adjudication. The provisions as to summary jurisdiction in the two acts are substantially identical, and it appears to us should receive the same construction.

In re Benedict, 140 Fed. Rep. 55; *In re Peiser*, 115 Fed. Rep. 199; *In re Sutter Bros.*, 131 Fed. Rep. 654; *In re Nelson Company*, 149 Fed. Rep. 590.

It is, however, urged that the act of 1898 contains restrictive provisions as to the jurisdiction of both the Circuit and District Courts which weaken the force of the reasoning of the decisions based upon the general language of the earlier statutes. Subdivision 7 of § 2 of the act of 1898 confers power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." And it is said that the following provisions of § 23 should be regarded as coming within the exception and operating to restrict the jurisdiction:

"(*a*) The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(*b*) Suits by the trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under § 60, subdivision *b*, and § 67, subdivision *e*."

Section 60, subdivision *b*, refers to preferences given within four months before the filing of the petition in bankruptcy, and provides that they may be recovered by the trustee, and further: "And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 67, subdivision *e*, provides that conveyances in fraud of creditors shall be null and void, and that it shall be the duty of the trustee to sue to recover the property conveyed, and that "for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

But the general jurisdiction was not restricted by these provisions, though they operated to mitigate the rigor of the rule laid down in the *Bardes case*.

There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy.

In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated.

In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation.

The former class falls within the ruling in the case of *Bardes* v. *Hawarden Bank*, 178 U. S. 524, and in the case of *Jaquith* v. *Rowley*, 188 U. S. 620, which hold that such a suit can be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere.

In the latter class of cases a plenary suit is not necessary, but the case falls within the rule laid down in *Bryan* v. *Bernheimer*, 181 U. S. 188, and *Mueller* v. *Nugent*, 184 U. S. 1,

which held that the bankruptcy court could act summarily. The question was not discussed as to whether a court other than the court of adjudication could exercise this summary jurisdiction.

The precise question before us on the present appeal is whether in a case in which the original court of bankruptcy could act summarily another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction.

Judge Holt, after expressing an opinion upholding ancillary jurisdiction, felt compelled to decide otherwise in this case on the authority of *In re Von Hartz*, 142 Fed. Rep. 726, decided by the United States Circuit Court of Appeals for the Second Circuit. It appears from the statement of the case in the opinion of the court in the matter of *Von Hartz* that the proceeding was a summary application in which the appellant had been directed to turn over to the trustee in bankruptcy a policy of life insurance upon the life of the bankrupt, which "had theretofore been assigned by Von Hartz to appellant." It was not stated in the opinion whether the assignment was prior or subsequent to the proceedings in bankruptcy. If prior thereto, then neither the court where the bankruptcy proceedings were pending nor any other court could grant a summary order disposing of the title of the adverse claimant claiming title to the policy by assignment. That could only be determined in a plenary suit, and would fall within the rule in the *Bardes* and *Jaquith cases*. But if the assignment was subsequent to the bankruptcy proceedings, then it would be a nullity, and would be disregarded by the bankruptcy court, and possession could be given to the trustee by a summary order, as in the *Bryan* and *Mueller cases*.

There is no decision of this court adverse to the ancillary jurisdiction of the District Courts as asked to be exercised in this case.

Upon the whole, we are of opinion that the District Court for the Southern District of New York had jurisdiction of the

petition below and to grant the relief therein prayed for, and therefore we

Reverse the order of that court denying the petition, and remand the cause for further proceedings in conformity with law.

ELKUS, PETITIONER. (IN THE MATTER OF THE MADSON STEELE COMPANY, BANKRUPT.)

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

No. 238. Argued November 29, 1909.—Decided February 21, 1910.

On the authority of *Babbitt* v. *Dutcher*, *ante*, p. 102, *held* that:

A court of bankruptcy has jurisdiction to grant an order for examination of a witness who resides in that district although the bankrupt proceedings in which the examination is desired are being administered in another district.

The respective District Courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the District Court of another district.

THE facts are stated in the opinion.

Mr. Abram I. Elkus pro se, with whom *Mr. Carlisle J. Gleason* was on the brief, for the petitioner.

There was no appearance for any other party.

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

The certificate, with the accompanying statement of facts, is as follows:

"On the 28th day of February, 1908, a petition in involun-

tary bankruptcy was filed in the United States District Court for the Northern District of Illinois, against the Madson Steele Company, and in due course the said corporation was adjudicated a bankrupt, and Frank M. McKey was appointed its trustee in bankruptcy.

"Application was made to the United States District Court for the Southern District of New York for an authorization to examine, pursuant to the provision of section 21*a* of the national bankruptcy act, the officers of a New York corporation which it was alleged had, within four months prior to the filing of the petition in bankruptcy received a payment under circumstances which would permit of recovery by the trustee in bankruptcy as a voidable preference. These officers were residents of the Southern District of New York.

"The application in the Southern District of New York was made on behalf of the trustee of the bankrupt's estate, which was being administered in the Northern District of Illinois, and the order proposed for signature required the examination of witnesses within the jurisdiction of the District Court for the Southern District of New York and the production of books and vouchers which contained transactions between the bankrupt corporation and the New York corporation.

"The United States District Court for the Southern District of New York refused to direct the appearance and examination of the said witnesses on the ground that it had no jurisdiction to grant an order for examination in a proceeding which was not pending within its own district, and from the order denying the right to examine the petition to review was taken to this court.

"The questions submitted are:

"I. Did the United States District Court for the Southern District of New York have jurisdiction to grant an order for the examination of witnesses, who were residents of that district, when the bankrupt proceedings in which the examination was desired were being administered in the Northern District of Illinois?

"II. Have the respective District Courts of the United States sitting in bankruptcy ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the District Court of another district?"

On the authority of *Babbitt, Trustee,* v. *Dutcher,* just decided, *ante,* p. 102, we answer both questions in the affirmative, and it will be

So certified.

WOODSIDE *v.* BECKHAM.[1]

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 56. Argued December 9, 1909.—Decided February 21, 1910.

Where a plaintiff sues as assignee of several claims, but is not in fact the owner of all the claims sued upon, and none of the claims is sufficient in amount to confer jurisdiction on the Federal court, that court has no jurisdiction and should dismiss the case for that reason although the assigned claims may in the aggregate exceed the jurisdictional amount.

142 Fed. Rep. 167, affirmed.

THE facts are stated in the opinion.

Mr. John R. Smith, with whom *Mr. Hartley B. Woods* was on the brief, for plaintiff in error:

The Circuit Court had jurisdiction. The judgments against the corporation on which the bill is based were valid under the state law and the assignee had title to all the judgments and could maintain an action against the directors therefor as in the aggregate the claims exceeded $2,000. *Bowden* v. *Burnham,* 59 Fed. Rep. 752; *Chase* v. *Sheldon Roller-Mills,* 56

[1] Original docket title: Woodside *v.* Vasey. December 9, 1909. Suggestion of death of Vasey and substitution of Beckham.

Fed. Rep. 625; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Holmes* v. *Goldsmith*, 147 U. S. 150; *Bergman* v. *Inman*, 91 Fed. Rep. 293; *Tennent Stribling Co.* v. *Roper*, 94 Fed. Rep. 739; *Brigham* v. *Gross*, 107 Fed. Rep. 769; *Huff* v. *Bidwell*, 151 Fed. Rep. 563.

Mr. J. W. Jamison, with whom *Mr. R. J. Williamson* and *Mr. J. N. Hughes* were on the brief, for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

This was an action to recover of defendants, as directors of the Neptune Mining Company, a Colorado corporation, the sum of $5,500 as the aggregate amount of claims or demands of the plaintiff and of thirty other persons, firms or corporations against the mining company, which had been assigned to the plaintiff.

The liability was asserted to arise under the requirement of the act of April 6, 1901, of Colorado, which required annual reports to be filed by all corporations with the Secretary of State for Colorado within sixty days after the first day of January in each year as to matters designated in the statute, and which provided: "If any such corporation shall fail, refuse or omit to file the annual report aforesaid, and to pay the fee prescribed therefor within the time above prescribed, all the officers and directors of said corporation shall be jointly and severally and individually liable for all debts of such corporation, joint stock company or association that shall be contracted during the year next preceding the time when such reports should by this section have been made and filed, and until such report shall be made and filed." And it was averred that no annual report was filed by or for said corporation, the Neptune Mining Company, within sixty days from and after January 1, 1903.

The complaint set out the various items of indebtedness incurred by the mining company, which, it was alleged, had been

assigned to William Woodside for collection only, with the agreement that each of the several assignors should remain the absolute owner of his or their claims, and should contribute his proportion of the expenses of collection of the same, including costs and attorney's fees, and it was agreed that the said several assignors have ever since been and now are the exclusive owners of their several claims, and that said William Woodside has no interest whatever in any of the claims so assigned.

The case coming on for trial, a jury was duly waived and the cause submitted to the court.

The court found that the plaintiff was not the owner of, or the real party in interest in, any of the claims against the mining company that had been assigned to him; that the amount of his own claim against the company was only $162.36; and that the amount of none of the separate claims of the others assigned to him exceeded $650, while some were less than $100; that the claims other than his own were assigned to plaintiff for the purpose of collection only; that he paid no consideration therefor, and that said assigned claims or demands in fact remained the property of the different assignors thereof, who were paying *pro rata* the expenses of prosecuting the action; that if plaintiff recovered upon the claims from defendants the amount of such recovery above the plaintiff's individual claim would be for the benefit of the several assignors thereof and would be distributed to them in proportion to the amount of the claim of each; that the several claims other than that of the plaintiff were assigned to him by the different owners thereof to be added to the amount of plaintiff's claim to create an amount in excess of $2,000 for the express purpose of enabling the plaintiff to sue thereon in the Circuit Court.

It also appeared that in 1903 plaintiff recovered judgment in the District Court of Custer County, Colorado, against the Neptune Mining Company for the amount of his own claim, to wit, $162.36, and a part of the other claims so assigned to

him, the judgment being for the sum of $2,724.46, and the items on which suit was brought being set forth in the present complaint.

The Circuit Court, in its opinion, quoted the evidence of the plaintiff as to his interest in or right to the assigned claims, upon which he sued in the action, as follows:

After stating that his own claim against the Neptune Mining Company was $162.36, he said:

"'The assignments of the accounts to me, and of the judgment aside from my personal account, were made to me for the sole purpose of beginning suit in my name, and to thus save expenses. I have no interest in any of said claims or judgments except my individual claim. The actual ownership of the said judgment and the proceeds thereon, and the accounts and the proceeds thereof, belong to the several assignors, and I am to account to them and to pay them such proceeds in case I collect them.'"

And the Circuit Court held that as none of the claims or demands so assigned were of sufficient amount to authorize an action thereon in a court of the United States, it was clear that this action could not be maintained in the Circuit Court, and it was accordingly dismissed without prejudice for want of jurisdiction, and at the plaintiff's costs. *American Can Co.* v. *Morris,* 142 Fed. Rep. 167.

Thereupon the court certified that the order of dismissal was based solely on the ground that the cause did not involve a controversy within the jurisdiction of the court, for the reasons stated in the opinion filed in the case, which opinion was by the terms of the certificate made a part of the record and directed to be certified and sent up as such.

The Circuit Court cited many cases decided in this court to sustain the proposition that where a plaintiff is not in fact the owner of the claims sued upon and none of the claims assigned is sufficient in amount to confer jurisdiction upon the Federal court, it has no jurisdiction and will dismiss the case for that reason.

Thus in *Bernards Township* v. *Stebbins*, 109 U. S. 341, 355, it was said:

"The decision in *Williams* v. *Nottawa*, 104 U. S. 209, establishes that the Circuit Court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same State as the defendant, or by reason of the insufficient value of their claims."

And so in *Waite* v. *Santa Cruz*, 184 U. S. 302, 328, this court quoted § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472, and said:

"We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the Circuit Court was without jurisdiction to render judgment upon any claim or claims, whether bonds or coupons, held by a single person, firm or corporation against the city and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims."

And see *Crawford* v. *Neal*, 144 U. S. 585, 593, and cases cited.

That rule is decisive in this case, and the judgment of the Circuit Court is

Affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* MAZURSKY.

SOUTHERN EXPRESS COMPANY *v.* McTEER.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* CHARLES.

SAME *v.* VON LEHE.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

Nos. 58, 59, 60, 61, 62. Argued December 9, 1909.—Decided February 21, 1910.

A state statute that requires a carrier to settle, within a specified time, claims for loss of or damage to freight while in its possession within that State, is not, in the absence of legislation by Congress on the subject, an unwarrantable interference with interstate commerce; and so held that Act No. 50 of South Carolina of February 23, 1903, to that effect is not unconstitutional under the commerce law as to goods shipped from without the State but which actually are in the possession of the carrier within the State.

A state statute in aid of the performance of the duty of an interstate carrier which would exist in the absence of the statute, which does not obstruct the carrier, and which relates to the delivery of goods actually in the carrier's possession within the State, is not void as a regulation or obstruction to interstate commerce, in the absence of congressional legislation on the subject.

78 So. Car. 36, affirmed.

By the act of the General Assembly of the State of South Carolina, entitled "An Act to Regulate the Manner in which Common Carriers doing Business in this State shall Adjust Freight Charges and Claims for Loss of or Damage to Freight," approved February 23, 1903 (No. 50, Acts of S. C. 1903, p. 81), it was enacted:

"SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That from and after the passage of this act, all common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading: *Provided*, The rate therein stipulated be in conformity with the classifications and rates made and filed with the Interstate Commerce Commission, in case of shipments from without this State, and with those of the Railroad Commissioners of this State, in case of shipments wholly within this State; by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carrier to inform any consignee or consignees of the correct amount due for freight, according to such classifications and rates; and upon payment or tender of the amount due on any shipment, or on any part of any shipment, which has arrived at its destination, according to such classifications or rates, such common carrier shall deliver the freight in question to the consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject each such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by suit in any court of competent jurisdiction.

"SEC. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments from without this State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: *Provided*, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor

until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: *Provided*, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: *Provided, further*, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902."

Section 1710, volume 1, page 661 of the Code of Laws of South Carolina, 1902, is as follows:

"When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial, delivering or terminal road, upon notice of such loss, damage or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight or express, and inform the said party so notifying when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: *Provided*, That if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, it shall thereupon be excused from liability under this section."

The above-entitled cases were brought to test the validity of

the provisions of § 2 of the act of February 23, 1903, when applied to claims for loss or damage to interstate freight.

In each case the objection that that section was unconstitutional and invalid was seasonably made. In each case the objection was overruled and judgment given in favor of the respective claimants, plaintiffs, for the value of the undelivered freight, with the full penalty of fifty dollars added.

The opinion of the Supreme Court of South Carolina construing and applying the provisions of the state statute appears in the printed transcript of the record in case No. 60, *Atlantic Coast Line Railroad Company* v. *Charles*, 78 S. C. 36. In each of the other cases the principles assumed to have been settled in and by that opinion were made the basis of the judgment of the state Supreme Court.

The cases were submitted to this court December 9, 1909, as one case, and argued as such on one side only. On the twentieth of December this court entered an order that notice of the pendency of these cases should be given to the Attorney General of South Carolina, and leave was given to him to file a brief as *amicus curiæ* on or before the third day of January, if he should be so advised. The Attorney General filed a brief accordingly January 3, 1910. Townsend was with him on the brief.

Mr. Frederic D. McKenney, with whom *Mr. P. A. Willcox*, *Mr. F. L. Willcox* and *Mr. Henry E. Davis* were on the brief, for plaintiff in error:

Seaboard Air Line v. *Seegers*, 207 U. S. 73, sustained the statute of South Carolina involved in this case only as to a shipment wholly intrastate; the act as to interstate shipments, as in these cases, is unconstitutional under Art. I, § 8, cl. 3 of the Federal Constitution. The power of Congress over such shipments is complete. *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209.

The statute does not fall within the test of a reasonable exercise of the police power, but constitutes a burden on inter-

state commerce. *Henderson* v. *New York*, 92 U. S. 259; *Minnesota* v. *Barber*, 136 U. S. 313; *McNeill* v. *Southern R. R.*, 202 U. S. 543; *Central Stock Yards* v. *L. & N. Railway*, 118 Fed. Rep. 113; *Gulf Railway* v. *Ellis*, 165 U. S. 150; *Atchison Railroad* v. *Matthews*, 174 U. S. 96; see also *Central of Georgia* v. *Murphey*, 196 U. S. 194, which involved a similar statute of Georgia; *Houston & Tex. Cent. R. R. Co.* v. *Mayes*, 201 U. S. 321.

Under this statute, as construed by the Supreme Court of South Carolina, a common carrier may be penalized for its failure to adjust a claim for damages growing out of injury to an interstate shipment if such injury occurs on its line, even though in another State than South Carolina. *Seegers* v. *Seaboard Air Line R. Co.*, 73 S. C. 71.

If it be true, as held by the Supreme Court of South Carolina, that the investigation and adjustment of claims is but an incident of interstate transportation, it follows that the regulations of such claims adjustment should properly be prescribed by Congress, and that the States are powerless to provide for such regulation.

Congress has legislated extensively in the field of interstate commerce, its enactments command the performance of a great variety of duties as well as prohibit many practices and customs heretofore indulged in by common carriers in the prosecution of interstate commerce. The failure of Congress to legislate with respect to the period within which claims such as those contemplated by the South Carolina statute should be adjusted, would seem to be tantamount to a declaration that the matter of such adjustments should be left free from restrictive regulations.

Payment of a claim connected with the interstate transportation of goods, before it has been developed by proper investigation to be legitimate and in good conscience payable, might be made to border on the ancient practice of rebating, which has been severely condemned by Federal laws. See *Union Pac. Co.* v. *Goodridge*, 149 U. S. 680. The Interstate Com-

merce Commission has recently so ruled. It may result, therefore, that under the South Carolina statute a carrier can and may be penalized for failing to settle within ninety days a claim which properly takes a single day longer to investigate.

Under such conditions would not the Interstate Commerce Commission have authority to proceed against it for derelictions under the provisions of Federal law relating to undue preferences? It is not possible in such matters, pertaining, as they do, to interstate commerce, for both the United States and the States to occupy the same field.

Since the decision in *Seaboard Air Line Co.* v. *Seegers*, 207 U. S. 73, South Carolina by act of February 26, 1908, 25 Stats. S. C. 1077, has amended the statute here under consideration by making it apply to both "property and baggage," and by reducing the periods of time allowed for the adjustment and payment of claims for loss or damage thereto from forty to thirty days in cases of shipments wholly within the State, and from ninety to forty days in cases of shipments without the State.

Mr. J. P. Kennedy Bryan submitted a brief on behalf of the Clyde Steamship Company, Manchester Lines, Limited, and other ocean carriers:

The statute is unconstitutional as a burden on interstate commerce.

The power of Congress to regulate commerce among the States is exclusive. *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Cook* v. *Pennsylvania*, 97 U. S. 574. Interstate transportation is interstate commerce. *State Freight Tax Case*, 15 Wall. 275; *United States* v. *Freight Association*, 166 U. S. 312.

The clear intention of the Constitution was to confer the power to regulate interstate commerce exclusively upon Congress, and not to divide the power between the state legislatures and Congress. One of the chief objects of the Constitution was to rid commerce of the conflicting, vexatious and burdensome restrictions which, under the articles of con-

federation, had been imposed by the various States. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 383; *State Freight Tax Case*, 15 Wall. 279; *Hall* v. *DeCuir*, 95 U. S. 485; *Wabash R. R. Co.* v. *Illinois*, 118 U. S. 557; *Pickard* v. *Pullman Co.*, 117 U. S. 34, 46; *Fargo* v. *Michigan*, 121 U. S. 238; *Leloup* v. *Mobile*, 127 U. S. 640; *Almy* v. *California*, 24 How. 169; *Woodruff* v. *Parham*, 8 Wall. 123; *American Express Co.* v. *Iowa*, 196 U. S. 133.

The particular matter sought to be regulated by the South Carolina statute is in no sense local, but is national in character and importance, and obviously admits of national regulation. From the first, certain state laws relating to pilotage, quarantine, etc., were sustained notwithstanding an incidental effect upon interstate and foreign commerce. *Hall* v. *DeCuir*, 95 U. S. 485, 487; *Cooley* v. *Board of Wardens*, 12 How. 299; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209. See also *Wilton* v. *State*, 91 U. S. 275; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Louisville & Nashville Ry.* v. *Eubank*, 184 U. S. 27; *Illinois Central Ry.* v. *Illinois*, 163 U. S. 142; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514.

If the State ever possessed such power, it was only until Congress should act, and Congress having assumed it, the State is no longer entitled to exercise it. Since Congress has acted and has provided a system of laws regulating railroads and steamships as instruments of interstate and foreign commerce in great detail, it has excluded the power of the States to act upon the subject. *Bowman* v. *Chicago &c. Ry.*, 125 U. S. 465; *Sinnot* v. *Davenport*, 22 How. 227.

The attempted defense of state legislation in violation of the Federal Constitution, that it is within the police power, is untenable in this case. *Railroad Co.* v. *Husen*, 95 U. S. 465; *License Cases*, 5 How. 504, 599; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Robbins* v. *Shelby County*, 120 U. S. 489.

The South Carolina statute as applied in this case plainly regulates interstate commerce, and is therefore void. *Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 358; *Railway Co.* v. *Murphey*, 196 U. S. 194; *Railway Co.* v. *Mayes*, 201 U. S. 331; *Express Co.* v. *Iowa*, 196 U. S. 133; *Railway Co.* v. *Wharton*, 207 U. S. 328; *Express Co.* v. *Kentucky*, 206 U. S. 129.

Mr. J. Fraser Lyon, Attorney General of the State of South Carolina, with whom was *Mr. W. H. Townsend*, submitted, at the suggestion of the court, a brief in support of the constitutionality of the statute involved as applied in these cases.

There was no appearance or briefs filed for any of the defendants in error.

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

In No. 60, *Atlantic Coast Line R. R. Co.* v. *Charles*, which was assumed by the Supreme Court of South Carolina to settle all the others and to have been made the basis for the judgment of that court in all the cases, the state court found, as matter of fact, "the evidence showed that defendant was in possession of the goods lost," and held as matter of law "that the statute in question, as it affects carriers doing business in this State who fail and refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment."

It is thus apparent that the statute is construed by the court as only concerning property lost or damaged while in the possession of a carrier in the State of South Carolina.

It is this conclusion of law that the plaintiff in error asks this court to review.

In *Venning* v. *Atlantic Coast Line R. R. Co.*, 78 S. C. 42, 55, it was expressly decided that the act did not apply to claims

for loss of property which never came into the possession of the defendant. In that case the state Supreme Court considered an act of May, 1903, and held it, for the reason given, to be unconstitutional, not as obnoxious to the Fourteenth Amendment of the Constitution of the United States and the constitution of South Carolina, but as amounting to an illegal attempt to regulate interstate commerce. And that "on principle, as well as under the authority of *Central R. R. Co.* v. *Murphey*, 196 U. S. 194, it is impossible to avoid the conclusion that the act of May, 1903, here under consideration, is unconstitutional." And further, that it was evident from the complaint that the action was intended to rest on the invalidity under the act of May, 1903, of such a contract as § 1710 contemplates, and that therefore that section could have no application.

The court then considered the act of February 23, 1903, and said (78 S. C. 55):

"The section of main importance here is the second, which provides for the recovery for loss of or damage to freight; and penalties for failure to adjust and pay such loss or damage within a certain time. The question vital to this case is whether the statute can be construed to impose upon one connecting carrier, liability for the default of another, unless such carrier obtains and gives the information, or uses due diligence to obtain it, as provided in § 1710 of the Civil Code. We do not think it can be so construed.

"The main enactment as to the recovery of damages and penalties thus begins in section 2: 'That every claim for loss of or damage to property *while in the possession of such common carrier* shall be adjusted and paid within forty days,' &c. The words we have italicized clearly limit the loss and damage which a carrier is required to adjust and pay for to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier.

"It is true there is a proviso at the end of this section 'that

no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. I, of the Code of Laws of South Carolina, 1902.' But as the body of the act does not make the carrier liable at all 'for goods which never came into its possession;' a *proviso* which exempts from liability for loss of or damage to such goods on certain conditions can have no effect. The act imposes no liability to which the exemption can be applied.

"The rule is that all parts of a statute, including *provisos*, are to be construed together, and effect given if possible to all. But it is contrary to reason as well as authority to *extend by implication a proviso* to cover that which is opposed to the express language of the main enactment. *Southgate* v. *Goldthwaite*, 1 Bail. 367; *United States* v. *Dickson*, 15 Pet. 141; *The Irresistible*, 7 Wheat. 551; 26 Am. & Eng. Enc. 681; Endlich on Statutes, secs. 184, 185. The fact that the statute is penal adds force to this conclusion. We are of the opinion that the *proviso* of section 2 has no effect, and the act only imposes penalties upon the carrier for failing to adjust claims for loss occurring while the goods are in its own possession.

"It follows, the plaintiff in this case cannot sustain his recovery on the ground that the defendant was liable under the act of February, 1903, for goods lost by a connecting carrier, because it failed to obtain and give information of the kind required in cases falling under that act, or to use due diligence to obtain such information.

"The penalty act of February will apply to the case, if the finding on the new trial should be, that the loss occurred on the defendant's road, but not otherwise. It is attacked as unconstitutional under the interstate commerce clause of the Constitution of the United States. That question is discussed and decided against the defendant's contention in *Charles* v. *A. C. L. R. R. Co.*, *ante*, 36."

In *Charles* v. *Railroad Company*, 78 S. C. 36, the action was brought in a magistrate's court to recover the value of four

sacks of rice, alleged to have been shipped from New Orleans, Louisiana, by Martin J. Wynne to the plaintiff at Timmonsville, South Carolina. and to have been lost while in the possession of the defendant carrier, and also to recover fifty dollars' penalty for failure to adjust and pay the claim within ninety days, as prescribed by the act of February 23, 1903. The magistrate gave judgment against defendant for the amount claimed, and that judgment, on appeal, was affirmed by the Circuit Court, and then again by the Supreme Court of the State in this case. The Supreme Court held that the last proviso of the second section of the act of February, 1903, had no application to carriers into whose possession the goods had come, and referred to the opinion of the court in *Seegers* v. *Railway*, 73 S. C. 71, 73, where it was said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end." And see same case, 207 U. S. 73.

The Supreme Court, after making that quotation, thus proceeded (78 S. C. 41):

"While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this State, who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damages. No penalty can at-

tach except upon the establishment in a court of a default of duty imposed by statute. The statute does not attempt to regulate interstate commerce and imposes no tax or burden thereon. It is supported by the general principle declared in *Sherlock* v. *Alling*, 93 U. S. 89, 104, and enforced in *Smith* v. *Alabama*, 124 U. S. 465, and *Nashville &c. R. R.* v. *Alabama*, 128 U. S. 96, that state legislation 'relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce is of obligatory force upon citizens within the territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'"

In the case of *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, a statute of Georgia requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith and diligence, under penalty of $100 in each case, in the absence of legislation by Congress on the subject, was held not to be an unwarrantable interference with interstate commerce as to messages without the State, and Mr. Justice Peckham, delivering the opinion of the court, said, p. 660:

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

And see *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*, 169 U. S. 133, 137; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, 491; *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*,

211 U. S. 612, 624. The present cases fall within the rules there laid down, and *Central of Georgia Ry. Co.* v. *Murphey*, 196 U. S. 194; *Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321; and *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, cited to the contrary, are really not in conflict therewith.

Judgments affirmed.

ZARTMAN, TRUSTEE IN BANKRUPTCY, *v.* FIRST NATIONAL BANK OF WATERLOO.

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

No. 74. Argued January 12, 1910.—Decided February 21, 1910.

The jurisdiction which equity has to decree correction of errors in written contracts caused by mutual mistake is not suspended by the bankruptcy law; and the trustee takes property as the debtor had it at the time of the petition subject to all valid claims, liens and equities, including the power of a court of equity to correct a manifest error by mutual mistake in an agreement made prior to the petition.

Where a contract is reformed to correct a mutual mistake and make it conform to the intent of the parties a new lien is not created, but the original lien is adjudicated and determined.

189 N. Y. 533, affirmed.

THIS was a suit brought in the Supreme Court of the State of New York by the First National Bank of Waterloo against Francis Bacon and George E. Zartman, as Bacon's trustee in bankruptcy, to procure the reformation of a written contract made by plaintiff and defendant Bacon February 15, 1902.

Before the contract was made, Bacon was president of the First National Bank of Waterloo, New York, and also of the Waterloo Wagon Company. He was active in the office of the Wagon Company, while the business of the bank was looked after by its cashier Becker. The Waterloo Bank had extended credit to the Wagon Company and to Bacon individually, discounting paper and taking notes.

The Exchange National Bank of Seneca Falls, New York,

held, by assignment from Bacon, 461 shares of the stock of the Wagon Company and 253 shares of the Waterloo Bank, as continuing collateral security for any existing or future indebtedness of Bacon or the Wagon Company.

The contract between Bacon and the Waterloo Bank provided that the shares were "to be held by said bank as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, due or not due, now existing or that may hereafter exist, arise, accrue or be contracted, on the part of himself or of the Waterloo Wagon Company Limited, to said bank, and the said Francis Bacon hereby agrees with the First National Bank of Waterloo that the said certificates of stock above named *are transferred to and* may be held by the said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, *now existing or* that may hereafter exist, arise, accrue or be contracted on the part of the Waterloo Wagon Company Limited, *or himself*, to said bank and said shares of stock upon their surrender by the Exchange National Bank shall be deposited with the said First National Bank of Waterloo."

The words in italics were omitted from the contract by mutual mistakes made in preparing and executing it, and the New York Supreme Court, by its decision, reformed the contract by inserting them. In the meantime, however, Bacon had become a bankrupt, having been so adjudicated May 4, 1904, and defendant Zartman had been appointed trustee.

This action was begun October 17, 1904. The trustee alone defended.

The judgment was unanimously affirmed by the Appellate Division of the Fourth Department, 113 App. Div. 612, and on appeal to the Court of Appeals the decision of the Appellate Division was unanimously affirmed without opinion. 189 N. Y. 533. The remittitur was filed below November 9, 1907, and this writ of error was thereupon allowed.

Mr. George E. Zartman pro se for plaintiff in error:

The interest which the trustee took could not be diminished by the action of the court; reformation of the contract would be in direct violation of the bankrupt act. Under § 67*a* claims which for want of record or for other reasons could not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

No lien in this case could be created on the stock affected except by delivery, and there was no delivery in this case. *Wilson* v. *Little*, 2 N. Y. 446, 457; 3 Pom. Eq. Jur., § 1235; *Stephens* v. *Perrine*, 143 N. Y. 476; *Skilton* v. *Coddington*, 185 N. Y. 80.

The day the petition is filed separates past and future as to liens and as to when rights of parties are to be adjusted. *Re Peare*, 4 Am. Bk. Rep. 578; *Goldman* v. *Smith*, 2 Am. Bk. Rep. 104; *Morgan* v. *Campbell*, 22 Wall. 381; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Re McDonald*, 21 Am. Bk. Rep. 358; *Security Co.* v. *Hand*, 143 Fed. Rep. 32, aff'd 206 U. S. 415.

The rights of the trustee as representing the receiver were not regarded by the state court. The receiver took the legal title.

The trustee is entitled to the same protection as a *bona fide* purchaser for value. *Re Book*, 98 Fed. Rep. 975; *Re Thorpe*, 12 Am. Bk. Rep. 195; *Fourth Street Bank* v. *Milbourne Mills*, 22 Am. Bk. Rep. 442.

The judgment reforming the contract created a new lien, and both judgment and lien are void as against the trustee.

Mr. W. H. Sholes for defendant in error:

The bankruptcy law does not suspend the important branch of equity jurisprudence which has to do with the correction of mistakes in written instruments caused by the oversight or carelessness of the parties thereto or their scriveners.

Plaintiff in error claims that the mistake made in dictating or writing out the contract is an asset in his hands as a part of

the estate of the bankrupt and that he takes the same kind of title as a *bona fide* purchaser for value. This is error, for the rule is, that the trustee takes the property of the bankrupt not as an innocent purchaser would, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities. *Winsor* v. *McClellan*, 2 Story, 492; *Donaldson* v. *Farwell*, 93 U. S. 631; *Casey* v. *La Societe de Credit Mobilier*, 2 Wood, 777; *Stewart* v. *Platt*, 101 U. S. 731; *Re N. Y. Economical Printing Co.*, 6 Am. Bk. Rep. 615; *Yeatman* v. *New Orleans Sav. Inst.*, 95 U. S. 764; *Thompson* v. *Fairbanks*, 196 U. S. 516.

An attaching creditor is not a *bona fide* purchaser. *Sargent* v. *Sturm*, 23 Colorado, 359; *Thompson* v. *Rose*, 16 Connecticut, 71; *Oswego Starch Factory* v. *Lendrum*, 57 Iowa, 573; *American Union Ex. Co.* v. *Willsie*, 79 Illinois, 92; *Jordan* v. *Parker*, 56 Maine, 557; *Thaxter* v. *Foster*, 153 Massachusetts, 151; *Naugatuck Cutter Co.* v. *Babcock*, 22 Hun, 481; *Mowrey* v. *Walsh*, 8 Cow. 245; *Devoe* v. *Brandt*, 53 N. Y. 462; *Bradley* v. *Olear*, 10 N. H. 477; *Poor* v. *Woodburn*, 25 Vermont, 234.

An assignee for benefit of creditors is not a *bona fide* purchaser. *Wailes* v. *Couch*, 75 Alabama, 134; *Belding* v. *Frankland*, 8 Lea (Tenn.), 67, *Farley* v. *Lincoln*, 51 N. H. 579; *Ratcliffe* v. *Sangston*, 18 Maryland, 383; *Bussing* v. *Rice*, 2 Cush. (Mass.) 48.

Nor is an assignee in bankruptcy a *bona fide* purchaser. *Donaldson* v. *Farwell*, 93 U. S. 631; *Montgomery* v. *Bucyrus Mach. Works*, 92 U. S. 257.

That courts of equity will decree the correction of errors in written instruments which have been caused by mutual mistakes has nowhere been more strongly upheld than in the United States courts. *Hunt* v. *Rousmanier*, 1 Pet. 1; *Same* v. *Same*, 8 Wheat. 174; *Ivinson* v. *Hutton*, 98 U. S. 79; *Walden* v. *Skinner*, 101 U. S. 577; *Elliott* v. *Sackett*, 108 U. S. 132; *Adams* v. *Henderson*, 168 U. S. 573.

There is no provision whatever in any statute, either state

or national, which connects the question involved in this case with any rule or regulation concerning the filing or recording of any paper whatever. No such question is here in any form.

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

The jurisdiction in equity to decree the correction of errors in written contracts which have been caused by mutual mistake is firmly established and needs no citation of authority to sustain it. In the present case the evidence of the mistakes in question was undisputed. We are not aware that the bankruptcy law has suspended that jurisdiction.

The position of the trustee in bankruptcy seems to be that the mistake made by Bacon in dictating or writing out the contract between himself and the Waterloo Bank "is an asset in his hands as part of the estate of the bankrupt," but we cannot agree to that. The trustee claims that he takes the same kind of title as a *bona fide* purchaser for value, but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities. *Thompson* v. *Fairbanks*, 196 U. S. 516, and cases cited. And this is so well settled that our jurisdiction of the writ of error is exceedingly doubtful. Judge Williams, speaking for Appellate Division, Fourth Department, treated of this point thus (113 App. Div. 612, 615):

"It is said that the bankruptcy of Bacon constituted a bar to the relief granted in this action. This cannot be true. The trustee took the bankrupt's property in the same condition and subject to the same liens as the bankrupt himself held it. The trustee is in no sense a *bona fide* purchaser for value, and entitled to protection as such. No new lien was created by the decision and judgment appealed from. The original lien was adjudicated and determined."

We concur in this view, and the judgment is *Affirmed.*

CHILDERS *v.* McCLAUGHRY, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 110. Submitted January 26, 1910.—Decided February 21, 1910.

Where *habeas corpus* proceedings are based on the want of jurisdiction in the trial court, and the question is whether under the statute that court had jurisdiction, the jurisdiction of the court in which the *habeas* proceeding is brought is not in issue, and if the constitutionality of the statute giving the trial court jurisdiction is not involved, but only its construction, a direct appeal does not lie to this court from the final order remanding the relator.

THE Oklahoma enabling act was approved June 16, 1906, 34 Stat. 267., c. 3335. November 16, 1907, the State was admitted into the Union, 35 Stat. 2160.

Childers was indicted October 21, 1906, in the United States court for the Northern District of the Indian Territory, for having, on August 6, 1906, and within the jurisdiction of said court, murdered one Lena Atwood. He was tried and convicted, and on June 17, 1907, sentenced to "be imprisoned in the penitentiary situated at Fort Leavenworth, Kansas, for the term and period of his natural life at hard labor." He was committed accordingly, and received at the United States penitentiary at Leavenworth, Kansas, by the warden, R. W. McClaughry, June 21, 1907.

November 29, 1907, Childers filed a petition for a writ of *habeas corpus* in the United States District Court for the District of Kansas.

The principal contention was that the United States court in the Indian Territory had no jurisdiction of the offense committed by Childers during the interim between the passage of the Oklahoma enabling act and the admission of the State, in view of the language of the enabling act, and especially of § 14. Some minor errors not jurisdictional were assigned. The District Court considered the terms of the act, construed § 14, and denied the petition, and from that judgment an appeal was taken directly to this court.

The Oklahoma enabling act, approved June 16, 1906, provided (34 Stat. 275):

"SEC. 13. That said State when admitted as aforesaid shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian Territory shall constitute said eastern district and the said Oklahoma Territory shall constitute said western district. . . . The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. . . .

"SEC. 14. That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed.

"SEC. 15. That all appeals or writs of error taken from the Supreme Court of Oklahoma Territory, or the United States Court of Appeals in the Indian Territory to the Supreme Court of the United States or the United States Circuit Court of Appeals for the eighth circuit, previous to the final admission of such State shall be prosecuted to final determination as though

this act had not been passed. And all cases in which final judgment has been rendered in such Territorial appellate courts which appeals or writs of error might be had except for the admission of such State may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Circuit Court of Appeals under the provisions of existing laws. . . .

"SEC. 16. That all causes pending in the Supreme and District Courts of Oklahoma Territory and in the United States courts and in the United States Court of Appeals in the Indian Territory arising under the Constitution, laws or treaties of the United States, or affecting ambassadors, ministers or consuls of the United States, or of any other country or State, or of admiralty or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same State claiming lands under grants from different States; and in all cases where there is a controversy between citizens of said Territories prior to admission and citizens of different States, or between citizens of different States, or between a citizen of any State and citizens or subjects of any foreign state or country, and in which cases of diversity of citizenship there shall be more than two thousand dollars in controversy, exclusive of interest and costs, shall be transferred to the proper United States Circuit or District Court for final disposition. . . .

"SEC. 17. That all cases pending in the Supreme Court of said Territory of Oklahoma and in the United States Court of Appeals in the Indian Territory not transferred to the United States Circuit and District Courts in said State of Oklahoma shall be proceeded with, held, and determined by the Supreme or other final appellate court of such State as the successor of said Territorial Supreme Court and appellate court, subject to the same right to review upon appeal or error to the Supreme Court of the United States now allowed from the Supreme or appellate courts of a State under existing laws. Jurisdiction of all cases pending in the courts of original jurisdiction in said Territories not transferred to the United States Circuit

and District Courts shall devolve upon and be exercised by the courts of original jurisdiction created by said State.

"SEC. 18. That the Supreme Court or other court of last resort of said State shall be deemed to be the successor of said Territorial appellate courts. . . .

"SEC. 19. That the courts of original jurisdiction of such State shall be deemed to be the successor of all courts of original jurisdiction of said Territories. . . .

"SEC. 20. That all cases pending in the District Courts of Oklahoma Territory and in the United States courts for the Indian Territory at the time said Territories become a State not transferred to the United States Circuit or District Courts in the State of Oklahoma shall be proceeded with, held, and determined by the courts of said State, the successors of said District Courts of the Territory of Oklahoma and United States courts for the Indian Territory. . . .

"SEC. 21. That the constitutional convention may by ordinance provide for the election of officers for a full State government, including members of the legislature and five Representatives to Congress. . . . Such State government shall remain in abeyance until the State shall be admitted into the Union and the election for State officers held, as provided for in this act. . . ."

The act of March 4, 1907, 34 Stat. 1286, c. 2911, amended § 16, 17 and 20 of the Oklahoma enabling act so as to read as follows:

"SEC. 16. That all civil causes, proceedings, and matters pending in the Supreme or District Courts of Oklahoma Territory, or in the United States courts or United States Court of Appeals in the Indian Territory, arising under the Constitution, laws, or treaties of the United States, . . . shall be transferred to the proper United States Circuit or District Court established by this act, for final disposition, and shall therein be proceeded with in the same manner as if originally brought therein. . . .

"Prosecutions for all crimes and offenses committed within

the Territory of Oklahoma or in the Indian Territory, pending in the District Courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States Circuit or District Court established by this act for the district in which the offenses were committed in the same manner and with the same effect as if they had been committed within a State. Prosecutions for all such offenses committed within either of said Territories and pending in the Supreme Court of the Territory of Oklahoma, or in the United States Court of Appeals in the Indian Territory, upon the admission of such Territories as a State, shall be transferred to the United States Circuit Courts created by this act for the district within which the offense was committed. . . .

"SEC. 17. That all causes, proceedings, and matters, civil or criminal, pending in the Supreme Court of the Territory of Oklahoma, or in the United States Court of Appeals in the Indian Territory, not transferred to the United States Circuit or District Courts in said State of Oklahoma shall be proceeded with, held, and determined by the Supreme Court or other final appellate court of such State as the successor of said Supreme Court of the Territory of Oklahoma and of the United States Court of Appeals in the Indian Territory, subject to the same right to review upon appeal or writ of error to the Supreme Court of the United States now allowed from the Supreme or final appellate court of a State under existing laws.

"SEC. 20. That all causes, proceedings, and matters, civil or criminal, pending in the District Courts of Oklahoma Territory, or in the United States courts in the Indian Territory at the time said Territories become a State, not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be proceeded with, held, and determined by the courts of said State, the successors of said District Courts of

the Territory of Oklahoma, and the United States courts in the Indian Territory. . . . All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be prosecuted to a final determination in the State courts of Oklahoma under the laws now in force in that Territory."

Mr. L. F. Parker, Jr., and *Mr. O. L. Rider* for appellant.

Mr. Assistant Attorney General Harr for appellee.

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

The jurisdiction of the District Court was not in issue, nor, properly speaking, was the construction or application of the Constitution involved in this case. The real question before the District Court was whether the United States court for the Northern District of the Indian Territory had jurisdiction of the offense for which Childers was undergoing punishment, in view of the provisions of the Oklahoma enabling act. The allegation in the petition that Childers has been deprived of his liberty without due process of law was based entirely upon the alleged want of jurisdiction in the United States court of the Indian Territory to try him for the offense. The question before the lower court was simply one of statutory construction, and not of the unconstitutionality of the statute in question.

In the case of *In re Lennon*, 150 U. S. 393, 400, Lennon had been committed for contempt by the Circuit Court for the Northern District of Ohio, and thereupon applied to the same court for a writ of *habeas corpus*, the petition alleging, as in this case, that he was restrained of his liberty in violation of the Constitution, and that the Circuit Court had no jurisdiction to commit him. The writ was refused, and a direct appeal was taken to this court.

After pointing out that the jurisdiction of the Circuit Court to issue a writ of *habeas corpus* was not in issue, but that jurisdiction was entertained, this court said:

"Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject-matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner."

Carey v. *Houston & Central Rwy.*, 150 U. S. 170; *Same* v. *Same*, 161 U. S. 115, 126; *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460, 470; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232.

Appeal dismissed.

LUDWIG, SECRETARY OF STATE OF ARKANSAS, *v.* WESTERN UNION TELEGRAPH COMPANY.

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

No. 45. Argued April 13, 14, 1909.—Decided February 21, 1910.

On the authority of *Western Union Telegraph Company* v. *Kansas*, *ante*, p. 1, and *Pullman Car Company* v. *Kansas*, *ante*, p. 55, held that:

A state statute which requires a foreign corporation engaged in interstate commerce to pay, as a license tax or fee for doing intrastate business, a given amount on its entire capital stock whether employed within the State or elsewhere, directly burdens the interstate business of such corporation and its property outside the jurisdiction of the taxing State and is unconstitutional and void; and so held as to the Wingo law of Arkansas of May 13, 1907.

Publication by proclamation by a state officer in his official capacity that a foreign corporation engaged in interstate and local business is not authorized, but is forbidden from continuing, to do local business would produce irreparable injury to such corporation; and, in order to prevent such contemplated or threatened injury a court of equity may enjoin the state officers from issuing such proclamation, if the state statute on which the contemplated action is based is unconstitutional.

An action brought by a corporation against a state officer to obtain such an injunction is not an action against the State within the meaning of the Eleventh Amendment. *Western Union Telegraph Company* v. *Andrews*, *post*, p. 165.

THE facts which involve the constitutionality of certain provisions of the Wingo Act of Arkansas applicable to foreign corporations are stated in the opinion.

Mr. Hal L. Norwood, Attorney General of the State of Arkansas, with whom *Mr. Joseph M. Hill*, *Mr. William F. Kirby* and *Mr. Otis T. Wingo* were on the brief for appellant in this case and for appellee in No. 8, argued simultaneously herewith.[1]

A State has plenary power to prescribe such terms as pleases it upon which foreign corporations may enter and do business.

[1] For decision in No. 8, see p. 165, *post*.

It has power to refuse admission to a foreign corporation not engaged in interstate commerce or governmental service, and to prescribe terms upon which a foreign corporation engaged in interstate commerce and the service of the Government may do intrastate business. It has the power to prevent a foreign corporation from doing business at all within its borders, unless such prohibition is so conditioned as to violate the Federal or its own Constitution. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *American Smelting Co.* v. *Colorado*, 204 U. S. 103; *Security Life Ins. Co.* v. *Prewett*, 202 U. S. 246; *Hooper* v. *California*, 155 U. S. 648; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60; *State* v. *Lancashire Ins. Co.*, 66 Arkansas, 466; *Woodson* v. *State*, 69 Arkansas, 528; *Western Union Tel. Co.* v. *State*, 82 Arkansas, 302; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *John Hancock M. Life Ins. Co.* v. *Warner*, 181 U. S. 73.

It may prescribe as such condition a forfeiture of its right to do business upon removal of a cause to the Federal court or the bringing of suit in the Federal court without the consent of the opposite party. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; and see *Security M. Life Ins. Co.* v. *Prewett*, 202 U. S. 246, holding a statute valid that prescribed such forfeiture in the exact terms of the Wingo Act.

The court was without jurisdiction, this being a suit against the State.

The act fixes a license fee or tax to be paid by foreign corporations to the State for its privilege or franchise of allowing such corporations to do business within the State upon the same terms and conditions as domestic corporations.

The penalty suits by the State's prosecuting attorneys in its courts, for the collection of its said license tax for its benefit, is its method of enforcing the payment of same. The State is the real party in interest against which the relief in these cases

is asked and the judgments would operate. These suits are brought to test the constitutionality of the statute,—not to prevent a trespass of individuals against its property. *In re Ayers*, 123 U. S. 443, 487; *Fitts* v. *Magee*, 172 U. S. 516, 528, and cases reviewed in the opinion below. See *Western Union Tel. Co.* v. *Andrews*, 154 Fed. Rep. 95. *Ex parte Young*, 209 U. S. 124, is not applicable.

The Wingo Act is not in violation of the Telegraph Company's rights under act of Congress of 1866, nor an interference with interstate commerce.

The terms "seeking to do business in this State" and "doing business in this State" mean and include only intrastate business, for such only has the State power to regulate. *Western Un. Tel. Co.* v. *State*, 82 Arkansas, 309, 321, and cases cited. And see also *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420.

Like expressions in statutes of North Carolina and Georgia have been similarly construed and the cases affirmed by this court. *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60. Other cases in point are: *State* v. *Telegraph Co.*, 27 Montana, 394; *State* v. *Wagner*, 77 Minnesota, 483; *Western Union Tel. Co.* v. *State*, 90 Pac. Rep. (Kans.) 307; *Commonwealth* v. *Gagne*, 153 Massachusetts, 205; cited in 188 Massachusetts, 241; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Norfolk & Western Ry. Co.* v. *Pennsylvania*, 136 U. S. 114.

The expression, "now or hereafter doing business in this State," and others of like import, as "do any business in this State," etc., having received a judicial interpretation, are presumed to be used in that sense in this act, there being nothing in the act to indicate a contrary intent. *Beasley* v. *Equitable Securities Co.*, 72 Arkansas, 610.

When the legislature adopts the statute of another State the interpretation of such statute by the courts of that State is adopted with it, and how much the more should our own court's construction of an act reënacted be conclusive in its

interpretation. *Nebraska Nat. Bank* v. *Walsh*, 68 Arkansas, 438; *McNutt* v. *McNutt*, 78 Arkansas, 352.

Kirby's Digest, § 7946, is part of the act (§ 10) of March 31, 1885, under the terms of which the company claims to have contracted with the State for the right to do intrastate business, and the Supreme Court of the State says the act does not even apply to a company not authorized to do intrastate business. Such is the construction of this statute by the Supreme Court of the State of Arkansas, and it is binding here. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60; *Pullman Co.* v. *Adams*, 189 U. S. 426; *Osborne* v. *Florida*, 164 U. S. 650.

The act is not in violation of the Telegraph Company's contract with the State, nor does it deprive it of its property without due process of law.

This law was passed by the State to enable her citizens to enforce without great inconvenience their just demands against foreign corporations doing business in this State under the comity existing between the States. See *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 621; *Am. Smelting Co.* v. *Colorado*, 204 U. S. 103, distinguished.

Mr. Rush Taggart and *Mr. Henry D. Estabrook*, with whom *Mr. George B. Rose* was on the brief, for appellee in this case and appellant in No. 8, argued simultaneously herewith.[1]

By discriminating between foreign and domestic corporations, the statute complained of denies to the Telegraph Company the equal protection of the law.

While a State may, if it sees fit to do so, exclude from its territory any foreign corporation not engaged in interstate commerce or in the service of the United States, if the State does admit the corporation within its borders, it is then a person entitled to the protection afforded by the Fourteenth Amendment. *Blake* v. *McClung*, 172 U. S. 239.

[1] For decision in No. 8, see p. 165, *post*.

When foreign corporations have entered a State with its permission, and made permanent investments therein, they cannot be discriminated against in favor of domestic corporations. To do so would be to deny them the equal protection of the law. *American Smelting Co.* v. *Colorado*, 204 U. S. 103.

The act forbids a foreign corporation to bring suit in the United States courts, and forfeits its right to do business in the State in the event of its instituting such an action, while it contains no restriction upon the right of domestic corporations to sue in those courts. This is a valuable right conferred by Congress, in pursuance of the authority of the Constitution of the United States, of which the State cannot deprive a citizen or a corporation. *Insurance Co.* v. *Moore*, 20 Wall. 425; *Barron* v. *Burnside*, 121 U. S. 180; *So. Pac. Ry. Co.* v. *Denton*, 146 U. S. 200; *Martin* v. *R. R. Co.*, 151 U. S. 673; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100.

The equal protection of the law is a pledge of the protection of equal laws. *Yick Wo* v. *Hopkins*, 118 U. S. 369.

The act violates the contract between the State and the Telegraph Company and deprives the latter of its property without due process of law.

A contract existed under the Arkansas act of March 31, 1885, Acts, p. 176, with the terms whereof the Telegraph Company has complied. See *United States* v. *Central Pacific Railroad Co.*, 118 U. S. 235; *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 103; *New Orleans* v. *Southern Telephone and Telegraph Co.*, 40 La. Ann. 41; *Monongahela Co.* v. *United States*, 148 U. S. 329; *Montgomery County* v. *Bridge Co.*, 110 Pa. St. 54, 68; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *Pearsal* v. *Great Northern Railway Co.*, 161 U. S. 661; *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 587; *Powers* v. *Detroit & Grand Haven Railway Co.*, 201 U. S. 544.

The fact that no money was paid to the State does not make the contract void for want of consideration. *Dartmouth College* v. *Woodward*, 4 Wheat. 637; *Erie Railroad Co.* v. *Pennsylvania*, 153 U. S. 628.

The act infringes the rights conferred on the Telegraph Company by the act of Congress of July 24th, 1866, as an agency of the United States Government and as an instrumentality of commerce.

The Telegraph Company under that act, is an instrumentality of the Government of the United States, which a State cannot exclude from its borders and such Telegraph Company is likewise an instrumentality of interstate commerce, the exclusive power to regulate which is vested in the Congress of the United States. *Pensacola Telegraph Company* v. *W. U. Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *W. U. Tel. Co.* v. *Penna. R. R. Co.*, 195 U. S. 540; *W. U. Tel. Co.* v. *St. Louis*, 148 U. S. 92.

Even if the act be thus interpreted by the state authorities, as applying only to domestic business it cannot be sustained under *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Company* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Palace Car Co.*, 191 U. S. 171; *New York* v. *Penna. R. R. Co.*, 192 U. S. 21, as in those cases, the acts sustained by this court either expressly separated the local business of the companies affected from the interstate business, and left it optional with the company affected, to continue its domestic business, or to discontinue it, or the act had been so interpreted by the courts of the State, and this court simply accepted such construction of the act as made by the state courts. To the same effect: *The Trade-Mark Cases*, 100 U. S. 82; *James* v. *Bowman*, 190 U. S. 127.

Mr. Justice Harlan delivered the opinion of the court.

The Western Union Telegraph Company, a corporation of New York, doing business, both interstate and intrastate, in Arkansas, as it had done for many years, brought this suit against O. C. Ludwig, Secretary of State of Arkansas, for the purpose of obtaining a decree that the statute of that State of May 13th, 1907, entitled "An Act to permit foreign corpora-

tions to do business in Arkansas and fixing fees to be paid by all corporations," Acts of Ark., 1907, p. 744, was unconstitutional, null and void, and enjoining the defendant, in his official capacity, from attempting to revoke, or proclaiming through official newspaper publications that he had revoked, the authority of the plaintiff to do business in Arkansas, or that it had no right to continue doing business in that State. The plaintiff, in its bill, asked such other and further relief as the case might require and as might seem just.

A temporary injunction was issued, and thereafter the defendant demurred and answered at the same time. The demurrer was on these grounds: That the court was without jurisdiction to hear and determine the case, "the same being in effect a suit against the State" by a citizen of another State to prevent the enforcement of one of its criminal or penal statutes; that the facts stated in the bill are not sufficient to constitute a cause of action nor to warrant the relief asked; and that the bill was wholly without equity. The answer denied all the material allegations of the bill.

Subsequently, the plaintiff, by leave of the court, filed an amendment of its bill. To that amendment no answer was made, but all parties being present, the cause was heard, without objection, on the demurrer to the bill. The demurrer was overruled, and the defendant having elected not to plead further, the injunction previously granted was made perpetual. From that order the present appeal was prosecuted.

The above statute, known as the Wingo Act, whose constitutionality is questioned by the plaintiff, is as follows (the italics being ours):

"§ 1. Every company or corporation incorporated under the laws of any other State, Territory or county, including foreign railroad and foreign fire and life insurance companies, *now or hereafter doing business in this State*, shall file in the office of the Secretary of State in this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the

proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served. *Provided*, before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall *thereafter continue to do* business in this State, it shall be subject to the penalty of this act *for each day* it shall continue to do business in this State after such revocation.

"§ 2. Any foreign corporation *which shall fail to comply with the provisions of this act*, and shall do *any* business in this State, shall be subject to a fine of not less than $1,000, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered, and as an additional penalty, any

foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make *any contract in this State which can be enforced by it either in law or in equity,* and the complying with the provisions of this act after suit is instituted shall in no way validate said contract.

"§ 3. That all corporations hereafter incorporated in this State and *all foreign corporations seeking to do business in this State,* shall pay into the treasury of this State *for the filing of said articles* a fee of $25 *where the capital stock is* $50,000 or under; $75 where the capital stock is over $50,000 and not more than $100,000; and $25 additional for each $100,000 of capital stock.

"Any foreign mutual corporation having no capital stock shall be required to pay to the Secretary of State for filing its articles of incorporation the sum of $500. *Provided, however,* nothing in this section shall apply to fraternal orders that write insurance.

"§ 4. That Act 185, approved April 17, 1907, and entitled 'An Act to provide a manner in which foreign corporations may become domestic corporations and for other purposes,' and all laws and parts of laws in conflict herewith, be and the same are, hereby repealed; and that this act take effect and be in force from and after its passage." Acts of Ark. 1907, p. 744.

As the case was decided on demurrer to the bill, the material facts properly alleged are to be taken as true on this hearing. The case made by the plaintiff in its bill is substantially as will be now outlined.

The Telegraph Company was organized in 1851, and immediately thereafter began the work of constructing and operating telegraph lines. Its system extended throughout the United States and Canada, and connected with lines in Mexico and Central and South America by means of submarine cables, and with telegraph systems of foreign countries.

Among the lines so constructed and forming a component part of the company's system and connecting with its main office in New York, are lines within Arkansas, most of which

were constructed since 1867, in which year the company accepted the terms and conditions of the act of Congress of July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." 14 Stat. 221, c. 230; Rev. Stat., §§ 5263 to 5269 *inclusive*.

It should be stated in this connection that the bill alleges that the company's lines within Arkansas are upon the public domain and upon the military and post roads of the United States, are part of the postal routes and postal establishment of the United States, and as such the complainant has under the Constitution and laws of the United States the power and is under obligation to transmit all messages for the Government and for the public generally as much and as fully with respect to messages between points within the said State as interstate messages. The company's lines within Arkansas were constructed with the consent and permission of the State, certainly without objection on its part, and in accordance with its laws. The amount which the company, up to the bringing of this suit, had invested in lines within Arkansas was $153,000 and continuously since their construction the Telegraph Company has used them "for the transmission of telegraph messages for the Government of the United States, and the several departments thereof, *and for the public*, as an instrumentality of the Postal Department and *of commerce wholly within the State of Arkansas*, and also for interstate commerce and commerce between points in said State and foreign countries, and thus said telegraph lines have been continuously employed in domestic, interstate and foreign commerce since their construction."

The above act of 1907 requires that every foreign corporation doing or seeking to do business in the State should file in the office of the Secretary of State a copy of its charter or articles of incorporation, duly authenticated, together with a statement of its assets and liabilities and the amount of its capital employed in the State, and designate its general office

or place of business therein, and the name of an agent upon whom process in any action brought or pending in the State may be served. The company tendered to the Secretary of State a duly authenticated copy of a resolution of the Board of Directors, assenting to the designation of an agent upon whom process against the company might be served; also, the above required statement; "and offered to the Secretary of State [who claimed to proceed under the above act of 1907] all reasonable fees for the filing and recording of the said papers." But the Secretary of State refused and still refuses to *file the same* unless the Telegraph Company pays to him a fee of $75 upon the first $100,000 of its capital stock, and $25 upon each additional $100,000 of stock. The capital stock of the Telegraph Company being $100,000,000, the sum which the Secretary required to be paid as a condition of the company's right to have its articles of incorporation filed, and thereafter to continue doing business within Arkansas without incurring the penalties prescribed by the statute, was $25,050.

We have seen that the act of 1907 provided that if any foreign corporation, without the consent of the other party to any suit brought by or against it in any state court should remove such suit to the Federal court, or institute a suit against a citizen of Arkansas in the Federal court, it became the duty of the Secretary of State to forthwith revoke all authority in the company and its agents to do business in Arkansas and publish such revocation in some newspaper of general circulation in the State; and if after such revocation the company continued to do *any* business in Arkansas it became subject to a fine of not less than $1,000 *for each day* it so continued, to be recovered by suits instituted by prosecuting attorneys in the name of the State for the use and benefit of the county in which the suit was brought; so, if the company failed to comply with any of the provisions of the act it became subject to a fine of $1,000; further, if a foreign corporation failed or refused to file its articles of incorporation, as required, it could not "make any contract" in Arkansas "which can be enforced

by it either in law or in equity." Before the bringing of this suit the company had, in fact, instituted a suit in the United States Circuit Court to enjoin the prosecuting attorneys in the several districts of the State from proceeding against it to recover the penalties set forth in the act in question—the suit of *Western Union Telegraph* v. *Andrews &c.*, this day decided, see p. 165, *post*.

It is alleged, and the demurrer admits, that the Secretary of State has threatened to promulgate, and, unless restrained by order of court, will promulgate, a proclamation that the authority of the company to do business in Arkansas has been revoked and publish the fact of such revocation in the newspapers, thereby making it appear that the company had become subject to the prescribed penalties to be recovered in suits brought by the State's prosecuting attorneys, and incapacitated, if the statute be enforced against it, to make any contract in Arkansas, whatever its subject-matter, which is enforcible in law or equity.

The special grounds upon which the statute in question is alleged to be unconstitutional and void may be thus summarized:

1. It imposes upon the Secretary of State the duty—in the event the company instituted a suit in the Federal court against a citizen of Arkansas, or removed to the Federal court, without the consent of the other party, any suit brought by or against it in any court of the State—to forthwith revoke its authority to do business within Arkansas, and subjects the company to the penalty of $1,000 for each day's continuance of such business in the State after such revocation.

2. If the company fails to file a copy of its articles of incorporation with the Secretary of State, and does not pay, in advance of such filing, the required fee or tax, based on its *capital stock*, which represents its property and business everywhere, inside and outside of the State, it is made liable to a fine of $1,000 for continuing, after such failure, to do business in Arkansas.

3. As the lines established by the company in Arkansas are

practically of no value unless used as the same have been located and constructed, any provision that would prohibit their being used for the purposes and as the same were constructed and designed to be used would deny it the equal protection of the laws and deprive it of its property without due process of law.

4. The State lays an unequal burden on the plaintiff as compared with corporations of Arkansas, in that domestic corporations, organized and existing at the time of the passage of the statute, are not required to pay into the treasury of the State any sum whatever upon their capital stock, but are allowed to continue their business without the payment of any sum; while corporations of other States, even those having lines within the State, under the protection thereof, are required to pay a large tax measured by their *entire capital stock, wherever employed*, for the privilege of continuing in Arkansas their established and existing business, whether the same be domestic or foreign commerce.

5. Upon the failure of the company to pay the required fee, based on its capital stock employed both within and without the State, the company is forbidden, or is not allowed, to make any contract within the State, which can be enforced either in law or equity, whether the same relates to domestic, interstate or foreign commerce; whereby, it is alleged, the statute denies to the company the equal protection of the laws, and seeks to enforce an illegal exaction for the privilege of using its property for purposes of domestic, interstate and foreign commerce.

6. As the company originally—some thirty or forty years ago—entered the State of Arkansas and constructed and has operated its lines of telegraph, with the consent of the State, and during that period has extended and operated its lines within its limits, with its consent; as the State, from time to time, through legislative enactments, has not only recognized the company's right to transact business within its limits, but regulated its business and affairs; and as, during the above

period, with the knowledge and acquiescence of the State, and in reliance upon such license, consent and acquiescence the company has expended large sums of money for the purpose of transmitting messages between the people of Arkansas, the State cannot withdraw its license and expel the company from its limits, even with respect to local business, without impairing the obligation of the company's contract with the State.

Such is the case as made by the bill; and the relief asked is a decree, declaring the statute unconstitutional and restraining any attempt to collect said fee of $25,050, and from imposing any of the penalties prescribed by it or by any provision therein (except the one requiring the designation of an agent upon whom process may be served in any suit brought against the Telegraph Company) and enjoining the defendant from attempting to revoke, or from proclaiming that he has revoked, its authority to do business in Arkansas.

The first contention of the appellant that this action is one against the State within the meaning of the Eleventh Amendment of the Constitution, declaring that the judicial power of the United States shall not extend to any suit in law or equity against a State by a citizen of another State. This contention must be held untenable on the authority of *Western Union Telegraph Company* v. *Andrews &c.*, this day decided. See p. 165, *post*.

But the vital question in the case is as to the constitutionality of the Arkansas statute. It is insisted by the defendant, among other grounds, that the provision in the statute requiring a foreign corporation, seeking to do business in the State, to pay a fee based upon the amount of its capital stock, for *filing* with the Secretary of State its articles of incorporation or association is a device which, in effect and by its necessary operation, under the guise of regulating intrastate business, imposes a tax on the interstate business of such corporation, as well as a tax on its property used and permanently located outside of the State.

Interpreting it according to the ordinary acceptation of its words, the statute does not discriminate between corporations engaged in interstate commerce and corporations whose business is intrastate in its character, so to make it clear that the State has not assumed to regulate or burden interstate business. Its words are unqualified and are made applicable to "*every* company or corporation incorporated under the laws of any other State, Territory or county, including foreign railroad and foreign fire insurance and life insurance, now or hereafter doing business in this State." § 1. "*Any* foreign corporation which shall fail to comply with the provisions of this act and shall do any business in this State," etc. § 2. "*All* corporations hereafter incorporated in this State and *all* foreign corporations seeking to do business in this State," etc. According to the words of the statute, not unreasonably construed, every corporation of another State, seeking to do business in Arkansas, whether interstate or domestic, in order that it may do business of any kind in Arkansas, without coming into conflict with the statute, must file a copy of its authenticated charter with the Secretary of State; and it seems that before that officer will file such copy the corporation must pay to him a given amount based upon its capital stock, representing, necessarily, *all* its business, interstate and intrastate, as well as *all* its property everywhere, *beyond as well as within the State*. If the foreign corporation, without first paying those amounts, does business of any kind in the State it will incur not only the penalty of $1,000 for so doing but will forfeit its right to make any contract in the State, enforcible in law or equity—whatever its subject-matter—even if it be one relating to the business of the United States or to commerce among States. A statute of that kind would be palpably in conflict with the Constitution, and, especially an invasion of rights under that instrument of a corporation engaged in interstate commerce and seeking to do business in Arkansas.

But, it is said, that the statute in question should not be so

broadly construed. The reasons given for this contention are these: Before the statute here in question was passed there was in force in Arkansas a statute (act of February 16th, 1899, as amended by the act of May 8th, 1899, Kirby's Dig., chap. 31) which was very similar, in many respects, to the act of 1907, now under examination. The state Supreme Court had occasion to determine the scope and effect of that act of 1899. Its decision was handed down March 18th, 1907, while the Legislature of Arkansas was in session, and on the same day another decision was rendered holding material parts of that act to be repealed. *Western Union Tel. Co.* v. *State*, 82 Arkansas, 302; *Same* v. *State*, 82 Arkansas, 309. These decisions, as counsel suggest, virtually left the State without any statute prescribing fees to be paid by foreign corporations. Thereafter, on May 13th, 1907, the Legislature passed the statute here in question, known as the Wingo Act, which, with slight exceptions not necessary to be mentioned, was substantially like the act of 1899. The Supreme Court of the State, in *Western Union Tel. Co.* v. *State*, 82 Arkansas, 309, 314, construing the above act of 1899, had held that it was its duty, unless otherwise compelled by the plain, ordinary meaning of the words of a statute, to reject any construction that would bring it into conflict with the Constitution of the United States, *Grenada County* v. *Brogden*, 112 U. S. 261; Cooley's Const. Lim., § 218; *Atty. Gen.* v. *Electric Storage Battery Co.*, 188 Massachusetts, 239; that it was too well settled to admit of debate, that "it is beyond the power of the State under the guise either of a license tax or police regulation to impose burdens upon interstate commerce or to deny a foreign corporation the right to engage in such commerce in the State"—citing *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47; and *Brennan* v. *Titusville*, 153 U. S. 289. Its conclusion, in that case, was that the act of 1899 "must be construed to have been intended only to impose terms upon the right of a foreign corporation to carry on *intra*state business and it was a valid statute." Now, the

argument at the bar was that when the Wingo Act was passed, the Legislature must be deemed to have had in mind the judicial construction given to the previous act of 1899, and that it must be assumed that the same court would adhere to its already expressed views; so, that if a case ever came before it hereafter that involved the meaning and scope of the Wingo Act, expressed substantially in the same words as the act of 1899, the court would construe the Wingo Act, as it construed the act of 1899, as intended only to apply to intrastate business, and not as having been enacted *for the purpose* of burdening or imposing illegal terms for the transaction of interstate business by foreign corporations in Arkansas.

But the acceptance of this view would not remove the difficulty which confronts the State in the present case. According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. *Henderson* v. *Mayor*, 92 U. S. 259, 268. If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute. But even if we should assume that the state court would construe the statute of 1907 as intended not to apply to interstate commerce but only to local or intrastate business, we are, nevertheless, informed by its decision in *Western Union Tel. Co.* v. *State*, 82 Arkansas, 302, 318, that, in the opinion of the state court, the statute so construed is valid, and therefore the Telegraph Company, in order that it may safely continue local business in Arkansas, *must* first pay into the treasury of the State certain amounts based on its *entire capital stock for simply filing its articles of incorporation* with the Secretary of State; and if it does not pay the specified fees, based on its entire capital stock, and yet continues to do intrastate busi-

ness in Arkansas, it will incur the prescribed penalty of *one thousand dollars* for continuing to do business in the State, and, in addition, lose its power or right to make any enforcible contract in the State. These are, in effect, *conditions* upon which the Telegraph Company, lawfully engaged in interstate business, and entitled to be in Arkansas for such business, is permitted to enter the State to do local business within its limits. And these conditions have been prescribed, notwithstanding the company has been permitted for many years, long before the act here in question was passed, to do local business in the State with its permission and acquiescence, and has invested there large sums of money in preparing to serve the public efficiently in that kind of business. The capital stock of the company represents, we repeat, *all* its business, property and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case $25,050), based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the State. The case cannot be distinguished in principle from *Western Union Tel. Co.* v. *Kansas*, *ante*, p. 1, and *Pullman Company* v. *Kansas*, *ante*, p. 56, recently decided. The difference in the wording of the Kansas and Arkansas statutes cannot take the present case out of the ruling of the former cases. On the authority of the *Kansas cases*, and for the reasons stated in the opinions therein, we hold the statute in question to be unconstitutional and void, as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the State.

Whether the statute of Arkansas is, in any particular, violative of the constitutional guaranty securing the equal protection of the laws, or of the guaranty prohibiting the deprivation of property, except by due process of law, or of any

other constitutional guaranty, it is not necessary now to consider. What has been said is sufficient for the determination of the present case, and we do not at this time go further than is indicated in this opinion. Suffice it to say that the defendant threatens to issue, in his official capacity, and publish, in the newspapers, a proclamation to the effect—no matter upon what specific grounds—that the Telegraph Company is not authorized, but is forbidden, under penalty, by the laws of Arkansas, from continuing to do local business in that State. Such a proclamation, which the court, as well as every one else, must know, would not only produce confusion in and irreparable damage to the company's business in Arkansas, but would, in effect, declare that the company is not only subject to a prescribed penalty of $1,000 for continuing to do local business in Arkansas, but is forbidden to make any contract whatever in that State that is enforcible in law or equity. In order to prevent the contemplated or threatened injury to the company the court below properly made a decree, perpetually enjoining the appellant, as Secretary of State, his agents and attorneys, from making proclamation that the Telegraph Company has no authority to continue doing business in Arkansas.

Mr. Justice Moody heard the argument of this case, participated in its decision, and concurs in this opinion.

The Chief Justice, Mr. Justice McKenna and Mr. Justice Holmes dissent.

The decree below must be affirmed.

It is so ordered.

WESTERN UNION TELEGRAPH COMPANY *v.* ANDREWS.

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

No. 8. Argued April 13, 14, 1909.—Decided February 21, 1910.

Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action; and such an action is not prohibited by the Eleventh Amendment of the Constitution of the United States. *Ex parte Young*, 209 U. S. 123.

THE facts are stated in the opinion.

Mr. Rush Taggart and *Mr. Henry D. Estabrook*, with whom *Mr. Geo. B. Rose* was on the brief, for appellants.

Mr. Hal L. Norwood, Attorney General of the State of Arkansas, with whom *Mr. Joseph M. Hill*, *Mr. William F. Kirby* and *Mr. Otis T. Wingo* were on the brief, for the appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This case grows out of alleged actions about to be taken to enforce against the Western Union Telegraph Company the penalties denounced in the act of May 13, 1907, of the legislature of Arkansas entitled "An Act to permit foreign corporations to do business in Arkansas, and fixing fees to be paid by all corporations."

As this act has just been the subject of consideration in *Ludwig, Secretary of State*, v. *The Western Union Telegraph*

Company, decided to-day, *ante*, p. 146, it is unnecessary to set out at large the provisions of the statute in question.

The bill in this case was brought against the prosecuting attorneys of the seventeen judicial circuits of the State of Arkansas to enjoin them from instituting actions against the Western Union Telegraph Company to recover the penalties of $1,000 for each alleged violation of the act. It was averred in the bill that the defendant prosecuting attorneys would, unless restrained by the order of the court, institute numerous actions, as they had threatened to do, for the recovery of the penalties aforesaid. The learned District Judge sustained the demurrer to the bill and dismissed the case upon the ground that the action is, in effect, a suit against the State of Arkansas, and for that reason prohibited by the Eleventh Amendment to the Federal Constitution. The sole question presented upon this record is as to the correctness of that ruling.

Since the decision in the Circuit Court this court has decided the case of *Ex parte Young*, 209 U. S. 123, 155. In that case the previous cases in this court concerning the application of the Eleventh Amendment of the Constitution were fully considered, and it was then said by Mr. Justice Peckham, speaking for the court:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose.

The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of *Ex parte Young*, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed and the cause remanded for further proceedings.

Reversed.

ALVAREZ Y SANCHEZ *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 69. Submitted January 11, 1910.—Decided February 21, 1910.

The rights of private individuals recognized and protected by the Treaty of 1898 with Spain did not include the salability of official positions, such as procurador; nor did the United States intend to so restrict its own sovereign authority that it could not abolish the system of perpetual and salable offices which is entirely foreign to the conceptions of this people.

Even if Congress did not intend to modify the treaty of 1898 by the Foraker Act of April 12, 1900, 31 Stat. 77, if that act is inconsistent with the treaty it must prevail, and be enforced despite any provision in the treaty. *Hijo* v. *United States*, 194 U. S. 315.

Congress recognized the action of the military authorities in Porto Rico in 1898 in abolishing the office of procurador and validated it by the provision in the Foraker Act of 1900 continuing the laws and ordinances then in force except as altered and modified by the military orders in force.

The abolition of a perpetual and salable office, established under the Spanish law in Porto Rico prior to its cession to the United States, does not violate any provision of the Constitution or infringe any right of property which the holder of the office can assert against the United States. *O'Reilly* v. *Brooke*, 209 U. S. 45.

42 C. Cl. 458, affirmed.

Mr. S. Mallet-Prevost for appellant:

Claimant's petition alleged a good cause of action. His

office was property under the Spanish law. It was not impaired during the military occupation of Porto Rico. The Treaty of Paris confirmed the claimant's property. The United States deprived the claimant of his property after the Treaty of Paris and became liable to compensate him for the value thereof. *O'Reilly* v. *Brooke*, 209 U. S. 45, is not decisive of this case.

The present case differs from it in several material points. In the present case the appellant was not possessed of a mere claim against Spain for the deprivation of his property, but was in the undisturbed enjoyment and possession of the same, at the time of the military occupation; he was actually engaged in the performance of the duties of his office. Moreover, this suit is not against an individual officer of a government, but against the government itself, which divested him of the property which the Treaty of Paris expressly confirmed in him. Furthermore, this suit involves the Island of Porto Rico and not that of Cuba; and it is well recognized that a different state of affairs existed in the two islands.

The claimant's right constituted property under the Spanish law. Civil Code of Porto Rico of 1889, Arts. 336, 349.

Moreover, the provisions of the Code of 1855 clearly indicate that Spain recognized that the holders of the offices held in perpetuity could not be deprived thereof without compensation. Arts. 126–129, 140–141, Civil Code, Porto Rico, 1855. It is important in this connection to note that the claimant's solicitorship was a perpetual and not a life solicitorship. The latter were of a wholly different character.

Prior to April 11, 1899, the date of the exchange of ratifications of the Treaty of Paris, and of the commencement of the sovereignty of the United States in Porto Rico, neither the office nor the property therein had been destroyed or abrogated.

The attempt to make the termination of Spanish sovereignty cotemporaneous with conquest cannot be supported.

The United States did not acquire Porto Rico by conquest,

but by cession. When the Protocol of Agreement was signed August 12, 1898, the United States was actually engaged in hostility in the field with Spanish troops in Porto Rico. Senate Doc. No. 62, pt. 2, 3rd Sess., 55th Cong., vol. 8.

The United States obtained possession of Porto Rico by virtue of the protocol, and obtained title to the Island by virtue of the cession by the Treaty of Paris.

The sovereignty of the United States commenced, and therefore that of Spain ceased, at the exchange of ratifications of the Treaty of Paris. *Dooley* v. *United States*, 182 U. S. 222, 230; *De Pass* v. *Bidwell*, 124 Fed. Rep. 615, 619; *Howell* v. *Bidwell*, 124 Fed. Rep. 688, 689; *Armstrong* v. *Bidwell*, 124 Fed. Rep. 690, 692, 693; *Ponce* v. *Roman Catholic Church*, 210 U. S. 296, 309.

Subsequent to the protocol, and prior to the exchange of ratifications of the Treaty of Paris, the United States held Porto Rico by military occupation, which could not affect the sovereignty of Spain and did not destroy the property in the office of the appellant. Wheaton on International Law, 4th ed., § 545, citing Vattel, Bk. III, ch. 13, §§ 197, 198; Davis, Int. Law, 333.

The mere fact of military occupation did not give the military forces sovereign rights. The rights of military occupation are distinctly limited. Hall on Int. Law, 2d ed., 430; Lieber's Code, Inst. for Govt. of Armies in the Field, § 38.

The mere fact of military occupation does not abrogate or destroy public offices or the title thereto. *Ketchum* v. *Buckley*, 99 U. S. 188.

The Treaty of Paris confirmed appellant's property rights. The treaty contemplated the preservation of rights as rights are understood under the Spanish law, as well as under the American law. *O'Reilly* v. *Brooke*, 135 Fed. Rep. 384, 391; Atty. Genl. Griggs, 22 Op. Atty. Genl. 617; *United States* v. *Reynes*, 9 How. 151; *Strother* v. *Lucas*, 12 Pet. 410, 466. See also *Ponce* v. *Roman Catholic Church*, 210 U. S. 309.

It is impossible that the property in the office in question

was destroyed by the treaty without violating the express terms of Art. VIII.

While the United States may take real or personal property whenever its necessities or the exigencies of the occasion demand, the Fifth Amendment guarantees that when this governmental right is asserted it shall be attended by compensation. *United States* v. *Lynah*, 188 U. S. 445, 465.

The provisions of the Constitution relating to life, liberty, and property are applicable to Porto Rico. *Downes* v. *Bidwell*, 182 U. S. 244.

It is immaterial whether the property so taken is of a tangible or intangible nature. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329; *O'Reilly* v. *Brooke*, 135 Fed. Rep. 384.

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

The military government of the United States in occupation of Porto Rico absolutely displaced Spanish sovereignty and required no further treaty to confirm its supremacy. 2 Halleck, 444; *Dooley* v. *United States*, 182 U. S. 230.

The office of Solicitor or Procurador was not property under Spanish law or within § 2 of Art. VIII of the Treaty of 1898. If it was property it was subject to confiscation by an invading army. Hall's Int. Law, 5th ed., 471; Whiting's War Powers, 2d ed., 340; 2 Halleck, 75; Taylor's Int. Law, 539; *United States* v. *Pacific R. R. Co.*, 120 U. S. 228.

An incumbent of an office has not under our own system any property in it. *Tool Co.* v. *Norris*, 2 Wall. 55; *Taylor and Marshall* v. *Beckham*, 178 U. S. 547, 577; *State* v. *Dews*, Charl. (Ga.) 397.

The office in question was a mere function or public station created by the Crown of Spain. It was not, nor can it be regarded as, property of a tangible nature. While spoken of as salable, it was not private property, nor property of

any nature, but a public office under the Crown of Spain, as much so as that of the highest office of the Spanish régime in Porto Rico.

A positive and affirmative act on the part of the United States was necessary to secure appellant in the exercise of the privileges of the office of Procurador. See Magoon's Report, 198.

The office in question was not in harmony with the spirit of our institutions. As to establishment of new system of courts in New Mexico, see *Leitensdorfer* v. *Webb*, 20 How. 176.

Acquired territory is held by the new sovereignty subject to its institutions and not to the laws of the former sovereignty. Vattel's Law of Nations, Bk. 1, ch. 19, §§210, 244, 245; and Bk. 2, ch. 7, § 80; *Pollard's Lessee* v. *Hagan*, 3 How. 225.

International law does not require a nation to protect property the existence of which is inconsistent with its system of government. That the United States should be called upon to protect slave property, titles of nobility, monopolies, or purchasable offices would be clearly inimical to the spirit of our laws and the genius of our institutions.

Where the enforcement of the foreign law would contravene some important and established policy of the State of the forum, or where such enforcement would contravene the canons of morality established by civilized society, the enforcement of such foreign laws is forbidden. Minor's Conflict of Laws, ch. 2, § 5, p. 9; *Ch., R. I. & P. Ry.* v. *McGlenn*, 114 U. S. 546.

The case of *O'Reilly* v. *Brooke*, 209 U. S. 45, controls this case.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellant, an inhabitant and citizen of Porto Rico, seeks to recover from the United States the value of a certain office held by him in that Island before and during the war with Spain, of which office, it is alleged, he was illegally deprived by the United States. A demurrer to the complaint was sustained and judgment given for the United States, the

opinion of the Court of Claims being delivered by Chief Justice Peelle. 42 Ct. Cl. 458, 472.

The complaint which, on demurrer, was adjudged to be bad, presents—using substantially the words of the complaint—the following case:

In the year 1878 the claimant, Sanchez, purchased from one Florenzio Berrios y Lopez, for a valuable consideration, the office known as "Numbered Procurador [Solicitor] of the Courts of First Instance of the capital of Porto Rico," at Guayamo, in perpetuity, and in the same year the Governor General of Porto Rico issued a provisional patent in his favor. In 1881 the claimant's tenure of the office was approved and confirmed, and a final patent therefor was issued by the King of Spain, in accordance with the laws, practice and custom of Spain and Porto Rico governing the sale, surrender and transfer of such an office. The claimant, it is alleged, thereby became vested with all the legal rights and privileges appertaining to the office.

From the date of the provisional patent issued to him until, as will be presently stated, he was deprived of his office, August 31st, 1899, the claimant exercised all the rights and privileges belonging to the office of Procurador or Solicitor. Under the laws of Spain and Porto Rico, it will be assumed, the office was transferable in perpetuity and vested the incumbent with exclusive rights and privileges, and as a consequence thereof the claimant was entitled under the laws of Spain in force in Porto Rico, during all the time he held the office, to perform its duties and receive its fees and emoluments which, prior to August 31st, 1899, averaged, it is alleged, more than $200 per month, of which he could not be legally deprived except by due process of law.

On the tenth day of December, 1898, a Treaty of Peace between the United States and Spain was concluded and having been duly ratified by the respective countries, was duly proclaimed April 11th, 1899. The Treaty contained these provisions: "Spain cedes to the United States the island of

Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam in the Marianas or Ladrones." Art. 7. ". . . And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." Art. 8.

A military government was organized in Porto Rico and was maintained there from October, 1898, up to and after April 30th, 1900. On the latter date, General Davis, as Military Governor, issued what is known as General Order 134, containing these among other paragraphs: "XI. The office of Solicitor ('procurador') is abolished. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of Municipal Courts. XII. Hereafter, litigants who do not appear personally shall be represented before the Supreme Court and District Courts exclusively by a lawyer, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur. In the Municipal Courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place. XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court." That order was issued without notice to claimant and without any complaint being made as to the manner in which he was exercising his rights or discharging his duties.

On the twelfth day of April, 1900, Congress passed (to take effect May 1st, 1900) what is known as the Foraker Act temporarily to provide revenues and civil government for Porto Rico and for other purposes. That act contained this provision: "Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered, or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States." 31 Stat. 77, 79, c. 191, April 12, 1900.

The reasonable value, the claimant alleges, of the "transferable" or "Numbered Procurador of the Courts of First Instance of the capital of Porto Rico," in perpetuity, was $50,000, for which amount he asks judgment. No compensation has ever been made to claimant for the loss of his office, and no action has been taken on his present claim either by Congress or by any Department of the United States Government.

Such is the case made by the claimant in his petition.

The claimant proceeds in his petition on the ground that the effect of the eighth section of the act of Congress of April 12th, 1900, was to confiscate, finally and effectually, without compensation to him, the office which he claims to have lawfully purchased in perpetuity, prior to the occupation of Porto Rico by the military forces of the United States, and the cession of that Island to this country; which confiscation, he insists, could not have been legally done without violating the Treaty between the United States and Spain which was in force when the act of 1900 was passed.

We do not think that the present claim is covered by the Treaty. It is true that a Treaty negotiated by the United States is a part of the Supreme Law of the Land, and that it is

expressly provided in the Treaty in question that it "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds . . . of private individuals." But, clearly, those provisions have no reference to public or quasi-public stations, the functions and duties of which it is the province of government to regulate or control for the welfare of the people, even where the incumbents of such stations are permitted, while in the discharge of their duties to earn and receive emoluments or fees for services rendered by them. The words in the Treaty "property . . . of private individuals," evidently referred to ordinary, private property, of present, ascertainable value and capable of being transferred between man and man.

When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that Island and its inhabitants and their property was displaced, the United States, the new Sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the Treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. It is true that Congress did not, we assume, intend by the Foraker Act to modify the Treaty, but if that act were deemed inconsistent with the Treaty the act would

prevail; for, an act of Congress, passed after a Treaty takes effect, must be respected and enforced, despite any previous or existing Treaty provision on the same subject. *Ribas y Hijo* v. *United States*, 194 U. S. 315, 324, and authorities cited. If, originally, the claimant lawfully purchased, in perpetuity, the office of Solicitor (Procurador) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done. The intention of Congress in relation to the office of Solicitor or Procurador by the Foraker Act cannot be doubted—indeed, its abolition by Congress is made the ground of the present action and claim. Upon the acquisition of Porto Rico that Island was placed under military government, subject, until Congress acted in the premises, to the authority of the President as Commander-in-Chief acting under the Constitution and laws of the United States. Porto Rico was made a Department by order of the President on the eighteenth of October, 1898. By his sanction, it must be presumed, General Order No. 134 was made, abolishing the office of Solicitor or Procurador. That order was recognized by Congress, if such recognition was essential to its validity, when Congress, by the Foraker Act of 1900, provided that the laws and ordinances of Porto Rico, then in force, should continue in full force and effect, *except* "as altered or modified by military orders in force" when that act was passed. It is clear that claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the Island and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States. See *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45, 49. The judgment of the Court of Claims must be affirmed.

It is so ordered.

PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 91. Argued January 19, 1910.—Decided February 21, 1910.

Congress may, in order to enforce its enactments, clothe an executive officer with power to ascertain whether certain specified facts exist and thereupon to act in a prescribed manner, without delegating, in a constitutional sense, legislative or judicial power to such officer.

Under its paramount power to regulate commerce, Congress can require navigable waters of the United States, although within a State to be freed from unreasonable obstructions; and it is not a delegation of legislative or judicial power to charge the Secretary of War with the duty of ascertaining, under a general rule applicable to all navigable waters and upon notice to the parties in interest, whether a particular bridge is an unreasonable obstruction to navigation.

An act of Congress which invests the Secretary of War with power to require the removal of obstructions to navigation after notice to parties in interest and opportunity to be heard and reasonable time to make alterations in the obstruction, as § 18 of the River and Harbor Act of March 3, 1899, 30 Stat. 1151, does not invest the Secretary with arbitrary power beyond constitutional limitations.

To require, after notice and hearing, alterations to be made within a reasonable time and in a bridge over such navigable waters so as to prevent its being an obstruction to navigation, is not a taking of private property for public use which, under the Constitution, must be preceded by compensation made or secured to the owners of the bridge.

The erection of a bridge over such navigable waters within a State by authority of the State is subject to the paramount authority of Congress to regulate commerce among the States and its right to remove unreasonable obstructions to navigation.

The mere silence of Congress, and its failure to interfere to prevent the construction under state authority of an obstruction to navigation does not prevent it from subsequently requiring the removal of the obstruction or impose upon the United States a constitutional obligation to make compensation therefor.

It is for Congress, under the Constitution, to regulate the right of navigation in navigable waters of the United States and to declare what must be done to clear navigation from obstructions; and where this has been done in the manner required by Congress it is not the province of the jury, on the trial of one refusing to remove obstructions, to determine whether the removal was necessary.

An act will not be declared unconstitutional merely because an executive officer might, in another case, act arbitrarily or recklessly under it. If such a case arises the courts can protect the rights of the Government or persons which are based on fundamental principles for the protection of rights of property.

THE facts are stated in the opinion.

Mr. David Watson, with whom *Mr. James H. Beal* was on the brief, for plaintiff in error:

The court below erred in refusing the offer of the Bridge Company to prove that the bridge was not an unreasonable obstruction to the navigation of the river, and that the changes in the bridge ordered by the Secretary of War were not necessary; and in also ruling that the proceedings before the Secretary of War were conclusive, and not subject to the examination of the courts.

No citizen can be deprived of his property through such a mental impression of the Secretary, merely because he has good reason to believe it was an obstruction. To have good reason to believe does not involve a definitive conclusion that he does believe the bridge is unreasonable, for there may be better good reasons to show it is not.

All trials in courts of justice where the private property of a citizen is involved must be in accordance with due process of law. This the Fifth Amendment requires. Even if due process of law does not always require judicial proceedings, still when Congress expressly confers jurisdiction upon the courts, then to the extent of that jurisdiction the courts will proceed to perform their duty in accordance with their own settled rules and maxims. They will always administer justice by due process of law.

As to what is due process of law see *Twining* v. *New Jersey*, 211 U. S. 78, 101; *C., B. & Q. Ry.* v. *Chicago*, 166 U. S. 226, 234; *Londoner* v. *Denver*, 210 U. S. 373, 386; *Hagar* v. *Reclamation District*, 111 U. S. 707.

The owners of the bridge were being tried charged with a crime. It was a criminal trial and the defendant was charged with a misdemeanor. Under Art. III, § 2, Amendment VI, Fed. Const., the trial of all crimes shall be by jury.

As to the citizen's right to a fair, full trial in court before he can be convicted of a crime, see among others, *Kilbourn* v. *Thompson*, 103 U. S. 168, 182.

While the power to prescribe a reasonable rate for the future is a legislative function, the question whether a given rate violates the private property rights of an individual or a corporation is a judicial function, and cannot be delegated to an administrative or executive body. *Interstate Comm. Comm.* v. *Railway Co.*, 167 U. S. 493, 499; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 397, 399; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226; *Rider* v. *United States*, 178 U. S. 251; *Salem* v. *Railroad Co.*, 98 Massachusetts, 461; *Miller* v. *Horton*, 152 Massachusetts, 540; *Stone* v. *Heath*, 179 Massachusetts, 385; *Lowe* v. *Conroy*, 120 Wisconsin, 151; *Pearson* v. *Zehr*, 138 Illinois, 48; *State* v. *Main*, 69 Connecticut, 123; *Gaines* v. *Waters*, 64 Arkansas, 609, 612; cases collected in Due Process of Law by McGehee, 372.

An executive board or committee or officer cannot conclude the owner of private property from proving in court that its conclusions are correct. *North American Storage Co.* v. *Chicago*, 211 U. S. 306; *Fisher* v. *McGirr*, 1 Gray, 36; *Commonwealth* v. *New Bedford Bridge Co.*, 7 Gray, 339; *Rosenberger* v. *Harris*, 136 Fed. Rep. 1003; *Turner* v. *Williams*, 194 U. S. 295; *Colon* v. *Lisk*, 153 N. Y. 188; *The People* v. *Yonkers*, 140 N. Y. 1.

Whether a nuisance exists is always ultimately a mixed question of law and of fact, to be determined by a court. Cooley's Const. Lim., 7th ed., 883; Dillon on Mun. Corp.,

4th ed., par. 374; Wood's Law of Nuisances, §§ 22, 483, 493; *Frostberg* v. *Hitchins*, 99 Maryland, 617, 628; *Hutton* v. *City of Camden*, 29 N. J. L. 122; *Texas* v. *St. Albans*, 38 W. Va. 19; *Yeates* v. *Milwaukee*, 10 Wall. 497; *The Mississippi R. R. Co.* v. *Ward*, 2 Black, 485, 492; *Health Department* v. *Trinity Church*, 145 N. Y. 32; *Bridge Co.* v. *United States*, 105 U. S. 470.

A public trial, such as Art. III and Amend. VI guarantees to the owner of a bridge being charged with a crime, necessarily involves the question of the guilt or innocence of the defendant, and the courts will not pass arbitrarily and convict arbitrarily, when the defendant offers to prove that he is not guilty of maintaining a nuisance, merely on the *ipse dixit* of the Secretary of War to the contrary. The courts must and will of themselves investigate and determine that question. *Callan* v. *Wilson*, 127 U. S. 540, 549, 557.

To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. *Schick* v. *United States*, 195 U. S. 65, 70; *Ex parte Milligan*, 4 Wall. 3, 121; *Schaezlein* v. *Cabaness*, 135 California, 466. See also *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Baltimore* v. *Radecke*, 49 Maryland, 217; *Railroad Co.* v. *Commonwealth*, 99 Kentucky, 136; *Railway Co.* v. *Dey*, 35 Fed. Rep. 866.

At common law the owner of a bridge charged with maintaining a nuisance was entitled to a jury trial on the question whether the bridge was an unreasonable obstruction to navigation. *Regina* v. *Betts*, 4 Cox C. C. 211, 213; *Regina* v. *Burt*, 11 Cox C. C. 399; *Rex* v. *Russell*, 6 Bar. & Cr. 566, 587, 595; *Regina* v. *Russell*, 3 El. & Bl. 942, 950; *Rex* v. *Tindall*, 6 Ad. & El. 143.

The Federal courts have jurisdiction to review the decisions of the executive departments on questions of law or of mixed law and fact, though no right of review is expressly given by statute. *Wis. Cent. Ry. Co.* v. *Forsythe*, 159 U. S. 46, 61,

citing *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330; *Quinby* v. *Conlan*, 104 U. S. 420; *Doolan* v. *Carr*, 125 U. S. 618, 624; *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 354; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108. To the same effect are *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 314; *Burfenning* v. *Ch. & St. Paul Ry. Co.*, 163 U. S. 321, 323; *Johnson* v. *Drew*, 171 U. S. 93, 100; *Hardin* v. *Jordan*, 140 U. S. 377, 401; *Williamson* v. *United States*, 207 U. S. 425, 462; *United States* v. *Copper Co.*, 196 U. S. 207, 214.

As to what due process of law is see Webster's definition in the *Dartmouth College case* adopted in *Hovey* v. *Elliott*, 167 U. S. 418; *Stitzel's Estate*, 221 Pa. 230; *Reynolds* v. *United States*, 98 U. S. 145, 154.

If the act of 1899 should be so construed as to authorize the Secretary of War to apply his own rule in determining whether a bridge was an unreasonable obstruction to navigation, and that rule was different from the rule established in the *Escanaba Transportation case*, then the act of Congress was unconstitutional because it vests in one and the same person the legislative power to make the law and the judicial power to determine whether the defendant had violated the law, and this is inconsistent with our theory of government. *Wong Wing* v. *United States*, 163 U. S. 228, 237; *Turner* v. *Williams*, 194 U. S. 279, 291; *Interstate Comm. Comm.* v. *Brinson*, 154 U. S. 447, 485.

The act of 1899 is unconstitutional.

It attempts to take and destroy the private property of the Bridge Company without due process of law and to take private property for public use without just compensation.

It undertakes to unlawfully delegate to the Secretary of War and to the Chief of the Engineer Corps both legislative and judicial powers.

If the statute is construed as was done in the court below and the Secretary makes the law and then applies it to the facts and finally decides, then it is unconstitutional, because

it does not furnish an ultimate resort to the courts for the bridge owner whose bridge is threatened. *Public Clearing House*, 194 U. S. 515. See cases *supra; Union Bridge Co.* v. *United States*, 204 U. S. 387, does not apply.

The power delegated by the act of 1899 is not merely executive. The Secretary acts in a judicial capacity on a mixed question of fact and law. *Mississippi R. R.* v. *Ward*, 2 Black, 492; Woods on Nuisances, §§ 22, 493, 748.

This is a delegation by Congress to the Secretary of judicial functions and is illegal. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 108.

The power of Congress in its regulation of commerce is limited by other clauses in the Federal Constitution. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

The word "taken" in the Fifth Amendment where the proceedings are under the interstate commerce clause, should not receive a strict technical, narrow definition which enables a great and wealthy nation to destroy the property of its citizen without compensation. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 177.

To compel the owner to spend money in the reconstruction of his bridge, is taking his money as effectively as if the money was actually taken by some officer of the Government. *West Chicago Ry. Co.* v. *Chicago*, 201 U. S. 506.

The Government practically invited and acquiesced in the construction of the bridge. The bridge became really a part of a link in the National Pike which Congress built and over this bridge went the traffic coming to it and as a part of that Pike. It should not therefore be destroyed by the Government without compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

Pennsylvania has never complained that the Bridge Company had disregarded the terms of its charter forbidding interference with navigation, and this, so far as the charter is concerned, is conclusive on the United States. It was erected in 1832, under the Act of the State, March 16, 1830,

P. L. 102, within the power of the State to authorize the structure. *People* v. *Rensalear R. R. Co.*, 15 Wend. 113, 131; *Wilson* v. *Blackbird*, 2 Pet. 250; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 2; *Lake Shore Co.* v. *Ohio*, 165 U. S. 365; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Mobile* v. *Kimball*, 102 U. S. 697.

The following conclusions should govern this case:

Neither the legislative nor the executive nor the judicial departments may invade the other;

No one of these departments may delegate its power to the other;

The legislative department makes the law; the judicial department construes the law, and the executive department enforces the law.

To some extent the judicial not only construes but enforces, as against the individual, the law, and punishes the individual for the violation of it;

The executive and the legislative departments are the political divisions of the Government, and in a general way between them they have charge of all political questions concerning the policies of the nation and relations of the nation to foreign powers, treaties with foreign powers, etc. The judiciary has charge of the construction of all laws which relate to the persons and the property of the individual citizen, and its chief purpose is the administration of justice, not only as between the individuals who compose society, but also as between governments (such as the United States and the state government) and between the individual and the State or the United States Government. *Patton* v. *Brady*, 184 U. S. 620; *Kilbourn* v. *Thompson*, 103 U. S. 182.

The existence of a nuisance always involves a question of law for the court. *Mississippi R. R.* v. *Ward*, 2 Black, 492; Wood on Nuisances, §§ 22, 493, 748.

If the act of 1899 be construed as giving to the Secretary of War the final power to pass upon and decide that the bridge is an unreasonable obstruction, and denies to the

citizen the right of appeal to the courts, then it is void, because it denies to the citizen due process of law, and destroys, if it does not take, his property, without due process of law, and denies to the citizen the right of trial by jury granted to him by the Federal Constitution.

The question as to whether the bridge is an unreasonable obstruction is one for the courts to determine on prosecution under the act and if the owner of the bridge can in court prove that it is not an unreasonable obstruction then the prosecution fails and the refusal of the court to receive the offer of the bridge owner to prove that the bridge was not an unreasonable obstruction to navigation and no change in it was necessary, is error.

Corporations are within Article III and the Amendments of the Constitution. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 73, 89; *American Publishing Co.* v. *Fisher*, 166 U. S. 464.

The Solicitor General for the United States:

This case falls directly within *Union Bridge Company* v. *United States*, 204 U. S. 364.

When the Bridge Company was chartered and when its bridge was built, the Monongahela River was by statute a navigable highway (Pa. Act of April 17, 1782). The Bridge Company's charter contained the clause that "the erection of said bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steam-boats or other water craft"; and this obligation assumed by the company is absolute, whether or not the river was actually navigable when the charter was granted or when the bridge was built. Similar clauses, both as to bridges and as to railroads crossing over the streets have invariably been interpreted as imposing a continuing duty of not interfering with the use of the rivers or streets at any time, however much that use may have grown in amount or kind from what it was when the bridge or railroad charter was granted.

The act of Congress of March 3, 1899, does not delegate legislative or judicial power to the Secretary of War or take private property without compensation. *Union Bridge Co.* v. *United States, supra,* pp. 377–387.

Plaintiff in error had a full and fair hearing by the Secretary of War, as required by statute. All proceedings, evidence and arguments at the public hearing were transmitted to him and his decision was given in view of all data presented by plaintiff in error. Plaintiff in error did not request that it be permitted to introduce further evidence or to offer further argument before the Secretary of War; and objection cannot now be made to the course of the proceedings before the Secretary of War, when no complaint concerning the character or extent of the proceedings was made to the Secretary of War himself.

Nor is it true that the Secretary of War determined his judgment as to the unreasonable obstructiveness of this bridge by the application of erroneous tests of law. Instead, the contrary must be presumed, for the record does not disclose what his processes of reasoning or grounds of decision were. He gave no opinion and made no findings, except his general conclusion that the bridge is an unreasonable obstruction of navigation.

The act of Congress makes the Secretary of War's decision conclusive that the bridge is an unreasonable obstruction, and plaintiff in error had no right to retry that question before the jury in this proceeding for violation of the Secretary's order.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a criminal information by the United States under § 18 of the River and Harbor Act of March 3d, 1899, against the President, Managers and Company of the Monongahela Bridge Company, a Pennsylvania corporation.

That section is as follows: "That whenever the Secretary of War shall have good reason to believe that any railroad or

other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers, that are required to be made, and shall prescribe, in each case, a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: Provided, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants." 30 Stat. 1121, 1153, c. 425.

The jury returned a verdict of guilty and a motion in arrest of judgment was made upon various grounds, the principal one being that the section of the above act of 1899 was unconstitutional, null and void. That motion was denied, and a motion for new trial having been overruled, the defendant was adjudged to pay to the United States a fine of $1,000 and the costs of prosecution. From that judgment the case comes directly to this court under the authority of the proviso in the above act. Section 18.

It is essential to a clear understanding of the questions raised by the Bridge Company that we state certain facts disclosed by the record.

The Bridge Company was incorporated under an act passed by the General Assembly of Pennsylvania in 1830; and in 1833, by authority of that Commonwealth, it constructed the bridge in question over the Monongahela River. The structure is known as the Brownsville Bridge between the towns of West Brownsville and Bridgeport. The charter of the company provided, among other things, that "the erection of said bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steamboats or other water craft." Penn. Laws, 1829–30, p. 105.

On the twenty-ninth of April, 1903, the Secretary of War, Mr. Root, was petitioned by numerous companies and individuals to have an investigation made of the bridge "as to its obstruction of navigation," and if it was found to be an obstruction of that character, "to have the means provided to compel it to be raised or equipped in such a way to relieve river people from the obstruction, making the height necessary to allow free navigation." The petition proceeded: "The coal in pools one, two, three and four below Brownsville has been practically exhausted and the Pittsburg district will, at no distant date, be forced to get its supply above Brownsville in the Fifth Pool. The petitioners recognize how impossible it will be to build or improve lock No. 3 unless the elevation of the Brownsville bridge be made at once." This petition was

referred by the Chief of Engineers to Major Sibert of the Corps of Engineers for investigation and report. The latter officer reported, among other facts, that ". . . 4. The height of this bridge is such that the average of the boats engaged in interstate commerce between the States referred to above [Pennsylvania and West Virginia] are prevented from passing under the bridge at a stage of water materially less than that which floods the walls of the locks of the Monongahela River. 5. A bridge that prevents the use of the locks owned by the Government of the United States until the same are placed out of service by means of high water is, in the opinion of this office, an unreasonable obstruction to navigation. . . . 7. This bridge is an old covered wooden bridge, constructed some time between 1830 and 1840. 8. In the opinion of this office this bridge is one that certainly requires action under section 18, River and Harbor Act of March 3, 1899. 9. It is therefore respectfully recommended that it be proceeded against in the manner specified under the law referred to above, both on account of insufficient height and length of span, and that, in the notice for a hearing in the case of this bridge the changes proposed be such as to give a least clearance 52 feet under a channel span of 400 feet wide; the length of side spans to be determined from the developments at the hearing. It is considered that one and one-half years is a reasonable time in which to make the necessary changes in this bridge." The Chief of Engineers endorsed that report and recommended that the papers be returned to Major Sibert, with instructions to hold a public hearing, after due notice to interested parties, as required by the law and the orders of the War Department.

Under date of May 23d, 1904, Major Sibert made a report to the Chief of Engineers, from which it appears that the parties interested were given a hearing, all parties being present. That report stated: "3. These hearings, as this office understands it, were held for the purpose of securing and forwarding such information as would enable the Secretary of War to decide whether or not there is good reason to believe that the

bridge in question is an unreasonable obstruction to navigation. 4. Stripped of all unnecessary verbiage the question for determination is: Is there good reason to believe that a bridge that prevents the better class of towboats actually navigating the Monongahela River, the commerce of which stream is about 10,000,000 tons annually, from passing under it for 17.7 days per year and prevents the packets actually navigating said stream from passing under it for 52.1 days per year, all as determined by the official records kept by the United States, an unreasonable obstruction to navigation? The above days are days that the boats in question cannot pass under the bridge but can pass through the locks that the Government of the United States has provided for their use. Would a railroad company consider that there was good reason to believe that its traffic was unreasonably obstructed by another highway if its passenger and express business were absolutely stopped for 52.1 days per year and its freight business so stopped for 17.7 days per year, when the same could be overcome at a reasonable cost to the obstructing highway, which latter highway was the last built? . . . This office is of the opinion that the following should constitute the grounds upon which a conclusion should be reached as to whether or not any particular bridge unreasonably obstructs navigation: 1st. Every bridge should be so constructed as to permit the passage under it or through it, with reasonable safety, of the average sized boat actually navigating the stream, at all practical stages of water. 2nd. Any bridge that does not permit the passage of such boat at such stages of water needlessly obstructs the use of the river highway and exists under conditions that are not reasonable, since it is impracticable to raise or lower a stream and it is always practicable to either build a bridge high enough and of sufficient width of span to allow the passage of such boats at such times as mentioned above or to place a draw in the bridge. 3rd. Where the topographical conditions are such that bridges can be made of such heights, without prohibitive cost, as to permit at all navigable stages of

water the passage of boats best suited to the river commerce, it is for the best interest of both the land traffic and the river traffic that bridges be so constructed. . . . Based upon the foregoing, the essential features of which are the facts that towboat navigation with the better class of boats actually in use is prevented for 17.7 days of the year from passing under this bridge when the same could pass through the locks Congress has provided for such navigation, and that the packets actually navigating this stream are prevented from passing under this bridge at such time for 52.1 days in the year, and from the fact that Congress has specified in the two acts passed in the present year that a least clearance of 54 feet is needed for the navigation of this pool, whereas the bridge in question has only 40.2 feet, this office is of the opinion that there is good reason to believe that the bridge owned by the Monongahela Bridge Company, at Brownsville, Pa., is an unreasonable obstruction to navigation, and therefore respectfully recommends that The Monongahela Bridge Company, (George W. Lenhart, President, Brownsville, Pa.), be given notice to make the following changes in its bridge crossing the Monongahela River at Brownsville, Pa., on or before August 1, 1905, to wit: That the bridge be so altered as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height at the left, or pier, end, of not less than 52 feet, and at the right, or abutment, end of not less than 54 feet above the fourth pool of the Monongahela River. This will permit of the construction of the bridge in accordance with plan as shown in Sheet 3, Exhibit B, submitted by the Bridge Company."

The Chief of Engineers concurred in the views expressed and conclusions reached by Major Sibert, and recommended that notice be served accordingly.

Subsequently, August 10th, 1904, the Secretary of War, Mr. Taft, issued the following official notice, addressed to the Bridge Company:

"Whereas, the Secretary of War has good reason to believe that the bridge of the Monongahela Bridge Company across the Monongahela River, at Bridge Street in the Borough of Bridgeport, Pennsylvania, and commonly known as the Brownsville Bridge, is an unreasonable obstruction to the free navigation of the said Monongahela River (which is one of the navigable waterways of the United States) on account of insufficient height and length of span; And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy and unobstructed, to wit: So alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet, above the Fourth Pool of the Monongahela River; and whereas, to August 1, 1905, is a reasonable time in which to alter the said bridge as described above: Now, therefore, in obedience to, and by virtue of, section eighteen of an act of Congress of the United States entitled 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, William H. Taft, Secretary of War, do hereby notify the said Monongahela Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before August 1, 1905." This notice was duly served August 15th, 1904, on the Bridge Company, and the company failed to comply with the direction given by the Secretary of War.

Thereupon the present information was filed charging the Bridge Company with having willfully failed, refused and neglected to comply with the above order of the Secretary of War.

In view of this statement, an extended examination of the authorities would seem to be unnecessary; for, substantially

all the material questions raised on this writ of error are, we think, concluded by former decisions cited in the margin.[1]

This court has heretofore held upon full consideration and after an examination of the adjudged cases:

1. That § 18 of the River and Harbor Act of March 3, 1899, 30 Stat. 1151, could not reasonably be taken as a delegation of legislative and judicial power to an Executive Department of the Government; that the statute did not in any real, constitutional sense delegate to the Secretary of War any power that must, under our system of government, be exclusively exercised either by the legislative or judicial branch of the Government; that under its paramount power to regulate commerce on and over the navigable waters of the United States Congress could require that such waters be freed from unreasonable obstructions to navigation; that the statute in effect prescribed the general rule, applicable to all navigable waters, that free navigation should not be hampered by unreasonable obstructions arising from bridges of insufficient height, width of span or other defects; that instead of exerting its power by direct legislation in each case of a bridge alleged to constitute an unreasonable obstruction to navigation, Congress charged the Secretary of War with the duty of ascertaining, in each case, upon notice to the parties concerned, whether the particular

[1] *Union Bridge Co.* v. *United States*, 204 U. S. 364; *The Brig Aurora*, 7 Cranch, 382; *Wayman* v. *Southard*, 10 Wheat. 1; *Field* v. *Clark*, 143 U. S. 649; *C. W. &c. R. R.* v. *Com'rs*, 1 Ohio St. 77; *Moers* v. *City of Reading*, 21 Pa. St. 188; *Locke's Appeal*, 72 Pa. St. 491, 498; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *N. O. Gas Light Co.* v. *Drainage Com.*, 197 U. S. 453; *C., B. & Q. R. R. Co.* v. *Drainage Com'rs*, 200 U. S. 561; *West Chicago Street R. R. Co.* v. *Chicago*, 201 U. S. 506; *Dugan* v. *Bridge Co.*, 27 Pa. St. 303; *Cooke* v. *Boston & Lowell R. R.*, 133 Massachusetts, 185; *Lake Erie & Western R. R. Co.*, v. *Cluggish*, 143 Indiana, 347; *Lake &c. Western R. R. Co.* v. *Smith*, 61 Fed. Rep. 885; *State of Indiana* v. *Lake Erie & Western R. R. Co.*, 83 Fed. Rep. 284, 287; *St. Louis & Iron Mountain R. R. Co.* v. *Taylor*, 210 U. S. 281; *Northern Pacific R. R. Co.* v. *Duluth*, 208 U. S. 583.

bridge came within the general rule prescribed; that any other method was impracticable in view of the vast and varied interests of the Nation requiring legislation from time to time; that the Secretary of War, proceeding under the act of 1899, could not be said to exercise strictly legislative or judicial power any more than when, upon investigation the Head of a Department ascertains, under the direction of Congress, whether a particular applicant for a pension belonged to a class of persons who, under a general rule prescribed by Congress, were entitled to pensions; and that a denial to Congress of authority, under the Constitution, to delegate to an Executive Department or officer the power to determine some fact or some state of things upon which the enforcement of its enactment may depend, would often render it impossible or impracticable to conduct the public business, and to successfully carry on the operations of the Government.

2. That the act of 1899 did not invest the Secretary of War with arbitrary power in the premises, since in reference to any bridge alleged to constitute an unreasonable obstruction to navigation he was bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him, give them an opportunity to be heard, and allow reasonable time to make such alterations as he found to be necessary to free navigation.

3. That to require alterations or changes in a particular bridge, within a specified time, and after the parties have been heard, was not such a taking of private property for public use as must, under the Constitution, be preceded by the making of or sufficiently securing compensation to the owners of the bridge.

Although the Brownsville Bridge was originally constructed under the authority of the Commonwealth of Pennsylvania, and may not, at the date of its erection, have been an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela River, the bridge must be taken as having been

constructed with knowledge, on the part of all, of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions; that the mere silence of Congress and its failure to directly interfere and prevent the original construction of the bridge, under the authority of Pennsylvania, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations, which the public good, in its judgment, required to be made.

The adjudged cases fully sustain the judgment of the court below. We are asked to consider whether the opinion in *Union Bridge Co.* v. *United States*, 204 U. S. 364—the case upon which the Government mainly relies—should not be modified. We perceive no reason for so doing. We adhere to what was said in that case.

It is urgently insisted that the defendant did not have such a hearing as it was entitled to have under the law on the question whether the bridge was in fact an unreasonable obstruction to navigation. This is a mistake. The Bridge Company had full notice of the action of the Engineer officer, who, under the order of the Secretary of War, made a tentative examination of the facts, and it appeared at the regular, final hearing before that officer, with liberty to contest the facts and introduce any evidence pertinent to the case. It does not appear that it offered any evidence that was rejected. It was not subjected to any mode of procedure that interfered in any degree with a full and fair disclosure of the material facts. The Engineer officer, after the hearing before him—the Bridge Company being represented at the hearing—found that the bridge was an unreasonable obstruction to navigation. He reported to the Secretary of War all the facts that were adduced before him and which constituted the basis of his conclusion. And the decision of the Secretary was based on

the facts so reported to him. That it must be assumed on this record. It does not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress. Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of Executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.

We find no error of law in the record, and the judgment must be affirmed. *It is so ordered.*

MR. JUSTICE BREWER dissents.

CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK *v.* APPLETON, RECEIVER OF THE COOPER EXCHANGE BANK.

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

No. 113. Argued January 27, 28, 1910.—Decided February 21, 1910.

Although a contract made by a corporation may be illegal as *ultra vires*, an implied contract may exist compelling it to account for the benefits actually received.

A national bank which guarantees a loan made by another bank in pursuance of an agreement that it be paid the amount due it by the borrower out of the proceeds of the loan, cannot avoid its liability for the amount actually received by it pursuant to the arrangement on the ground simply of *ultra vires;* it may be liable for money had and received.

190 N. Y. 417, affirmed.

THE facts are stated in the opinion.

Mr. John A. Garver, with whom *Mr. James M. Beck* was on the brief, for plaintiff in error:

The rule, that corporations have no powers except those expressly conferred by law or incidental to the exercise of their express powers, is peculiarly applicable to banks. *Logan County Bank* v. *Townsend*, 139 U. S. 67; *California Bank* v. *Kennedy*, 167 U. S. 362, 366.

Unusual safeguards are thrown about these institutions, not merely for the protection of those dealing with them but also for the benefit of the general public and even of the governments under which they exist. In the statutes under which they are organized, their powers are not merely defined in general terms, as is the case with most corporate statutes, but they are enumerated with explicit detail. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Farmers' Nat. Bank* v. *Dearing*, 91 U. S. 29; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *McClellan* v. *Chip-*

man, 164 U. S. 347; *Owensboro Nat. Bank* v. *Owensboro,* 173 U. S. 664; *Easton* v. *Iowa,* 188 U. S. 220, 238.

It was an important object on the part of Congress to create and maintain confidence in the national bank system. *McCormick* v. *Market Bank,* 165 U. S. 538, 552.

Powers are conferred upon national banks by Rev. Stat., § 5136, and this statute is the sole measure of those powers. *Bank of United States* v. *Dandridge,* 12 Wheat. 64, 68.

The exercise of powers not expressly granted to national banks is prohibited. *First Nat. Bank* v. *Nat. Exchange Bank,* 92 U. S. 122, 128; *California Bank* v. *Kennedy,* 167 U. S. 362, 367; *Concord Bank* v. *Hawkins,* 174 U. S. 364.

Unless expressly empowered by statute, corporations have no power to act as accommodation indorsers or guarantors, even for a consideration. *Commercial Nat. Bank* v. *Pirie,* 82 Fed. Rep. 799; *Bowen* v. *Needles &c. Bank,* 94 Fed. Rep. 925.

Provision is usually made in the general laws of the States for the organization of corporations authorized to execute surety bonds and contracts of guaranty and indemnity; and, in New York, only corporations thus organized have the power to guarantee. *Nat. Park Bank* v. *German-American Warehousing Co.,* 116 N. Y. 281, 292; *Fox* v. *Rural Home Co.,* 90 Hun, 365; aff'd 157 N. Y. 684.

The Court of Appeals conceded that the contract of guaranty was *ultra vires* and that no action could be maintained upon it. That is undoubtedly the law in this court, which holds that an *ultra vires* contract is no contract at all and that no liability can be predicated upon it. *Thomas* v. *Railroad Co.,* 101 U. S. 71; *Pennsylvania R. Co.* v. *St. Louis &c. R. Co.,* 118 U. S. 290; *Oregon R. Co.* v. *Oregonian R. Co.,* 130 U. S. 1; *Pittsburgh &c. R. Co.* v. *Keokuk Bridge Co.,* 131 U. S. 371; *Central Transportation Co.* v. *Pullman Car Co.,* 139 U. S. 24; *St. Louis &c. R. Co.* v. *Terre Haute &c. R. Co.,* 145 U. S. 393; *Union Pacific R. Co.* v. *Chicago &c. R. Co.,* 163 U. S. 564; *McCormick* v. *Market Bank,* 165 U. S. 538; *Railway Company* v. *Trust Company,* 174 U. S. 553.

It makes no difference that the defendant may have received benefit from the contract. *California Bank* v. *Kennedy*, 167 U. S. 362; *Concord Nat. Bank* v. *Hawkins*, 174 U. S. 364; *Merchants' Nat. Bank* v. *Wehrmann*, 202 U. S. 295.

The decision below was based upon principles of state law which are contrary to those recognized in this court.

The National Bank Act provides a complete system for the establishment and government of national banks. *Cook County Bank* v. *United States*, 107 U. S. 445, 448.

In so far, therefore, as the Court of Appeals sought to ignore the decisions of this court, by applying a doctrine contrary to that which is recognized here, it disregarded the statute.

The necessity for uniform construction has been recognized by this court. *Tullock* v. *Mulvane*, 184 U. S. 497, 505; *Yates* v. *Jones Nat. Bank*, 206 U. S. 158.

The National Bank Act is the supreme law of the land to national banks, and a state statute which attempts to authorize the exercise of a power or impose a liability not permitted by that act, is a nullity. *Farmers' Nat. Bank* v. *Dearing*, 91 U. S. 29; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 237. *People's Bank* v. *National Bank*, 101 U. S. 181, and *Cochran* v. *United States*, 157 U. S. 286, relied on below, are not applicable; and see *Bank of Genesee* v. *Patchin Bank*, 13 N. Y. 309, 314; *Commercial Nat. Bank* v. *Pirie*, 82 Fed. Rep. 799; *Bowen* v. *Needles Nat. Bank*, 94 Fed. Rep. 925.

The method actually employed cannot be disregarded, nor can a void and unlawful transaction be rendered valid merely because the result might have been attained in a lawful manner.

Mr. John W. Hutchinson, Jr., and *Mr. Julius M. Mayer*, with whom *Mr. H. Snowden Marshall* was on the brief, for defendant in error:

The defendant in error is entitled to recover the $10,000

which it gave up on the faith of the guaranty and which was received by the guarantor.

An action for money had and received is exactly appropriate. 27 Cyc. 858; *Gaines* v. *Miller,* 111 U. S. 395, 397.

While it is conceded that under the decisions of this court a party cannot recover upon an *ultra vires* contract it has never been held in this court or in any other jurisdiction that a party can retain what it has received under such a contract, and refuse to perform the contract on the ground that it is *ultra vires. Logan County Bank* v. *Townsend,* 139 U. S. 67; *Aldrich* v. *Chemical National Bank,* 176 U. S. 618.

As said in the opinion of the Court of Appeals, whatever the difference of view there may be as to the effect of *ultra vires* on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract, and see also *Merchants' Bank* v. *State Bank,* 10 Wall. 604, 644; *United States* v. *State Bank,* 96 U. S. 30, 36; *Louisiana* v. *Wood,* 102 U. S. 294; *Pullman's Car Company* v. *Transportation Co.,* 171 U. S. 138, 151.

The transaction was not such a contract of guaranty as is forbidden to be made by national banks, but was a written promise made to a third party for the purpose of collecting an existing debt and is therefore an enforceable obligation.

The lack of power, however, to guarantee the payment of obligations, which is prohibited because not expressly conferred, refers to the business of guaranteeing debts, or to a transaction the very purpose of which is to guarantee for profit as a commercial risk the payment of another's obligation.

It is, however, the duty of a national bank to collect the debts owing to it, and, in that connection, it has frequently become necessary for a national bank to engage in transactions or to accept payment or security in a manner and of a character not permissible as an original or initial transaction. *American National Bank* v. *National Wall Paper Co.,* 77 Fed. Rep. 85; *Morris* v. *Third National Bank of Springfield,* 142 Fed.

Rep. 25; *National Bank* v. *Case*, 99 U. S. 628; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122; *Cockrill* v. *Abeles*, 86 Fed. Rep. 505; *Central R. R. & Banking Co. of Georgia* v. *Farmers' Loan & Trust Company*, 114 Fed. Rep. 263. *People's Bank* v. *National Bank*, 101 U. S. 181, and *Cochran* v. *United States*, 157 U. S. 286, are decisive upon the question at bar.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was commenced in the Supreme Court of New York by the Receiver of the Cooper Exchange Bank, a New York corporation, against the Citizens' Central National Bank of New York, a national bank corporation formed by the consolidation (Rev. Stat., §§ 5220 and 5221) of the Central National Bank of the city of New York with the National Citizens' Bank of the same city. The action was dismissed on demurrer to the complaint, and that judgment was affirmed in the Appellate Division. 116 App. Div. 404. But on appeal to the highest court of New York the judgment was reversed, 190 N. Y. 417, and the cause was remitted to the Supreme Court of that State for judgment in accordance with the opinion of the former court.

The complaint alleges—

That the defendant, the Citizens' National Bank of New York, by the consolidation referred to, acquired all the assets and became subject to the liabilities of the Central National Bank of that city;

That on and prior to January 4th, 1904, one Michael Samuels was indebted to the Central National Bank in the sum of $10,000;

That "at the instance and request of Samuels, trading under the name of Mikael Samuels & Co., *and the Central National Bank of the city of New York*," the Cooper Exchange Bank loaned and advanced to the former the sum of $12,000, Samuels executing his written obligation, dated January 4th,

1904, to return or repay the same on or before four months after date with interest, and *at the same time* the Central National Bank of the city of New York, under seal, executed a written guaranty for the payment of the debt, as follows: "For and in consideration of one dollar and other good and valuable considerations, the Central National Bank of the city of New York hereby guarantees to the Cooper Exchange Bank the payment at maturity of a loan of twelve thousand dollars, made this day to Mikael Samuels & Co. by the Cooper Exchange Bank;"

That previous to the obtaining of said loan of $12,000, Samuels "agreed with the said Central National Bank to pay to it the said sum of $10,000 *of the said* $12,000 *so obtained,* and the said loan was obtained by the said Mikael Samuels and was guaranteed by the said Central National Bank *in order that the said Central National Bank might obtain the said sum of* $10,000, which it did receive and which was owed to it by the said Samuels;"

That previous to the maturity of the loan, namely, on January 30th, 1904, only a few weeks after the loan was made, Samuels was adjudged a bankrupt; and,

That no part of said loan had ever been paid, except $1,000, which was paid April 7th, 1906.

The Court of Appeals of New York—Cullen, C. J., delivering the opinion—held and the counsel for the Cooper Exchange Bank conceded in that court, that no recovery could be had against the guaranteeing bank in excess of the amount actually received by it out of the $12,000 loaned, as above stated. 190 N. Y. 417. The case being remitted to the inferior state court, judgment was therefore rendered against the defendant only for $10,000, with interest from January 4th, 1904, with costs in all courts.

The plaintiff in error insists that the guaranty given by the Central National Bank to the Cooper Exchange Bank was beyond its power, was in violation of the National Banking Act, and, therefore, could not be made the foundation of an

action against the guarantor bank. But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank, whereby the latter, under the circumstances disclosed by the record, came under a duty to account to the former for the $10,000 *of the* $12,000 actually paid to Samuels *at its request and on its guaranty.* The law would be very impotent to do justice if it could not, under those circumstances and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. Samuels owed the Central National Bank $10,000, and—with knowledge perhaps of his financial condition—he was put forward by that bank to obtain $12,000 from the Cooper Exchange Bank so that it could get $10,000 *out of that sum,* for its own use. The circumstances show that the latter bank would not have loaned the money to Samuels except at the request and on the guaranty of the Central National Bank. All this, it may be observed, occurred under a previous agreement between the Central National Bank and Samuels, that that bank was to have $10,000 of the $12,000 in discharge of its claim upon him. In short, the Central National Bank, by means of the device mentioned, got $10,000 of the money of the Cooper Exchange Bank for its own use, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief.

In *Logan County National Bank* v. *Townsend,* 139 U. S. 67, 74, it appears that a national bank purchased, at a stipulated price, certain municipal bonds, which it agreed to return to the seller upon demand or replace them at the same or a less price. Demand was subsequently made on the bank to return or replace the bonds according to the agreement. But it failed to do either, and when sued for the value of the bonds it

pleaded, as a defense, the absence, under the law of its creation, of any authority or power on its part to make the above contract. This court said: "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff, on demand, the question would still remain, whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and, at the same time, refuse to comply with the terms of purchase. If the bank's want of power, under the statute, to make such a contract of purchase may be pleaded in bar of all claims against it based *upon the contract*—and we are assuming, for the purposes of this case, that it may be—it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice,' this court said in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, 'rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.' "

The case of *Aldrich* v. *Chemical National Bank*, 176 U. S. 618, is equally in point. A vice-president of a national bank, without authority from it, borrowed money from another national bank, and placed the amount in still another bank to the credit of the bank which he assumed to represent in the transaction. The national bank in whose name the

money was deposited drew the money out by check and applied it in discharge of its own valid obligations; and when it was sought to hold it liable, the defense, in part, was that the original borrowing was not only unauthorized by it, but was in violation of the National Banking Act. Upon an extended review of the authorities this court said: "As the money of the Chemical Bank was obtained under a loan negotiated by the vice-president of the Fidelity Bank who assumed to represent it in the transaction, and, as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. . . . If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank, by its check upon the Chemical Bank, had drawn the whole $300,000 at one time, and now had the money in its possession unused? It would not be allowed to hold the money even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could

use in its business and for its benefit money obtained by one of its officers from another bank under the pretence of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing."

These views are supported by many other adjudged cases. In *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60, the court, speaking by Mr. Justice Gray, said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract." So, in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, the court, speaking by Mr. Justice Peckham, said: "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or to make compensation for it." Other cases are cited in the margin.[1]

[1] *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 644; *United States* v. *State Bank*, 96 U. S. 30, 36; *Louisiana* v. *Wood*, 102 U. S. 294; *Parkersburg* v. *Brown*, 106 U. S. 487, 503; *Read* v. *Plattsmouth*, 107 U. S. 568; *Ditty* v. *Dominion National Bank of Bristol*, 43 U. S. App. 613, 615; *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Massachu-

We need not go farther. It is entirely clear that the judgment against the defendant bank—which came into the possession of the property, and was subject to the liabilities of the Central National Bank—was consistent with sound legal principles and was intrinsically right, even if the guaranty in question was beyond the power of the guaranteeing bank, under the national banking statutes. Whatever may be said as to the validity of the written guaranty, now alleged to be illegal, the judgment can be supported as based wholly on the implied contract, which made it the duty of the Central National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the latter in execution of the agreement made by the former with the borrower.

The judgment must be affirmed.

It is so ordered.

GREAT NORTHERN RAILWAY COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 359. Argued November 5, 8, 1909.—Decided February 21, 1910.

A state legislature, unless restrained by the constitution of the State, may contract to limit the State's power of taxation; but, as taxation is essential to the existence and operation of government, an exemption therefrom will not be presumed from doubtful language, but must be expressed beyond reasonable doubt.

When a State becomes the owner by purchase of the entire property and franchises of a corporation created by itself, it can only convey the same pursuant to the provisions of the then existing constitution and it cannot reinvest either a purchaser or the original owner with any exemption from taxation prohibited by the existing constitution.

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setts, 268; *Perkins* v. *Boothby*, 71 Maine, 94, 97; *Bank of Lakin* v. *National Bank*, 57 Kansas, 183.

Where the constitution of the State requires equal and uniform taxation of all real and personal property in the State upon a cash basis and specifies the property that can be exempted, the legislature cannot thereafter agree that the payment of a given per cent. of the earnings of a corporation from property of a class not included among the properties that can be exempted shall be in lieu of all other taxation; and such a contract, if attempted to be made, would not be protected by the impairment of obligation clause of the Constitution of the United States.

There is a difference between a contract for a commuted system of taxation on earnings of a railroad corporation and a specific exemption from taxation of lands granted to the corporation, for a defined period; the former is personal and not assignable while the latter is attached to and follows the land.

In this case this court accepts the view of the state court as to the scope of its own decisions.

106 Minnesota, 303, affirmed.

THE facts are stated in the opinion.

Mr. William R. Begg for plaintiff in error:

The decision of the Supreme Court of Minnesota in this cause is not controlling upon the questions presented by the assignments of error.

Where the claim is that a contract is impaired by a state law this court determines for itself the existence and scope of the contract and whether it is impaired by the law as construed by the highest court of the State. *Bank* v. *Skelly*, 1 Black, 436, 443; *Insurance Co.* v. *Debolt*, 16 How. 415, 451; *Wright* v. *Nagle*, 101 U. S. 791, 793; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Railroad Co.* v. *Palmes*, 109 U. S. 244, 256; *Gas Co.* v. *Gas Light Co.*, 115 U. S. 683, 692; *Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board*, 151 U. S. 639, 650; *Railroad Co.* v. *Tennessee*, 153 U. S. 486, 492; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Stearns* v. *Minnesota*, 179 U. S 223, 233; *Muhlker* v. *Railway Co.*, 197 U. S. 544, 570; *Powers* v. *Railway Co.*, 201 U. S. 543, 546.

But the law as it has been declared by the state court at the date when the contract was made, enters into and becomes a part of the contract. *Bronson* v. *Kinzie*, 1 How. 311, 315; *McCracken* v. *Hayward*, 2 How. 608, 612; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 177; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Edwards* v. *Kearzey*, 96 U. S. 595, 601; *Douglas* v. *Pike County*, 101 U. S. 677; *Railroad Co.* v. *Hamblen County*, 102 U. S. 273, 277; *Wilson* v. *Gaines*, 103 U. S. 417, 422; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 71; *Green County* v. *Conness*, 109 U. S. 104, 105; *Bank* v. *Franklin County*, 128 U. S. 526; *Los Angeles* v. *Water Co.*, 177 U. S. 558; *Bradley* v. *Lightcap*, 195 U. S. 1, 20.

The settled rules of property existing at the time a contract is made are just as much a part of that contract as are the covenants of the parties; and the law which has thus entered into the contract cannot be abrogated or changed by subsequent decisions so as to save legislation enacted after the date of the contract. Cases *supra* and *Hardin* v. *Jordan*, 140 U. S. 371, 380.

Where the Supreme Court of a State has sustained the validity of a statute from which a contract arises, this court accepts that decision. *Powers* v. *Railway Co.*, 201 U. S. 543, 556.

The act of May 22, 1857, and the acceptance thereof by the Minnesota Company created a valid and irrepealable contract relating to the taxation of the railroads authorized by the act. *Home* v. *Rouse*, 8 Wall. 430, 438; *Railroad Co.* v. *Reid*, 13 Wall. 264; *Humphrey* v. *Pegues*, 16 Wall. 244, 249; *Delaware Railroad Tax Case*, 18 Wall. 206, 225; *Railroad Co.* v. *McGuire*, 20 Wall. 36, 43; *Railroad Co.* v. *Decatur*, 147 U. S. 190, 201; *Railroad Co.* v. *Tennessee*, 153 U. S. 486; *Powers* v. *Railway Co.*, 201 U. S. 543; *First Div. Co.* v. *Parcher*, 14 Minnesota, 297; *Railway Co.* v. *Pfaender*, 23 Minnesota, 217, 223; *St. Paul* v. *St. Paul & S. C. R. Co.*, 23 Minnesota, 469, 474; *Stevens County* v. *Manitoba Co.*, 36 Minnesota, 467, 471; *State* v. *Stearns*, 72 Minnesota, 200, 223; *Traverse County* v. *Manitoba Co.*, 73 Minnesota, 417, 426.

There were no constitutional restrictions upon the power

of the Territory to create corporations by special act and to make valid contracts with respect to taxation. Cases *supra*, and *People* v. *Marshall*, 6 Illinois, 672.

The act in question was passed by the legislative assembly of the Territory and accepted by the Minnesota Company prior to the admission of the State into the Union.

The benefit to accrue to the public from the enterprise contemplated by the charter is a sufficient consideration for the contract. Cases *supra*, and *Tomlinson* v. *Jessup*, 15 Wall. 454, 459; *Railroad Co.* v. *Decatur*, 147 U. S. 190, 201.

The contract created by the act of May 22, 1857, is an entire and inseparable contract covering the taxation of both the railroads and the granted lands. *New Jersey* v. *Yard*, 95 U. S. 104, 116; *Stevens County* v. *Manitoba Co.*, 36 Minnesota, 467; *Traverse County* v. *Manitoba Co.*, 73 Minnesota, 417, 423; Ch. 253, Laws, 1901; *Railway Co.* v. *Pfaender*, 23 Minnesota, 217; *State* v. *Manitoba Co.*, 30 Minnesota, 311; *State* v. *Northern Pac. Ry. Co.*, 32 Minnesota, 294; *State* v. *Northern Pac. Ry. Co.*, 36 Minnesota, 207; *State* v. *Luther*, 56 Minnesota, 156; *Todd County* v. *Manitoba Co.*, 38 Minnesota, 534.

The State cannot take the benefits of the contract without making compensation therefor. *Bridge Co.* v. *Dix*, 6 How. 507, 534; *Gas Light Co.* v. *Light Co.*, 115 U. S. 650; *Stearns* v. *Minnesota*, 179 U. S. 256, distinguished.

The legislature of the State had power under the constitution to make a valid and irrepealable contract modifying the provisions as to taxation of the act of May 22, 1857. Cases *supra*.

The vicissitudes through which these four original land-grant companies passed are stated in *Huff* v. *Winona & St. Peter Co.*, 11 Minnesota, 181; *Fitz* v. *Minnesota Central Co.*, 11 Minnesota, 414; *First Div. Co.* v. *Parcher*, 14 Minnesota, 297; *State* v. *Winona & St. Peter Co.*, 21 Minnesota, 315; *St. Paul* v. *St. Paul & Sioux City Co.*, 23 Minnesota, 469, 472.

It was within the power of the State, acting as trustee of the land-grant, to make such contract with reference to the tax-

ation of the roads for whose benefit the grant was made as in its opinion would best accomplish the objects of the trust.

The contract does not create an exemption from taxation but provides a commuted or substituted form of taxation. It is a tax against property, not against the person. *Stearns* v. *Minnesota*, 179 U. S. 223; *St. Paul* v. *St. Paul S. C. R. Co.*, 23 Minnesota, 469, 471; *State* v. *Nor. Pac. Co.*, 32 Minnesota, 294, 295; *Hennepin County* v. *Manitoba Co.*, 33 Minnesota, 534, 535; *County of Ramsey* v. *Railway Co.*, 33 Minnesota, 537; *County of Todd* v. *Manitoba Co.*, 38 Minnesota, 163; *St. Paul* v. *Manitoba Co.*, 39 Minnesota, 112, 113; *State* v. *Luther*, 56 Minnesota, 156, 160; *Traverse County* v. *Manitoba Co.*, 73 Minnesota, 417, 425; *State* v. *Koerner*, 85 Minnesota, 149, 150; *State* v. *Telephone Co.*, 120 N. W. Rep. 534, 538.

The contract was not personal to the Minnesota Company, but with the railroads and the other franchises, powers, privileges and immunities granted by the charter, was transferable to the successors of that company. Cases *supra*, and *First Div. Co.* v. *Parcher*, 14 Minnesota, 297; *County of Nobles* v. *Railroad Co.*, 26 Minnesota, 294, 298; *County of Ramsey* v. *Railway Co.*, 33 Minnesota, 537; *Board* v. *Railroad Co.*, 49 N. J. Law, 193; *S. C.*, 7 Atl. Rep. 826, 838.

The State of Minnesota, the St. Paul Company, the First Division Company and the Manitoba Company successively acquired by transfer all the franchises and immunities, including the franchise to be a corporation, granted to the Minnesota Company by the act of May 22, 1857.

The contract as to taxation is a right which passed by transfer under the description "property, franchises, rights and privileges." Cases *supra*, and *Railroad Co.* v. *Maryland*, 10 How. 376, 394; *Tomlinson* v. *Branch*, 15 Wall. 460; *Humphrey* v. *Pegues*, 16 Wall. 244, 247; *The Delaware Railroad Tax Case*, 18 Wall. 206; *Railroad Co.* v. *Georgia*, 92 U. S. 665; *Railroad Co.* v. *Virginia*, 94 U. S. 718; *Green County* v. *Conness*, 109 U. S. 104; *Railroad Co.* v. *Wright*, 116 U. S. 231; *Tennessee* v. *Whitworth*, 117 U. S. 139, 146; *Given* v. *Wright*, 117 U. S. 648.

Neither the transferability of the contract as to taxation nor the capacity of the St. Paul Company, the First Division Company, the Manitoba Company and the plaintiff in error to acquire the contract has been destroyed by the constitution of the State of Minnesota.

Such was the settled rule of law in Minnesota until the decision in the present case. The rule was an established rule of property.

A valid contract cannot be affected any more by constitutional amendment than by act of legislature. *Gunn* v. *Barry*, 15 Wall. 610, 623; *State* v. *Young*, 29 Minnesota, 474, 550; *Dartmouth College Case*, 4 Wheat. 518, 652; *Planter's Bank* v. *Sharp*, 6 How. 301, 321; *Walker* v. *Whitehead*, 16 Wall. 314; *Railway Co.* v. *Texas*, 170 U. S. 243, 256.

Constitutional provisions do not enter into the merger or prevent the acquisition by the absorbing company of the franchises and immunities of the merged companies. *State* v. *Railroad Co.*, 45 Maryland, 361; *Tomlinson* v. *Branch*, 15 Wall. 460; *Charleston* v. *Branch*, 15 Wall. 470; *Branch* v. *Charleston*, 92 U. S. 677; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Railroad Co.* v. *Maine*, 96 U. S. 499; *Shields* v. *Ohio*, 95 U. S. 319; *Railroad Co.* v. *Palmes*, 109 U. S. 244; see also *Railroad Co.* v. *Commissioners*, 112 U. S. 609; *Railroad Co.* v. *Berry*, 113 U. S. 465; *Railroad Co.* v. *Miller*, 114 U. S. 176; *Railroad Co.* v. *Missouri*, 152 U. S. 301; *Bank* v. *Tennessee*, 161 U. S. 186; *Railroad Co.* v. *Adams*, 180 U. S. 1; *Railroad Co.* v. *Hewes*, 183 U. S. 66; *Railroad Co.* v. *Maryland*, 187 U. S. 258; *Traction Co.* v. *Algelt*, 200 U. S. 304; *Railway Co.* v. *Rochester*, 205 U. S. 236; *Railroad Co.* v. *Vicksburg*, 209 U. S. 358.

Mr. George T. Simpson, Attorney General of the State of Minnesota, and *Mr. George W. Peterson*, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This suit by the State of Minnesota against the Great North-

ern Railway Company, a corporation organized and existing under the laws of that State, has for its object to recover the balance alleged to be due the State on account of taxes from the railway company, under a statute known as Chapter 253 of the General Laws of Minnesota of 1903.

The controlling question in the case relates to the constitutionality of certain sections of that statute, as follows: "§ 1. Every railroad company owning or operating any line of railway situated within or partly within this State shall, during the year 1905, and annually thereafter, pay into the treasury of this State in lieu of all taxes and assessments upon all property within this State owned and operated for railway purposes by such company, including the equipment, appurtenances, appendages and franchises thereof, a sum of money equal to *four* per cent of the *gross earnings* derived from the operation of such line of railway within this State; and the annual payment of such sum shall be in full *and in lieu of all other taxes and assessments upon the property and franchises so taxed.* The lands acquired by public grants shall be and remain exempt from taxation until sold or contracted to be sold or conveyed, as provided in the respective acts whereby such grants were made or recognized. § 2. The term 'gross earnings derived from the operation of such line of railway within this State' as used in section one of this act is hereby declared and shall be construed to mean all earnings on business beginning and ending within the State and a proportion based upon the proportion of the mileage within the State to the entire mileage over which such business is done of earnings on all interstate business passing through, into or out of the State." Gen. Laws, Minn., 1903, c. 253, p. 375.

The effect of the statute, Minnesota asserts, was to place the Great Northern Railway Company, as to rates, on the same basis of taxation as other railroads in the State. But, the company contended in the courts below, and contends here, that the requirement to pay for 1905 and annually thereafter *four* per cent of the gross earnings derived from the operation

of its railroad within the State was in violation of a statute enacted May 22d, 1857, by the Territory of Minnesota, incorporating the Minnesota and Pacific Railroad Company, and which fixed *three* per centum of the gross earnings of that company's railroad property as a tax in lieu of all taxes and assessments whatever. Sess. Laws, Minn., 1857, Extra Sess., §§ 1, 4, 18. The provisions in the latter statute, it is alleged, constituted a contract with that company, (the remote predecessor of the defendant company), which was protected, in favor of the latter, by the contract clause of the Constitution of the United States, as well as by the clause of the Fourteenth Amendment forbidding the deprivation of property without due process of law. All this was disputed by the State.

The gross earnings of the company during 1905 were, it is conceded, $18,540,396.27, four per cent of which, $741,615.85, the State demanded under the act of 1903. The company paid $620,878.47 on account of gross earnings for 1905, and refused to pay more. For the difference, $120,737.38, with interest, the State claimed judgment. The railway company admitted its liability to pay four per cent on the gross earnings derived from certain lines operated by it in 1905, but denied liability in excess of three per cent on the gross earnings derived, during the same period, from certain other lines. It insisted that the sum paid by it before being sued herein was all that could be legally demanded by the State for the year 1905.

The trial court made certain findings of fact and announced certain conclusions of law that were not satisfactory to either party. But it was stipulated that, on the basis of those findings and conclusions, the State would be entitled to a judgment for $32,285.94, with interest from July 11th, 1898, and costs; and for that sum judgment was given by the trial court against the railway company. Each party prosecuted an appeal to the Supreme Court of Minnesota. That court sustained the State's appeal and reversed the judgment with directions to enter judgment in favor of the State for the entire amount it had

sued for—$120,737.88, with interest. 106 Minnesota, 303. Hence this writ of error by the railway company.

It is necessary to a clear understanding of the question of contract, as well as the objections raised against the act of 1903, that we state certain facts in the history of the taxation of railroad property in Minnesota.

By an act approved February 26th, 1857, Congress authorized the people of the Territory of Minnesota to form a constitution preparatory to its admission into the Union as a State on an equal footing with the original States. 11 Stat. 166, c. 60. And by an act passed March 3d, 1857, it made a grant of lands to the Territory to aid in the construction of railroads between certain points with branches between certain other points, and provided that the lands so granted should be subject to the future disposal by the Legislature of the Territory or future State for the purposes expressed by Congress, and no other. 11 Stat. 195, 196, c. 99, §§ 1, 3.

In execution of the trust created by that act of Congress, the Legislative Assembly of the Territory, by the above act of May 22d, 1857, incorporated the Minnesota and Pacific Railroad Company, investing it with all the powers, privileges, franchises and immunities incident to a corporation, and empowering it to survey, locate, construct, maintain and operate a railroad with one or more tracks or lines between certain named places; to which end it was authorized to enter upon and appropriate lands belonging to the Territory or future State, not exceeding a prescribed width throughout the entire length of its railroad. Sess. Laws Minn., 1857, Extra Sess., p. 1, §§ 1, 4, 18.

The 18th section of the latter act constitutes an important feature in this case. So much of that section as is material in determining this case is as follows: "*In consideration of the grants, privileges and franchises* herein conferred on the said Minnesota and Pacific Railroad Company, the said company shall and will, on or before the first day of March in each year,

pay into the treasury of the Territory or future State, *three* per centum of the *gross earnings* of the said railroad, for the year ending on the last day of the preceding December, *in lieu of all taxes and assessment whatever,* . . . and for securing to the Territory or State the payment of the aforesaid per centum it is hereby declared that the State shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company. The first payment shall be made on the first day of March next after fifty miles of said railroad shall be completed, and such payment shall be in lieu of all taxes and in full of all claims of the Territory or State for the grant hereby made, *and in consideration of such annual payments* the said company shall be *forever exempt from all assessments and taxes* whatever by the Territory or State which shall succeed the Territory, or by any county, city, town, village or other municipal authority in the Territory or State upon all stock in the said 'Minnesota and Pacific Railroad Company,' whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal, or mixed, held by said company, and said *land* granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be *exempt from all taxation till sold and conveyed by said company.*" This act, it must be remembered, was passed before Minnesota became a State.

By an act approved May 11th, 1858, Minnesota was admitted into the Union as a State, with the constitution it had adopted by popular vote on the thirteenth of October previous, 11 Stat. 285, c. 31; which constitution provided that all taxes to be raised in the State "shall be as *nearly equal as may be,* and *all* property on which taxes are to be levied shall have *a cash valuation* and *be equalized and uniform throughout the State.*" Another section in the same article required that

"laws shall be passed taxing all moneys, credits, investments in bonds, stock, joint stock companies or otherwise, and also *all* real and personal property, *according to its true value in money;*" also, that certain specified kinds of property, devoted to charitable and public uses, "shall, by general laws, be exempt from taxation." Art. 9, §§ 1, 3. But *railroad property was not included in such exemptions;* therefore, after the state constitution went into operation, railroad property—if no inviolable contract controlled the matter—was taxable in Minnesota only on the basis fixed in that instrument.

On the twenty-third of June, 1860, there was a foreclosure of two mortgages, (the principal one having been executed July 31st, 1858, and a supplementary one executed November 27th, 1856), which the Minnesota and Pacific Railroad Company, under the authority of an act of the legislature, had given to secure moneys borrowed by it as well as certain bonds it had issued. Those mortgages covered the company's line and all its property and franchises. Their validity is not questioned in this case. The State, being the highest and best bidder at the foreclosure sale, became the purchaser on the twenty-third of June, 1860, and by that purchase, the Supreme Court of Minnesota has said, "the State became vested with all the railroad properties, and, no redemption being made, the company became wholly divested of its rights."

Subsequently, on March 8th, 1861, the Legislature passed an act entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad," which provided "that the road, lands, property, rights, franchises, privileges and immunities belonging or pertaining to the Minnesota and Pacific Railroad Company, prior to the sale and purchase thereof by the Governor on the 23d day of June, 1860, on behalf of the State, and now claimed or held by the State, and all bonds and securities of the said company held by the State, shall be and are hereby released, discharged and restored to the said company free of all liens or claims thereon held by or

in behalf of the State." Section 1. The act named certain conditions to be performed by the company in respect of the proposed railroad, and if they were not performed by the time specified, then all the rights and benefits conferred upon said company "shall be forfeited to the State absolutely without any further act or ceremony whatever." Laws, Minn., 1861, c. 5, p. 235. The company having failed wholly to comply with the conditions prescribed, all the rights, privileges, franchises and immunities granted to it by the last named act were resumed by and reinvested in the State.

Thereafter, by an act of March 10th, 1862, the Legislature, with a view of facilitating the construction of the Minnesota and Pacific Railroad and of amending and continuing the act of incorporation relating thereto, granted to certain named parties under the corporate name of the St. Paul and Pacific Railroad Company "all the rights, privileges, property, franchises, property and interests" granted by the Territory of Minnesota to the Minnesota and Pacific Railroad Company by the above act of May 22d, 1857, "with all the immunities, rights, property, benefits and privileges which the said Minnesota and Pacific Railroad Company had, or might, or could have by reason of the passage of said act, free and clear of all liens thereon, and free from all liens and claims of the State of Minnesota against the same, except such as are retained by the provisions of this act." Special Laws, Minn., 1862, c. 20.

We take from the opinion of the Supreme Court of the State this additional statement of facts, 106 Minnesota, 303, 319: "By Chapter 3, p. 174, Sp. Laws 1864, the St. Paul and Pacific Company was authorized to issue one or more classes of preferred stock and to enter into agreements or contracts with the holders thereof for the administration of the portion of the road to which the stock might pertain, and for the independent organization by such holders to enable them separately or in conjunction with the general directors of the road to exercise supervision and control of their separate portion of the road. Under this act preferred stock was duly issued and

the holders thereof, acting under the statute just referred to, organized and incorporated the First Division of the St. Paul and Pacific Railroad Company, which company, through its officers, thereafter coöperated with the St. Paul and Pacific Company in the construction of the road. The act incorporating the latter named company contained no express reference to the rate or system of taxation to be imposed upon the company, but it is claimed that all the provisions on this subject contained in the old Minnesota and Pacific Company's charter passed by the terms of the act incorporating it and were included within the designation of 'rights, privileges, and immunities.' However, by Chapter 6, p. 40, Sp. Laws 1865, an act to facilitate the completion of the St. Paul and Pacific Railroad and branches, [March 2d, 1865], the Legislature imposed a different rate of taxation than that contained in the Minnesota and Pacific Company's charter, in this, that by this act the company was required to pay during the first three years, after thirty miles of its road had been completed, one per cent of its gross earnings, two per cent during the succeeding seven years, and thereafter three per cent. The act also contained a provision that the lands of the company should be subject to taxation as soon as sold, leased, or contracted to be sold or leased. The St. Paul and Pacific Company formally accepted this act, and the First Division Company thereafter complied with its terms and provisions by paying the rate of taxation thereby imposed. The organization of the First Division Company was legalized and confirmed by Chap. 1, p. 11, Sp. Laws 1866.

"Between 1862 and 1871, both these companies separately executed trust deeds and mortgages covering the main line of the road and all its branches according to the ownership of the same by the separate companies, thereby conveying to the mortgagees or trustees all property, rights, privileges, franchises, and immunities held, owned, or possessed by either company. Both companies made default in the payment of the indebtedness secured by these instruments and they were duly

foreclosed in the manner prescribed by law, John S. Barnes, for himself and associates, being the purchaser at the sale made under the foreclosure as to the branch line. Thereafter Barnes and his associates incorporated under the laws of the State the St. Paul, Minneapolis and Manitoba Railroad Company, and to this company they conveyed all rights acquired under the foreclosure stated. Thereafter the mortgage on the main line was foreclosed and the Manitoba Company became the purchaser. By these foreclosures the Manitoba Company became the sole owner of all rights, privileges, and property of the two other companies. The Manitoba Company leased its line, together with all property rights, franchises, privileges, and immunities to the defendant Great Northern Company, incorporated under the laws of the State for the term of 999 years. The old Pacific and the First Division Companies paid taxes to the State upon the basis of the act of 1865, already referred to, viz., one per cent for the first three years after the completion of thirty miles of road, two per cent for the succeeding seven years, and thereafter, and until their rights passed from them by the foreclosure proceedings, just referred to, at the rate of three per cent of their gross earnings. The Manitoba Company paid this rate at all times during its ownership and operation of the road."

In 1871 the provisions of the state constitution in relation to the taxation of railroad property were extended by an amendment. That amendment was as follows: "Art. 4, sec. 32 (*a*). Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State, or operating its roads therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this State a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same

shall take effect or be in force, be submitted to a vote of the people of this State, and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them." This amendment was submitted to popular vote and approved by the electors. It thereby became, to all intents and purposes, a part of the constitution. Const. Minn., Art. 4, § 32*a*.

After the adoption of that amendment the Legislature passed the above act of 1903, increasing the tax to be paid for 1905 and annually thereafter on the *gross earnings of railroads* operated within the State to *four* per cent. That act was submitted to a vote of the electors and was sustained by the requisite majority.

As already stated, the railway company insists that the territorial act of May 22d, 1857, incorporating the Minnesota and Pacific Railroad Company, constituted a valid and irrepealable contract with that company of which its successors in interest could avail themselves and that its obligation could not be subsequently impaired by any legislative enactment, or by any provision of the state constitution adopted in 1858 after the act of 1857 was passed or as amended in 1871.

We have seen that the (old) Minnesota and Pacific Railroad Company was required, by the territorial act of May 22d, 1857, "in consideration of the grants, privileges and franchises" conferred upon it, to pay annually into the treasury of the Territory or future State *three* per centum of its gross earnings for the preceding year, in lieu of all taxes and assessments whatever, and that, "in consideration of such annual payments," the company should be forever exempt from all assessments and taxes whatever, territorial, state or municipal, upon all its stock, by whomsoever held, and upon all its franchises or estate, real, personal or mixed, and that the land granted by Congress and conveyed to the company under the authority of the State should be exempt from all taxation until sold and conveyed by it.

The Supreme Court of the State expressed doubt whether

the act of 1857 was so worded as to constitute, in itself, a contract that would prevent the Territory or the State from adopting and enforcing any different rule of taxation from that prescribed by that act. We share this doubt of the state court, that act being alone considered, and we are somewhat justified in so doing by the fact that the state Legislature, by the act of 1865, changed the rate of taxation as to this property, then operated by the St. Paul and Pacific Company (a predecessor of the plaintiff), which had undertaken to complete the contemplated railroad and branches. The act of 1865 seems to have been accepted and complied with by the successors in interest of the Minnesota and Pacific Railroad Company, and amounted, as the court below well said, to a practical construction by the parties of the alleged contract of exemption to be found in the territorial act of 1857. But we forbear any direct decision of this question; for there are other grounds upon which our judgment will be based.

The state court recognized the doctrine as firmly established that a legislature, unless restrained by state constitutional provisions, may contract to limit its power of taxation. But it held that, as taxation was essential to the existence and operations of government, an exemption from taxes cannot be presumed from doubtful language but must be expressed in words so clear and explicit as to leave no reasonable doubt that the exemption was intended to be given. And such is the settled rule announced by this court in cases familiar to counsel and too numerous to be cited. Passing without direct decision the question whether the act of 1857 constituted, in itself, an irrepealable contract as between the Territory and the (old) Minnesota and Pacific Railroad Company, the Supreme Court of Minnesota considered the question whether the contract was personal to that particular company, or "did it become attached as an appurtenant to the charter, rights, franchises, and privileges of the company and pass down the line to the defendant." The first clause of that question was answered by the court in the affirmative: the latter in the

negative—the court citing in support of its conclusions the following cases: *Morgan* v. *Louisiana*, 93 U. S. 217; *Gulf &c. Ry. Co.* v. *Miller*, 114 U. S. 176; *Covington Turnpike Co.* v. *Sanford*, 164 U. S. 578; *City of Rochester* v. *Railway Co.*, 182 N. Y. 99; *Memphis Ry. Co.* v. *Com'rs*, 112 U. S. 609. We need not extend the discussion upon that point.

But the state court said, and correctly, that there was another and stronger reason why it should be adjudged that an irrevocable contract did not and could not pass to the companies that claimed to have succeeded to the rights of the Minnesota and Pacific Railroad Company. That reason is suggested by the facts and circumstances now to be stated by us.

The rights, franchises, privileges or immunities of every kind covered by the above territorial act of 1857 were wholly lost to the old Minnesota and Pacific Railroad Company when the State, by its purchase of June 23d, 1860, at the foreclosure sale, became completely reinvested with them. Those rights, franchises, privileges and immunities were swept away from that company by that sale. Now *when that purchase was made* the Territory had become a State, with a constitution expressly requiring the equal and uniform taxation of *all* real and personal property in the State *upon a cash basis* and authorized the exemption from taxation of certain specified kinds of property, devoted to public and charitable uses; but, as we have seen, *railroad property was not included among the properties that could be so exempted*. It is, therefore, to be taken that the Constitution of the State after it went into operation in 1858, required all railroads to be taxed by an equal and uniform rule and on a cash basis. The State having, by its purchase, become reinvested, in 1860, with all the rights, franchises and privileges granted to the Minnesota and Pacific Railroad in 1857 could, speaking generally, have disposed of such interests at will, but, clearly, it could not have disposed of the interests acquired by its purchase, in any manner that was inconsistent with, or which would have rendered nuga-

tory, the requirements or injunctions of the state constitution. Even if the territorial act of 1857, considered alone, might have been regarded as a contract with the State in respect of the amount of the tax to be paid by the railroad company named in it, that contract ceased to have any force, as against the State, when the State in 1860 became, by purchase at foreclosure sale, the owner of all the rights, property, immunities and franchises of the company. The Legislature of the State could not, *after the state constitution went into operation*, have reinvested the old railroad company with such property, rights, immunities or franchises, or have transferred them to a new corporation or to a consolidated railroad corporation created by the union of prior corporations, *accompanied* by an exemption from taxation that was inconsistent with the constitution. Therefore, when by the act of March 8th, 1861, the State released and restored to the Minnesota and Pacific Railroad Company the road, lands, property, rights, franchises, privileges and immunities which had belonged to that company prior to the State's purchase of 1860, there did not go, there could not have gone, with that release or restoration an exemption from taxation that was forbidden by the state constitution then in operation. That instrument stood in the way of such legislation. And, upon like grounds, it must be held that no qualified or partial exemption from taxation could have been acquired by the St. Paul and Pacific Railroad Company under the act of March, 1862, which assumed to pass to that company all the rights, benefits, privileges, property, franchises and interests of the Minnesota and Pacific Railroad Company, which the State had acquired by its second purchase. It was not competent for the Legislature, *after* the state constitution went into operation, to agree, for the State, that the payment of any *given per cent of the gross earnings* of the railroad corporation should be in lieu of all other taxation. The constitution again stood in the way.

Apart from the decision of the Supreme Court of Minnesota in this case the views just expressed are abundantly supported

by adjudged cases. It is well to look at some of those cases, because the question relates to the existence or non-existence of a contract protected as to its obligation by the Constitution of the United States; and upon that question this court must exercise its independent judgment. *Douglas* v. *Kentucky*, 168 U. S. 489, 492, *and authorities there cited.*

In *Trask* v. *Maguire*, 18 Wall. 401, 404, 409, it appeared that a railroad company was incorporated with an exemption from state and county taxes. The corporation obtained a loan from the State. The act under which the loan was made and the bonds given to secure it, provided that the acceptance of such bonds should be a mortgage of the road and every part thereof for the benefit of the State. *Subsequently*, the State adopted a new constitution, which declared that no property, real or personal, should be exempt from taxation, except such as was used exclusively for public schools or belonged to the United States, and also forbade the Legislature to pass any special laws exempting the property of any named person or corporation from taxation. The Legislature passed an act under which proceedings were instituted against defaulting railroad companies to foreclose the State's lien. Pending those proceedings, another act was passed, declaring that any corporation, purchasing at such a foreclosure sale, should have the same power, franchises, rights and privileges and be subject to the same liabilities and restrictions as the corporation whose property and franchises were to be sold. A sale was had and the State became the purchaser of the defaulting railroad and its appurtenances. It was then sold to a private person, who, with his associates, organized a new corporation with the same name as the old one. The question was whether the last corporation was entitled to the immunity from taxation granted to the original company. This court, speaking by Mr. Justice Field, said: "When the State became the purchaser *the immunity ceased;* the property stood in its hands precisely the same as any other unincumbered property of the State, exempt from taxation, not by virtue of any previous

stipulation with the company, but as all property of the State is thus exempt. Subsequently the road and its appurtenances, and all the franchises, which, under the new constitution of Missouri, adopted in 1865, were transferable by the State, were sold by the commissioners to McKay, Vogel, and Simmons, who conveyed the same to Thomas Allen, who with others, in July, 1867, became incorporated under the name of the St. Louis and Iron Mountain Railroad Company. That company is still in existence, and is one of the defendants herein. To it Allen transferred all the rights and privileges acquired from the State. The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges, and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company had possessed, if it were competent for the Legislature *at the time, under the new constitution,* to confer this privilege. The question, therefore, is, whether the Legislature was competent to grant the immunity claimed, under that constitution, which went into operation on the fourth of July, 1865, previous to the passage of any of the acts authorizing the proceedings under which the new company acquired its rights. . . . The inhibition of the constitution applies in all its force *against the renewal of an exemption equally as against its original creation; and this inhibition the Legislature could not disregard in providing for the sale of the property which it had purchased.*"

The *Trask case* was cited with approval in *Morgan* v. *Louisiana,* 93 U. S. 217, 224, and *Louisiana & N. R. R. Co.* v. *Palmes,* 109 U. S. 244, 254.

In the latter case it appeared that at a particular date the Legislature of Florida passed an act that was valid under the existing state constitution, which exempted from taxation the capital stock of railroad companies accepting its provi-

sions. The road, property, franchises and privileges under that act were acquired by a certain railroad company; there was a foreclosure and sale under which the road, property and franchises were ultimately acquired by another railroad company, and the Legislature, by an act, declared that the latter company, as assignees of the original company, should have the same exemption as the old company. But *before the above foreclosure a new state constitution came into operation,* which provided for an uniform and equal rate of taxation, and that the property of corporations, whenever created, should be subject to taxation. This court, speaking by Mr. Justice Matthews, said: "It does not weaken this conclusion to say that the exemption contained in the Internal Improvement Act of 1855 was authorized by the Constitution of the State then in force, which may be admitted, and that it was assignable in its nature or by its terms in such manner that it became impressed upon the property itself, into whosesoever hands it should afterwards come. . . . *After the adoption of the Constitution of Florida of* 1868, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited. In the case of the Pensacola and Louisville Railroad Company, 1872, the capacity at that time to receive this privilege depended altogether upon the Legislative Act amending its charter to that effect; and if any doubt as to this might be reasonably entertained, certainly none can arise as to the Pensacola Railroad Company, which derived all its powers and its very existence from legislation dependent for its validity wholly upon the Constitution of 1868. The prohibition which forbids the Legislature from exempting the property of railroad corporations from taxation, makes it impossible for the Legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation."

In *Memphis Railroad Co.* v. *Commissioners,* 112 U. S. 609, 623, which was a case in which a railroad claimed an exemp-

tion from taxation, enjoyed by its predecessor, this court said: "It is, of course, the law in force *at the time the transaction is consummated and made effectual,* that must be looked to as determining its validity and effect. This is the principle on which this court proceeded in deciding the case of *Railroad Co.* v. *Georgia,* 98 U. S. 359. The franchise *to be a corporation* remained in, and was exercised by, the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the State, and by a new grant then made passed to the corporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing. Our conclusions, then, are, that the exemption from taxation contained in the 28th section of the act of January 11, 1853, was intended to apply only to the Memphis and Little Rock Railroad Company as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway and the right to make profit therefrom; and that the appellant, not having become a corporate body *until after the restrictions in the Constitution of* 1874 *took effect,* was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation." That case was referred to with approval in *Mercantile Bank* v. *Tennessee,* 161 U. S. 161, where it was held that a sale of a corporate charter and franchises transferred to the purchaser only the right to reorganize as a corporation, "subject to the laws, constitutional and otherwise, existing at the time of the organization."

A case in point is *Keokuk & Western Railroad Company* v. *Missouri,* 152 U. S. 301, 312. Under the authority of a legislative enactment, passed in 1869, a Missouri corporation was consolidated in 1870 with an Iowa corporation, created in

1857, and the charter of which contained an exemption of its stock from taxation for a specified period. The consolidated road was sold in 1886 under a decree of foreclosure of a mortgage given by the Iowa corporation and conveyed to the Keokuk and Western Railroad Company. The latter company claimed the benefit of the exemption contained in the charter of the company created in 1857. *Between that date and the passage of the act of* 1869 *a new state constitution was adopted*, and it provided that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." After considering the general question whether an immunity from taxation passed to the purchaser of the franchises, rights, and privileges of a railroad company under a foreclosure of a mortgage, the court said: "But the decisive answer to this objection is that the Legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, *it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of* 1869."

In *Yazoo & Miss. Valley Ry. Co.* v. *Adams*, 180 U. S. 1, 23, which related to an exemption from taxation claimed by a company consolidated in 1892 by the union of companies organized in 1882, and which consolidation was held to create a new corporation, this court said: "But it is scarcely necessary

to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the constitution of 1890, with the disabilities attaching thereto, among which is the provision that 'the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals.' Even if the Legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the constitution would be interpreted as nullifying it to that extent. A similar remark may be made with regard to the provision that these companies might consolidate upon such terms as they should agree upon. Obviously such terms must be consistent with the law existing *at the time of the consolidation*. . . . Under no circumstances would they be interpreted as conveying rights to the new corporation which the Legislature was incompetent to confer."

In *Rochester Ry. Co.* v. *Rochester*, 205 U. S. 236, 254, 255, it was held, in respect to a legislative enactment assuming to transfer to a particular corporation an exemption granted to a former corporation, the court, after a full reference to the adjudged cases, held: "No corporation can receive by transfer from another an exemption from taxation or governmental regulation which is inconsistent with its own charter *or* with the constitution or laws of the State then applicable, and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it;" that "those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws *then in force*, whether in the constitution, in general laws or in the charter itself."

The recent case of *Yazoo & Miss. Valley R. R. Co.* v. *Vicksburg*, 209 U. S. 358, 364, 365, was the case of a consolidated corporation claiming the benefit of an exemption legally given to its predecessor before the adoption of a state constitution prohibiting the exemption of corporate property

from taxation. This court said: "The exemption to the former constituent company could not inure to the consolidated company without, in effect, ignoring the constitutional provision. . . . The formation of the consolidated company was not imposed upon the complainant; it had the privilege of standing upon such rights as it had by contract or otherwise under the former legislation in force before the adoption of the new constitution. When it saw fit to enter into the consolidation and form a new corporation in 1892 the constitution *then in force* in the State became the law of its corporate being, and the requirement that corporate property should not be exempt from taxation then became binding upon it, as upon all other corporations formed under the new organic law."

In view of the adjudged cases it would seem clear that after the Minnesota constitution went into operation in 1858 the Legislature could not, by legislation or otherwise, enter into a binding contract for a complete or partial exemption, either in favor of the corporation originally created by the Territory in 1857, or in favor of a new railroad corporation or of one created by the consolidation of old corporations. It must have been controlled by the fundamental law of the State. So the highest court of Minnesota has held in this case. And so we hold. It follows that legislative acts, relating to the property and railroads here in question, and passed after the state constitution took effect, which proceeded, in the matter of taxation on grounds of taxation different from those established by that instrument, were ineffectual.

We have not deemed it necessary in this discussion to refer in detail to the numerous cases in the Supreme Court of the State which have been cited by counsel. This course has been pursued for two reasons: 1. The state court, in its opinion in the present case, said: "That the question here presented, viz., whether the provisions of the Minnesota and Pacific Company's charter on the subject of the earnings tax constituted an irrevocable contract was not involved in any prior litigation be-

tween the State and the railroad company, and as what was said in the previous cases bearing upon the question was wholly unnecessary to the decision of the particular case, and therefore not of binding force or effect, we take up and dispose of the present case as though the question were, as it is, here for the first time." We accept that view of the state court as to the scope of its own decisions. 2. The question just stated—the question of the existence or non-existence of a binding contract with the State—is one peculiarly for the final determination of this court. The authorities heretofore cited by us show that upon an issue of that kind this court must, upon its own responsibility and independent judgment, determine the legal rights of the parties under the clause of the Federal Constitution protecting the obligation of contracts against being impaired by state legislation.

In the present case it is gratifying that there is a concurrence of views between this court and the state court upon the question whether the plaintiff in error, the Great Northern Railway Company, described by the state court as the "successor in interest of all the prior companies," was entitled, as upon contract, to claim the benefit of the three per centum gross earnings tax provision in the act of 1857. And this seems to be a determination of the only question of a Federal nature arising on this writ of error and which should be now decided; for, if the contention of the railroad company as to that question be overruled—as both this court and the state court agree that it must be—it would only remain to inquire whether the act of 1903, prescribing a four per centum gross earnings tax, was authorized by the state constitution, as amended in 1871. The Supreme Court of the State adjudges that it was so authorized, but that is a state or local question upon which this court need not express its opinion. It is true that one of the assignments of error before the state court was that the act of 1903 was inconsistent with the due process clause of the Federal Constitution. But the suggestion was not much pressed in argument; and it cannot, under the evi-

dence before us in this case, be assumed that the rate prescribed by the act of 1903 is confiscatory either in its nature or in its necessary operation. If, when the act of 1903 was passed, the State was not fettered by inviolable contracts in respect of the taxation of the gross earnings of railroad property, there was nothing to prevent the Legislature, instructed by a popular vote, from prescribing an uniform gross earnings tax for all railroad property operated in the State. There being no adequate proof showing the contrary, the rate prescribed by that act must be taken as being within the power of the Legislature to establish and not as being confiscatory. There is absolutely nothing in the record that would justify the conclusion that the rate fixed by the act of 1903 was confiscatory in its nature, that is, wanting in the due process of law enjoined by the Constitution.

One other matter deserves notice. Some reference was made at the argument to *Stearns* v. *Minnesota*, 179 U. S. 223, 230, 240, 253. There is nothing in the judgment in that case which at all conflicts with or controls the decision in this case. That case involved only the question whether certain *lands* owned by the defendant railroad companies, but which were not used in the operation of their roads in the State, were subject to taxation according to their value or were exempted from ordinary rule of taxation by virtue of statutes, like that of 1857, passed after the state constitution took effect. A similar question was adverted to in the present case and the state Supreme Court, referring to the charter of the Minnesota and Pacific Railroad Company, said: "Two distinct provisions on the subject of taxation were embodied therein, the first providing for a gross earnings tax in lieu of all other taxes and assessments, and second, an exemption of the *land* granted until sold or contracted to be sold by the company." Observing that the exemption in question did not pass as an appurtenant to the railroad properties in question and was not included within the expression 'rights, privileges, and immunities'—citing *Gulf &c. Ry. Co.* v. *Hewes*, 183 U. S. 66;

C. & O. Ry. Co. v. *Miller,* 114 U. S. 176; *Lake* v. *Drummond,* 49 S. E. Rep. 506; *Rochester* v. *Ry. Co.,* 182 N. Y. 99; *Covington Turnpike Co.* v. *Sandford,* 164 U. S. 578—the court said: "A distinction must not be overlooked when considering the assignability of a tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land, granted to a railroad company to aid in the construction of a railroad company, is specifically exempted from taxation until sold by the company, and the company accepts, in consideration of the exemption, the exemption attaches to and follows the land. *New Jersey* v. *Wilson,* 7 Cranch, 164; *State* v. *Hicks,* 30 Am. Dec. 423; *Ry. Co.* v. *State,* 75 Texas, 356. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it." In the *Stearns case* the court determined only the question whether the *lands* of the railroad company were taxable. It held, upon the showing there made, that there was a valid contract with the railroad companies in respect to the taxation of the lands there in question which it was beyond the power of the State to impair by legislation. Nothing beyond that was actually adjudged in the *Stearns case.* No such question arises in the present case. There is no attempt here to tax the *lands* granted by the territorial act of 1857 or by any other act.

The State sues only for the balance due to it on account of taxes imposed by the act of 1903 on the *gross earnings* of property used and operated within its limits for railroad purposes.

Perceiving no error in the record as to the Federal question involved, the judgment must be affirmed.

It is so ordered.

CHICAGO GREAT WESTERN RAILWAY COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 377. Argued November 8, 1909.—Decided February 21, 1910.

On the authority of *Great Northern Railway Company* v. *Minnesota*, *ante*, p. 206, held that:

As against the plaintiff in error, the act of Minnesota of 1903, requiring all railroad companies to pay a tax equal to four per cent of its gross earnings, is not an unconstitutional impairment of a legislative contract created by an act passed in 1856 imposing a tax of two per cent on a railroad company whose franchise was transferred to plaintiff in error.

The judgment of the state court in which it was held that the legislative contract of exemption from taxation in favor of a railroad company which was under consideration did not pass unimpaired to another corporation acquiring the franchises of the former, and constitute an irrepealable contract so that the rate of taxation could not be subsequently altered by legislative enactment, affirmed.

106 Minnesota, 290, affirmed.

THIS suit, like that of the *Great Northern Railway Company* v. *Minnesota*, just decided, *ante*, p. 206, involves the constitutionality, as applied to the plaintiff in error, of Chapter 253, General Laws of Minnesota of 1903, requiring every railroad company owning or operating any line of railway in that State to pay an annual tax, commencing with 1905, equal to *four* per cent of the gross earnings derived from the operation of such line within the State.

The gross earnings received by the defendant company, during the year 1905, amounted to $1,248,890.93, four per cent of which is $49,959.24. The State alleges that the defendant refused to pay and has paid only $24,979.62—leaving a balance of $24,979.62, for which amount the State asked judgment.

The court of original jurisdiction sustained the contention of the company that it was liable only to a sum equal to *two* per cent of its gross earnings and gave judgment for the defendant.

That court was of opinion that a certain statute of the Territory of Minnesota, approved March 1st, 1856 (Laws of 1856, c. 47), constituted a valid contract between the Territory and State of Minnesota, on one side, and the Minnesota and Northwestern Railroad Company, on the other, and fixed the lawful rate of taxation to be paid by that company at two per cent of its gross earnings; that said contract was never forfeited or lost by the company, but was transferred and passed, first to the Chicago, St. Paul and Kansas City Railway, and subsequently to the defendant herein; and that the statute of 1903, fixing the tax at four per cent of the company's gross earnings, was unconstitutional when applied to the defendant herein.

The judgment was reversed by the Supreme Court of Minnesota, with directions to enter judgment in favor of the State for the full amount stated in its complaint. 106 Minnesota, 290, 300.

The facts and issues are so fully and accurately set forth by the Supreme Court of Minnesota that we take from its opinion the following statement of the case: "This action, like that of *State* v. *Great Northern Company, infra*, p. 303, 119 N. W. Rep. 202, filed herewith, involves the validity of chapter 253, p. 375, General Laws, 1903, increasing the rate of the gross earnings tax upon railroad companies in this State to 4%. As in the *Great Northern case*, defendant asserts an irrepealable contract, under which it claims the right forever to discharge its tax liability by the payment of a 2% rate. The fixed rate claimed by the Great Northern Company was 3%. The determination of the case involves, as in the other case, the construction of an old Territorial railroad charter, the facts with reference to which are as follows:

"By c. 47, p. 121, Territorial Laws 1854, the Minnesota and

Northwestern Railroad Company was duly incorporated and authorized to construct a railroad within the limits of the Territory, the line of which road in a general way was therein designated. The act was accepted by the persons named as incorporators, but no effort was made by them to construct the road. By c. 58, p. 148, Laws of 1855, the act incorporating the company was amended by adding thereto, among other things, a provision requiring the company to construct and equip fifty miles of its road within three years after the passage of the amendment, and the entire line within six years, in default of which, the act provided, the charter of the company and all grants and rights thereby conferred 'shall cease and be void.' This act also contained a clause reserving to the legislature the right of amendment after the expiration of twenty years. In the original charter, and also in the amendment just mentioned, the company was required to pay into the treasury of the Territory or future State 7% of its net earnings. Whether this was intended as a substitute for taxes to be levied and collected in the usual way was not expressly stated. But in 1856, by c. 47 of the laws of that year, p. 76, the charter was again amended by imposing a 2% gross earnings tax in lieu of all other taxes. It is upon this act and the rate of taxation therein imposed that defendant relies in support of its defense. Defendant claims to have succeeded to all the rights of this old company, including the right to an irrepealable 2% tax contract. The facts leading up to this asserted succession are as follows: The old company, though fully organized, wholly failed to construct its railroad within the time prescribed by its charter and did nothing in that direction until some time in 1884, thirty years after its organization and twenty-four years after the time limited for the completion of the road. By this failure the company forfeited all its rights under the charter and all grants thereby conferred 'ceased and were void.' But by c. 83, p. 221, Special Laws 1883, the legislature of the State recognized the existence of the corporation and in effect waived the default in the construction of

the road by authorizing the consolidation of 'its stocks, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Minnesota and Northwestern Railroad Company is authorized to construct and operate.' Sec. 2 of that act amended sec. 7 of the original charter by authorizing the construction of a line of road differing somewhat from that authorized by the old charter. The company was thus revived from its extended slumbers and proceeded to construct its road, and completed it some time in the year 1885. It thereafter operated the same until December of 1887, when it conveyed all its property 'contracts, rights, privileges and immunities' to the Chicago, St. Paul and Kansas City Railroad Company, a corporation created, organized and existing under the laws of the State of Iowa. Counsel for defendant treat this transfer as a consolidation of the two companies, authorized by the act of 1883. But as we read the documents by which the transfer was effected the transaction took the form of an absolute and unconditional sale by the Northwestern Company. The Kansas City Company took possession of the road and thereafter continued its operation until June, 1892, when it leased the line and all property connected therewith to the Chicago Great Western Railroad Company, defendant herein, a corporation organized and existing under the laws of the State of Illinois. Subsequently, in September, 1893, the Kansas City Company conveyed the property so leased, and all contracts, franchises and immunities, to its lessee, the Great Western Company, since which time the latter has continued in the operation of the road. Again, counsel claim that the conveyance by the Kansas City Company to defendant was a consolidation and authorized by law. This, however, is not important. The fact remains that the transaction resulted in an absolute transfer of the railroad property to defendant, and inasmuch as both those companies were foreign corporations, the laws of this State, would not control their dealings, and this State could neither authorize nor prohibit their consolidation.

But that question in no way controls the result in this case. The old Northwestern Company, after the completion of its road in 1885, commuted its taxes by the payment of the 2% rate imposed by the amendment of its charter in 1856, and the succeeding roads, including defendant, have paid the same rate.

"Defendant having refused to pay the rate prescribed by the statute under consideration, this action was brought to recover the amount of the increased rate. It is the contention of defendant that the terms of the old Northwestern charter fixing a two per cent rate constituted a contract between the company and the Territory or future State, irrevocable and irrepealable, to which defendant has succeeded, and that to enforce the new rate would impair the terms of the contract in violation of both the State and the Federal Constitutions. Defendant does not contend that the new rate is unreasonable or unfair or at all disproportionate to the rate paid by other taxpayers, but stands squarely upon its asserted legal right to a perpetual two per cent rate. The trial court sustained this view, ordered judgment for defendant, and the State appealed.

"The charter of this road has never heretofore been before the court for construction. No question has ever been raised relative to the rights of defendant or its predecessors upon the subject of taxation; and the construction of the old charter and amendatory acts, and right of the State to change the rate of taxation thereby imposed, are before us for the first time. Most of the questions involved were presented in the *Great Northern case*, where they were fully considered and disposed of adversely to the contentions of defendant. We there held, among other things, that the charter provisions of the old Minnesota and Pacific Company, upon which the Great Northern Company relied, did not constitute an irrepealable contract which passed unimpaired to the successors of that company; and further, that the gross earnings tax system first came into legal existence in this State by force of the consti-

tutional amendment of 1871 (Laws, 1871, p. 41, c. 18), and that it then became subject to the reserved right of the State to amend or repeal the same as public interests might justify or require. The language of the charter under consideration, in so far as it imposes this form of taxation, is for all practical purposes the same as that construed in the *Great Northern case*, and the conclusions there reached fully apply at bar, and we adopt and follow them."

Mr. George W. Peterson, with whom *Mr. George T. Simpson*, Attorney General of the State of Minnesota was on the brief, for defendant in error.

Mr. Frank B. Kellogg, *Mr. Cordenio A. Severance*, *Mr. Robert E. Olds* and *Mr. A. G. Briggs* for plaintiff in error, submitted.

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

The rights of the plaintiff in error depend primarily upon the construction of the act incorporating the Minnesota and Northwestern Railroad Company, Territorial Laws, 1854, c. 47, the amendatory act of 1855, c. 58, the amendatory act of 1856, c. 47, and the act of 1883, Special Laws, c. 83. That act of 1856 imposed a two per cent gross earnings tax in lieu of all other taxes. The Supreme Court of the State observed that until the present case arose it had never had occasion to construe the charter of the original company, and the acts amendatory thereof, nor determine whether the State could change the rate of taxation thereby imposed. It was of opinion that the question of taxation, here involved, was substantially the same as the one involved in *Great Northern Railway Company* v. *State of Minnesota*. That court consequently adjudged, upon the authority of that case, that the defendant, as a successor in interest of the Minnesota and Northwestern Railroad

Company, could not claim the benefit of an irrepealable, unchangeable contract relating to taxation that passed or could, under the state constitution, have passed, unimpaired from the old company to a successor in interest, or that prevented the State from enacting the statute of 1903, chapter 253, General Laws of 1903. Without repeating what was said in the former case, we hold, upon the grounds set forth in the opinion in that case, that the state court rightly held that the State was not prevented by contract from passing the gross earnings tax law of 1903, and it properly reversed the judgment of the court of original jurisdiction, with directions to enter judgment in favor of the State for the amount claimed in its complaint. The judgment herein must be affirmed.

It is so ordered.

BALLINGER, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. FROST.[1]

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

No. 54. Argued December 8, 1909.—Decided February 21, 1910.

The power of supervision and correction vested in the Secretary of the Interior over Indian allotments is not unlimited and arbitrary; it cannot be exercised to deprive any person of land the title to which has lawfully vested.

However reluctant the courts may be to interfere with the executive department, they must prevent attempted deprivation of lawfully acquired property and it is their duty to see that rights which have become vested pursuant to legislation of Congress are not disturbed by any action of an executive officer.

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[1] Docket title: No. 54. James Rudolph Garfield, Secretary of the Interior, *v.* The United States of America *ex rel.* Frost.

The head of a department of the Government is bound by the provisions of congressional legislation which he cannot violate, however laudable may be his motives.

After all the requirements of the act of Congress providing for distribution of Indian lands have been complied with, and the statutory period has elapsed without contest, the title of the allottee becomes fixed and absolute and only the ministerial duty of execution and delivery of the patent remains for the Secretary of the Interior.

The performance of a ministerial duty by an executive officer can be compelled by mandamus; and so held as to the delivery of patent to land selected by a Cherokee Indian allottee after all requirements of the acts of Congress under which the selection was made had been complied with.

30 App. D. C. 165, affirmed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Harr for plaintiff in error:

Although mandamus will issue against an executive officer to do a purely administrative act in which he has no discretion it will not issue as to any duty involving any discretion. *United States* v. *Black*, 128 U. S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 335.

In this case it was necessary for the Secretary to decide whether the land was allottable and if so to the allottee or the town dweller.

The supervisory power of the Secretary of the Interior arises from the Revised Statutes and the express terms and necessary implication of the allotment acts. Rev. Stat., §§ 441, 463; Act of June 28, 1898, 30 Stat. 506; § 24, Act of July 1, 1902, 32 Stat. 641, 644; Act of May 31, 1900, 31 Stat. 221, 236; Act of March 3, 1903, 32 Stat. 982, 996; 25 Op. Atty. Gen. 460, 464; *West* v. *Hitchcock*, 205 U. S. 80, 84.

That the Secretary's approval is necessary has therefore been determined by two departments—the one charged with administration of these acts and the other charged with construction of statutes for advice of the Executive. A settled construction by the departments will not be overturned by

the courts unless clearly wrong. *United States* v. *Healy*, 160 U. S. 136, 145; *Hewett* v. *Schultz*, 180 U. S. 139, 157; *United States* v. *Finnell*, 185 U. S. 236, 244.

The supervisory power of the Secretary of the Interior continues until ultimate, final action, whereby the title passes—that is, until his approval of the patent and authorization of its delivery. *Hy-yu-tse-mil-ken* v. *Smith*, 194 U. S. 401; *West* v. *Hitchcock*, *supra*. And see also as to the extent of supervisory power of the Secretary: *Knight* v. *Land Association*, 142 U. S. 161, 177; *Orchard* v. *Alexander*, 157 U. S. 372, 381; *Stoneroad* v. *Stoneroad*, 158 U. S. 240, 249; *Williams* v. *United States*, 138 U. S. 514; *Iron Co.* v. *United States*, 165 U. S. 379; *Wallace* v. *Adams*, 204 U. S. 415; and see case below, 143 Fed. Rep. 716, 720.

The Secretary of the Interior never authorized allotment of this tract. Determination as to whether it was allottable or not was under his consideration until October 23, 1905, when he decided in the negative.

The allotment certificate no more passes title than does the final certificate upon a public-land entry. Until patent issues and title passes, the right to the title is subject to investigation; equitable rights come within the cognizance of the Secretary, and the final receipt, or its analogue, the allotment certificate, may for good cause be annulled. *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 453; *Michigan Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 593; *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288, 326, 327.

Until the legal title passes from the Government inquiry as to equitable rights comes within the cognizance of the Land Department. *Brown* v. *Hitchcock*, 173 U. S. 473, 478; *Oregon* v. *Hitchcock*, 202 U. S. 60, 70.

The Secretary of the Interior was, from the first legislation looking to dissolution of tribal relations of the Five Civilized Tribes, made supervising head of all agencies to effect that policy, and the magnitude of the work was such that some supervising head was necessary.

The magnitude of the work appears when it is considered that these acts involved disposal of 28,440 square miles—18,202,000 acres—(Annual Rep. Sec'y Interior, 1902, part 1, pp. 596, 597) inhabited in 1900 by 355,225 people (12th Census, vol. I, p. XVIII), estimated in 1906 at 750,000, of which only 92,122 were citizens of Indian tribes. (Report Com. Ind. Affairs, 1906, p. 148.) Less than one in eight could claim title as Indians to the land they inhabited.

The Secretary's decision made such disposal of the land as a court having jurisdiction in like case must inevitably have made, as the only just, proper, or lawful disposal of the land.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler*, *Mr. H. C. Potter* and *Mr. E. A. Walker* were on the brief, for defendant in error:

The Secretary of the Interior having refused to add the land in controversy to the town site of Mill Creek and that being within his discretion his decision is not open to review. But having acted he thereafter could not reverse himself subsequent to defendant in error acquiring a sole indefeasible right in the land. *Linn* v. *Belcher*, 24 How. (U. S.) 526; *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 228; *Johnson* v. *Towsley*, 13 Wall. 83; *Noble* v. *Union River Logging Co.*, 147 U. S. 170.

Defendant in error had acquired a vested interest of which she cannot be deprived by the Secretary of the Interior or any other tribunal save a court of equity, for good cause and in accordance with settled procedure in equity. *United States* v. *Schurz*, 102 U. S. 169; *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Cornelius* v. *Kessel*, 128 U. S. 456.

Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject-matter but he must also keep within the limits of the power conferred on him by statute. Where the statute defines he cannot, under the name of administration, make law. *United*

States v. *Thurber*, 28 Fed. Rep. 56; *United States* v. *McDaniel*, 7 Pet. 1, 14.

After issuance of the allotment certificate the issuance of a patent as a more formal muniment or evidence of title was but a ministerial act, performance of which will be coerced. *United States* v. *Stone*, 2 Wall. 535.

An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. *Flournoy* v. *Jeffersonville*, 17 Indiana, 169; *Crane* v. *Camp*, 12 Connecticut, 463; *Roberts* v. *Valentine*, 176 U. S. 221; *West* v. *Hitchcock*, 19 App. D. C. 333; *Barney* v. *Dolph*, 97 U. S. 397; *Frasher* v. *O'Connor*, 115 U. S. 315.

The allotment certificate is declared by statute to be "conclusive evidence" of the holder's right to the land. It comprises an adjudication and conveyance of the allottee's right to the land. *Wallace* v. *Adams*, 204 U. S. 415, distinguished.

Mr. Justice Brewer delivered the opinion of the court.

The defendant in error, a citizen and resident of the Choctaw Nation in the Indian Territory, whose enrollment had been approved by the Secretary of the Interior, and who was entitled to an allotment under the acts of Congress, on December 20, 1906, filed her petition in the Supreme Court of the District of Columbia for a mandamus compelling the Secretary of the Interior to deliver, or cause to be delivered, to her a patent to a tract of land consisting of forty acres, located in the Choctaw Nation in the Indian Territory, and which she had selected in accordance with law. The then Secretary of the Interior, Ethan A. Hitchcock, filed an answer, giving his reasons for declining to issue the patent. Subsequently, James R. Garfield becoming Secretary of the Interior, was substituted as defendant, and filed an amended answer. A demurrer to the amended answer having been sustained,

judgment was entered as prayed for, which was affirmed by the Court of Appeals of the District, and thereupon the case was brought to this court. After the record had been filed in this court, and during the present term, Richard A. Ballinger, the successor of Secretary Garfield, was substituted for him as plaintiff in error.

The facts essential to a decision are briefly these: By treaty between the Choctaw Nation and the United States, dated September 27, 1830 (7 Stat. 333), and the proclamation of the President of the United States of February 24, 1831, the United States caused "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." By subsequent treaties and agreements the Choctaw and Chickasaw Nations were consolidated. The nations have not become extinct, and are still resident on the lands. The act of June 28, 1898, c. 517 (30 Stat. 495), authorized the allotment of the land to the Choctaws and Chickasaws in fair and equal proportions, and provided that this should be done under the direction of the Secretary of the Interior; also, that as soon as practicable after the completion of the said allotment the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation should jointly execute under their hands and the seals of their respective nations and deliver to their allottees patents conveying to them all the right, title and interest of the Indians in and to the lands allotted. The act of May 31, 1900, c. 598 (31 Stat. 221), also authorized the Secretary of the Interior to lay out, survey and plat the sites of such towns as then had a population of two hundred or more, and that he might, upon the recommendation of the Commission to the Five Civilized Tribes, at any time before the allotment set aside and reserve, not exceeding 160 acres in any one tract, at such stations as were or should be established on the line of any railway which should be constructed or be in process of construction in or through either of said nations

prior to the allotment of the lands therein. These townsite provisions were incorporated into the act of March 1, 1901, c. 675 (31 Stat. 848, 851).

On October 26, 1900, the townsite of Mill Creek, containing 155.45 acres, on which there was a railway station, was designated and laid out. The land in controversy is adjacent to that townsite. Section 45 of the act of July 1, 1902, c. 1362 (32 Stat. 641), authorized an addition to such townsites on the recommendation of the Commission to the Five Civilized Tribes, not exceeding 640 acres, and the appropriation act of March 3, 1903, c. 994 (32 Stat. 982, 996), appropriated $25,000 to pay the townsite expenses, with this proviso:

"That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting, and appraisement of townsites heretofore set aside and reserved from allotment: *And provided further,* That nothing herein contained shall prevent the survey and platting at their own expense of townsites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

On February 17, 1903, the Commission to the Five Civilized Tribes made recommendation that this adjacent land be segregated as an addition to Mill Creek, under the provisions of the act of July 1, 1902, *supra.* This recommendation having been approved by the Commissioner of Indian Affairs, was by him transmitted to the Secretary of the Interior, who, on March 18, 1903, addressed a letter to the Commission, reciting the segregation of Mill Creek townsite on October 26, 1900, and the recommendation of the Commission approved by the Commissioner of Indian Affairs, and said: "The department does not deem it advisable to make the recommendation in view of the act of March 3, 1903." On July 23, 1903, the relator selected as her allotment the land in controversy, upon

which were her buildings and improvements. This was received by the Commission, and nine months thereafter, the time prescribed by statute for contest (act July 1, 1902, *supra*) having elapsed, and no contest of her right to the designated allotment having been made, a certificate of allotment was issued and delivered to her. Thereafter the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation jointly executed a patent under the seals of their respective nations, conveying to her the title of said nations in and to said forty acres of land. Sections 23 and 24 of the act of July 1, 1902, *supra*, read as follows:

"SEC. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"SEC. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land."

The Secretary alleged in his answer that after the issue of the allotment to relator, and on or about March 11, 1905, his predecessor in office was advised that the land had then and prior to its selection by petitioner been under urban occupancy, and on June 19, 1905, he ordered an investigation, and finding such to be the fact, and that the inhabitants had expended large sums in building upon and improving their tracts and were entitled to be protected, he did, on October 23, 1905, by virtue of the powers in him vested, segregate the lands for townsite purposes and cancel petitioner's allotment thereof, with leave to select other lands to fill her right to tribal lands in severalty. The patent that had previously been exe-

cuted for delivery to her was returned and remained on file in the office of the Commissioner of Indian Affairs to be canceled.

The Interior Department has general control over the affairs of the Indians—wards of the Government. In addition, the Secretary of the Interior was by these several acts specially charged with the duty of supervising the action of the Commission to the Five Civilized Tribes in making the allotments authorized by those acts. On both of these grounds he claims authority to have done what he did, and that his acts in that respect are not subject to review by the courts. We have no disposition to minimize the authority or control of the Secretary of the Interior, and the court should be reluctant to interfere with his action. But as said by Mr. Justice Field in *Cornelius* v. *Kessel,* 128 U. S. 456, 461:

"The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

See also *Orchard* v. *Alexander,* 157 U. S. 372, 383, in which it was declared:

"Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius* v. *Kessel,* 128 U. S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson* v. *Towsley,* 13 Wall. 72. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has

acquired an interest of which he cannot be arbitrarily dispossessed."

Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation. It must be borne in mind that this allotment provided by Congress contemplated a distribution among the Choctaw and Chickasaw Indians of the lands that belonged to them in common. They were the principal beneficiaries, and their titles to the lands they selected should be protected against the efforts of outsiders to secure them. White men settling on townsites were not the principal beneficiaries. Congress, it is true, authorized townsites, and the town of Mill Creek was established in compliance with the statute. It further provided for an enlargement of any townsite upon the recommendation of the Commission to the Five Civilized Tribes. That recommendation was made in respect to the town of Mill Creek, but disapproved by the Secretary of the Interior. Thereafter the relator selected the land in controversy, a tract of forty acres, on which were her improvements. Notice was given as required, and the time in which contest could be made—nine months—elapsed. Thereupon, as provided by the statute, the title of the allottee to the land selected became fixed and absolute, and the chief authorities of the Choctaw and Chickasaw Nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered.

That the performance of a ministerial duty can be com-

pelled by mandamus has been often adjudged. As said by Mr. Justice Peckham, in *Roberts* v. *United States*, 176 U. S. 221, 229:

"The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty."

See also *Noble* v. *Union River Logging Co.*, 147 U. S. 165, in which Mr. Justice Brown cites many cases and draws distinctions between them.

But the authorities come more closely to the facts in this case. In *Barney* v. *Dolph*, 97 U. S. 652, 656, Mr. Chief Justice Waite said:

"The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."

In *Simmons* v. *Wagner*, 101 U. S. 260, 261, the same Chief Justice repeated the proposition in these words:

"Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Barney* v. *Dolph*, 97 U. S. 652; *Stark* v. *Starrs*, 6 Wall. 402."

In *United States* v. *Schurz*, 102 U. S. 378, 403, Mr. Justice Miller, delivering the opinion of the court, said:

"No further authority to consider the patentee's case remains in the land-office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner,—a duty which,

within all the definitions, can be enforced by the writ of mandamus."

We think the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District, was right, and it is

Affirmed.

CENTRAL TRUST COMPANY *v.* CENTRAL TRUST COMPANY OF ILLINOIS.

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

No. 86. Argued January 18, 1910.—Decided February 21, 1910.

The management of the post office business has been placed by Congress in the hands of the Postmaster General and his assistants, and the Postal Laws and Regulations provide for the delivery of mail where two or more persons of the same name receive mail at the same post office.

While the benefit of one's legal name belongs to every party, individual or corporation, it may at times be necessary and proper to look beyond the exact legal name to the name by which a party is customarily known and addressed in order to properly deliver mail to the person to whom it is addressed.

The findings of fact by officers in charge of the several departments of the Government are conclusive unless palpable error appears.

In this case the First Assistant Postmaster General having made an order directing delivery of mail addressed to Central Trust Company, Chicago, to the Central Trust Company of Illinois instead of to a South Dakota corporation having the name Central Trust Company, *held* that there was not enough clear right shown by the latter company to justify the setting aside of the order by the court.

152 Fed. Rep. 427, affirmed.

On June 22, 1906, the Central Trust Company, a corpora-

tion engaged in the mining, promoting, real estate and trust business, filed its bill in the Circuit Court of the United States for the Northern District of Illinois to compel the defendant, Frederick A. Busse, postmaster at Chicago, to deliver to it certain mail-matter which it claims it was entitled to receive and which he wrongfully delivered to the defendant the Central Trust Company of Illinois. Demurrers to the bill were filed, which were sustained, and the bill dismissed. On appeal to the United States Circuit Court of Appeals for the Seventh Circuit the decree of dismissal was affirmed, and thereupon the case was brought here on appeal.

The allegations in the bill are that on or about April 17, 1897, the complainant was created a corporation by the State of South Dakota under the name and title of "Central Trust Company," and was authorized by said State to establish an office and hold directors' meetings in Chicago; that on or about that date it established an office in Chicago on the corner of Monroe and La Salle streets, and began to carry on its business, though without any express authority from the State of Illinois, and continued to do so up to and including February 7, 1903; that in August, 1902, it applied to the Secretary of State of Illinois for a license to do business within that State, and complied with all the statutory requirements for foreign corporations desiring to do business within the State; that owing to a contest made before the Secretary of State by the Central Trust Company of Illinois the granting of said license was delayed until February 7, 1903, at which time it was granted, and that from that date complainant has continuously conducted its business in Chicago at the office and under the above stated name; that ever since its coming to Chicago it has received through the post office a large amount of mail matter addressed to it by simply its name.

The bill further alleges that the defendant, the "Central Trust Company of Illinois," is a corporation chartered by the State of Illinois on or about July, 1902, and engaged in a general banking and trust business at No. 142 Monroe street, in

Chicago; that its first place of business was at the corner of Dearborn and Monroe streets, but about the beginning of the year 1906 it removed to No. 142 Monroe street, where it has ever since remained.

The bill still further alleges that from 1897 to 1901 the name of complainant appeared in the Lakeside directory, a directory of general circulation in Chicago and recognized as a reliable and authoritative publication; that while its name was omitted from the directory for 1902, the omission was due to a mere error by the publishers of the directory, and was through no fault of the complainant; that said directory for 1902 was not published and issued until after defendant, the Central Trust Company of Illinois, had filed its articles of incorporation.

It also appears that complaint having been made to the Postmaster General of the action of the postmaster at Chicago in reference to the delivery of the mail received at Chicago, an order was made by the First Assistant Postmaster General in these words:

"January 10, 1903.

"The Postmaster, Chicago, Ill.:

"Sir: I am in receipt of information to the effect that a letter was delivered to Mr. Pfau, a representative of the Central Trust Company of South Dakota, which contained remittances intended to protect checks drawn on the Central Trust Company of Illinois; that Mr. Pfau, instead of returning the letter promptly to the post office for delivery to the Trust Company for which it was intended, returned it to the sender, thereby jeopardizing his credit. Mr. Pfau well knew that the deposit was intended for the Central Trust Company of Illinois.

"You are hereby directed to deliver mail addressed 'Central Trust Co., Chicago, Ill.,' without the addition of the street, box or other designation to indicate that it is intended for the South Dakota Company, to the Central Trust Company of Illinois, and request that company to return to you promptly for delivery to the Central Trust Company of South Dakota all

letters falling into their hands intended for the company represented by Mr. Pfau.

Very respectfully,
(Signed) R. J. WYNNE,
First Assistant Postmaster General."

The prayer of the bill is that the defendant Busse be restrained "from delivering mail addressed 'Central Trust Company' without the street address of this complainant thereon, or some other mark thereon indicating for whom the same is intended, or with the street address 'corner of La Salle and Monroe streets,' to the defendant Central Trust Company of Illinois," and restraining the Central Trust Company of Illinois and its cashier, the defendant William R. Dawes, from receiving and opening said mail so described.

Mr. W. H. Sears, with whom *Mr. Daniel McCaskill* and *Mr. O. L. McCaskill* were on the brief, for appellant:

The decision of the Postmaster General giving the mail in controversy to the Central Trust Company of Illinois is reviewable by this court. The act is ministerial in character.

If the act were official, requiring the exercise of judgment and discretion, the decisions would be final and not reviewable by the courts. If, on the other hand, it is ministerial in character, he may be compelled to perform it. *Kendall* v. *United States,* 12 Pet. 524, 614; *New Orleans Bank* v. *Merchant,* 18 Fed. Rep. 841, 850; *Mississippi* v. *Johnson,* 4 Wall. 475, 488; *Teal* v. *Fenton,* 12 How. 284, 291.

This obligation is recognized in the postal regulations, and provision is made for complying with the decrees of court concerning the delivery of mail. Postal Laws and Reg., 1902, § 653, p. 313; and see *Nat'l Life Ins. Co.* v. *Nat'l Life Ins. Co.,* 209 U. S. 317.

In this case not only is all of the mail addressed in the name of appellant, but part of it has the street number of appellant on it. The postmaster has no right to open the mail or au-

thorize others to open it to ascertain its contents. By so doing he subjects himself to a penalty. *In re Jackson*, 96 U. S. 727, 733; *United States* v. *Mathias*, 36 Fed. Rep. 892, 896; *United States* v. *Eddy*, 1 Bissel, 227, 228.

All the postmaster has a right to do under the law in determining for whom mail is intended is to look at the cover of the mail. The postmaster is no more at liberty to act upon mere guesses or surmises than a private agent. The rule that the discretion of an executive officer will not be disturbed presupposes that information upon the matter upon which judgment and discretion are invoked is presented to the officer for consideration, or that knowledge respecting them is possessed by him. *United States* v. *Barlow*, 132 U. S. 280; *School of Magnetic Healing* v. *McAnulty*, 187 U. S. 94, 107, 109.

Where the act of a head of a department is beyond the scope of his authority such act is subject to review by the courts and any person who will sustain injury by such act may enjoin it. *Noble* v. *Union River Logging R. R.*, 147 U. S. 165, 171, 172; *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 509; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108; *Brown* v. *United States*, 9 How. 487; *Payne* v. *Nat'l Ry. Pub. Co.*, 20 App. D. C. 581.

The Post Office Department cannot act arbitrarily and do as it likes with the mail. If it has any right to refuse to accept or to refuse to deliver mail except to the addressee that right must come from some law of Congress. *School of Magnetic Healing* v. *McAnulty*, 187 U. S. 94, 109. The Postmaster General can exclude letters from the mail only where the mail is being used for certain prohibited purposes, as where the mail matter is obscene, 25 Stat. 187, 496, or where the letters concern lotteries, gift enterprises and schemes to defraud and obtain money by false pretenses. Rev. Stat., § 3894. Congress has also authorized the Postmaster General to classify the mail matter, and he may refuse to carry mail except under its proper class. *Houghton* v. *Payne*, 194 U. S. 88. In no other case has any authority been given him to exclude or to refuse

to deliver mail except to the addressee. Under §§ 3890, 3892, Rev. Stat., however, he must deliver the mail to the addressee.

Appellant's failure to file its certificate of incorporation does not affect the issues of this case. The law requiring certificates to be filed was not passed until after appellant had established its office, and subsequently appellant complied with all the requirements of this law. 4 Starr & Curtiss' Ill. Rev. Stat., 310.

The state statute does not say a foreign corporation shall be deprived of all rights to its mail until it files its charter, and if it did it would be assuming powers which belong to the Federal Government alone. A State may forbid a foreign corporation to do business within its boundaries, but it cannot forbid it the right of the mails. As to what is doing business see *Bradbury* v. *Waukegan & Washington M. Co.*, 113 Ill. App. 600, 607; *Boardman* v. *S. S. McClure Co.*, 123 Fed. Rep. 614; *Caldwell* v. *North Carolina*, 181 U. S. 622; Thompson on Corporations, § 7936.

Where a foreign corporation makes a contract within a State before filing its articles of incorporation and subsequently files its articles the contract may be enforced; the remedy is merely suspended until the law has been complied with. 7 Am. & Eng. Enc. of Law, 2d ed., 875–876; *Caesar* v. *Capell*, 83 Fed. Rep. 403, 423; *Wood Mowing Co.* v. *Caldwell*, 54 Indiana, 270, 281; *Carson-Rand Co.* v. *Stern*, 129 Missouri, 381; *Neuchatel Asphalt Co.* v. *Mayor*, 155 N. Y. 373; *Behler* v. *German Mut. Fire Ins. Co.*, 68 Indiana, 347, 355; *Crefeld Mills* v. *Goddard*, 69 Fed. Rep. 141, 142.

These cases take a somewhat different view from *United States Lead Co.* v. *Elevator Mfg. Co.*, 222 Illinois, 199, where such a contract was held void *ab initio*, and see *Ottoman Co.* v. *Dane*, 95 Illinois, 203; *Grand Lodge* v. *Graham*, 96 Iowa, 592.

The courts of Illinois have held in numerous cases that where there is a valid corporation law, and a user by a corporation of the powers intended to be granted by the corporation law, a mere failure to file articles of incorporation with the Secretary of State, or otherwise comply with some of the statu-

tory regulations, cannot be taken advantage of by third parties collaterally. The corporation is held to have a *de facto* existence of which it can be deprived only in a direct proceeding by the State. *Tarbell* v. *Page*, 24 Illinois, 46, 48; *Thompson* v. *Candor*, 60 Illinois, 244, 247, 248; *Cin., LaF. & Chi. R. R. Co.* v. *D. & V. Ry. Co.*, 75 Illinois, 113, 116; *The People ex rel.* v. *Trustees of Schools*, 111 Illinois, 171, 173; *Hudson* v. *Green Hill Seminary*, 113 Illinois, 618, 624.

Numerous States have passed laws making it essential for foreign corporations to file their articles of incorporation to hold real estate within the State. But where the corporations have purchased lands within those States before filing their articles it was held that the State alone could take advantage of their failure. No other corporation could preëmpt the land or confiscate it to its own use on the theory that it was not owned by the foreign corporation. The latter could pass good title to land so taken and held by it, and could maintain an action for trespass upon it. *Seymore* v. *Slide & Spur Gold Mines*, 153 U. S. 523; *Fritts* v. *Palmer*, 132 U. S. 282, 291; *Whitman Mining Co.* v. *Baker*, 3 Nevada, 386; *Carlow* v. *Aultman*, 28 Nebraska, 672, 676; *Sherwood* v. *Alvis*, 83 Alabama, 115.

Where a State requires registration by a foreign corporation doing business within the State, and imposes a penalty for noncompliance with the statute, it shows that, in the mind of the state legislature, the penalty is sufficient to accomplish the desired result, and is exclusive of all other remedies. Cases *supra*, and *Sherwood* v. *Alvis*, 83 Alabama, 115, 119; *State Mut. Ins. Assoc.* v. *Brinkley Co.*, 61 Arkansas, 1, 6; *Kindel* v. *Beck Lithographing Co.*, 19 Colorado, 310, 314; *Union Mut. Ins. Co.* v. *McMillen*, 24 Ohio St. 67, 79; *Garrott Ford Co.* v. *Vermont Mfg. Co.*, 20 R. L. 187, 189; *Toledo Tie Co.* v. *Thomas*, 33 W. Va. 566, 570.

Mr. Max Pam, with whom *Mr. Stephen A. Day* was on the brief, for appellee:

First: The name "Central Trust Company" so designates appellee as to justify the postmaster in making delivery to appellee of mail so addressed.

The proposition that a corporation cannot be designated, known by and receive letters, conveyances or grants unless its corporate name is in all respects fully and accurately set forth is untenable. *Chadsey* v. *McCreery*, 27 Illinois, 253; *Board of Education* v. *Greenebaum Sons*, 39 Illinois, 609; *Clement* v. *City of Lathrop*, 18 Fed. Rep. 885; 7 Am. & Eng. Enc. of Law, 2d ed., p. 687; Cl. 10, § 634, Postal Reg. of 1902, applies to corporations as well as individuals.

The rights of the appellee to the use of the name in question were prior to those of the appellant.

Appellant concedes that it did not comply with the statute requiring it to file its certificate, Supp. (1902), Starr & Curtiss, Ann. Stat. Ill., Ch. 32, Par. 52, 53, 54, until after the incorporation of the appellee; as to effect of this, see Hurd's Rev. Stat. Ill., Ch. 32, §§ 28½, 50; *Illinois Watch Case Co.* v. *Pearson*, 140 Illinois, 423, 429.

Appellant does not come into court with clean hands; it has been guilty of such unconscionable conduct in that respect, and so decided by the Post Office Department, as to debar it of any relief in a court of equity.

Appellee is entitled to have mail so addressed delivered to it in the first instance under the laws and regulations of the Post Office Department.

Postal regulations promulgated by the Postmaster General under authority of an act of Congress have the force of law of which the courts must take judicial notice.

The Post Office Department has decided the question in controversy and the court will neither overturn such decision nor interfere with the discretion of the department. *Appleby* v. *Cluss*, 160 Fed. Rep. 984; *Nat'l Life Ins. Co.* v. *Nat'l Life Ins. Co.*, 209 U. S. 541; and see also *United States* v. *Hitchcock*, 190 U. S. 698.

Appellant has misconceived its remedy. It is not entitled to

injunction. In no event could it be entitled to any relief except that of mandamus.

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

The management of the great post office business of the country is placed in the hands of the Postmaster General and assistants. Rev. Stat., §§ 388, 389, 396. In the discharge of his duties as Postmaster General he has assigned to the First Assistant Postmaster General "the preparation of decisions as to delivery of ordinary mail, the ownership of which is in dispute." Postal Laws and Regulations, 1902, § 17, par. 9. The question here presented is whether the First Assistant Postmaster General, having directed the postmaster at Chicago to deliver to the "Central Trust Company of Illinois," defendant herein, mail-matter addressed "Central Trust Company, Chicago, Ill.," without any further designation of the party for whom it was intended, the courts are, upon the facts as presented, justified in setting aside that order and directing the delivery of such mail to the complainant. It is not always easy to determine for whom a letter is intended. In furtherance of the effort to secure delivery of mail-matter to the proper party, pars. 3 and 4, § 634, and pars. 4 and 5, § 645, of Postal Laws and Regulations provide:

"SEC. 634, Par. 3. When a postmaster is in doubt as to the identity of the addressee, he may require proof, and should exercise great care, especially where mail matter appears to be of value, to make proper delivery.

"Par. 4. Where two or more persons of the same name receive mail at the same office the postmaster should advise them to adopt some address or means by which their mail may be distinguished. Postmasters will deliver such matter according to their best judgment, and will not return it to the mailing office for better description of the addressee until, after inquiry, they are unable to determine to whom it should be delivered."

"SEC. 645, Par. 4. Attempts to secure the mail of an established house, firm, or corporation through the adoption of a similar name should not be recognized. Where disputes arise between individuals, firms, or corporations as to the use of a name or designation, matter addressed to a street, number, or building should be delivered according to such address. When not so addressed, the mail will be delivered to the firm or corporation which first adopted the name of the address at that place.

"Par. 5. When in doubt as to the firm or corporation for which any mail matter is intended, and claim therefor is disputed, postmasters will withhold delivery and report the facts and any statements made by either claimant to the First Assistant Postmaster General, for advice."

Appellant contends that its legal name is "Central Trust Company" while the legal name of defendant is "Central Trust Company of Illinois;" that, therefore, it has a right to have mail directed to "Central Trust Company, Chicago," without further designation, delivered to it rather than to defendant. The argument primarily is that every corporation is entitled to the legal benefit of its own name; that when that name appears on mail-matter as the party addressed, and nothing else is shown, the postmaster has simply the ministerial duty of making a delivery to that corporation, and that a failure to discharge this ministerial duty can be corrected by the courts.

While in a certain sense it is true that the benefit of one's legal name belongs to every party, individual or corporation, yet that may not be the name by which it is customarily known or addressed, and of course the object is and must be to deliver the mail-matter to the party for whom it is intended. In the determination of this it may often be necessary to look beyond the exact legal name. Many things may have to be considered, and the action of an officer charged with that duty should not lightly be disturbed by the courts, and only when it is clear that a mistake has been made or a wrong

done. Initials are often used, abbreviations made, words left out. The number of letters delivered to the respective parties and the disposition made by each of those received may cast some light upon the question, for while a party for whom a single letter is intended has a right to receive it, yet the number of letters, taken in connection with the amount of business apparently done by the recipient, may well suggest for whom any given letter was intended, and the action taken by the recipient, when as here each knows of the existence of the other, may show its good or bad faith in dealing with the post office. So also the character of the business done may be considered. Where a corporation is engaged in the banking business letters from other banks will point to it as the intended recipient, while if it is a real estate corporation letters from real estate firms will indicate differently. And so we might go on and mention other things which, while by no means conclusive, tend to throw light on the matter.

We have had occasion to consider the effect of findings of fact by officers in charge of the several departments of government, and the accepted rule is that those findings are conclusive, unless palpable error appears. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, and cases cited in the opinion; *United States ex. rel. Parish* v. *MacVeagh, Secretary, &c.*, 214 U. S. 124, 131. In *National Life Insurance Company* v. *National Life Insurance Company*, 209 U. S. 317, it appeared that the Post Office Department had made a special order in reference to the delivery of mail, and the court was asked to correct that order. In denying this application the court, by Mr. Justice Peckham, said (p. 325):

"The appeal made by the complainant to the department was really nothing but an appeal to its discretion. . . . Assuming that the court in some cases has the power to, in effect, review the determination of the department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the department to the discretion of the court, and the complainant has no clear

legal right to obtain the order sought. See *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108.

"A court in such case ought not to interfere in the administration of a great department like that of the Post Office by an injunction, which directs the department how to conduct the business thereof, where the party asking for the injunction has no clear right to it."

We do not deem it necessary to consider other questions discussed by counsel, for, upon the facts presented and for the reasons stated, we are of opinion that there is not enough to show such clear right in the complainant as justifies the setting aside of the order of the First Assistant Postmaster General.

The decree is, therefore, *Affirmed.*

MISSOURI PACIFIC RAILWAY COMPANY *v.* STATE OF KANSAS EX REL. RAILROAD COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 38. Argued November 30, 1909.—Decided February 21, 1910.

The fact that a railroad company is chartered by another State and has projected its lines through several States does not make all of its business interstate commerce and render unconstitutional, as an interference with, and burden upon interstate commerce, reasonable regulations of a State Railroad Commission applicable to a portion of the lines wholly within, and which are valid under, the laws of that State.

Quære whether on writ of error where the constitutional question is whether a rate or duty prescribed by a state commission amounts to deprivation of property without due process of law, this court is bound by a finding of the state court that a rate or duty is not actually confiscatory.

There is a difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of a public service corporation by fixing them below a remunerative

standard and one compelling the corporation to render a service which it is essentially its duty to perform; and an order directing a railroad company to run a regular passenger train over its line, instead of a mixed passenger and freight train, is not, even if such train is run at a loss, a deprivation of property without due process of law, or a taking of private property for public use without compensation; nor is such an order an unreasonable exercise of governmental control. Such an order if made by the railroad commission of a State is not an interference with, or burden upon, interstate commerce if it relates to a portion of the line wholly within that State.

A state statute making provisions for passengers riding on the caboose of freight trains will not be construed as a declaration of the State that there is no distinction between passenger train service and mixed train service, especially where, as in Kansas, the liability of the railroad is limited as to persons riding in cabooses.

An order cannot be said to be such an unreasonable exertion of authority as to amount to deprivation of property without due process of law, because made operative only to the limit of the right to do so.

While railway property is susceptible of private ownership and protected by constitutional guarantees, these rights are not abridged by being subjected to governmental power of reasonable regulation.

Where a contract is held subject to the reserved power to alter, amend or repeal, the right conferred, whatever be its extent, is subject to such reserved power; and so held that a charter privilege to regulate train service is subject to the reasonable and otherwise legal order of a commission created by the legislature, and such an order is not invalid under the contract clause of the Federal Constitution.

An order of the railroad commission of a State requiring a train to be run from a point within the State to the state line is not invalid if otherwise legal, as an interference with, or burden upon, interstate commerce because there are no present terminal facilities at the state line and it is more convenient to the corporation to run the train to a further point in the adjoining State.

76 Kansas, 467, affirmed.

THE facts are stated in the opinion.

Mr. Balie P. Waggener for plaintiff in error:

The order of the board and the mandate of the state court were, in substance and effect, a regulation of commerce among the States, and beyond the jurisdiction. *L. & N. R. R. Co.*

v. *Eubanks*, 184 U. S. 27; *Hall* v. *DeCuir*, 95 U. S. 480, 489. It is not the wording of the regulation, but the necessary effect thereof, which determines its invalidity. *Henderson* v. *Mayor*, 92 U. S. 259; *State Freight Tax Cases*, 15 Wall. 276.

The order of the board, on its face, is manifestly unreasonable, and, in the light of the findings of fact, arbitrary, and without the first element of due process of law, and a denial of the equal protection of the law guaranteed by the Federal Constitution. It is not justified under the police power. *Welch* v. *Swasey*, 214 U. S. 105.

It amounted to a taking of property for public use without compensation. *C., B. & Q.* v. *Chicago*, 166 U. S. 241.

The power of regulation is not without limit, and is not a power to destroy or the power to compel the doing of the services without reward, or to take private property for public use without just compensation, or without due process of law. *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *L. & N. R. Co.* v. *Central Stock Yards*, 212 U. S. 132; *Railroad Commission Cases*, 116 U. S. 307, 331.

A corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. *Smyth* v. *Ames*, 169 U. S. 466, 546; *Dow* v. *Beidelman*, 125 U. S. 680; *Ga. R. R. Co.* v. *Smith*, 128 U. S. 174, 179; *Railway Co.* v. *Wellman*, 143 U. S. 339; *Budd* v. *New York*, 143 U. S. 517; *Railway Co.* v. *Gill*, 156 U. S. 649; *Road Co.* v. *Sandford*, 164 U. S. 578.

When, as in this case, there is a conflict between the state law, the courts and company, who is to manage the property? That in no proper sense is the public the manager was held in *Interstate Comm. Comm.* v. *Chi. G. W. Ry. Co.*, 209 U. S. 108, 113.

The record shows that the separate train could not be operated except at a loss.

The enforcement of the order here complained of, under the circumstances, disclosed by the record, would not be regulation, but confiscation. *Atlantic Coast Line* v. *N. Car. Corp.*

Comm., 206 U. S. 1; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Budd* v. *New York*, 143 U. S. 517; *C., B. & Q.* v. *Chicago*, 166 U. S. 241; *McNeil* v. *Southern Ry. Co.*, 202 U. S. 543, 559; *L. & N. R. R. Co.* v. *Stock Yards*, 212 U. S. 132, 144; *Smyth* v. *Ames*, 169 U. S. 466.

The order of the board of railroad commissioners was a usurpation of power by the board, and the construction placed upon the law by the state court impaired the obligation of the contract between the State and the railway company, in violation of the Constitution of the United States, and deprived it of its property without due process of law and without compensation, and denied to it the equal protection of the law.

The reserved power to alter or amend could be exercised only by the legislature and not by the commission and until the legislature acted the company has a contract charter right to regulate its train service that cannot be impaired. *Fletcher* v. *Peck*, 6 Cranch, 87; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Charles River Bridge* v. *Warren*, 11 Pet. 420. Nor can a vested right be taken away by judicial construction. *Dodge* v. *Woolsey*, 18 How. 360.

That would equally amount to impairing the contract. *State Bank* v. *Knorp*, 16 How. 391; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Jefferson Bank* v. *Shelley*, 1 Black, 436; *University* v. *People*, 99 U. S. 321; *New Orleans W. W.* v. *Sugar Co.*, 125 U. S. 36; *L. & N. R. R. Co.* v. *Palmer*, 109 U. S. 256.

The right of the company to regulate its trains applies to manner as well as time, and as to effect of word "manner" as used in this connection, see *Railroad Co.* v. *Cincinnati*, 1 Ohio Prob. R. 269, 278; *City* v. *Caulkins*, 85 Pa. St. 253; *Bankers' Life Co.* v. *Robbins*, 59 Nebraska, 174; *Pitcher* v. *Board*, 20 Ill. App. 326; *People* v. *Railroad Co.*, 176 Illinois, 176, distinguished. There is no statute of Kansas which specifically requires the company to run this train, and so mandamus will not lie, *Railroad Co.* v. *Dustin*, 142 U. S. 492, and

as to lack of power of courts to enforce the order adversely to the charter contract, see cases *supra* and *Georgia &c.* v. *Smith*, 128 U. S. 174; *Chicago R. R. Co.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Railway Co.*, 94 U. S. 164; *Ruggles* v. *Illinois*, 108 U. S. 526; *Salt Co.* v. *East Saginaw*, 13 Wall. 378; *Stanislaus Co.* v. *San Joaquin*, 192 U. S. 201, 206; *Tomlinson* v. *Jessup*, 15 Wall. 458.

Mr. Fred S. Jackson, with whom *Mr. G. F. Grattan* was on the brief, for defendants in error.

Mr. Justice White delivered the opinion of the court.

This is a writ of error to a judgment of the Supreme Court of Kansas ordering a peremptory mandamus commanding the Missouri Pacific Railway Company to obey an order of the state board of railroad commissioners. The order directed the putting in operation of a passenger train service between Madison, Kansas, and the Missouri-Kansas state line, on what is known as the Madison branch of the Missouri Pacific Railway Company.

The branch road in question lies between Madison, Kansas, and Monteith Junction, Missouri. From Madison to the state line is 89 miles and from the state line to Monteith Junction is 19 miles, the total distance between the two terminal points being 108 miles. At Monteith Junction the Madison branch intersects with the Joplin line of the Missouri Pacific, by means of which connection is made with Kansas City and other points. There being no terminal facilities at Monteith Junction, the trains operated on the Madison branch do not remain over at the junction, but run as far as Butler station, three miles distant on the Joplin line, where terminal facilities exist.

There are no large towns on the Madison branch, either in Kansas or Missouri, and the country which that branch serves is largely agricultural, Kansas City being the nearest and

most natural market for the products of the territory. The greater volume of the passenger travel, however, originating on the Madison branch does not move to Kansas City by going to Monteith Junction, but leaves the branch at various points between Madison and the state line, at which points the branch crosses various roads, which, generally speaking, run in a northerly or northeasterly direction, affording a means of reaching Kansas City more directly than by going to Monteith and thence *via* the Joplin line to that city. Three of these intersecting roads are operated by the Atchison and Topeka, two by the Missouri, Kansas and Texas, one by the St. Louis and San Francisco, one by the Kansas and Colorado Pacific, and one by the Missouri Pacific. Pleasanton is the last station on the branch in Kansas and is six miles distant from the state line.

Without clearing up some confusion in the record upon the subject, we take the fact to be as stated by the court below, that the branch between Madison and Monteith Junction, at least so far as it was constructed within the State of Kansas, was built by a Kansas corporation chartered in 1885, known as the Interstate Railroad Company, and that to aid in the building of the road within the State of Kansas about two hundred thousand dollars was contributed by counties through which the road passed. A construction company did the work, at the contract cost of $1,095,000, and this sum was paid by the railway company by delivering to the contractors an issue of $1,622,000 of six per cent mortgage bonds. The Interstate Railroad Company, in July, 1890, consolidated with another Kansas corporation known as the St. Louis and Emporia Railroad Company, the consolidated company being designated as the Interstate Railway Company. Subsequently, in December, 1890, by authority of a statute of Kansas, the Interstate Railway Company and eleven other Kansas railway corporations were consolidated, the consolidated company being designated as the Kansas and Colorado Pacific Railway Company.

The Missouri Pacific Railway Company is a corporation chartered in Missouri, Kansas, and Nebraska. It owns virtually all the mortgage bonds issued by the Interstate Railroad Company for the construction of the Madison branch and a majority of the stock of that company. Indeed, it is the owner of a majority of the stock and mortgage bonds of all the constituent companies which united in forming the consolidated company known as the Kansas and Colorado Pacific Railway Company, and, as the lessee of the latter company, operates its lines of road, including, of course, the Madison branch. It is not questioned that substantially all the equipment used in operating the roads covered by the leases is owned by the Missouri Pacific Railway Company.

In September, 1905, residents along the Madison branch within the State of Kansas filed a petition with the board of railroad commissioners, alleging, in substance, that only a mixed train was furnished for passenger service on the branch, that such service subjected the public to great inconvenience, prevented anything like a regular and timely passenger service, and, besides, was dangerous to those traveling over the road. An order was prayed requiring the Missouri Pacific to operate a regular passenger train over the branch road between Madison and the state line. The evidence introduced before the board is not in the record. After a hearing, the following finding and order was made (76 Kansas, 490):

"Now, on this seventh day of December, 1905, after hearing the evidence and argument of counsel, in the above-entitled action, the board finds that during the years 1902 and 1903, when the respondent railway company operated a passenger train on said Madison branch of its line, that the said passenger train was operated at a loss, and there was no testimony introduced at this hearing that the train, if put on as asked for by the petitioners, could be operated at a profit to the respondent company. The board believes that the people along the line of the Madison branch of said company are entitled to better passenger train service than they are

now receiving, and it has been represented to the board by officers of said company that the respondent is constructing motor cars for establishment on its branch lines that can be operated at a much less expense than steam service.

"It is therefore ordered by the board that on or before the first day of May, 1906, a motor passenger car service be put on and operated on said Madison branch, from Madison, Kansas, to the Kansas and Missouri state line, and in the event said railroad company is unable at that time to put on a motor car passenger service, a regular steam passenger train service be forthwith put on and operated."

The road not having obeyed, this proceeding by mandamus was commenced to compel compliance.

Three special defenses were set up in the return to the alternative writ. In the first it was insisted that the branch road was an interstate road and could only be operated as such, and, therefore, was not subject to the jurisdiction of the railroad commission or the courts of the State of Kansas, and in the second it was claimed that the burden which would be occasioned by compelling the operation of a passenger train service would be confiscatory and in violation of rights protected by the Fourteenth Amendment. The court below, in its opinion, thus, we think, accurately summarized the elaborate averments relating to the two defenses just referred to (76 Kansas, 470):

"To the alternative writ an answer was filed which denies that the company operated the Madison branch as a line of road wholly within the State of Kansas, and alleges that said branch is a part of the Missouri Pacific general system; that defendant maintained terminal facilities for the said branch at Butler, Mo., twenty miles east of the Kansas State line, where the branch connects with the main line of defendant's railroad, that the company has no terminal facilities near the State line within the State of Kansas, and that the branch road cannot be operated as a road within the State of Kansas without such terminal facilities, to maintain which would

involve the company in ruinous expense. It also alleges that the order is unreasonable and confiscatory, and that the company could not comply with it without great financial loss; that the entire revenue of the road within the State of Kansas, including passenger and freight business, is insufficient to meet the expense and cost of operating the road within the State; that from July 1, 1903, to April 30, 1905, it maintained separate passenger train service upon this branch, but was obliged to abandon the same and return to the mixed passenger and freight service because the total receipts of passenger and freight business during that period proved wholly insufficient to meet the expenses of operation. It further alleges that compliance with the order of the board would compel defendants to divert its revenues from other lines and parts of its system outside the State of Kansas to the maintenance of separate passenger train service in the State, and that the extent of such additional cost would amount to a confiscation of its property."

The third defense set up that the company was diligently endeavoring to perfect a motor car for experimental purposes, that the practical utility of such service on railway tracks was problematical, and that it was the design of the company "to test the practicability of said character of service on its said Madison branch line as soon as the same can be done, and is also its design to furnish said motor car service for separate passenger traffic if the cost of said service can be brought within the passenger service cost of the mixed train service, which it now furnishes, and if said motor car service can be successfully operated from the standpoints of utility and safety and other considerations necessary to be taken into account."

By stipulation a referee was appointed to take evidence and report findings of fact and conclusions of law. The referee transmitted the evidence taken and made lengthy findings of fact, upon which his conclusions of law were stated. Those conclusions briefly were that although it might be un-

reasonable to order a separate passenger train service to be operated on the branch line, viewed as an absolutely independent line, it was not unreasonable to compel the furnishing of such service, viewing the line as a part of the system of the Missouri Pacific road, and taking into account the possible benefits which might arise to that system. It was, however, concluded that as the branch road was an interstate road, and could only be operated as such, the State was without power to compel the putting in operation of the passenger train service between Madison and the state line, and that the relief prayed for should therefore be refused.

It was recognized by the Supreme Court of Kansas when it came to consider the report of the referee that the authority which the commission had exerted in making the order took its source in a section of the act of the legislature of Kansas enacted in 1901, and now found in § 5970, General Statutes of Kansas of 1901, the section being as follows:

"Whenever in the judgment of the railroad commissioners it shall appear that any railroad corporation or other transportation company fails in any respect or particular to comply with the terms of its charter or the laws of the State, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commissioners shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioner's secretary, with any station agent, clerk, treasurer or any director of said corporation; and if such orders are not complied with, the said commissioners, upon complaint, shall proceed to enforce the same in accordance with the provisions of this act as in other cases."

Reviewing the findings and conclusions of the referee, the court held that the referee was wrong in holding that there was a want of power in the commission to make the order, and it was therefore decided that the order was valid and that the duty of the railroad company was to obey it. 76 Kansas, 467.

A brief summary of the questions passed on by the court will serve to an understanding of the assignments of error which we are called upon to consider:

a. The court disposed of certain contentions which would seem to have been raised at the argument concerning the repugnancy to the state constitution of the law creating the commission and conferring authority upon that body, and held the objections untenable. As these involved matters of purely state concern we shall not further refer to them.

b. The court also adversely disposed of a contention based upon the assumption that the railway company had by its charter a contract right to regulate the time and manner of operating its trains, and hence was not subject to the order which the commission had made. Although such contention did not deny that the charter right relied on was subject to repeal or amendment by the legislature, it was urged that, as the legislature had not expressly amended or repealed the right, such a result should not be made to flow from the section conferring powers upon the commission, as repeals by implication were not favored.

Having thus cleared the way for the graver questions which the case involved, the court came to consider, first, the reasonableness on its face of the order of the commission, viewed in the light of the findings of that body; second, the reasonableness of the order tested by the findings of the referee and the evidence upon which such findings were based; and third, the validity of the order in view of the power of Congress to regulate interstate commerce as applied to the nature and character of the road to which the order of the commission was made applicable.

As to the first, although the duty of the company under its charter was referred to and authorities were cited, with evident approval, holding that the obligation to operate a separate passenger train service rested upon a railroad company in the fulfillment of the law of its being, the court did not expressly pass upon that aspect of the case, but held that as it did not plainly and obviously result upon the face of the findings and order made by the commission, that the service required would be rendered at a pecuniary loss, it could not in any event be said that the order was unreasonable on its face. As to the second, considering the inherent and *prima facie* reasonable nature of the service, the performance of which the order commanded, along with the findings of the referee and the evidence, it was held that the unreasonableness of the order had not been established, since, taking all the foregoing into account, it had not been affirmatively proven that any material pecuniary loss would be sustained from rendering the service in question. In reaching this conclusion it was pointed out that as a result of the state statute a *prima facie* presumption of reasonableness attached to the order of the commission, and therefore the burden was on the railroad company to overcome this presumption. As to the third contention, it was held that the exertion by the State of its authority to regulate the operation within the State of the road chartered by the State was but the exercise of a lawful state police power which did not impose any direct burden upon interstate commerce, and hence did not conflict with the Constitution of the United States.'

The grievances which the railroad company deems it may endure by the enforcement of the order of the commission as commanded by the court are expressed in many assignments of error. To consider them in detail is not essential, as all the complaints which they embrace were embodied in the argument at bar by the counsel for the railway company in the following propositions:

"First. The order of the board and the mandate of the

State court were, in substance and effect, a regulation of commerce among the States, and the court was without power or jurisdiction in the premises.

"Second. The order of the board, on its face, is manifestly unreasonable, and, in the light of the findings of fact, arbitrary, and without the first element of due process of law, and a denial of the equal protection of the law guaranteed by the Federal Constitution.

"Third. The order and judgment of the State court, on the evidence and facts found, deprived the railroad company of its property without due process of law, and without compensation, and denied to it the equal protection of the law.

"Fourth. The order of the board of railroad commissioners was an usurpation of power by the board, and the construction placed upon the law by the State court impaired the obligation of the contract between the State and the railway company, in violation of the Constitution of the United States, and deprived it of its property without due process of law and without compensation, and denied to it the equal protection of the law."

While it may be that in some of their aspects each of the first three propositions involve considerations apparently distinct from the others, as in substance the ultimate reasons by which all three are controlled, are identical, we consider them together. Before doing so, however, we dispose of the question concerning the alleged impairment of a contract right, protected by the Constitution of the United States, which is formulated in the fourth proposition, by pointing out the twofold contradiction upon which the proposition is based. As it is not denied that the asserted charter right was held subject to the power of the State to repeal, alter or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 345. Stating the contention in a different form, the same contradiction becomes apparent. As

the argument concedes the existence of the legislative power to repeal, alter or amend, and as it is impossible to assume that a legislative act has impaired a contract without by the same token declaring that such act has either repealed, altered or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract. And, of course, this reason is controlling, irrespective of the scope of the alleged charter right, since whatever be the extent of the right conferred it was subject to the reserved power.

The court in *Atlantic Coast Line* v. *N. Car. Corp. Com'n*, 206 U. S. 1, reiterating a doctrine expounded in preceding cases, said (p. 19):

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

Also in the same case, restating a principle previously often announced, it was held (p. 20) that railway property was susceptible of private ownership, and that rights in and to such property securely rested under the constitutional guarantees by which all private property was protected. Pointing out that there was no incompatibility between the two, the truism was reannounced that the right of private ownership was not abridged by subjecting the enjoyment of that right to the power of reasonable regulation, and that such governmental power could not in truth be said to be curtailed because it could not be exerted arbitrarily and unreasonably without impinging on the enduring guarantees by which the Constitution protected property rights.

The *Coast Line case* was concerned with the exertion of

state power over a matter of state concern. But the same doctrines had been often previously expounded in reference to the power of the United States in dealing with a matter subject to the control of that Government. Moreover, in the cases referred to, as the power of the two governments operated in different orbits, it was always recognized that there was no conflict between them, although it was constantly to be observed that, resulting from the paramount operation of the Constitution of the United States, even the lawful powers of a State could not be exerted so as to directly burden interstate commerce.

Coming to apply the principles just stated to the order in question, and considering it generically, it is obvious that it exerted a lawful state power. Its commands were directed to a railroad corporation which, although chartered by other States, was also chartered by Kansas, and concerned the movement of a train on a branch road wholly within the State which had been built under the authority of a Kansas charter, although the road was being operated by the Missouri Pacific under lease. The act commanded to be done was simply that a passenger train service be operated over the branch line within the State of Kansas. Unless then for some reason, not manifested in the order, intrinsically considered, it must be treated as such an arbitrary and unreasonable exercise of power as to cause it to be, in effect, not a regulation, but an infringement upon the right of ownership, or, considering the surrounding circumstances, as operating a direct burden upon interstate commerce, it is clear that, within the doctrine previously stated, no error was committed in directing compliance with the order. And this brings us to consider the several reasons relied upon to establish, first, that the order made by the railroad commission was so arbitrary and unreasonable as to cause it to be void for want of power; or, second, that the order was void because its necessary operation was to place a direct burden upon interstate commerce.

1. *The alleged arbitrary and unreasonable character of the order.*

In its principal aspect this contention is based on the insistence that the order and findings of the commission and the findings of the referee, when elucidated by the proper inferences of fact to be drawn from the evidence, show the service which the order commanded could not be rendered without a pecuniary loss. And this, it is insisted, is the case, not only because of the proof that pecuniary loss would be occasioned by performing the particular service ordered, considering alone the cost of that service and the return from its performance, but also because it is asserted the proof establishes that the earnings from all sources, not only of the branch road, but of all the roads operated by the Missouri Pacific in Kansas, produced no net revenue and left a deficit. It is at once evident that this contention challenges the correctness of the inferences of fact drawn by the court below. They therefore assume that we are not bound by the facts as found by the court below, but must give to the evidence an independent examination for the purpose of passing on the constitutional question presented for decision. But we do not think that the case here presented requires us to consider the issues of fact relied upon, even if it be conceded, for the sake of argument only, that on a writ of error to a state court, where a particular exertion of state power is assailed as confiscatory because ordering a service to be rendered for an inadequate return, the proof upon which the claim of confiscation depends would be open for our original consideration, as the essential and only means for properly performing our duty of independently ascertaining whether there had been, as alleged, a violation of the Constitution. We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and en-

joyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in *Atlantic Coast Line* v. *N. Car. Corp. Com'n, supra.* In that case the order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld, despite the fact that it was conceded that the return from the operation of such train would not be remunerative. Speaking of the distinction between the two, it was said (p. 26):

"This is so (the distinction) because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth* v. *Ames*. . . .

* * * * * * * *

"Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

Indeed, the principle which was thus applied in the *Atlantic*

Coast Line case had previously, as pointed out in that case, been made the basis of the ruling in *Wisconsin &c. Ry. Co.* v. *Jacobson*, 179 U. S. 287. The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course, as declared in the *Atlantic Coast Line case* as a general rule, a circumstance to be considered in determining its reasonableness, as are the other criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are in the nature of things paramount, since it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road, is then the question to be considered.

It may not be doubted that the road by virtue of the charter under which the branch was built was obliged to carry passengers and freight, and therefore as long as it enjoyed its charter rights was under the inherent obligation to afford a service for the carrying of passengers. In substance this was all the order commanded, since it was confined to directing that the road put on a train for passenger service. True it is that the road was carrying passengers in a mixed train, that is, by attaching a passenger coach to one of its freight trains. Testing the alleged unreasonableness of the order in the light of the inherent duty resting upon the corporation, it follows

that the contention must rest upon the assumption that the discharge of the corporate duty to carry passengers was so completely performed by carrying them on a mixed train as to cause an order directing the running of a passenger train to be so arbitrary and unreasonable as to deprive of rights protected by the Constitution of the United States. But when the necessary result of the contention is thus defined its want of merit is, we think, self-evident, unless it can be said as a matter of law that there is such an identity as to public convenience, comfort and safety between travel on a passenger service train and travel on a mixed train—that is, a train composed of freight cars with a passenger car attached —as to cause any exertion of legislative authority for the public welfare based on a distinction between the two to be repugnant to the Constitution of the United States. The demonstration as to the want of foundation for such a contention might well be left to the consensus of opinion of mankind to the contrary. The unsoundness of the proposition was clearly pointed out by the Supreme Court of Illinois in *People* v. *St. Louis, A. & T. H. R. Co.*, 176 Illinois, 512, 524, where it was said:

"Independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers, no less than as a carrier of freight. It cannot be said that the carriage of passengers in a car attached to a freight train is a suitable and proper operation of the railroad, so far as the carriage of passengers is concerned. The transportation of passengers on a freight train or on a mixed train is subordinate to the transportation of freight, a mere incident to the business of carry-

ing freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train; that is to say, the duty of furnishing all necessary rolling stock and equipment for the suitable and proper operation of a railroad carrying passengers involves and implies the duty of furnishing a train which shall be run for the purpose of transporting passengers only, and not freight and passengers together."

Even, however, if it be conceded that the reasoning of the case just cited may not be universally applicable because conditions might exist which in some cases might cause a different rule to apply, there is no room for such view in this case. This is so because, as was pointed out by the court below, the statutes of Kansas in force at the time the branch road was incorporated lend cogency to the conclusion that the effect of the acceptance of the charter was to bring the road under the obligation of furnishing passenger service, a duty which could not be escaped by giving the service only on a mixed train and thus subjecting passengers to the resulting dangers and inconveniences. Nor do we think there is any force in the argument elaborately pressed, that chapter 274, Kansas Laws of 1907, as amended by chapter 190, Laws of 1909 (which is in the margin),[1] shows that the law

[1] Part of Chapter 274, Kansas Laws of 1907, as amended by Chapter 190, Laws of 1909.

That all freight trains to which a caboose is attached shall be obliged to transport, upon the same terms and conditions as passenger trains, all passengers who desire to travel thereon, and who are above the age of fifteen years, or who, if under fifteen years, are accompanied by a parent or guardian, or other competent person, but no freight train shall be required to stop to receive or discharge any passenger at any other point other than where such freight train may stop; nor shall it be necessary to stop the caboose of such trains at the depot to receive and discharge passengers; provided, that on such trains the

of Kansas proceeds on the conception that there is no distinction between a passenger train service and the carriage of passengers on a mixed or freight train. On the contrary, we think the statute referred to sustains the opposite inference, since it recognizes that persons who avail of the right conferred to travel in the caboose of a freight train are not entitled to ordinary passenger facilities or to the legal protection ordinarily surrounding passenger traffic. The first, because the statute provides that persons must get on or off the caboose where the company finds it convenient to place that car, and second, because persons riding in the caboose are afforded redress for injury only where the company is guilty of gross negligence.

The contention that the order is unreasonable in and of itself, irrespective of whether there is profit in the operation of the train service which the order commands to be operated, because it directs the movement of the passenger train directed to be run to the state line, where, it is said, there are no terminal facilities, and no occasion for the termination of the transit, is disposed of by the considerations previously stated. We say this because its unsoundness is demonstrated by the reasoning which has led us to conclude that there was no merit in the contention that the fact of pecuniary loss was of itself alone adequate to show the unreasonableness of the order. This follows, from the principle which we have previously expounded to the effect that the criterion to apply in a case like this is the nature and character of the duty ordered

railroad companies shall only be liable for their gross negligence; and provided further, that this act shall not be construed to apply to freight trains on main lines, the most of which trains shall be composed of cars loaded with live stock.

Any officer or employé of such railroad company who shall violate any of the provisions or conditions of § 1 of this act shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined in any sum not less than ten nor more than one hundred dollars, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment.

and not the mere burden which may result from its performance.

2. *That the order was void because it operates a direct burden upon interstate commerce.*

To support this proposition it is urged that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas but to extend into Texas and Missouri, and therefore for an interstate railroad. This being its character, the argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce and beyond the control of the State of Kansas. But this simply confounds the distinction between state control over local traffic and Federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless at the same time it were held that the incorporation of the road had operated to extend the powers of the Government of the United States to subjects which could not come within the authority of that Government consistently with the Constitution of the United States. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several States did not change the nature and character of our constitutional system and therefore did not destroy the power of Kansas over its domestic commerce or operate to bring under the sway of the United States matters of local concern and of course could not project the authority of Kansas beyond its own jurisdiction. The charter therefore left the road for which it provided subject as to its purely local or state business to the authority of the respective States into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the Constitution upon the Government of the United States.

The contention that a burden was imposed upon interstate

commerce by causing the train to stop at the state line where there were no terminal facilities, but in a disguised form reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when, in fact, the order does not deal with an interstate train or put any burden upon such train, but simply requires the operating within the State of a local train, the duty to operate which arises from a charter obligation. It is said that as the state line may be but a mere cornfield and great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the state line, but twenty miles beyond to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and, therefore, must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the State of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328.

Affirmed.

HANNIS DISTILLING COMPANY *v.* MAYOR AND CITY COUNCIL OF BALTIMORE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 75. Argued January 12, 1910.—Decided February 21, 1910.

Where the unsoundness of a Federal question so clearly appears from previous decisions of this court as to foreclose the subject and leave no room for controversy, the writ of error will be dismissed.

This court having decided in *Carstairs* v. *Cochran*, 193 U. S. 10, that the State of Maryland can, as an exertion of its taxing power, without denial of due process of law, tax tangible property having a situs within its borders, irrespective of the residence of the owner, and can if necessary impose the obligation to pay such tax upon the custodian or possessor of such property, giving a lien thereon to secure reimbursement, the only Federal question involved and which would give this court jurisdiction in this case is so foreclosed that the writ of error is dismissed for want of jurisdiction.

This court will not usurp the functions of a state court of last resort in order to distort if not destroy for infirmity of state power a state statute expressly upheld as valid by the state court.

THE facts, which involve the constitutionality of a taxing law of the State of Maryland and the jurisdiction of this court to consider the same on writ of error, are stated in the opinion.

Mr. Shirley Carter for plaintiff in error.

Mr. Sylvan Hayes Lauchheimer and *Mr. Edgar Allan Poe*, with whom *Mr. Oscar Leser* was on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The city of Baltimore sued to recover from the Hannis Distilling Company, a West Virginia corporation, $18,218.68, of which $9,259.29 was the amount of state and city taxes for 1902 on an assessment of 50,996 barrels of distilled spirits, and $8,959.49 was the sum of state and city taxes for 1903

on an assessment of 54,514 barrels of distilled spirits. It was alleged that the spirits assessed were "in the ownership and possession or custody of said defendant in the city of Baltimore, State of Maryland . . . at the time each assessment was made." The declaration as amended alleged that the taxes sued for had been levied by virtue of "chapter 704 of the acts of general assembly of Maryland passed at the January session of 1892, as amended by chapter 320 of the acts of the general assembly of Maryland, passed at the January session of 1900." The provisions thus referred to are embraced in §§ 214–224, inclusive, of Article 81 of the Code of Public General Laws of Maryland of 1904. Their purpose is indicated by §§ 214 and 215, which are as follows:

"SEC. 214. There shall be levied and collected upon all distilled spirits in this State, as personal property, the same rate of taxation which is imposed by the laws of the State on other property for state and county purposes.

"SEC. 215. For the purpose of such assessment and collection it is hereby made the duty of each distiller, and every owner or proprietor of a bonded or other warehouse in which distilled spirits are stored and of every person or corporation having custody of such spirits to make report to the state tax commissioner, on the first day of January in each and every year, of all the distilled spirits on hand at such date, and the tax for the ensuing year from the said first of January shall be levied and paid on the amount of distilled spirits so in hand, as representing the taxable distilled spirits for such year; provided, however, that the same distilled spirits shall not be taxed twice for the same year."

By the remaining provisions of the act the machinery for levying and collecting the taxes for which the act provided was created. Such regulations afforded those interested an opportunity to be heard as to the amount of any assessment, made it the duty of the person having the possession, control or custody of the spirits assessed to pay the taxes levied thereon, and gave to the persons thus made liable to make

payment a lien upon the spirits to secure the reimbursement of the taxes paid.

Because of diversity of citizenship the defendant removed the case to the Circuit Court of the United States for the District of Maryland. In that court two pleas to the declaration were filed. By the first, it was alleged that the corporation was not only incorporated under the laws of West Virginia, but had always been exclusively a citizen and resident of that State, and of no other. The corporation, it was averred, was not, at the time when the taxes sued for were levied, the owner of the distilled spirits upon which the levy was made, or any portion thereof, and, indeed, had never at any time since the assessment and levy had any interest, direct or indirect, in the distilled spirits in question. Under these circumstances it was charged "that under the provisions of article 15 of the bill of rights of the constitution of Maryland, as the same has been construed by the Court of Appeals of Maryland . . . the respective taxes levied on the assessed value of all of the said barrels of distilled spirits . . . were levied on the owners of said barrels of distilled spirits, who were and are persons other than this defendant, and the said taxes were not and could not have been levied on this defendant." The plea then proceeded to aver that at all times prior to the day when the assessment had been made and since, the spirits assessed had been stored in the defendant's bonded warehouse subject to the acts of Congress applicable to bonded warehouses, and that the defendant had at no time "any further custody or control of the spirits than is by the acts of Congress applicable to the subject." The plea further charged that the corporation had no funds in its possession or under its control, belonging to the owners of the spirits with which to pay the taxes; that the corporation had not agreed to pay them, that it had never borne any other relation to the owners than that of creditor, and therefore there was no right to recover the taxes from the corporation or to compel it to pay them. It

was specially averred that to compel the corporation to pay the taxes would be to deprive it of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. The second plea substantially reiterated the averments of the first, and, in addition, specially alleged that all the persons who owned the distilled spirits resided outside of the State of Maryland and could not be taxed *in personam*, and that, by the construction given to the constitution of the State by the highest court of the State, the property, although situated in the State, was not susceptible of being taxed, and, therefore, the taxes were void, and there was no power to cast upon the corporation the duty of paying them, and to compel the corporation to pay the taxes would be a violation of the due process clause of the Fourteenth Amendment.

A demurrer filed by the city to both pleas, on the ground that they stated no defense, was sustained without an opinion. The distilling company, electing to stand upon its pleas, judgment was entered against it for the amount of the taxes. Thereupon a writ of error directly from this court was prosecuted upon the assumption that questions under the Constitution of the United States were involved which gave a right to an immediate resort to this court for their solution. Upon the correctness of such assumption our jurisdiction depends. The assumption, however, may not be indulged in simply because it appears from the record that a Federal question was averred, if such question be obviously frivolous or plainly unsubstantial, either because it is manifestly devoid of merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy. *Leonard* v. *Vicksburg, S. & P. R. Co.*, 198 U. S. 416, 421, and cases cited; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324, 335; *McGilvra* v. *Ross*, 215 U. S. 70.

The assignments merely charge that error was committed

in sustaining the demurrer to the pleas, and consequently in refusing to give effect to the alleged rights under the Constitution which the pleas asserted. But the pleas based the claim of Federal right not merely upon the inherent operation of the law under which the taxes were levied, abstractly considered, but upon limitations which it was assumed were to be treated as embodied in the law in consequence of restrictions on the general power of the State to tax, based upon the construction which it was asserted had been given to a provision in the bill of rights in the state constitution by the court of last resort of the State. And the argument elaborately pressed at bar concerning the assumed Federal question accords with this conception of the pleas, since it does not deny that the act under which the taxes were levied would not be wanting in due process if it had been enacted by a state government possessing normal powers of local taxation, but contends that the act under consideration must be held to be wanting in due process, because its provisions should be construed with reference to the assumed abnormal limitations upon the taxing power of the State of Maryland, above referred to. By the limitation which the argument thus assumes to exist, it is urged the government of the State of Maryland, in the exertion of its taxing power, is confined exclusively to the levy of taxes *in personam* upon the owners of property. Being thus limited by the state constitution, the argument proceeds to insist that there was no taxing power in the State of Maryland adequate to embrace an assessment of taxes upon a mere custodian of distilled spirits, and consequently that the compelling of a custodian to pay such an imposition, not being within the taxing power, was virtually an exercise of the power of eminent domain, and hence there was such a proposed taking of the money or property of the custodian, without full and adequate compensation, as would constitute a denial of due process of law. In addition, it is elaborately insisted that as by the Constitution of the United States a State may not extend its taxing au-

thority over non-residents it must follow, from the limitations on the taxing power of the State of Maryland above asserted, that that State not having the power to tax a non-resident owner of distilled spirits, could not, without a violation of the Fourteenth Amendment of the Constitution of the United States, by indirection accomplish the same result by imposing the obligation to pay upon the custodian. But back of the abstract theories as to the scope of the state taxing power upon which these propositions necessarily depend lies the inquiry whether, for the purposes of this case, in view of the previous decisions of the court of last resort of the State of Maryland and of this court dealing with such decisions, it is open to press such theories and to attempt to make them the basis of the assumed existence of rights under the Constitution of the United States.

In *Carstairs* v. *Cochran,* 95 Maryland, 488, 498, suit was brought by Cochran, as treasurer and tax collector, to recover from Carstairs and another the amount of taxes assessed and levied in respect of distilled spirits in a warehouse of the defendants, the assessment and levy having been made under the identical law by virtue of which the assessment and levy here in controversy was made. The Court of Appeals of Maryland upheld the statute and consequently sustained the validity of the tax. In opening its opinion the court said:

"This appeal constitutes the third attack upon the validity of the act of 1892, c. 704, as now amended by the act of 1900, c. 320, being §§ 204 and 213, inclusive, of Article 81 of the Supplement to the Public General Code of Maryland, providing for the collection of taxes upon distilled spirits in this State.

"The appellants admit that all the features of the law which are here assailed upon constitutional grounds were considered by the court in *Monticello Distilling Co.* v. *City of Baltimore,* 90 Maryland, 416; and that while the act was there held invalid, as it then stood, because of the failure to provide for a hearing in respect to the valuation to be placed on the

spirits for the purposes of taxation, it was declared to be 'in other respects free from constitutional objections.' "

After then stating that it was contended that, as the *Monticello case* had been decided on the ground that the statute did not provide adequate notice, the declarations of the court in that case upholding the constitutionality of the law in other respects were *obiter*, the court proceeded to consider that contention and hold that it was not well founded, because the reasoning in the *Monticello case* concerning the constitutionality of the statute was directly responsive to the contentions made, and therefore involved in the case as presented. Although reaching this conclusion, in view of the court's estimate of the importance of the subject, it nevertheless proceeded to reconsider all the contentions concerning the constitutionality of the statute. As a prelude to the reinvestigation the court said (95 Maryland, 500):

"The provisions of the act of 1892, c. 704, were sufficiently detailed in the opinion rendered in *Monticello Distilling Co.* v. *City of Baltimore, supra,* and that statement will be adopted for this case without repeating it here. That act is assailed here as it was there, as fundamentally vicious, and upon precisely the same grounds, with the exception of the want of notice of assessment, which has been cured by act 1900, c. 320. These grounds are twofold: First, that it lays a tax upon property, and not upon the owner of the property; and, second, that it compels one not the owner of the spirits to pay the tax due by the owner, who is usually unknown to the party compelled to pay."

And after an elaborate consideration of all the contentions the conclusions reached in the *Monticello case* were adhered to and the constitutionality of the statute imposing the tax was reaffirmed. The case was brought to this court (*Carstairs* v. *Cochran,* 193 U. S. 10) and the repugnancy of the statute to the Constitution of the United States was elaborately pressed. Preliminarily to a consideration of the Federal questions which were presented for decision the court at the

outset declared (p. 16) "that the statutes in question do not conflict with the constitution of Maryland is settled by the decisions of its highest court." In considering the Federal question it was held that the State of Maryland could, as an exertion of its taxing power, without denial of due process of law, tax tangible property having a situs within its borders, irrespective of the residence of the owner, and could impose, if necessary, the obligation to pay such tax upon the custodian or possessor of such property, giving a lien thereon to secure the reimbursement of the tax so paid. It was moreover expressly held that neither the regulations contained in the laws of the United States concerning bonded warehouses for the storage of distilled spirits nor the fact that the custodian in whose warehouse such spirits were stored had issued negotiable receipts for the same, operated to prevent the assessment of the spirits for state taxation and the imposing of the duty to make payment of the tax upon the warehouseman. Since the decision in the *Carstairs case* the right of a State consistently with the Constitution of the United States to tax tangible property having a situs within its borders, irrespective of the residence of the owner, and to impose the duty on a warehouseman to pay a tax upon distilled spirits in his custody, even although the warehouse in which they were stored was bonded under the laws of the United States, has been again upheld in *Thompson* v. *Kentucky*, 209 U. S. 340.

It follows that at the time the writ of error directly from this court was sued out, upon the assumed theory that the Maryland act imposing the taxes sued for was repugnant to the due process clause of the Constitution of the United States, such contention had been expressly decided to be without foundation by this court, and therefore the propositions of Federal right upon which alone the jurisdiction of this court depended was foreclosed and not open to controversy, and afforded no substantial basis for the writ of error, unless for some of the reasons alleged by counsel the case is taken out of this general principle.

To accomplish such result the argument is that in *Carstairs* v. *Cochran* this court erroneously, although unwittingly, assumed that the law of the State of Maryland levying the tax which was in question in that case, and which is the same law and character of tax involved in this case, had been upheld by the Maryland court of last resort as a valid exercise of the state taxing power. This alleged oversight, it is suggested, arose from the fact that the court overlooked the "singular limitations" on the taxing power of the State of Maryland, which, as we have previously seen, it is asserted, results from a provision in the bill of rights of the constitution of that State, by which it is insisted the State is bereft of general powers of taxation, and is limited strictly to taxing the owners of property *in personam*. Before further noticing this theory we briefly advert to an attempt to support the suggestion of oversight alleged to have occurred in the decision in the *Carstairs case* by reference to the subsequent case of *Corry* v. *Baltimore*, 196 U. S. 466. The *Corry case* did not concern the Maryland law here in question, but involved the constitutionality of a tax imposed by the State of Maryland upon the shares of stock in a domestic corporation held by a non-resident of the State, which were assessed at the domicil of the corporation, accompanied with the obligation upon the corporation to pay the tax. The principal contention was that the tax was repugnant to the due process clause of the Fourteenth Amendment, because, as the complainant stockholder was a non-resident of Maryland, the tax was an attempt to extend the taxing power of the State over a person not subject to its jurisdiction. The court, while recognizing that the Maryland court had decided that the tax in question was not upon the stock *in rem* or upon the corporation, but was upon the owner, nevertheless decided that the tax was not wanting in due process, because the situs of the stock for the purpose of taxation was in effect fixed by the act of incorporation by which the stockholder was bound, and that the right thus to tax at the domicil of the corporation carried with it

as an incident the regulating power to compel the corporation to pay. Because it was recognized that the court below had decided that the tax there in question was *in personam*, and, accepting the complexion given to the tax by the court of last resort of Maryland, it was held not to be repugnant to the Constitution of the United States, lends even no semblance of support to the proposition that thereby it was in the remotest degree intimated that the *Carstairs case* was mistakenly decided or that in disregard of the ruling made by the Maryland court in the *Carstairs case* it was intended to intimate that the burden which the court in that case had sustained as an exercise of the taxing power of the State of Maryland was not the exertion of such authority. And this serves to demonstrate the unsubstantial character of the contention concerning the limitation of the state taxing power as applied to the case before us, by which alone the semblance of support for the existence of a Federal question necessary to confer jurisdiction upon this court can be evolved. Beyond dispute, in the *Carstairs case* the court of last resort of Maryland upheld the act here in controversy as an exertion of the taxing power of the State, and in so doing declared that it but reiterated and reëxpounded rulings by it previously made. It follows that, as for the purposes of a review by this court of alleged questions concerning the repugnancy of the taxing act to the Constitution of the United States, the decision of the state court maintaining under the state constitution the validity of the taxing power which the act exerted was binding upon this court, it must result that contentions to the contrary are so devoid of merit as to present no substantial Federal question. *Castillo* v. *McConnico*, 168 U. S. 674. Indeed, considered in its ultimate aspect, the entire argument by which it is sought to evolve a supposed Federal question and thus to escape the controlling effect of the decision of this court in the *Carstairs case*, rests upon the assumption that the conclusion of the state court in that case as to the validity of the taxing act under the state constitution was not sus-

tained by the reasoning which the court gave for its conclusion or that the reasoning was inherently unsound because it proceeded upon a misconception of the state constitution. In other words, the only possible foundation for the asserted Federal question is the conception that this court would usurp the functions of a state court of last resort in order to distort, if not to destroy, for infirmity of state power, a state law expressly upheld as valid by the state court of last resort.

Dismissed for want of jurisdiction.

FRAENKL *v.* CERECEDO HERMANOS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 411. Submitted January 10, 1910.—Decided February 21, 1910.

Where a bill of review is presented for filing within the period allowed, and the court delays passing upon the application until after that period has elapsed, the time between tendering the bill for filing and permission given to file is not counted in applying the limitation. *Ensminger* v. *Powers*, 108 U. S. 292.

Jurisdiction is determined as of the time of commencement of the suit, and even though the jurisdiction of the court be enlarged by a subsequent statute so as to include the parties, the court cannot acquire jurisdiction against objection.

After a case has been decided below without reference to any Federal question parties may not for purpose of review by this court inject a Federal question by the suggestion that a Federal right was relied on.

1 Porto Rico Fed. 53, affirmed.

THIS is an appeal from a decree of the District Court of the United States for Porto Rico, upon a bill of review, vacating and annulling a decree entered by that court in an equity cause, and dismissing the bill of complaint in said cause without prejudice.

The bill in the equity cause referred to was filed in December, 1900. The present appellants were complainants. Some of them were alleged in the bill to be copartners doing business in Dundee, Scotland, as Jaffe Brothers & Company, and to be subjects of the Queen of Great Britain and Ireland. The others were averred to be copartners doing business in Berlin, Germany, as Hinne & Company, and to be subjects of the Emperor of Germany. The defendants to the bill were Demetria Bolta and Alfredo Arnaldo y Sevilla, and various other individuals alleged to be the general and special partners of a firm styled J. Fernandez & Co. Among such were Manuel, Enrique, José and Francisco Cerecedo, all of whom were members of a firm styled Cerecedo Hermanos, which firm, it was charged, was a special partner in J. Fernandez & Co. All the defendants were averred to be citizens and residents of Porto Rico.

The allegations of the bill were thus summarized in an opinion rendered in the court below:

"It avers, in substance, that Fernandez & Co., of which firm Cerecedo Brothers were special partners up to the time when Fernandez & Company suspended payment, were indebted to the complainants in certain sums set forth in the bill; that fraudulently and to obtain time the last-named firm agreed with Jaffe Brothers & Company to transfer to them certain securities upon third parties for their debt, but thereafter proposed to turn them over in actual payment *pro tanto*, but when the agent of Jaffe Brothers & Company obtained authority to agree to this, said firm applied for suspension of payments; that to get this they issued false evidences of indebtedness to Cerecedo Brothers and others; that after the suspension of payments Fernandez, as liquidator, fraudulently transferred the securities complainants Jaffe Brothers & Co. were to have to a third party without consideration, and for half of their value, Cerecedo Brothers being in fact the real purchasers; that Fernandez, after the suspension of payments, turned over to Cerecedo Brothers a large amount

of property, the amount being unknown to complainants, and disposed of a large part of the assets fraudulently. Interrogatories were propounded in the bill to Fernandez. The relief sought was a specific performance of the agreement with Fernandez as to the securities; that a receiver be appointed and the assets of Fernandez & Company be marshaled; that Fernandez & Company be enjoined from collecting said securities or interfering with the company's assets; that they be delivered to the receiver, the liens be ascertained, the property sold and distributed among the creditors, Jaffe Brothers & Company being allowed to participate in the distribution, said securities being first applied on their debt."

After the return of service of summons upon the firm, Herbert E. Smith, signing himself "Solicitor for defendants," filed a "special appearance" in the case "for the purpose of moving the court for the compliance on the part of the plaintiffs with the rule of court relative to non-residents giving security for costs, and for the purpose of opposing the motion for an injunction and receiver." On January 14, 1901, a receiver was appointed, who however never qualified. It was recited in the order appointing the receiver that after due notice had been given of an application for temporary injunction, the cause had been fully argued by counsel for the respective parties. Subsequently, on January 31, 1901, by written stipulation between counsel for the plaintiffs and defendants, it was agreed "that the defendants herein may and shall have until the 20th day of February, 1901, for the purpose of demurring to, pleading to or answering the bill of complaint of said complainants herein." Thereafter, on February 23, 1901, a decree *pro confesso* was entered against all the defendants, and complainants were given leave to proceed *ex parte*. On June 8 following a final decree was entered, adjudging the general and special partners in the firm of J. Fernandez & Co. to be indebted to the complainants in specified amounts, cancelling and annulling, as against the rights of complainant, because fraudulent and fictitious, the

alleged indebtedness of the firm of J. Fernandez & Co. to the special partners, cancelling and setting aside as fraudulent the transfers made to the defendant Bolta, and adjudging that the defendants composing the firm of J. Fernandez & Co. pay the amounts found due to the complainant, and that in default of so doing execution should issue. On January 31, 1902, an execution was issued, which was levied upon the property of the firm of Cerecedo Hermanos. Thereupon, on February 6, 1902, there was filed in the court from which the execution issued, on behalf of the members of that firm, a petition praying for leave to file a bill to review and set aside the decree theretofore entered *pro confesso* against them. The petition recited the presentation of the bill of review, and that document was marked as "Tendered February 6, 1902."

Both in the petition and bill of review various errors asserted to be apparent on the face of the record were set out, which, from the view we take of the case, need not be here detailed.

While, as stated, the petition for leave was filed on February 6, 1902, leave to file was not granted until June 22, 1903, on which date the court filed an opinion. 1 Porto Rico Fed. 53. The opening paragraph of the opinion is as follows:

"This is a petition for leave to file a bill of review, which is also tendered. The decree asked to be set aside was entered June 8, 1901. This petition was presented February 6, 1902. Objection is made that it comes too late. It is claimed that the act of Congress of March 3, 1891, relative to the United States Court of Appeals, applies to it. The limitation for appeal, and which, by analogy, has been applied in equity to the time for filing bills of review, applicable, however, is the two years provided in section 1008 of the United States Revised Statutes. *Clark* v. *Killian*, 103 U. S. 766; *Allen* v. *S. P. R. Co.*, 173 U. S. 479."

The court considered two of the grounds assigned in support of the petition for leave to file. One related to the jurisdiction of the court to render the decree and was disposed

of by the statement that all the complainants were aliens. Upon the ground, however, that the averments of the bill in the main cause did not authorize the money decree which had been rendered, it was held that in order to prevent injustice the "petitioners should be allowed to file their bill of review, appear, open the decree, and make defense," upon payment of costs to date and the execution of a bond in the sum of fifteen thousand dollars, conditioned to perform any judgment that might finally be rendered against them. On June 19, 1903, an order was entered permitting the filing of the bill of review, opening the decree in the original cause and permitting the Cerecedos to appear therein and make defense, and ordering the return of the execution upon the giving of bond. The condition as to payment of costs and giving bond having been complied with, thereafter, on October 13, 1903, a demurrer was filed to the bill of review, and at the same time in the main cause a plea to the jurisdiction of the court was filed.

On October 14, 1903, an amended bill of review was filed. Nearly four years afterwards, on June 1, 1907, an opinion was filed, holding that the demurrer to the bill of review and also the plea to the jurisdiction in the main case should be overruled. On the twenty-second of the same month an answer was filed to the bill of review, to which a reply was filed in the following month. On the same day the Cerecedos also demurred to the bill of complaint in the main cause. On April 3, 1908, the court vacated, as improvidently made, the order opening the final decree in the main cause and suspended further proceeding therein until the determination of the questions raised by the bill of review. On October 30 following, however, the court consented to a reargument of the plea to the jurisdiction in the main cause which had been theretofore adversely ruled upon, with the result that on February 1, 1909, the plea to the jurisdiction was sustained. A final decree was thereupon entered upon the issues made upon the bill of review, and after reciting that it appeared upon the

face of the record in the original cause that the court was without jurisdiction to entertain the same, it was decreed as follows:

"It is, therefore, hereby ordered, adjudged and decreed that this bill to review the proceedings of this court in said original cause be, and the same hereby is, sustained for the reason aforesaid; that the decree entered by this court on the 8th day of June, A. D. 1901, in the city of Mayaguez, in favor of complainants in said original suit, the same being as aforesaid No. 6 on the equity docket at Mayaguez, entitled *Jaffe Brothers & Company* and *Hinne & Company* v. *J. Fernandez & Company and Cerecedo Brothers*, be, and the same hereby is, vacated and annulled; and that said original bill of complaint be, and the same hereby is, dismissed without prejudice, with costs of this bill of review in favor of the complainants herein."

The cause was then appealed to this court.

Mr. N. B. K. Pettingill and *Mr. George H. Lamar* for appellant:

A bill of review must be *filed* within the statutory period for taking an appeal or writ of error. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Central Trust Co.* v. *Grant Locomotive Wks.*, 135 U. S. 207. From the Porto Rico court this would be two years. *Allen* v. *So. Pac. Ry. Co.*, 173 U. S. 479; *Royal Ins. Co.* v. *Martin*, 192 U. S. 149; Rev. Stat., §§ 702, 1008.

The objection to the jurisdiction of the District Court of the United States for Porto Rico was not seasonably raised and under the circumstances of this case the court properly took and retained jurisdiction. *Kennedy* v. *Bank*, 8 How. 586; *Ex parte Watkins*, 3 Pet. 193; *Dowell* v. *Applegate*, 152 U. S. 327, 340.

The lower court had jurisdiction after the act of March 2, 1901, 31 Stats. 953, when the final decree was entered and the passage of that act cured any defect of jurisdiction. *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289; *Richardson* v. *Green*, 61 Fed. Rep. 423, 431; *First National Bank* v. *Radford Co.*, 80

Fed. Rep. 569; *Hoffman* v. *Knox*, 50 Fed. Rep. 484; *Masterson* v. *Howard*, 18 Wall. 99; *Pennsylvania* v. *Bridge Co.*, 18 How. 421.

The original bill also raised a Federal question as the construction of a statute of the United States was involved and that gave the court jurisdiction. *Cohens* v. *Virginia*, 6 Wheat. 264, 379; *Osborne* v. *Bank*, 9 Wheat. 738, 822; *Wyman* v. *Wallace*, 201 U. S. 230.

Mr. Francis H. Dexter for appellees.

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

The assignments of error which require consideration assail the power of the court below to permit the filing of the bill of review, and also question the validity of its action in vacating the decree entered in the main cause and dismissing the bill filed therein.

Respecting the first, the proposition is that the limit of time within which a bill of review might be filed had expired when leave was given, and that the court should have required payment of the money judgment decreed in the main cause before granting permission to file the bill of review. These contentions are untenable. True it is that in analogy to the time allowed by law for an appeal to this court from a final decree of the District Court of Porto Rico, the bill of review should have been filed in two years from June 8, 1901, the date when the final decree sought to be reviewed was entered, and the bill of review was not actually filed until June 22, 1903. But the bill was presented for filing on February 2, 1902, and it is plain that the failure of the complainants in the bill of review to actually file the same until June 22, 1903, was occasioned by the action of the court in not sooner passing upon the application for leave to file. Under such circumstances, we think the time which elapsed between the

tendering of the bill for filing and the permission given to file should not be counted in applying the two years' limitation. *Ensminger* v. *Powers,* 108 U. S. 292. As respects the granting of permission to file the bill of review, the court was vested with a judicial discretion to permit such filing without a previous payment of the moneys awarded by the decree sought to be reviewed, and there was no abuse of such discretion in giving leave to file, conditioned upon the furnishing of the indemnity bond which was thereafter executed.

As to the alleged error in vacating the decree entered in and dismissing the original cause.—In the court below the allegation attacking the jurisdiction of the court over the original cause was as follows:

"That this court did not have jurisdiction of the original cause and bill of complaint, for the reason that, according to the allegations of said bill, all the parties plaintiff were foreign subjects, and all the parties defendant were citizens of Porto Rico, there being no citizen of the United States or of a State of the United States a party defendant, and no other or sufficient ground or reason for the jurisdiction of this court is in the said original bill set forth sufficient to give this court jurisdiction of the said cause."

The bill in the main cause was filed in December, 1900. At that time the jurisdiction of the court below was fixed and limited by § 34 of the act of Congress of April 12, 1900, commonly known as the Foraker Act, which established civil government in Porto Rico. It was provided in the section that the District Court of the United States for Porto Rico "shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court." That, in view of the parties to the controversy, the case would not have been cognizable in a Circuit Court of the United States is obvious, and hence, manifestly, the court below was without jurisdiction under the act of 1900. It is urged, how-

ever, that as the final decree in the main cause was entered in June, 1901, although the court was clearly without jurisdiction to entertain the cause when the bill was filed, as no question as to jurisdiction had been raised, the court had power to enter the decree by virtue of the third section of the act of March 2, 1901, 31 Stat. 953, chap. 812, reading as follows:

"That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Pacific R. Co. v. *Ketchum*, 101 U. S. 289, 298, is cited as authority for the proposition. In that case, however, not only was no objection made by the parties in the progress of the cause to the right of the court to proceed, but the decree when rendered was consented to, and the ruling was that although "Consent cannot give the courts of the United States jurisdiction, it may bind the parties and waive previous errors, if when the court acts jurisdiction has been obtained." A brief consideration, however, of the circumstances in this case demonstrates that the *Ketchum case* is not in point. The last appearance of the defendants in the litigation in the main cause was on January 31, 1901, when a stipulation was made in respect to the time for pleading to the bill, and, of course, an exertion of jurisdiction by the court was neither invoked by the defendants nor consented to by them after the enactment of the amendatory statute of 1901. Under such circumstances it cannot be held that the defendants were estopped from availing of the objection of want of jurisdiction.

The additional contention is made that the case presented by the bill in the main cause was one arising under the laws of the United States, and that because thereof jurisdiction

existed, irrespective of the want of citizenship of the parties. The argument is that the complainants, in their bill, made reference to the provisions of an order of the military governor of Porto Rico concerning "suspension of payments," which, if given proper effect, would have prevented the accomplishment of the fraud which it was the object of the bill to prevent. This order thus referred to, it is said, was, in legal effect, a law of the United States, and the reference to and reliance upon its provisions was an invoking of the jurisdiction of the court on the Federal ground that the case was one arising under the laws of the United States. In our opinion, however, there is not even color for the proposition that the bill presented a controversy arising under a law of the United States, even if the military order referred to be treated as a law of the United States. To sustain such a contention it must appear that a controversy of that nature was called to the attention of the lower court in such a way as to invoke its action thereon. In other words, after a case has been decided below parties may not, for the purpose of a review by this court, attempt to inject a Federal question into the cause by suggesting that it would have been possible by a latitudinarian construction of the pleadings to suggest that a right under the Constitution or a law of the United States was relied upon. And of course in saying this we must not be understood as intimating that the assumed Federal question, even if it had been called to the attention of the court below, would have had sufficient substantiality to have been the basis for jurisdiction.

Affirmed.

PENDLETON *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 53. Argued January 21, 1910.—Decided February 21, 1910.

The retention by the prosecuting authorities, without using it on the trial, of a statement made by the accused, does not amount to compelling him to be a witness against himself within the provisions of Chap. 5 of the Philippine Act of Congress of July 1, 1902, 32 Stat. 691.

The Supreme Court of the Philippine Islands tries a criminal case on the record *de novo*, and if it avoids an error which may have been committed by the Court of First Instance, the judgment will not be reversed by this court on account of such error; and so held in this case in which the Court of First Instance took into consideration the fact that accused did not offer to testify on his own behalf, but the Supreme Court, on the accused's own appeal, declared that it did not take that fact into consideration but rendered its decision on the proofs.

7 Philippines, 457

THE facts are stated in the opinion.

Mr. Henry E. Davis and *Mr. James H. Blount* for plaintiff in error:

The neglect or refusal of accused to be a witness shall not in any manner prejudice or be used against him. Military Order, No. 58, of April 23, 1900, 1 Pub. Laws Phil. Comm., § 15, subsec. 3, p. 1083; *Kepner* v. *United States*, 195 U. S. 112; *Ruloff* v. *The People*, 45 N. Y. 203; *People* v. *Doyle*, 58 Hun (N. Y.), 535; *Wilson* v. *United States*, 149 U. S. 60; *Showalter* v. *State*, 84 Indiana, 562, 566; *Staple* v. *State*, 89 Tennessee, 231; *Commonwealth* v. *Scott*, 123 Massachusetts, 239; *Minor* v. *State*, 120 Georgia, 490; *Quinn* v. *The People*, 123 Illinois, 333, 347; *Dorr* v. *United States*, 195 U. S. 138; *State* v. *Brownfield*, 15 Mo. App. 593; *People* v. *Tyler*, 36

California, 527; *Baker* v. *People*, 105 Illinois, 458; *Watt* v. *People*, 126 Illinois, 31; *State* v. *Ryan*, 70 Iowa, 156; *State* v. *Graham*, 62 Iowa, 111; *State* v. *Mosley*, 31 Kansas, 357; *State* v. *Banks*, 78 Maine, 492; *State* v. *Cleaves*, 59 Maine, 301; *People* v. *Rose*, 52 Hun (N. Y.), 29; *Reddick* v. *State* (Miss.), 16 So. Rep. 490; *Eubanks* v. *State*, 7 So. Rep. 426; *Yarborough* v. *State*, 70 Mississippi, 593; *State* v. *Howard*, 35 S. Car. 203; *Brazell* v. *State*, 29 Tex. Crim. App. 452; *Johnson* v. *State*, 31 Tex. Crim. Rep. 464; *Jordan* v. *State*, 29 Texas, 595; *Richardson* v. *State*, 27 S. W. Rep. 139; *State* v. *Chicell*, 36 W. Va. 659; Wharton's Crim. Ev. 435.

Military Order No. 58 is for the Philippine Islands what the Fifth Amendment is for the United States, and constitutional provisions for security of persons and property must be liberally construed. See *Boyd* v. *United States*, 116 U. S. 616, 635.

The action of the prosecuting attorney in holding on to the affidavit improperly obtained from accused prevented accused from taking the witness stand and was therefore prejudicial to his interests.

Mr. Assistant Attorney General Russell for the United States.

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error was convicted of the crime of murder in the Court of First Instance of the Province of Cebu, Philippine Islands, and sentenced to twenty years' imprisonment, which was reduced to seventeen years by the Supreme Court.

The assignments of error are as follows:

"1. The accused has been compelled to be a witness against himself in violation of Article V of the law of Congress of July 1, 1902.

"2. The fact that the accused did not offer himself as a witness in his own favor has been used to his prejudice in violation of his right to remain silent until his guilt be established by the evidence beyond a reasonable doubt.

"3. The evidence does not show the guilt of accused of the crime imputed to him beyond a reasonable doubt."

The argument to support the first assignment of error is not very tangible. It is based upon an affidavit of defendant in error that he was subpœnaed as a witness and obeyed by going to the fiscal's, where he answered questions put to him without knowing that he had a right to refuse or being notified that he had such right, and not knowing that "the object of securing his statement was in order to search for proof against him." The affidavit also states that he was not represented by counsel, and did not know that he had a right to consult a lawyer. Motion was made, presumably based on the affidavit, for an order to the fiscal to return to the defendant the statement, together with all copies of the same, and that the fiscal be prohibited from using the statement in any manner whatever. Nothing seems to have been done with that motion, and subsequently it was repeated and denied on the ground "that it was not a proper time to make such motion, as the court could not then decide on the admissibility of proofs which had not yet been offered in the cause." An exception was entered.

It is not contended that the statement was afterwards used in any way, but the action of the court is urged nevertheless as an error "so grave and so material," to use counsel's words, "as to call for a new trial."

The argument to support it is based on suppositions of what might have been done, and the potency of the statement in the hands of the prosecuting officer. "It left the defendant open, it is said, to the fire of a masked battery." But the law has no measure to apply to such a situation. Defendant was certainly not disabled from telling the truth in other statements if he wished to make them, and to be able not to tell the truth can hardly be urged as a legal and constitutional right. The assignment of error, therefore, is not well taken.

The second assignment of error is that the fact that the

defendant did not offer himself as a witness was used against him. To support this contention certain remarks of the judge of the trial court in delivering sentence upon the defendant are quoted. The court said:

"The prosecution has presented an abundance of proof which, in case the court should give it full credence, would establish the guilt of the accused beyond all reasonable doubt. On the other hand, the defense has presented very little direct proof; the accused did not use his right to testify in his own favor, and no eyewitness has testified favorably to him. The defense has practically limited itself to insisting on: (1) Alleged contradictions between the various witnesses of the prosecution relating to the details of identical facts or happenings related by them. (2) Mistakes which they claim to be essential, in the testimony of the witnesses for the prosecution with respect to distances and relative positions of persons and objects connected with the case. (3) The expert testimony of two physicians that the deceased could not have died as the result of a wound received in the manner stated by the witnesses for the prosecution."

An analysis of this language is made by counsel and its relation to the general character of the evidence is discussed, and the conclusion deduced that the trial court urged three arguments to sustain its judgment: "First, paucity of proof in behalf of the defendant. Second, his failure to testify in his own favor. Third, his failure to get any eyewitness to the shooting, to rebut evidence of the Filipinos who claim to have been eyewitnesses." And to this summary, which, it is urged, demonstrates that the trial court considered in determining the guilt of defendant, that he failed to take the stand in his own behalf, there is added the comment of the Supreme Court of the islands in its review of the case, or rather in denying a motion for a new trial, after its decision of the case. Upon the first consideration of the case in the Supreme Court no assignment of error based on the point was made. It was raised for the first time in what is styled "Exception to the

judgment, and motion for a new trial," in which he excepted to the judgment rendered by the Supreme Court and prayed that it be set aside and a new trial granted him. The reasons given were as follows:

"I. The defendant has been compelled to testify against himself in violation of art. No. 5 of the law of Congress of July 1, 1902, in the following manner:

"The accused, taking advantage of the right conceded him in the third paragraph of article 15 of the General Orders, No. 58, did not testify in the Court of First Instance, and said court in its judgment considered this circumstance as prejudicial to the defendant; and the attorney general adduced the same circumstance in his brief in this court in the following words:

"'No direct proof was presented by the defense to contradict the facts stated by the witnesses for the prosecution; nor did the defendant himself testify in his own favor to deny the grave crime with which he is charged.'

"And to overcome as far as possible the effect of this illegal procedure so prejudicial to the accused, his counsel in this court, speaking in his name, felt himself obliged to state to the court that the defendant did not go on the witness stand because he did not remember anything about the occurrence; which circumstance was considered by the court as a fact prejudicial to the defendant and appellant in the following words:

"'The defendant, a lieutenant of constabulary in command at the Parian Barracks at Cebu, being intoxicated borrowed a carromata, which was without lights, from a friend and was found wandering about the streets therein by a municipal policeman named Almonte, who at his request drove him to the barracks. As to subsequent occurrences we have not the benefit of his recollection and must rely on the testimony of the witnesses for the prosecution and the circumstances of the case.'"

To which it was replied:

"The court having heard the petition of Attorney Kincaid, praying for a new trial of case No. 3176, the *United States* v. *Pendleton*, in which a decision was rendered by this court on the ninth of the present month of February, 1907, said, that although the fact that the defendant declined or failed to testify as a witness was taken into consideration by the Court of First Instance, this court, in deciding the cause did not take said fact into consideration, but rendered the decision in accordance with the proofs presented at the trial, and, therefore, the new trial solicited is denied."

Defendant puts aside the disclaimer of the Supreme Court as unimportant in an argument which is certainly difficult to represent if not to follow. He appealed to the Supreme Court to review the judgment of the lower court. He made a motion for a new trial in the Supreme Court, and that being denied, he now urges, not error committed in the Supreme Court, but error committed in the trial court. This is worked out and attempted to be justified by an argument that, it may be, we do not understand. It is said that the Supreme Court misapprehended the "function conferred upon it by Congress and the Philippine Commission in relation to reviewing the decisions of Courts of First Instance." That it seemed to be of opinion that it had "the same authority in this regard as was possessed by its Spanish predecessor, the audiencia," and "passed on the decision of the court below about as a reviewing court would pass on an equity proceeding upon written testimony submitted by affidavits and interrogatory depositions." And by doing so, counsel further urge that the Supreme Court did not have before it what they describe as "the supremely human element—the appearance of the witnesses and their manner on the stand, etc.," and, not having such element, could not judge of the effect of the evidence independently of the silence of the defendant, and could not determine therefore how much the error of the trial court, in considering such silence, controlled its judgment. The answer is that the Supreme Court had the power

to review the case and consider all that was necessary to the exercise of such power. That power was invoked by defendant, and he secured from its exercise a reduction of three years in his sentence. And *Trono* v. *United States*, 199 U. S. 521, may be cited as an answer to the contention. In that case the power of review which the Supreme Court possessed over the judgment of the trial court was exerted to the extent of reversing a judgment and sentence for assault, and rendering a judgment for homicide. *Trono* v. *United States* needs very little comment. It declares the relation of the courts and the scheme of procedure existing in the Philippine Islands and brings the case at bar to the simple proposition, when stripped of ingenious suggestions, that an error which was made (if error was made, of which we express no opinion) at the trial in the court of first instance, and which was not repeated in the Supreme Court, is not a ground of legal complaint.

The third assignment of error is not discussed by counsel. It is, however, manifestly without merit.

Judgment affirmed.

MR. JUSTICE HARLAN dissents.

PENMAN *v.* ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

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

No. 67. Argued January 7, 10, 1910.—Decided February 21, 1910.

The rule of *ejusdem generis* is a rule of interpretation, and even if it should be applied more liberally to contracts of insurance than to contracts of other kinds, it cannot be so applied as to exclude "blasting powder" from a prohibition to keep or allow on insured premises certain specified explosives and "other explosives."

Where the policy furnishes the only way by which its terms can be

waived and expressly provides against modification by customs of trade or manufacture or by agents, and are unambiguous, courts cannot admit parol testimony to alter the written words of the contract. *Northern Assurance Company* v. *Grand View Building Association*, 183 U. S. 308.

151 Fed. Rep. 961, affirmed.

THE facts, which involve the liability of a fire insurance company on a policy of insurance, are stated in the opinion.

Mr. A. J. Truit, with whom *Mr. Frederic D. McKenney* and *Mr. B. M. Clark* were on the brief, for petitioner:

The action is governed by the law of Pennsylvania. 22 Am. & Eng. Ency. of Law, 1349; *Mann* v. *Salsberg*, 17 Pa. Super. Ct. 280; *Musser* v. *Stauffer*, 192 Pa. St. 398; Judiciary Act of 1789, c. 20, § 34. The knowledge and act of an insurance company's local agent connected with the risk is the knowledge and act of the company itself. *Caldwell* v. *Fire Assn.*, 177 Pa. St. 492; *Davis* v. *Insurance Co.*, 5 Pa. Super. Ct. 506, 512; *Phila. Tool Co.* v. *British Am. Assurance Co.*, 132 Pa. St. 236; *People's Ins. Co.* v. *Spencer*, 53 Pa. St. 353; *Humphreys* v. *Nat. Ben. Assn.*, 139 Pa. St. 264.

Evidence is admissible to show the understanding and intent of the parties and the customs connected therewith at the time the insurance was contracted. *Graybill* v. *Fire Ins. Assn.*, 170 Pa. St. 75; *Lancaster Co.* v. *Fire Ins. Co.*, 170 Pa. St. 151; *W. & A. Pipe Lines* v. *Insurance Co.*, 145 Pa. St. 346; *Helme* v. *Phila. Life Ins. Co.*, 61 Pa. St. 107; *Pittsburg Ins. Co.* v. *Frazee*, 107 Pa. St. 521; *Lutz* v. *Insurance Co.*, 205 Pa. St. 159; *Machine Co.* v. *Insurance Co.*, 173 Pa. St. 53; *Bently* v. *Insurance Co.*, 191 Pa. St. 276; *McCaffery* v. *Knights of Columbia*, 213 Pa. St. 609.

Where a policy of insurance is susceptible without violence of two interpretations that which is more favorable to the insured should be adopted. *Teutonia Fire Ins. Co.* v. *Mund*, 102 Pa. St. 94; 16 Am. & Eng. Ency. of Law, 862; 17 Am. & Eng. Ency. of Law, 25. The expression in a contract of one or

more things of a class implies the exclusion of all not expressed though all would have been implied had none been expressed. *Higgins* v. *Eagleton*, 13 Misc. (N. Y.) 223; *S. C.*, 68 N. Y. St. 82; *O'Niel* v. *Van Tassel*, 137 N. Y. 297; *Cree* v. *Bristol*, 66 N. Y. St. 518; *Hummerquist* v. *Swensson*, 44 Ill. App. 627.

Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties. *Woodruff* v. *Woodruff*, 52 N. Y. 53; *McMillen* v. *Titus*, 222 Pa. St. 500.

The burden is on the insurance company to prove the existence of the condition and its violation. 16 Am. & Eng. Ency. of Law, 955; *Dougherty* v. *Insurance Co.*, 154 Pa. St. 386.

A parol waiver by an agent of the insurer of a condition of the policy is binding on the insurer. *Coursin* v. *Pa. Ins. Co.*, 46 Pa. St. 323; *McFarland* v. *Kit. Ins. Co.*, 134 Pa. St. 590.

The burden was on the insurance company to show that blasting powder, which was not among the prohibited articles named in the condition, was of the same nature, as dangerous and inflammable, as dynamite and gunpowder, and if the same as gunpowder that a quantity in excess of twenty-five pounds was kept on the premises.

There was no proof that benzine was of like nature with camphene or spirit gas. It is not a matter of which the court will take judicial notice. It is a question of fact, to be found by a jury upon evidence. *Mears* v. *Humboldt Ins. Co.*, 92 Pa. St. 15, 19; *Wood* v. *Northwestern Ins. Co.*, 46 N. Y. 421.

The universal rule of legal construction and interpretation is that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality. *Sandinan* v. *Breach*, 7 B. & C. K. B. Reps. 100; *Brooks* v. *Lord Kensington*, 14 Eng. Ruling Cases, 723; *Alabama* v. *Montague*, 117 U. S. 602; *United States* v. *Celluloid*, 82 Fed. Rep. 627; *Newport &c. Co.* v. *United States*, 61 Fed. Rep. 488; *Crystal Sp. Distillery Co.* v. *Cox*, 49 Fed. Rep. 555;

Erwin v. *Jersey City*, 60 N. J. L. 145; *Livermore* v. *Camden County*, 29 N. J. Law, 247; *King* v. *Thompson*, 87 Pa. St. 369; *Renick* v. *Boyd*, 99 Pa. St. 555; *Pardee's App.*, 100 Pa. St. 412; *Bucher* v. *Commonwealth*, 103 Pa. St. 528.

Mr. William D. Mitchell, with whom *Mr. W. K. Jennings*, *Mr. D. C. Jennings*, *Mr. Jared How*, *Mr. Pierce Butler* and *Mr. George Hoke* were on the brief, for respondent:

To keep, use or allow blasting powder upon the premises was clearly prohibited by the terms of the written contract, and no application of the rule of *ejusdem generis* can exclude blasting powder from the words "other explosives" in the policy. *Renick* v. *Boyd*, 99 Pa. St. 555; *United Ins. Co.* v. *Foote*, 22 Ohio St. 340. See statutes, 1 Mass. Rev. Laws, 1902, p. 880, c. 102, § 105; So. Car. Civ. Code, 1902, § 2156.

A violation by a tenant has same effect as violation by the insured. *L'pool & Lon. & Globe* v. *Gunther*, 116 U. S. 113; *Diehl* v. *Insurance Co.*, 58 Pa. St. 443.

The condition included even a temporary presence of the prohibited article. 180 Pa. St. 257. Extrinsic or parol evidence is not admissible to alter the meaning of the written contract. *Northern Ins. Co.* v. *Grand View Assn.*, 183 U. S. 308; *West. Assn. Co.* v. *Rector*, 85 Kentucky, 294; *Citizens' Ins. Co.* v. *McLaughlin*, 53 Pa. St. 485, distinguished, and see *McKeesport Co.* v. *Insurance Co.*, 173 Pa. St. 53; *Lutz* v. *Royal Ins. Co.*, 205 Pa. St. 159.

The question in the case is not governed by the decisions in the State of Pennsylvania. *Commonwealth* v. *Huntzinger*, 98 Pa. St. 41. If the contract did not express the real intention of the parties as written the petitioner's remedy is to seek its reformation in equity. *Nor. Ins. Co.* v. *Grand View Assn.*, 203 U. S. 106.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action to recover the sum of $2,600, with interest, upon a fire insurance policy for the value of a building de-

stroyed by fire. The action was brought in the Court of Common Pleas of Jefferson County, Pennsylvania, and by the insurance company, the respondent herein removed to the United States Court for the Western District of Pennsylvania.

Plaintiff's statement, to use the local name for her pleading, alleged a contract of insurance whereby the insurance company insured, for the term of three years, against direct loss by fire, "a two-story shingle-roofed building, 28 x 96, and additions," etc., to be occupied by tenants as dwellings, and situated in Punxsutawney, Jefferson County, Pennsylvania. Payment of the premium and charges was alleged, also the total loss of the building by fire. A copy of the policy was attached to the statement and made a part of it. The policy contained the following covenant:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 lbs., in quantity, naphtha, nitro-glycerine, or other explosives."

The policy also contained the following covenant:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The case was tried to a jury and resulted in the verdict for the plaintiff, upon which judgment was duly entered. A motion for a new trial was denied. The judgment was reversed by the Circuit Court of Appeals. 151 Fed. Rep. 961. This writ of certiorari was then allowed. 209 U. S. 543.

The question in the case is the effect of the covenants which we have quoted. It was raised in the Circuit Court by objection to certain testimony, which was admitted, and the denial of certain instructions which were requested.

The property is situated in the coal mining regions of Pennsylvania, and the testimony shows that an explosion preceded or was coincident with the fire as its cause or effect. Indeed, it seems to be clear that the explosion was caused by one of the tenants throwing lighted "squibs" in the air "for fun." And there was testimony that it was the custom of miners to keep more or less blasting powder in their dwellings. The custom seems to have arisen on account of a law of Pennsylvania, which provides that "no powder or high explosive shall be stored in any mine and no more of either article shall be taken into the mine at any one time than is required for any one shift unless the quantity be less than five pounds. . . ."

In supplement to this testimony the Circuit Court admitted, over the objection of the company, the testimony of the agent who placed the insurance upon the property, to the effect that he had taken considerable risks as agent for defendant company on miners' dwellings; that he knew of the custom of miners to keep blasting powder in their dwellings; that he knew that the building insured was in seven compartments, "seven miners' dwellings," to be occupied by seven different families, and that he "increased the rate by reason of the fact that this building was to be occupied by miners, and having knowledge that they kept more or less blasting powder about their dwellings." And he also testified that, after he had placed the risk, the special agent of the company went with him, looked at the risk and said it was satisfactory, after

having made inquiry as to the rate. He expressed the increase in percentage as "one and a quarter for one year, or two and a half for two years." He also charged an extra premium for finishing.

He increased the premium, he further testified, because he "thought it was going to be occupied by coal miners," and "because there was seven of them." The increase was from one and a quarter per cent to two and a half per cent, but he did not know what he would have charged if the building had not been for coal miners. And further, that he was not told that the building was to be occupied by coal miners, he knew that from his experience in the business. Mrs. Penman did not tell him, nor did he tell her that he had increased the rate, because she might possibly have it occupied by miners, but he told the special agent of the company "that that entered into the calculations." He did not report it on the form because it was not his custom to do so. To the question whether it was special business he was "performing rather than acting for the company," he answered, "yes."

The policy recited that the building insured was "in process of erection with privilege to finish and to be occupied by tenants as dwellings," and that "in consideration of the extra premium of three and 90–100 dollars ($3.90) 30 days' permission is hereby granted to finish the building." There was evidence showing that blasting powder is a lower degree of explosive than gunpowder or dynamite, and that the latter is a higher degree than gunpowder.

In view of this testimony the Circuit Court decided, as it said, that though ordinarily it was "the duty of a court to construe a written instrument and instruct the jury what its terms meant," he would leave to the jury "as a question of fact" for it "to determine, whether, under the evidence and the facts proven here, blasting powder" was "included in the term 'other explosives.'" Entertaining that view, the court refused to instruct the jury, as requested by the company, "that under the evidence the verdict should be for the

defendant." The court refused other requests which were based on the controlling effect of the policy.

In passing upon the motion for a new trial the Circuit Court reasserted the view that it was for the jury to "determine whether blasting powder was one of the prohibited articles which was to invalidate the policy." The court observed: "It was contended by one side that it was embraced under the term 'other explosives;' by the other, that it was not." The court further said: "While of course blasting powder is an explosive, and is therefore covered by the generic term 'other explosives,' yet the fact that other explosives of the general character of blasting powder, and those of a much more dangerous character than blasting powder, to wit, dynamite and gunpowder, of which twenty and five pounds were permitted, were specified, it was contended that the express mention of these more dangerous powders evidenced an intent not to cover the less dangerous article of blasting powder under the general term 'other explosives.'" To the last contention the court, as we have seen, yielded, and rejected the case of *The Northern Assurance Co.* v. *Grand View Building Asso.*, 183 U. S. 308, as not decisive, by saying that "in that case there was no question as to what the policy provided, in the present the crucial question was as to what the policy in question covered by the term 'other explosives.'"

The majority of the Circuit Court of Appeals took another view. It found nothing obscure in the language of the policy, and nothing therefore to excuse the Circuit Court from exercising the duty of construing it. Answering the contention that the words "or other explosives" should not be held to include explosives of lower power than gunpowder or dynamite, it was said: "Such an application of the maxim *noscitur á sociis* is too narrow."

It was pointed out that the enumeration of explosives included other explosives than gunpowder and blasting powder, and that there was nothing in the record to show their relative degrees of power, nor whether they or any of them were

of less explosive power than gunpowder or dynamite. Their relative power, it was said, was not a matter of common knowledge, and if the general words "or other explosives" were to be or could be limited by such relation or their relation to blasting powder, the burden was upon the plaintiff to show it, as those words "in their literal and natural meaning included blasting powder." It was hence concluded that "to hold, under the present proofs, that the general words 'or other explosives' do not include blasting powder merely because it is a less dangerous explosive than dynamite or gunpowder, when it may be more dangerous than Greek fire, benzine, benzole, ether, gasoline, or naphtha, is virtually to decide arbitrarily that no meaning or effect shall be given to the general words. We are satisfied that this cannot be done, and that, as the proofs stand, the general words include blasting powder."

The court thus deciding that the words of the policy included blasting powder, further decided that the Circuit Court erred in admitting parol testimony to vary its terms, and also erred in not directing a verdict for the company.

A member of the court dissented from both propositions. His argument was elaborate and would not be adequately represented by condensation. It asserted the view of the Circuit Court and the contention of the plaintiff. It considered that by the rule of *ejusdem generis* blasting powder was not covered by the words "other explosives," and by them were meant explosives of the same power as those enumerated, which it seems to have been assumed blasting powder was not. It was considered besides that the words could be given a meaning by the custom of miners and the industrial conditions which existed in the neighborhood, and also from the knowledge and conduct of the company's agent when the insurance was placed. Cases from Pennsylvania were cited to support that proposition, of which we may select as representative *Machine Company* v. *Insurance Company*, 173 Pa. St. 53, where the policy of insurance on two buildings, one a

foundry and machine shop, and the other a pattern shop, was considered. The policy covered the patterns in the pattern shop by these words, "on patterns therein one thousand dollars." The pattern shop was from fifteen to twenty feet from the foundry in which the fire occurred, and in which the patterns were destroyed, where they were taken the evening before the fire for actual use next day in accordance with the orders and customs in that and other shops in the use of patterns. It was found by a jury returning a special verdict that such use was a reasonable one and answered the convenient operation of such plants, and that the agent of the defendant company examined the shops and patterns and buildings before taking the insurance. The court said:

"The policy sued on in this case was issued to a manufacturing company and covered the buildings, machinery, fixtures and appliances in daily use in the business of the company. The rules of construction applicable to such a contract of insurance are well settled. The object of the contract is indemnity against the loss by fire of the business plant, or any portion of it, while used and occupied by the owners in the manner and for the purposes for which it was designed. If its provisions are susceptible of two or more interpretations, that one should be adopted that will make the contract effective for the protection of the insured. In other words, the contract should be liberally construed in aid of the indemnity which was in contemplation of the parties who made it. *W. & A. Pipe Lines* v. *Insurance Co.*, 145 Pa. 346.

"Again, an insurance company issuing a policy upon a business plant, or any portion of it, is chargeable with knowledge of the customary methods of conducting the business in which the property insured is used. *Pipe Lines* v. *Insurance Company, supra.* This rule is not limited to insurance upon property in use for manufacturing or other business purposes. It was applied in the construction of a policy issued upon a dwelling house in *Doud* v. *Citizens' Insurance Company*, 141 Pa. 47, and in *Roe* v. *Dwelling House Insurance Co.*, 149 Pa.

94. It was applied to a policy of insurance upon a horse in *Haws* v. *Fire Association of Phila.*, 114 Pa. 431. Still another rule of construction is that the circumstances surrounding the making of the contract and affecting the subject to which it relates form a sort of context that may properly be resorted to for aid in determining the meaning of the words and provisions of the contract. *Bole, Assignee,* v. *New Hampshire Fire Ins. Co.*, 159 Pa. 53; *Graybill* v. *The Penn Township Mutual Fire Ins. Co.*, 170 Pa. 75."

We have stated the rulings of the courts below, because they accurately exhibit the contentions of the parties and the questions for decision and with such fullness of argument that there is not much more for this court to do than to select and concur. The Court of Appeals decided, as we have seen, that under the terms of the policy blasting powder could not be "kept, used or allowed" on the insured property, and that such prohibition was not waived by the knowledge and acts of the company's agent. We concur in this, and we think the reasoning by which it was supported is conclusive. The rule of *ejusdem generis* is a rule of interpretation, and granting, *arguendo,* it should be applied more liberally to contracts of insurance than to contracts of other kinds, yet we think it would be giving it too much force to yield to the contention of petitioner. Blasting powder is an explosive, and one of power; it is therefore capable of producing the result that the provision of the policy was intended to guard against. We are given no tests, as the Court of Appeals said, and we certainly may not assume them, of a comparison of it with the explosives which are enumerated, except dynamite and gunpowder. The law of Pennsylvania, as we have seen, has given it character and has guarded against its destructive force.

We think also that the policy furnishes the only way by which its terms can be waived. It provides against modifications by the usage or custom of trade or manufacture. It guards against any acts of waiver of its conditions or a change of them by agents. It provides that such waiver or change

"shall be written upon or attached" to the policy. The company could have used no words which would have been more explicit. There is no ambiguity about them. Parol testimony was not needed nor admissible to interpret them. They constituted the contract between the company and the insured. No agent had power to change or modify that contract except in the manner provided. This was decided in *Northern Assurance Company* v. *Building Association, supra.* Any other ruling would take from contracts the certain evidence of their written words and turn them over for meaning to the disputes of parol testimony.

The Pennsylvania cases cited by the petitioner do not militate with the rule there announced. If they did, it might be open to controversy how far they were binding on this court. *Kuhn* v. *Fairmont Coal Company,* 215 U. S. 349.

Judgment affirmed.

BLAKE, TRUSTEE IN BANKRUPTCY, *v.* OPENHYM.

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

No. 71. Submitted January 11, 1910.—Decided February 12, 1910.

The judgment in this case that the vendor of goods sold to the bankrupt had a right to, and did, rescind the contract of sale on the ground that the goods were obtained by the bankrupt's fraud, and that the rescission was seasonably made on that ground, involves no provision of the bankruptcy law, but depends on principles of general law, and an appeal will not lie to this court from the judgment of the Circuit Court of Appeals. *Chapman* v. *Bowen,* 207 U. S. 89.

Where, after writ of replevin, the state court turns the goods over to the receiver, who so receives them, on the express condition that he assume the liabilities incurred in that court which has held that the liability under the re-delivery bond was incurred for benefit of the estate, no provision of the bankruptcy act is involved that would make the decision reviewable in this court on writ of error.

Where, after replevin, the paramount authority of the bankruptcy court is conceded and the replevin suit is considered only as evidence of rescission and identification of goods, no provision of the bankruptcy law or jurisdiction of the bankruptcy court is involved on which a writ of error from, or an appeal to, this court can be based. 157 Fed. Rep. 536, affirmed.

THE facts are stated in the opinion.

Mr. Alexander New and *Mr. Edwin A. Krauthoff*, with whom *Mr. J. V. C. Karnes*, *Mr. Samuel Feller*, and *Mr. Arthur Miller* were on the brief, for appellant:

Under the bankruptcy law of 1867 this court assumed jurisdiction, *inter alia*, of the following cases on writs of error to state courts: *Forsythe* v. *Vehmeyer*, 177 U. S. 177; *Sharpe* v. *Doyle*, 102 U. S. 686; *Factors' &c. Co.* v. *Murphy*, 111 U. S. 738, 741; *Mays* v. *Fritton*, 131 U. S. cxiv; *Dushane* v. *Beall*, 161 U. S. 513, 518; *Williams* v. *Heard*, 140 U. S. 529; *Traer* v. *Clews*, 115 U. S. 528, 533, 534; *New Orleans &c. R. R. Co.* v. *Delamore*, 114 U. S. 501, 506; *Palmer* v. *Hussey*, 119 U. S. 96; *Hennequin* v. *Clews*, 111 U. S. 676.

Under the bankruptcy law of 1898, this court has assumed jurisdiction in the following cases, coming to this court under the provision of § 25*b*, from the Circuit Court of Appeals: *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438; *Pickens* v. *Roy*, 187 U. S. 177; *Page* v. *Edmunds*, 187 U. S. 596; *Jaquith* v. *Alden*, 189 U. S. 78; *New York Co. Nat. Bank* v. *Massey*, 192 U. S. 138; *Hewit* v. *Berlin Mach. Wks.*, 194 U. S. 296; *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502; *Whitney* v. *Dresser*, 200 U. S. 532; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Conboy* v. *First Nat. Bank*, 203 U. S. 141; *New Jersey* v. *Anderson*, 203 U. S. 483; *Hiscock* v. *Varick Bank*, 206 U. S. 28; *Gazlay* v. *Williams*, 210 U. S. 41.

Under the bankruptcy law of 1898, the following cases have been reviewed by this court on writ of error to a state court: *Dunbar* v. *Dunbar*, 190 U. S. 340; *Kean* v. *Calumet Canal*, 190 U. S. 452; *Tinker* v. *Colwell*, 193 U. S. 473; *Crawford* v. *Burke*, 195 U. S. 176; *Kaufman* v. *Tredway*, 195 U. S.

271; *Birkett* v. *Columbia Bank*, 195 U. S. 345; *Cramer* v. *Wilson*, 195 U. S. 408; *Bullis* v. *O'Beirne*, 195 U. S. 606; *Wetmore* v. *Markoe*, 196 U. S. 68; *First Nat. Bank* v. *Lasater*, 196 U. S. 115; *Thompson* v. *Fairbanks*, 198 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91; *Hammond* v. *Whitredge*, 204 U. S. 538.

An examination of the opinion in the Circuit Court of Appeals (157 Fed. Rep. 536), shows that the result reached depended upon the force and effect given to the action in replevin, which was instituted after the petition in bankruptcy was instituted; in other words, the question in the case was as to the force and effect of a proceeding in bankruptcy followed by a subsequent petition in replevin. This clearly presents a Federal question.

The authority relied on by the appellees in their motion to dismiss has no bearing on the question presented in the case at bar.

Since the bankruptcy law was enacted in 1898, *Chapman* v. *Bowen*, 207 U. S. 89, is the only case in which this court has declined to assume jurisdiction on an appeal or a writ of error arising under the bankruptcy law.

Mr. Benjamin N. Cardozo, *Mr. T. J. Ringolsky*, *Mr. Morris J. Hirsch* and *Mr. David L. White*, for appellees:

This court will not retain jurisdiction of this case on this appeal, as the appeal was prayed for and allowed under § 25*b* of the bankruptcy act of July 1, 1898, and the record does not show that such questions were involved in the decision of the case by the Court of Appeals as are necessary in order to give jurisdiction to the Supreme Court of the United States on appeal under § 25*b*. *Chapman* v. *Bowen*, 207 U. S. 89.

Mr. Justice McKenna delivered the opinion of the court.

This appeal was taken to review the decree of the Circuit Court of Appeals reversing the disallowance of a debt due to

Openhym & Sons as a preferential claim against the estate of Walkeen-Lewis Millinery Company (we shall call it the millinery company).

A motion to dismiss is made on the ground that the question involved is not one which could be brought here on writ of error from the highest court of a State, and that no Justice of this court has certified that a determination of the question is essential to a uniform construction of the bankrupt act throughout the United States.

The facts, which we condense somewhat from the findings of the Court of Appeals, are, that the millinery company, then being in the millinery business at Kansas City, Missouri, obtained, by false representations of its liabilities, goods of the value of three thousand one hundred and twenty-five dollars and seventy cents from Openhym & Sons of New York city. Subsequently, a suit was brought against the millinery company by another creditor and a receiver was appointed of all its property. The receiver of the property forthwith took possession, and under the orders of the court continued its sale. A few days afterwards certain other creditors of the millinery company filed a petition in the District Court of the Western District of Missouri to have the company declared a bankrupt. Four days later the company admitted its insolvency and consented that it be declared a bankrupt.

Openhym & Sons, the appellees, asserting that their goods had been obtained from them by the millinery company by false representations of its solvency, demanded possession of the goods from the state court's receiver. Possession was refused, and Openhym & Sons, having obtained from the state court permission to do so, brought an action of replevin against the receiver and the millinery company. "Process was duly served on both defendants. In the execution of the replevin writ but $2,582.80 worth of the goods obtained from Openhym & Sons were found. The sheriff, in executing the writ, separated the goods so found from the remainder of the

stock then in possession of the state court receiver, and took them into his own possession. The receiver thereupon gave a re-delivery bond, resumed possession of the goods, put them back into the stock, and continued sales therefrom."

On September 23, 1905, the millinery company was adjudged a bankrupt. Before the date of the adjudication no receiver had been appointed by the District Court, and no order had been made affecting the property in the possession of the state court or the continuance of the sales thereof by the state court receiver. On the day of the adjudication of bankruptcy Daniel F. Blake, appellant, was appointed receiver in bankruptcy and was directed to apply to the state court for an order on its receiver for the possession of the property. He was further directed that before taking possession, he should request the state court to fix and determine the liabilities which its own receiver had incurred for the benefit of the estate. "The order of direction to the receiver in bankruptcy contained this clause: 'The liabilities incurred by the said receiver appointed by the state court shall be assumed and paid by the receiver herein.' "

On September 25, 1905, the state court stated the liabilities incurred by its receiver, and in addition thereto recited the proceedings in the replevin action brought by Openhym & Sons, and found that whatever liability had been incurred under the re-delivery bond had been incurred for the benefit of the estate. The court then ordered the delivery of the property to the receiver in bankruptcy upon the conditions that the latter should assume and pay the liabilities recited and the liability arising under the re-delivery bond. It was not shown what part of the goods in controversy actually passed into the possession of the receiver in bankruptcy, but it was shown that all of the stock remaining unsold, and all of the proceeds of sales by the state court receiver, largely in the form of customers' accounts, were, less expense of conducting the business, turned over to the receiver in bankruptcy.

October 2, 1905, the receiver in bankruptcy sold all of the property of the millinery company; on the thirteenth the receiver was selected as trustee; on the twenty-seventh the District Court ruled Openhym & Sons to show cause why they should not be enjoined from prosecuting the action of replevin and temporarily enjoined them from doing so; December 1 the temporary injunction was made permanent.

On December 10, 1905, a dividend upon the claims against the estate of the millinery company was declared, but its payment left the greater portion of the estate in the hands of the trustee. Up to that time Openhym & Sons had not intervened and presented their claim for preferential payment, but this fact had no effect upon the declaration of the dividend and no creditor was prejudiced thereby.

December 21, 1905, Openhym & Sons intervened and presented their claim for $2,582.80 as a preferred one. On March 24, 1906, it was found by the referee to be entitled to be allowed as such. Upon petition for review, the District Court reversed the finding. Upon appeal the Circuit Court of Appeals substantially found the above facts and reversed the decree of the District Court. 157 Fed. Rep. 536.

The conclusions of law of the Circuit Court of Appeals were as follows:

"1. There were sufficient grounds for a rescission of the sale by Openhym & Sons, the right of rescission was seasonably asserted, and the right was not impaired or destroyed by the commencement of bankruptcy proceedings against the vendee who obtained the goods by fraud. The receiver and trustee in bankruptcy had no greater right or title to the goods in controversy than the bankrupt had.

"2. It was competent for the bankruptcy court to permit the prosecution of the replevin action in the state court for the recovery of the goods. The continuance of such prosecution was lawful up to the time it was forbidden by the injunction of the bankruptcy court. The commencement and prosecution of that action, though subsequently enjoined, was avail-

able to Openhym & Sons as an act of rescission, and the proceedings therein could properly be resorted to in ascertaining what part of the goods sued for was in the possession of the state court and afterwards with proceeds of sales went into the possession of the bankruptcy court.

"3. There was no such delay by Openhym & Sons in intervening in the bankruptcy proceedings as estopped them from asserting their right to a preferential claim for the value of their goods.

"4. Openhym & Sons are entitled to an order that the trustee pay their claim out of funds in his hands before making further payments to general creditors."

The contention of appellee upon the motion is that the bankruptcy law limits the right of appeal to two classes of cases, in neither of which, it is further contended, the case at bar falls: (1) where the amount in controversy exceeds a thousand dollars and the question involved is one that might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; (2) where a Justice of the Supreme Court of the United States shall certify that the determination of the question involved is essential to a uniform construction of the act throughout the United States.

The consideration of the second ground we can immediately dismiss, as there is no such certificate. Of the other, or first ground, it is urged that *Chapman* v. *Bowen*, 207 U. S. 89, is decisive. In that case the facts were that there was borrowed from Bowen, on two different occasions, the sum of five thousand dollars, for which two promissory notes were given, signed by the firm of A. McCoy & Company and by the individual names of Alfred McCoy and Thomas McCoy, the proceeds of the transactions going into the partnership business. The firm and the individuals became bankrupt, and the notes were presented as claims against the firm and allowed to the extent of thirty per cent. A claim was presented for the balance against the estate of Alfred McCoy, and dis-

allowed by the referee, whose decision was affirmed by the District Court. The decision was reversed by the Circuit Court of Appeals. *In re McCoy*, 150 Fed. Rep. 106. An appeal was allowed to this court by a judge of the Circuit Court of Appeals, which, on motion, was dismissed, on the ground that a writ of error from the highest court of the State to this court could not be maintained, because no validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question; nor the validity of a statute of, or any authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any treaty, right, privilege or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, and decided against it. It was further said that "the decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act."

We think that case controls this, and that the cases cited by appellant, of which this court took jurisdiction, are not apposite. The determining facts in the case at bar are that the goods were obtained by the millinery company by fraud, and that the sale was seasonably rescinded on that ground. In the decision of this there was involved no provision of the bankruptcy law. Nor is any provision of the bankruptcy law involved in the consideration of the question whether the goods turned over by the state court to the receiver in bankruptcy could be identified as the goods obtained from Openhym & Sons. Surely, as decided by the Court of Appeals, the proceedings in the state court "could properly be resorted to in ascertaining what part of the goods sued for was in the possession of the state court, and afterwards what proceeds of sales went into possession of the bankruptcy court." To these facts must be added the important one that the goods were ordered by the state court to be delivered to the receiver in bankruptcy upon the express condition, and they were

received by him subject to the condition, that he should assume and pay the liabilities incurred in that court, that court finding "that whatever liability was incurred under the re-delivery bond was incurred for the benefit of the estate."

It was from these facts that the Court of Appeals concluded that Openhym & Sons were "entitled to an order that the trustee pay their claims out of funds in his hands before making further payments to general creditors." In this conclusion we cannot see that any provision of the bankruptcy law was involved, so that if the decision had been made by a state court it would have been reviewable here on writ of error.

It is the contention of appellant, however, that the writ of replevin brought by Openhym & Sons and the levy under it "were unlawful and unauthorized acts," and that Openhym & Sons "could not, and did not, conserve any rights thereby." And, further, the appellant says, "it will be observed at the outset that this question goes directly to the jurisdiction of the bankruptcy court over the *res* of the bankrupt after the filing of the involuntary petition in bankruptcy." Putting it another way, appellant says that "the question in the case is as to the force and effect of a proceeding in bankruptcy followed by a subsequent petition in replevin." And, it is insisted, that the result reached by the Court of Appeals "depended upon the force and effect given to the action in replevin," and that, therefore, a Federal question is presented. This, however, proceeds from a misapprehension of the opinion of the Court of Appeals. The paramount jurisdiction of the bankruptcy court was conceded. The replevin suit was considered as showing the purpose of Openhym & Sons to rescind the sale of the goods and as a means of their identification, as we have already pointed out. In holding it competent for those purposes we cannot see how any provision of the bankruptcy law was involved.

The motion to dismiss must therefore be granted.

So ordered.

ALBRIGHT *v.* SANDOVAL.
SANDOVAL *v.* ALBRIGHT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Nos. 116, 117. Argued January 28, 1910.—Decided February 21, 1910.

Where the final judgment of the Supreme Court of a Territory is not based on the power of the legislature to enact the statute involved but on the construction thereof, this court is not disposed to disturb that construction; and so held, following the decisions of the territorial court, that a statute of New Mexico carving a new county out of an existing one did not create a vacancy in an office of the original county because the incumbent did not reside in that portion of the county which remained.

Quære whether a judgment of ouster in *quo warranto* is conclusive between the same parties in a suit brought by the *de jure* relator against the *de facto* incumbent.

After judgment of ouster in *quo warranto* a *de jure* officer may recover the emoluments of the office, less the reasonable expenses incurred in earning the same, where, as in this case, the *de facto* officer entered the office in good faith and under color of title.

79 Pac. Rep. 719, affirmed.

THE facts are stated in the opinion.

Mr. E. L. Medler for Albright:

The entire controversy, including the status of the parties as to who was *de jure* assessor is before this court, for although the decision in the *quo warranto* case may bind the New Mexico courts it does not bind this court. *United States* v. *Denver & R. G. Ry. Co.*, 191 U. S. 86; *Dye* v. *Crary*, 208 U. S. 515; *Fitzpatrick* v. *Flanigan*, 106 U. S. 648; *Mendenhall* v. *Hall*, 134 U. S. 559; *Gallagher* v. *Jones*, 126 U. S. 193. The judgment in the *quo warranto* case is not *res judicata* in this case as the object of the judgment is different although the parties

are the same. *Gaines* v. *Hennen*, 24 How. 553; *Carey* v. *Roosevelt*, 81 Fed. Rep. 611.

The acts of the legislature of New Mexico of 1903 creating Sandoval County and the amendatory act were within the power of the legislature. Rev. Stat., § 1851. These acts are not in conflict with the Springer Act and the act of 1886 prohibiting the passage of special or local bills.

Where the legislature exercises a power to create new counties, it creates a vacancy in the old county and it is germane to the subject to fill that vacancy by the same special act. *State* v. *Piper*, 24 N. W. Rep. 205; *Reals* v. *Smith*, 56 Pac. Rep. 690.

The act creating Sandoval County and the amending act are not regulations of county affairs. *Holliday* v. *Sweet Grass County*, 48 Pac. Rep. 533; *Mode* v. *Beasley*, 42 N. E. Rep. 727.

The effect of the acts creating Sandoval County was to create a vacancy in the office of assessor of Bernalillo County and to provide for filling the same. *Lane* v. *Kolb*, 92 Alabama, 636; *State* v. *Board of Public Lands*, 7 Nebraska, 42; *Fox* v. *McDonald*, 21 L. R. A. 537; *De Guenther* v. *Douglass*, 26 Wisconsin, 428; *State* v. *Davis*, 44 Missouri, 129; *People* v. *Haskell*, 5 California, 357; *Attorney General* v. *Squires*, 14 California, 12; *Hoke* v. *Henderson*, 25 Am. Dec. 703, note; *Butler* v. *Pennsylvania*, 10 How. 402; *Stewart* v. *Police Jury*, 116 U. S. 133; *Taylor* v. *Marshall & Beckham*, 178 U. S. 548. As to power of removal and control of legislature over offices see *Crenshaw* v. *United States*, 134 U. S. 99; *Long* v. *Mayor*, 81 N. Y. 426; *People* v. *Hurlbut*, 24 Michigan, 44; *Denver* v. *Hobart*, 10 Newark, 30; *Territory* v. *Van Gaskin*, 6 Pac. Rep. 30.

As to the power of a territorial legislature unless restricted by the Constitution and laws of the United States, see *Vincennes University* v. *State*, 14 How. 267; *Rogers* v. *Burlington*, 3 Wall. 654; *Clinton* v. *Englebrecht*, 13 Wall. 446; and as to power of legislature to name officers temporarily, see *People* v. *Hurlbut*, 24 Michigan, 44; *Territory* v. *Van Gaskin*, 6 Pac.

Rep. 32; *Territory of South Dakota* v. *Scott*, 20 N. W. Rep. 401; *Waterman* v. *Freeman*, 80 California, 233.

The appointment of Albright by commissioners as provided by the legislature was not void by reason of the act of 1901, providing for appointment by the governor to fill vacancies caused by death, resignation or otherwise. The rule of *ejusdem generis* does sustain appellee's contention. *United States* v. *Bevans*, 3 Wheat. 391; *United States* v. *Chase*, 153 U. S. 255, 260; *Moore* v. *American Trav. Soc.*, 2 How. 141; Sedgwick on Construction of Statutes, 360; Cooley on Constitutional Law, 149.

The legislation was not void because it provided for a different manner of selection than that provided for other counties. *Guild* v. *Bank*, 57 N. W. Rep. 499; *Missouri* v. *Lewis*, 101 U. S. 22.

Residence is a necessary qualification to the office involved and the appellee is not qualified. Meecham on Public Offices, §§ 57, 67, 82, 159; *United States* v. *Johnson*, 173 U. S. 363; 23 Am. & Eng. Ency. of Law, 426; *Mauk* v. *Lock*, 70 Iowa, 266; *State* v. *Hixon*, 27 Arkansas, 398; § 772 and subs. 15, § 664, Comp. Laws New Mexico, 1897; *State* v. *McMillen*, 23 Nebraska, 385.

The territorial legislature had the power to declare such a vacancy irrespective of the question of Sandoval's residence. Rev. Stat., §§ 1851, 1857; Meecham, § 1; *Campbell* v. *Morris*, 3 Har. & M. (Md.) 535.

The acts creating Sandoval County went into effect from the date of their passage.

Albright's appointment was legal and no recovery could be had for the fees and emoluments collected by him as a *de facto* officer. 8 Am. & Eng. Ency. of Law, 815; *Hussy* v. *Smith*, 99 U. S. 20; *McDowell* v. *United States*, 159 U. S. 601; *Nofire* v. *United States*, 164 U. S. 661; *Ball* v. *United States*, 140 U. S. 125; *Norton* v. *Shelby County*, 118 U. S. 425; *Insurance Co.* v. *Seaman*, 80 Fed. Rep. 357.

A *de facto* officer is entitled in any event to retain the rea-

sonable expenses of earning the fees and emoluments of the office. 23 Am. & Eng. Ency. of Law, 403; *Mayfield* v. *Moore*, 53 Illinois, 428; *Re Havird*, 2 Idaho, 252; *Chowing* v. *Boger*, 9 Am. & Eng. Corp. Cas. 91; *Atchison* v. *Lucas*, 83 Kentucky, 451; *Arris* v. *Stukeley*, 2 Mod. 260; *Bier* v. *Gorrell*, 30 W. Va. 95.

There is no property in a public office. *Stuhr* v. *Curran*, 15 Vroom, 181; *Wayne County* v. *Benvit*, 4 Am. Rep. 382; *Taylor* v. *Beckham*, 178 U. S. 548; *Butler* v. *Pennsylvania*, 10 How. 402.

Mr. Neill B. Field for Sandoval:

An officer *de jure* may maintain an action for the recovery of the fees and emoluments of an office against a person who has been adjudged in *quo warranto* not entitled to the office. *Stuhr* v. *Curran*, 44 N. J. L. 181; *United States* v. *Addison*, 6 Wall. 291. And in such a suit the judgment of ouster is conclusive as to title of the office.

That judgment cannot be attacked collaterally. *New England Mortgage Security Co.* v. *Gay*, 145 U. S. 123; *Washington R. R. Co.* v. *District of Columbia*, 146 U. S. 227; *Kimball* v. *Kimball*, 174 U. S. 158.

Albright is liable to Sandoval for the entire amount received by him. Had it been a salaried office the measure would have been the entire salary and the rule should be the same as to fees, nor can Albright escape on the ground of having wronged Sandoval unintentionally. *Woodenware Co.* v. *United States*, 106 U. S. 432. As to measure of liability, see *Mayfield* v. *Moore*, 53 Illinois, 428; *Beard* v. *City of Decatur*, 7 Am. & Eng. Corp. Cases, 145; *Chowning* v. *Boger*, 9 Am. & Eng. Corp. Cases, 91; *Atchison* v. *Lucas*, 83 Kentucky, 451; *Arris* v. *Stukeley*, 2 Mod. 260; *Bier* v. *Gorrell*, 30 W. Va. 95; *Nichols* v. *MacLean*, 101 N. Y. 526; *Kreitz* v. *Behrensmeyer*, 149 Illinois, 496; 3 Sutherland on Damages, 3d ed., § 693; *United States* v. *Addison*, 6 Wall. 291; *Michel* v. *New Orleans*, 32 La. Ann. 1094.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These cases involve controversies over the right to the fees of the office of assessor of Bernalillo County, New Mexico. Plaintiff in error received the fees, defendant in error claims the right to them as the duly-elected officer.

There was prior litigation over the right of the office. Proceedings in the nature of *quo warranto* were instituted against plaintiff in error, by the Territory, upon the relation of defendant in error, to try the title of plaintiff in error to the office. Judgment went in favor of the latter in the trial court, which was reversed by the Supreme Court, and the case remanded for further proceedings. 78 Pac. Rep. 204.

Upon the subsequent proceedings in the trial court judgment was entered, declaring plaintiff in error not entitled to the office. The judgment also ordered him to deliver to the relator, defendant in error here, the records and the equipments of the office, "as the lawful custodian thereof." This part of the judgment was reversed by the Supreme Court; the other part, as to the title of plaintiff in error to the office, was affirmed. 79 Pac. Rep. 719. An appeal was taken to this court and dismissed because the matter in controversy was not "measurable by some sum or value in money." As to the fees of the office, it was said: "The term of office had expired before the rendition of judgment by the territorial Supreme Court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in such subsequent action. *New England Mortgage Security Co.* v. *Gay*, 145 U. S. 123; *Washington & Georgetown R. R. Co.* v. *District of Columbia*, 146 U. S. 227."

This action was brought for the past fees and emoluments of the office, amounting, it is alleged, to the sum of six thousand one hundred eighty-four dollars and sixteen cents ($6,184.16).

The grounds of action are, as alleged, that Sandoval, de-

fendant in error, was duly elected to the office; that Albright, plaintiff in error, on the twenty-seventh of March, 1903, "usurped the same, and excluded the plaintiff therefrom, and received and appropriated to his own use the fees and emoluments" of the office until the nineteenth of November, 1904, when the plaintiff (defendant in error here), by a judgment in a "certain proceeding entitled The Territory of New Mexico on the relation of Jesus Maria Sandoval against the said George F. Albright, was restored to the possession of the said office." The judgment was made part of the complaint.

A demurrer was filed to the complaint. It was overruled. An answer was then filed which practically admitted the allegations of the complaint, except the legal right of the plaintiff to the fees of the office. It admitted that in the *quo warranto* proceeding it was adjudged that Albright was not entitled to the office and had usurped the same, and that Sandoval was entitled to it. The answer, however, set up a right to the office in Albright; that on the twenty-third of March, 1903, he was appointed assessor of the county by the board of county commissioners of the county, acting under and by virtue of § 3 of an act of the legislative assembly of the Territory, entitled an act to create the county of Sandoval, approved March 10, 1903, as amended March 12, 1903. That the office of assessor of the county of Bernalillo became vacant by reason of such legislation, Sandoval County having previously been a part of Bernalillo. The validity of such legislation was alleged and that the power of appointment was vested thereby in the board of commissioners created by the amendatory act of March 12. It is alleged also that "the office was subject to the control of the legislature and that a vacancy thereafter was created by said acts." That Sandoval, at the time Sandoval County was created, was and had been a long time before a resident of Bernalillo, and ceased, therefore, upon the passage of the acts creating Sandoval County, to be a resident of Bernalillo, and became disqualified from exercising the duties of the office of assessor thereof, to which

he had been elected, and that at the time of the appointment of Albright the office was and had been vacant from the time of the creation of Sandoval County.

The answer admitted the receipt of $6,648 on account of fees and emoluments, and alleged that Albright paid out the sum of $2,142.25 for clerical and other expenses necessarily incurred in administering the office, which amount, he alleged, he was "entitled to receive as a set off against any demand" against him. And he alleged that the said sum was paid in good faith. There was a demurrer to the answer filed and a replication. The latter accepted the statement of the amount received by Albright, alleged want of information as to the amount expended as expenses of the office, and denied that Albright was an incumbent of the office in good faith.

The demurrer was sustained to all parts of the answer except those alleging receipt of fees and the payment of expenses. As to them, evidence was submitted to a jury, which, under the direction of the court, returned a verdict for the plaintiff, Sandoval, in the sum of $5,360.53, which was the amount sued for less the expenses which had been incurred by Albright. Both parties moved for a new trial, the plaintiff on account of the allowance of the expenses, the defendant on account of the recovery against him of the fees and emoluments received by him. Judgment was entered for the amount of the verdict in favor of the plaintiff, and affirmed by the Supreme Court. 93 Pac. Rep. 717. Both parties sued out writs of error. That of Albright (No. 116) is directed to the judgment against him; that of Sandoval (No. 117) to redress the error, which he contends, was made against him in allowing as a set off against his demand, the expenses that Albright had incurred in administering the office.

It is clear that the only questions of fact presented by the pleadings were as to the amount received and the amount expended by Albright. This was the view taken of them by the Supreme Court. That court said: "The right of office and that the appellee [defendant in error here] was the *de jure*

officer were fully determined in the former suits, and cannot be considered in this, therefore the court below properly sustained the demurrer to all such parts of the answer as sought to raise this issue." The suits referred to by the court were *Albright* v. *Territory*, 78 Pac. Rep. 204; *Territory* v. *Albright*, 79 Pac. Rep. 719; *Albright* v. *Sandoval*, 200 U. S. 9.

The court, therefore, addressed itself to the two propositions which it conceived were left in the case, the right of Sandoval to recover the fees received by Albright and the right of the latter to set off against them his disbursements for expenses. The court, passing on the first proposition, found, it said, no statute of the Territory "governing this subject," but decided that "the common law, in the absence of a statute, authorizes a recovery by the officer *de jure* in such cases." On the second proposition it found that there could be no question of Albright's good faith, and that it considered the cases made good faith "the controlling consideration for the allowances of expenses to an ousted *de facto* officer," and affirmed the judgment of the trial court.

Plaintiff in error, however, goes back of the decision of the Supreme Court, and contends that he is not only an officer *de facto* but an officer *de jure*. In other words, he asserts the correctness of the position taken in his answer that by the legislation creating Sandoval County defendant in error ceased to be the assessor of Bernalillo, to which he was duly elected, that therefore a vacancy existed to which plaintiff in error was duly appointed.

The basis of this contention is the power of the legislature to create Sandoval County, and that by the exercise of the power defendant in error was made a resident of Sandoval County and became disqualified to be assessor of Bernalillo. From this it followed, it is argued, a vacancy occurred to which plaintiff in error was appointed under the act amending the act creating Sandoval County. It certainly follows that if the residence of defendant in error in Sandoval County did not create a vacancy there was none to fill, unless, as it is

contended by defendant in error, that the legislature has the power to create a vacancy and actually exercised the power.

In *Territory* v. *Albright*, 78 Pac. Rep. 204, the judgment of the trial court, which dismissed the *quo warranto* proceedings, was reversed, as we have seen. The Supreme Court said that the trial court, in considering the section of the acts relied on by plaintiff in error, "arrived at the conclusion that it was the intention of the legislature to declare that office [the office of assessor of Bernalillo County] vacant, and therefore, although those sections did not contain a declaration to that effect, the court was of the opinion that these sections should be given the effect of such a declaration." But the Supreme Court added, "we cannot concur with the trial court in this conclusion," and proceeded to analyze the legislation, and decided that it did not have the meaning plaintiff in error attributes to it. In other words, did not create a vacancy in the office of assessor of Bernalillo County. And considering the laws of the Territory as to the qualification of county officers, decided that residence was not one of them. The court further decided that when plaintiff in error was appointed the act, under which it is contended that it was done, had not taken effect, and that, therefore, his appointment was unauthorized.

The court, considering the legislation in view of the powers of the legislature as limited by the act of Congress of July 30, 1886 (24 Stat. 170, c. 818), concluded that the legislature had not the power to remove and appoint county officers as contended, but the decision of the case was put on the other grounds which we have stated. In other words, put upon the construction of the statutes. And that construction we are not disposed to disturb. *Fox* v. *Haarstick*, 156 U. S. 674; *English* v. *Arizona*, 214 U. S. 359; *Dye* v. *Crary*, 208 U. S. 515.

Under these views it is not necessary to decide whether the judgment in the *quo warranto* proceedings is conclusive of the issues in this case, as contended by defendant in error.

The decision upon the respective rights of the parties arising from the statute of the Territory may be rested on the grounds which we have expressed, and we come to the proposition whether Sandoval can recover the fees and emoluments received by Albright, and whether, if he can, may the latter set off his expenses. The first proposition is not controverted by Albright, although he suggests that there are some well-considered cases the other way, and he cites *Stuhr* v. *Curran*, 15 Vroom (44 N. J. L.), 181. He also cites *Taylor* v. *Beckham*, 178 U. S. 548; *Butler* v. *Commonwealth of Pennsylvania*, 10 How. 402, for the view that there is no such thing as property in a public office. However, his ultimate concession is that the weight of authority is to the effect that a *de jure* officer may recover from the *de facto* officer the emoluments of the office, less the reasonable expenses incurred in earning such fees, when the *de facto* officer entered into the office in good faith and under color of title. And this was the view of the Supreme Court of the Territory. To sustain the first proposition the court reviewed *Stuhr* v. *Curran*, *supra*, and cites against it *United States* v. *Addison*, 6 Wall. 291; *Dolan* v. *Mayor of New York*, 68 N. Y. 274; *Hunter* v. *Chandler*, 45 Missouri, 452; *Glascock* v. *Lyons*, 20 Indiana, 1; *Douglass* v. *State*, 31 Indiana, 429; *People* v. *Miller*, 24 Michigan, 458; *Dorsey* v. *Smyth*, 28 California, 21; *Nichols* v. *McLean*, 101 N. Y. 538; *Kreitz* v. *Behrensmeyer*, 149 Illinois, 503; *Vaux* v. *Jefferen*, 2 Dyer, 114; *Arris* v. *Stukeley*, 2 Mod. 260; *Lee* v. *Drake*, Salk. 467, 468; *Webb's Case*, 8 Rep. 45; 1 Selw. N. P. 81; 1 Chil. Pl. 112. It is not necessary to make a review of these cases. It is enough to say that they sustain the proposition for which they are cited.

The second question is more debatable, to wit, whether Sandoval was entitled to the gross receipts of the office, as contended by him, or to the net receipts as contended by Albright and as decided by the courts below.

Counsel for Sandoval sees and admits the difficulties which beset the question, and is not insensible to the justice under

the circumstances of this case of the deductions allowed by the courts below.

There is argument based on the illegality of Albright's occupation of the office, and strength in the contention that a trespasser may not set off the expense he incurred in executing the trespass. It has been held, in a well-considered case, there can be no deduction for the personal services of the intruder. *People* v. *Miller*, 24 Michigan, 458. It was said in that case, however, that "There may be reason for deducting from any official earnings the actual cost of obtaining them which would have been entailed on any person who might have held the office." This may be said of the expenses in controversy in the case at bar. *Mayfield* v. *Moore*, 53 Illinois, 428, is the leading case which sustains the right to deduct such expenses. This case is followed by others in the same court and the same view has been announced by other courts. We think they express the correct rule. It makes the measure of recovery the extent of the injury, and the injury, it is clear, is not the gross earnings of an office, but such earnings less, to use the language of Mr. Chief Justice Campbell in *People* v. *Miller*, *supra*, "the actual cost of obtaining them which would have been entailed on any person who might have held the office."

Judgment affirmed.

ALBRIGHT *v.* SANDOVAL (NO. 2).

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 118. Argued January 28, 1910.—Decided February 21, 1910.

Where the decision of the Supreme Court of a Territory is based upon the construction of the territorial statute involved, and not upon the power of the legislature to pass it, an appeal does not lie to this court, if the amount in controversy is less than $5,000.

A decision of the territorial court as to who had the right to an office which depends on whether the office was or was not vacant, and whether or not an appointment was made before the statute involved took effect, depends upon the construction of, and not the power of the legislature to pass, such statute; such a case does not involve the validity of an authority exercised under the United States and an appeal does not lie to this court if the amount in controversy is less than $5,000.

Appeal from 94 Pac. Rep. 947, dismissed.

THE facts are stated in the opinion.

Mr. E. L. Medler for appellant.

Mr. Neill B. Field for appellee, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appeal involves the same questions as those that have just been decided in No. 116, *Albright* v. *Sandoval, ante,* p. 331. In the latter case the right of Sandoval to recover the fees and emoluments of the office of assessor of Bernalillo County from Albright is decided.

The case at bar is another action for additional fees received by Albright. The judgment rendered was for the sum of $1,688.84, which, with interest, amounted to the sum of

$1,813.25. The judgment was affirmed by the Supreme Court. 94 Pac. Rep. 947. This appeal was then taken. A motion is made to dismiss it on the ground that the amount in dispute does not exceed $5,000. To this it is replied that the case involves the validity of an authority exercised under the United States in the passage of the laws by which, it is contended, Albright derived a right to the office.

The appellant supports this contention by saying that his answer in the trial court raised the "legal propositions of the power and authority of the Territorial legislature to pass the acts creating Sandoval County and to vest the power of appointment in the county commissioners of Bernalillo County," and also contained a full record of the *quo warranto* proceedings in which the same questions were raised. But by reference to the opinion in No. 116 it will be seen that the Supreme Court rested its decision upon the construction of the statutes, not upon the want of power in the legislature to pass them. As to the acts themselves, the Supreme Court said: "It does not seem necessary or profitable in this case to consider the question of the power of the legislature, for the reason that however adequate the power of the legislature might be, if the legislature did not see fit and had not intended to exercise the power to declare the office of assessor of Bernalillo County vacant by the legislation enacted, the legal right of the incumbent elected by the people of the county is not affected by the legislation, and no vacancy existed, to be filled either by election or by appointment."

As to the vacancy alleged to have occurred by the nonresidence of Sandoval in Bernalillo County, the court said that it was unable to find any provision of the statutes "requiring residence in the county as a qualification to hold the office of assessor." And further said that it was hence "led to the logical conclusion that even if it were admitted that Sandoval had been for years and was still residing in what would become Sandoval County when the act took effect, that fact would neither disqualify Sandoval from holding his office nor

have the effect of rendering the office vacant." And again: "The legislature acted upon a mistaken view of the law and the result of which was to provide for the election of an officer to an office not vacant, but which, on the contrary, was in the possession of a legally elected and qualified incumbent." It was also decided that Albright's appointment was made before the law took effect and necessarily was illegal.

Upon the second appeal of the case the court did not enlarge on the ground of its decision. 79 Pac. Rep. 719. It follows that as Sandoval's right to the office and Albright's want of right were based upon the construction of the statutes of the Territory, not upon power of the legislature to pass them, the motion to dismiss must be granted, and it is

So ordered.

WM. J. MOXLEY, A CORPORATION, *v.* HERTZ, UNITED STATES COLLECTOR.

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

No. 398. Argued December 13, 14, 1909.—Decided February 21, 1910.

Where the function of a natural ingredient, such as palm oil, used in manufacturing oleomargarine is so slight that it probably would not be used except for its effect in coloring the product so as to look like butter, the product is artificially colored and subject to the tax of ten cents a pound under par. 8 of the act of May 9, 1902, Chap. 784, 32 Stat. 193.

As the record in this case shows that the use of palm oil produced only a slight effect other than coloration on the product, it falls under the rule adopted in *Cliff* v. *United States*, 195 U. S. 159, that the use of a natural ingredient must be for something more substantial than coloration in order to relieve the oleomargarine of the tax of ten cents a pound.

A statute may not be evaded, nor its purpose made to yield to what is non-essential and thus render it a means to accomplish the deception it was meant to prevent.

THE facts are stated in the opinion.

Mr. John Maynard Harlan for Moxley & Co.

By the special finding in this case palm oil is shown to be one of the unartificially colored legal component parts of oleomargarine referred to in the Treasury Department's Regulations as to artificial coloration of June 2, 1902. This a fair and reasonable interpretation consistent with the language and purpose of the statute and should not be lightly departed from. *United States* v. *1412 Gallons*, 10 Blatchf. 428. This interpretation is not overruled by the *Cliff case*, 195 U. S. 159. The fact distinguishing the *Cliff case* from the case at bar is just this: that the plaintiff in error herein has proved, and the trial court has found, palm oil to be a food ingredient of oleomargarine, while in the *Cliff case* it was conceded, in effect, that palm oil was merely a color ingredient. In fact the *Cliff case* taken in connection with *McCray* v. *United States*, 195 U. S. 27, logically requires all the certified questions to be answered in the negative.

"For the purpose of assessing the statutory tax on the oleomargarine described in the first question," the rate of taxation is not "dependent, either upon the ratio which the quantity of palm oil used bears to the other ingredients, or the extent or ratio of other benefits than that of coloration given by the palm oil."

The fact that the manufacturer intended and used the palm oil for the coloration of the oleomargarine cannot enter into the determination of the amount taxable under the statute. Taxes are laid upon things, not upon motives. *Merritt* v. *Welsh*, 104 U. S. 694; *Seeberger* v. *Farwell*, 139 U. S. 608; *Magone* v. *Luckemeyer*, 139 U. S. 612; *United States* v. *Schoverling*, 146 U. S. 76, 81; *United States* v. *Irwin*, 78 Fed. Rep. 799.

If there be any doubt, under the law, whether plaintiff in

error should have been compelled to pay, under protest, a tax at the rate of ten cents per pound on the oleomargarine here in question, this doubt should be resolved in favor of the manufacturer.

The oleomargarine law, being a revenue law, should be construed most strongly against the Government and in favor of the taxpayer. *United States* v. *Wigglesworth*, 2 Story, 369; *Hartranft* v. *Wiegmann*, 121 U. S. 609; *United States* v. *Isham*, 17 Wall. 496; *Am. Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *Eidman* v. *Martinez*, 184 U. S. 578; *Bensinger* v. *United States*, 192 U. S. 38, 55.

The English rule in stamp duty cases is the same. See *Tomplins* v. *Ashby*, 6 B. & C. 541, 543; *Doe* v. *Smith*, 8 Bing. 147, 152; *Gurr* v. *Scudds*, 11 Exch. 190, 192; *Warrington* v. *Furbor*, 8 East, 242, 245.

The rule that one who claims the benefit of an exception must make it clear that he comes within its scope has no application to this case.

The proviso of § 8 of the oleomargarine law, as amended in May, 1902, is really an independent enactment. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *United States* v. *Whitridge*, 197 U. S. 135; *United States* v. *Babbitt*, 1 Black, 55; *Savings Bank* v. *Collector*, 3 Wall. 495; *Eidman* v. *Martinez*, 184 U. S. 578; *Warrington* v. *Furbor*, 8 East, 242.

The amount of the revenue tax paid on oleomargarine bears no causal relation to the accomplishment of the purpose of the act, to prevent the sale of oleomargarine as and for butter. *Re Kollock*, 165 U. S. 526, cited in *McCray* v. *United States*, 195 U. S. 27; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

The Solicitor General for Hertz, Collector:

This case is governed by the case of *Cliff* v. *United States*, 195 U. S. 159. Under that decision the first question now certified to this court must be answered in the affirmative; and response to the second and third certified questions will then become unnecessary.

The only difference in the constituents of the oleomargarine involved in the *Cliff case* and that here considered is the addition of some cream to the latter.

The customary formulæ for making oleomargarine show that coloring matter is uniformly a fraction of one per cent. of the total weight of the oleomargarine to be colored. Vol. 9, 12th Fed. Census, Manufactures, part 3, p. 521. The very slight quantity of palm oil used in this case (a fraction of one per cent., as in the *Cliff case*) makes it impossible to regard the palm oil as anything but a colorant. If in the *Cliff case* palm oil had no other substantial operation than to color, the same is true here.

It is error to suppose that the statute defines either the only or the essential ingredients of oleomargarine. The statutory list was merely to prevent the escape of any real oleomargarine compounds from the reach of the law through addition to them of any substance which Congress thought might probably be added. The law operates upon compounds not only of those things named in the act but also of those things and extraneous things not named. It is not enough to make any substance a natural colorant of oleomargarine that it is named in the statute as a thing that may be found in oleomargarine. *McCray* v. *United States,* 195 U. S. 27; *Cliff* v. *United States,* 195 U. S. 159. The *McCray case* held this as to artificially colored butter, which is itself named in the statute as a possible constituent; and the *Cliff case* held it as to palm oil, which is one of the "vegetable oils" named in the statute.

The true distinction between natural and artificial colorants is unconnected with the statutory enumeration and must be discovered in the real nature of oleomargarine itself as universally recognized and not altered by statute, or in the natural relation of the colorant to the end (butter color) sought to be accomplished. By this test, oleomargarine is an article manufactured from animal fats; and a vegetable oil is a foreign, and so artificial, addition to it just as much

as if it were not named in the statute. When, therefore, the addition to oleomargarine of a foreign substance like palm oil imparts to it a butter color, such color is artificial, whether or not other qualities than color are given by the same foreign addition. The only ingredients which can be considered natural to oleomargarine are the animal (including butter) fats, and the only natural colorant is butter itself.

The statutory proviso relieving naturally colored oleomargarine from the general tax of 10 cents per pound, is not to be construed liberally in favor of the manufacturer. A party who claims the benefit of this proviso must make it clear that his oleomargarine is within its scope. *Cliff case, supra,* p. 163.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The certificate cannot easily be condensed, therefore we give it in full. It is as follows:

"In this case, which has been argued and submitted to this court, questions of law arise concerning which the court desires the instruction and advice of the Supreme Court of the United States.

"The plaintiff in error brought suit (at law) in the trial court to recover the amount paid to the defendant in error, as collector of internal revenue, under constraint, as a tax of ten cents per pound, assessed by the Commissioner of Internal Revenue, for the manufacture by the plaintiff in error of 284,998 pounds of oleomargarine under due authority to engage in such business. Issues were joined and upon written stipulation by the parties were submitted to the court for trial without a jury. After hearing the testimony, the trial court made and filed a special finding of facts upon the several issues so submitted, and thereupon judgment was rendered against the plaintiff in error, whereof reversal is sought on writ of error.

"The tax in controversy of ten cents per pound purports to be assessed under the provisions of section 8 of the act of Congress approved May 9, 1902, published as chap. 784, 32

U. S. Stat. L. 193; and the present inquiry involves only the following of such finding of facts, viz:

"(1) That in June, 1902, after the above-mentioned enactment, 'the Commissioner of Internal Revenue officially promulgated and published and issued in regular course by the United States Treasury Department, the regulation as to "artificial coloration," in language as follows:

"'*Regulation as to Artificial Coloration.*

"'If in the production of oleomargarine the mixtures of compounds set out in the law of 1886 are used, and these compounds are all free from artificial coloration and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of one-fourth of 1 cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been artificially colored is used as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow) as the oleomagarine is not free from artificial coloration, the tax of 10 cents per pound will be assessed and collected. But if butter is absolutely free from artificial coloration or cottonseed oil free from artificial coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product oleomargarine has naturally a shade of yellow in no way produced by artificial coloration, and through the use of one or more of these unartificially colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only one-fourth of 1 cent per pound, as it is absolutely free from artificial coloration that has caused it to look like butter of any shade of yellow.'

"Which said 'Regulation as to Artificial Coloration,' thenceforth continued to be the regulation of the Commissioner's office when the oleomargarine hereinafter referred to was made and sold by the plaintiff.'

"(2) The rulings and assessments in question by the Commissioner of Internal Revenue were made in 1903.

"(3) The oleomargarine, on account of which said assessment was levied by said Commissioner of Internal Revenue and said reduced amount thereof was required by him to be paid by said plaintiff, was composed of oleo-oil, lard, milk, cream, salt, and two vegetable oils commonly known as cottonseed oil and palm oil, and of nothing else. The proportion of palm oil present in said oleomargarine was about one-half of one per cent. (½%) of the total volume of said oleomargarine. Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has about the consistence of pure butter. Palm oil consists almost entirely of palmatine and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested and has long been used as an article of food in countries where it is produced. Palm oil was successfully employed in oleomargarine prior to May, 1902; and is a proper constituent of oleomargarine. The oleomargarine involved in this suit looked like butter of a shade of yellow, and such resemblance to butter of a shade of yellow was caused by the presence of the palm oil used in said oleomargarine, and the levy of said assessment by said Commissioner of Internal Revenue was based upon and because of such resemblance to butter of a shade of yellow resulting from such use of palm oil in said oleomargarine. In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly better grain of texture, causing it to act more like butter in the frying pan, and it also caused said oleomargarine to have a better physiological effect upon the persons who ate it; but such function of the palm oil, other than as coloring matter, was slight, and but for the coloring imparted to the oleomargarine, would not probably have been actually used in its manufacture.

"Upon the foregoing facts—distinguishing the case from that presented in *Cliff* v. *United States*, 195 U. S. 159, as we

understand the facts there reported—the questions of law concerning which this court desires the instruction and advice of the Supreme Court are these:

"First. With the oleomargarine caused 'to look like butter,' by the use of natural palm oil as one of the ingredients—'a pure vegetable oil,' named in the statute as an ingredient of oleomargarine—which not only gives the coloration sought for the finished product, but otherwise (in some degree) improves the texture, quality and healthfulness of the oleomargarine. Can such use be denominated 'artificial coloration,' within the terms and meaning of the statute referred to, fixing the rate of taxation?

"Second. For the purpose of assessing the statutory tax on the oleomargarine described in the first question, Is the rate of taxation dependent, either (1) upon the ratio which the quantity of palm oil used bears to the other ingredients, or (2) the extent or ratio of other benefits than that of coloration given by the palm oil?

"Third. Can the fact that the manufacturer intended and used the palm oil for coloration of the oleomargarine enter into the determination of the amount taxable under the statute."

It, as it will be observed, is implied in the certificate and, it is also contended at bar, that the facts of this case distinguish it from *Cliff* v. *United States*, 195 U. S. 159. What the decision was in that case, therefore, becomes the first subject of inquiry. And an element of that inquiry is the act of Congress under which the tax in controversy was imposed, of which §§ 2 and 8 are only necessary to quote (24 Stat. 209, chap. 840, Aug. 2, 1886):

"SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neu-

tral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter."

"SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of 2 cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound*" [italics ours].

The defendant in that case was charged with having knowingly purchased and received for sale oleomargarine which had not been properly stamped according to law. It was shown that out of 160 ounces of which the compound was composed, only one and one-half ounces were palm oil, and the following ruling of the Commissioner was introduced in evidence:

"This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of ten cents per pound."

The contention was that Congress having, in § 2, defined oleomargarine to consist of certain substances the color,

which resulted from the use of such substances, or any of them, was a natural, not an artificial, coloration. The contention, and the argument of counsel to support it, was given at length so that its full extent and strength should be shown. Among other things this was said: "However minute may be the quantity of palm oil used, it is none the less a vegetable oil, a statutory, or so to speak, a natural ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as, for instance, cottonseed oil." And it was argued that the statute conferred "no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health." The argument could not be misunderstood or evaded. It asserted the purity of the oleomargarine under the law and that its color came from its purity, not from any illegal addition to it. The contention, therefore, was direct and unqualified by any consideration of the relative quantity of the ingredients. Its force was recognized but it was nevertheless rejected, and in reply it was pointed out that the statute was not enacted to permit the manufacture of oleomargarine but to prevent its sale "as and for butter." And it was decided "that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass and so as to cause the product to 'look like butter of any shade of yellow,' it is an artificial coloration." It was stated that palm oil is a vegetable oil, and one of the substances authorized to be used by § 2 in the composition of oleomargarine. But this, it was added, did not exempt the product from the higher tax if the palm oil or any other "statutory ingredient," to use the phrase of counsel, was used only for coloring. The statute was carefully analyzed and the words, "and other coloring matter" in § 2 was declared to have an obvious purpose. "It was to prevent," it was said, "excluding from the operation of the stat-

ute anything in its nature oleomargarine (that is to exempt from the higher tax anything in its nature oleomargarine) by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter." And it was further said, "the fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does substantially only this it is rightfully styled an artificial coloration." This language brings us to the point of distinction between that case and the case at bar. It is put beyond controversy that oleomargarine may be subject to the higher tax though its color result from a "statutory ingredient." To relieve from such consequence the ingredient must be there in substantial quantity, in quantity substantial enough to contribute to the product something more than color. And this, it is insisted, the palm oil does in the case at bar and the case is, therefore, it is further insisted, distinguished from the *Cliff case*. The contention is that the defendant in the *Cliff case* "stood upon the narrow proposition, that palm oil being a vegetable oil and, *therefore*, being a statutory ingredient of oleomargarine, it made no difference whether the amount of it used was small or large, or whether the *sole purpose* of its use was to impart the desired color; coloration due to its use was not, within the meaning of the statute 'artificial coloration.' "

It is further urged that "Cliff made no effort whatever to show what, if any, were the effects of palm oil upon the oleomargarine other than giving color to it," but admitted for the purpose of the case "that the *sole and only* function of the palm oil was to make the oleomargarine 'look like butter of a shade of yellow.' "

He did not show, as he might have shown, it is further urged, "what are found as facts in this case, namely: that palm oil in its nature is suitable for food; that, for many years prior to 1902, it had been used for food and that, when

so used, it was found healthful and digestible; and that palm oil had been successfully used in oleomargarine *prior to May* 9, 1902, the date of the passage of the amendment which for the first time made the tax upon oleomargarine that *is free* from artificial coloration smaller than the tax upon oleomargarine that *is not free* from artificial coloration. Prior to May 9, 1902, all oleomargarine was taxed under the original oleomargarine law passed in 1886 at the rate of two cents per pound, regardless of whether it was free or not free from artificial coloration."

Are these contentions sustained by the facts certified? Do they show that the palm oil has substantially any other purpose than to color the product? It is certified that palm oil is a purely vegetable oil, "is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced." These are useful qualities undoubtedly, and the extent of their contribution by the presence of one-half of one per cent of palm oil is attempted to be estimated. It is the ingredient, the certificate says, that gives to the oleomargarine a "shade of yellow" and makes it resemble butter, that is, enables it to seem what it is not, and so far, at least, to defeat the purpose of the law against coloration. And the certificate further recites that, "in addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly better grain of texture, causing it to act more like butter in the frying pan, and it also caused said oleomargarine to have a better physiological effect upon the persons who ate it; but such function of the palm oil, other than as coloring matter, was slight, and but for the coloring imparted to the oleomargarine, would not probably have been used in its manufacture."

We do not think these facts take the case out of the ruling in the *Cliff case*. There is no more substantial contribution of character to the compound in this case than in that. The amount of palm oil used in that case was something greater than in this and the purpose of its use was the same. It, of

course, added whatever qualities it possessed and could exist in a fraction of one per cent of the product of which it made a part. This did not need explicit statement and it gains nothing now by explicit statement. What effect is claimed for it? It gives, it is said, a slightly better grain of texture, a better physiological effect upon those who eat it. But those effects are "slight," it is certified. What is meant by "slight"? It is the word of a rather indeterminate meaning. It usually implies unimportance or insignificance, and is practically given that meaning in the certificate. The palm oil, it is certified, contributes so little to the value or quality of the oleomargarine that but for its coloring power it would not be used. It may be, as counsel says, that the motive of its use cannot make it illegal and that one cannot become an offender against the law by doing what it permits. But the question here is not what the law permits. That was decided in the *Cliff case*. The question here is whether we shall exaggerate a slight use of a "statutory ingredient" into a substantial use of it, and by doing so bring its use within the permission of the statute and relieve the product of which it is a "slight" part from a tax of ten cents.

We have so far considered this case on the authority of the *Cliff case*, deeming it unnecessary to repeat the reasoning of the latter, as though the question was *res integra*. It may be well, however, to develop the argument of counsel somewhat further. It is presented in a summary way into the following syllogism:

"First premise: Color due to the use of an authorized food ingredient, not artificially colored, is not artificial colorization. (*McCray case*.)

"Second premise: Palm oil, being a vegetable oil, suitable for food, and its nature such as to make oleomargarine suitable for food, and being itself not artificially colored, is an authorized food ingredient. (*Cliff case*.)

"Conclusion: Therefore color due to the use of palm oil is not artificial coloration."

The premises and conclusion are assumed by ignoring, not by following, the cases cited to support them. The error arises by making the term "authorized food ingredient" unqualified and by disregarding what the *Cliff case* makes essential. The quality of suitableness for food of an ingredient is made determinative, and wholly determinative, disregarding its quantity, its relation and proportion to other ingredients, and this, counsel indeed contends for and is the proposition presented in the second question certified. But the contention contravenes the rule in the *Cliff case*, where the distinction was made between the mere addition of an authorized food ingredient and its service in the compound for something more substantial than coloration. We now repeat it. Any other rule would give too easy a way to evade the statute and make its purpose yield, not to what is essential to the manufacture of oleomargarine, but what is nonessential, and render a law which was intended to prevent deception an easy means to accomplish it.

We are not called upon to consider whether the first premise of counsel's syllogism is sustained by *McCray* v. *United States*, 195 U. S. 27, but we are concerned to say, to meet a contention of counsel, that it will not be put into antagonism with the *Cliff case* by the meaning we have given the latter. On the contrary, the cases support each other. In both this court declined to follow arguments based upon the mere letter of the statute in destruction of its manifest intention. The contention in the *McCray case* was that butter, whether artificially colored or not, was an authorized ingredient of oleomargarine, and when added to oleomargarine made it free from artificial coloration. This was pronounced an "obvious *non sequitur*." The product, it was said, would be "oleomargarine," but it would not be "oleomargarine free from artificial coloration within the intendment of the proviso" of § 2.

It follows from these views that *the first question certified must be answered in the affirmative; the second and third questions do not call for specific answers on this record.*

LAUREL HILL CEMETERY *v.* CITY AND COUNTY OF SAN FRANCISCO.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 100. Argued January 21, 24, 1910.—Decided February 21, 1910.

Great caution must be exercised by any tribunal in overruling, or allowing to be overruled, the decision of the local authorities on questions involving the health of the neighborhood; and this court is doubly reluctant to interfere with deliberate decisions of the highest court of a State confirming a specific determination on such a question previously reached by the body making the law.

Where opinion is divided as to whether a practice prohibited by a police ordinance is dangerous, and if the ordinance be valid if the danger be real, this court will not overthrow the ordinance as an unconstitutional deprivation of property without due process of law or a denial of equal protection of the law merely because of adherence to the other belief. *Jacobson* v. *Massachusetts*, 197 U. S. 11.

One not belonging to a class, cannot raise the question of constitutionality of a statute as it affects that class.

Tradition and habits of the community count for more than logic in determining constitutionality of laws enacted for the public welfare under the police power.

An ordinance prohibiting burial of the dead within the limits of a populous city based on a determination of the city authorities that the practice is dangerous to life and detrimental to public health, and which has been sustained by the highest court of the State, will not be overthrown by this court as an unconstitutional exertion of the police power of the State; and so held as to such an ordinance of San Francisco, California.

152 California, 464, affirmed.

THE facts are stated in the opinion.

Mr. Thomas E. Haven for plaintiff in error:

The ordinance is invalid because it goes beyond the necessities of the case.

The determination by legislative bodies as to the necessity of the exercise of the police power is not final nor conclusive.

Welch v. *Swasey*, 214 U. S. 91; *Chicago, B. & Q. R. R.* v. *Illinois*, 200 U. S. 592; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Hannibal & St. Joseph R. R. Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313.

The prohibition of burials from which no injury can result is neither reasonable nor necessary.

The Supreme Court of California has held that an ordinance prohibiting burials in an entire county is unreasonable and void. *Los Angeles* v. *Hollywood Cemetery Association*, 124 California, 344; *Hume* v. *Laurel Cemetery*, 142 Fed. Rep. 564–565; Freund on Police Powers, § 178; *Lake View* v. *Letz*, 44 Illinois, 81.

Courts cannot know judicially that the burial of human remains in proximity to the habitations of the living is dangerous to the health of the inhabitants. *Brown* v. *Piper*, 91 U. S. 37.

When authorities differ as to scientific facts, courts cannot take judicial knowledge of them. *St. Louis Gas Light Co.* v. *American Fire Ins. Co.*, 33 Mo. App. 367–369; Underhill on Evidence, § 241, p. 371; *Minnesota* v. *Barber*, 136 U. S. 313.

That cemeteries are not so dangerous to health as to constitute nuisances *per se* has been held by the Supreme Court of California and numerous other authorities. *Los Angeles* v. *Hollywood Cemetery Association*, 124 California, 347; *Lake View* v. *Letz*, 44 Illinois, 81; 5 Am. & Eng. Ency. of Law (2d ed.), 791; *Monk* v. *Parkard*, 71 Maine, 309; *Lake View* v. *Rose Hill Cemetery*, 90 Illinois, 195; *Begein* v. *City of Anderson*, 28 Indiana, 79; *Kingsbury* v. *Flowers*, 65 Alabama, 485; Wood on Nuisances (2d ed.), p. 6, § 3; *Dunn* v. *City of Austin*, 77 Texas, 139, 146; *Musgrove* v. *St. Louis Church*, 10 La. Ann. 431; *New Orleans* v. *St. Louis Church*, 11 La. Ann. 244; *Ellison* v. *Commissioners*, 5 Jones' Equity, 57.

Scientific authorities quoted in the brief and in the record, including article by M. J. Robinet, in Popular Science Monthly, September, 1881, Vol. 19, p. 657, establish the scientific fact that whatever unhealthy conditions have heretofore arisen

from cemeteries, have been due to the improper or negligent conduct of the same, rather than to any inherent danger resulting from burials when properly conducted.

Prohibition of burials is unreasonable and beyond the necessities of the case, if possible dangers can be avoided by regulation of burials without absolute prohibition. *Los Angeles* v. *Hollywood Cemetery Association*, 124 California, 349; Freund on Police Power, p. 132, § 141. See report of the Connecticut board of health containing a discussion of the regulation of cemeteries, and Political Code of California regulating manner of burial of human remains, §§ 3012, 3025, 3027; Acts of California, April 1, 1878, p. 1050; 1889, p. 139; Deering's Gen. Laws, Act 545, p. 83; Henning's Gen. Laws, p. 505; provisions of Penal Code as to removal of dead bodies without permit, §§ 290–291.

The police power vested in the Board of Supervisors of San Francisco is a power to abate nuisances and to regulate such occupations as are nuisances.

Whenever threatened danger can be removed by restrictions, or regulations, without entire prohibition, the latter course is manifestly oppressive, unreasonable and invalid. 24 Am. & Eng. Ency. of Law (2d ed.), pp. 243–244; *Ex parte Patterson*, 42 Texas Crim. Rep. 256; *McConvill* v. *Jersey City*, 39 N. J. Law, 44; *City of Austin* v. *Austin Cemetery Assn.*, 87 Texas, 330; *Re Hauck*, 70 Michigan, 390; *State* v. *Mott*, 61 Maryland, 297; *Re Frazee*, 63 Michigan, 396.

A mere tendency to endanger the health of the public is not a sufficient warrant for the prohibition of a lawful business. *Lake View* v. *Rosehill Cemetery Company*, 70 Illinois, 191; *Miller* v. *Horton*, 152 Massachusetts, 540; *Lochner* v. *New York*, 198 U. S. 45.

Complainant is entitled to be heard upon the question as to whether or not burial of the dead within San Francisco is dangerous to life and detrimental to the public health. *Dobbins* v. *City of Los Angeles*, 139 California, 179; *Re Smith*, 143 California, 372–373.

The ordinance is unreasonable for the reason that it prohibits burials upon large unoccupied tracts of land. *Wygant* v. *McLauchlan,* 39 Oregon, 429.

The ordinance deprives complainant and its lot owners of their property without due process of law.

The means are unreasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *Lawton* v. *Steele,* 152 U. S. 137; *Holden* v. *Hardy,* 169 U. S. 398.

The question as to whether or not modern cemeteries are dangerous to the health of neighboring inhabitants has never been considered or determined by any court.

The cases cited in the courts below, while sustaining prohibition of burials in cities as a proper exercise of the police power have been based on the mere assumption and not the actual finding of any danger.

Mr. Jesse H. Steinhart, with whom *Mr. Percy V. Long* was on the brief, for the defendant in error:

The San Francisco Burial Ordinance has been twice sustained by the courts of California. *Laurel Hill Cemetery* v. *San Francisco,* 152 California, 464; *Odd Fellows' Assn.* v. *San Francisco,* 140 California, 226; and in each case held to be within the powers conferred upon the municipality.

The ordinance is constitutional under the Fourteenth Amendment. Complainant cannot complain on behalf of persons owning large tracts of land which might be used for cemetery purposes as it does not belong to that class. *Brown* v. *Ohio Valley R. R.,* 79 Fed. Rep. 176; *Clark* v. *Kansas City,* 176 U. S. 114; *Pittsburg & C. R. R.* v. *Montgomery,* 39 N. E. Rep. 582; *Austin* v. *Boston,* 7 Wall. 694.

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. And this ordinance falls within that definition. *C., B. & Q. R. R.* v. *Illinois,* 200

U. S. 561; *Escanaba Transp. Co.* v. *Chicago*, 107 U. S. 678; *Leisy* v. *Hardin*, 135 U. S. 100; *Holden* v. *Hardy*, 169 U. S. 366; *Welch* v. *Swasey*, 214 U. S. 91; *Gundlin* v. *Chicago*, 177 U. S. 183.

The court should not declare the act unconstitutional because a statute ordains a complete prohibition of the act or thing legislated against instead of a regulation thereof. *Powell* v. *Pennsylvania*, 127 U. S. 678.

The judiciary cannot declare the act unconstitutional merely because it prohibits harmless things and harmless acts as well as harmful things and harmful acts. *Booth* v. *Illinois*, 184 U. S. 425.

The court will not declare an ordinance unconstitutional merely because the court itself knows or feels that the legislative conclusion as expressed in the enactment is incorrect, when as a matter of fact, the legislative conclusion is supported by public opinion, commonly held belief, or scientific authority. *Austin* v. *Tennessee*, 179 U. S. 343.

The prohibition in this case is a prohibition of burials; it is not a direct confiscation of cemeteries. In so far as it may act as a deprivation of the property of plaintiff, it does so incidentally only; as to the danger of cemeteries and for upholding prohibition of burials in cities and settled neighborhoods, see *Carpenter* v. *Yeadon*, 158 Fed. Rep. 766; *Odd Fellows' Cemetery Assn.* v. *San Francisco*, 140 California, 226.

Of the cases holding such ordinance invalid some can be distinguished and others are erroneous. *Lake View* v. *Rosehill Cemetery*, 70 Illinois, 190; *Cemetery Assn.* v. *Railway Co.*, 121 Illinois, 199; *Ex parte Wygant*, 39 Oregon, 429; *Commonwealth* v. *Alger*, 7 Cushing, 84; *Went* v. *Methodist Church*, 80 Hun, 267; Freund, Police Powers, par. 125; *Lowe* v. *Prospect Hill Cemetery*, 46 L. R. A. 240.

More than twenty-five States in the United States have specifically, in one form or another, legislated against cemeteries and, legislated in such a way as to show that they have considered cemeteries fraught with danger to public health.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to restrain the City and County of San Francisco and its officers from enforcing an ordinance forbidding the burial of the dead within the City and County limits. The allegations of the complaint are lengthy, but the material facts set forth are as follows: The plaintiff was incorporated in 1867 as a rural cemetery under a general act. The land in question had been dedicated as a burying ground, being at that time outside the city limits and a mile or two away from dwellings and business. It was conveyed to the plaintiff, and later a grant of the same was obtained from the city in consideration of $24,139.79, which sum the city retains. The land has been used as a cemetery ever since; forty thousand lots have been sold and over two million dollars have been spent by the lot owners and other large sums by the plaintiff in preparing and embellishing the grounds. By the terms of the above-mentioned general statute the lots, after a burial in them, are inalienable and descend to the heirs of the owner, and the plaintiff is bound to apply the proceeds of sales to the improvement, embellishment and preservation of the grounds. There is land still unsold estimated to be worth $75,000. There now are many dwellings near the cemetery, but it is alleged to be in no way injurious to health, or offensive, or otherwise an interference with the enjoyment of property or life. There also is an allegation that there are within the city large tracts, some of them vacant and some of them containing several hundred acres, in several of which interments could be made more than a mile distant from any inhabitants or highway. The ordinance in question begins with a recital that "the burial of the dead within the City and County of San Francisco is dangerous to life and detrimental to the public health," and goes on to forbid such burial under a penalty of fine, imprisonment, or both. The complaint sets up that it violates Article I, § 8, and the Fourteenth Amendment of the Constitution of the United States.

The answer denied some of the above statements on the ground of ignorance, and categorically denied the averment as to the large vacant tracts available for burying within the city. The defendants moved for judgment on the pleadings, the notice showing the ground to be that the complaint did not state a cause of action, but going on to say that the motion would be made upon all the papers on file. The motion was granted and an exception to the judgment was affirmed by the Supreme Court of the State. 152 California, 464. As the state court and the arguments before us assumed the material allegations of the complaint to be true, we shall assume that the judgment was ordered upon the complaint without regard to the denials in the answer, although it was then on file.

The only question that needs to be answered, if not the only one before us, is whether the plaintiff's property is taken contrary to the Fourteenth Amendment. In considering it, the allegation as to the large tracts available for burying purposes may be laid on one side. The plaintiff has no grievance with regard to them. *The Winnebago*, 205 U. S. 354, 360. Moreover, it is said by the Supreme Court of the State that burial within the San Francisco City or County limits already was forbidden by statute, except in existing cemeteries or such as might be established by the Board of Supervisors. The Board of Supervisors passed the ordinance now complained of; so that, as pointed out by the court, the ordinance in effect merely prohibited burials in existing cemeteries. It was, therefore, a specific determination by the lawmaking authority as to the relation of those cemeteries to their respective neighborhoods, and the question is whether the court can say that it was wrong.

To aid its contention and in support of the averment that its cemetery, although now bordered by many dwellings, is in no way harmful, the plaintiff refers to opinions of scientific men who have maintained that the popular belief is a superstition. Of these we are asked, by implication, to take judicial

notice, to adopt them, and on the strength of our acceptance to declare the foundation of the ordinance a mistake and the ordinance void. It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this court has power to form its own judgment without the aid of a jury. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227. But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins* v. *Los Angeles*, 195 U. S. 222. *Lochner* v. *New York*, 198 U. S. 45, 58 *et seq.* But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the State whose people are directly concerned. *Welch* v. *Swasey*, 214 U. S. 91, 106. The reluctance must be redoubled when as here the opinion of that court confirms a specific determination concerning the same spot previously reached by the body that made the law. See *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 341; *Smith* v. *Worcester*, 182 Massachusetts, 232, 234, 235.

But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this Bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *S. C.*, 183 Massachusetts, 242. See

Otis v. *Parker*, 187 U. S. 606, 608, 609. Again there may have been other grounds fortifying the ordinance besides those recited in the preamble. And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World. This is shown sufficiently by the cases cited by the court below; e. g. *Coates* v. *New York*, 7 Cow. 585. *Kincaid's Appeal*, 66 Pa. St. 411. *Sohier* v. *Trinity Church*, 109 Massachusetts, 1, 21. *Carpenter* v. *Yeadon*, 158 Fed. Rep. 766; *S. C.*, 86 C. C. A. 122. The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold.

Judgment affirmed.

MR. JUSTICE MCKENNA took part in the decision of this case.

HAWAIIAN TRUST COMPANY, LIMITED, ET AL., EXECUTOR, *v.* VON HOLT ET AL., TRUSTEES.[1]

SAME *v.* SAME.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Nos. 106, 107. Argued January 26, 1910.—Decided February 21, 1910.

A provision that a definite amount of net income be paid by trustees to the widow does not entitle her to income from the death of the testator, but only from after the executors have been discharged and the property turned over to the trustees.

This rule applies even if, after acceptance by the widow, of the provision in lieu of dower, it appears that the provision is not as advantageous to her as though she elected to take her dower.

In considering whether a provision in a will is as advantageous as dower interest, the fact that the widow is an executor and receives commissions may be considered.

18 Hawaii, 34, 342, affirmed.

THE facts are stated in the opinion.

Mr. Aldis B. Browne, with whom *Mr. Alexander Britton, Mr. Evans Browne, Mr. Sidney M. Ballou, Mr. Mason F. Prosser, Mr. Robbins B. Anderson, Mr. F. E. Thompson* and *Mr. C. F. Clemons* were on the brief for appellants.

Mr. E. M. Watson, guardian *ad litem* and attorney for appellees, Kawananakoa heirs.

Mr. W. L. Stanley, Mr. Henry Holmes and *Mr. C. H. Olsen* for the trustees, appellees, submitted.

[1] Original docket titles, No. 106, Abigail K. Campbell Parker, Appellant, *v.* Abigail K. Campbell Parker and others, Trustees, etc.; No. 107, Same *v.* Same. On October 11, 1909, suggestion of death of appellant and substitution of Hawaiian Trust Company as appellant. January 24, 1910, suggestion of death of appellee and substitution of Hannah Martin Von Holt as trustee, appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills in equity, brought by the respondents, trustees under the will of James Campbell, for instructions as to the meaning of a clause in the will. James Campbell died on April 21, 1900, leaving large amounts of real and personal property. His will was proved on June 26, 1900. By it the same persons were made, first, executors, and afterwards trustees. On July 3, 1905, a decree of distribution was made discharging the executors and ordering them to turn the property over to themselves as trustees. The testator left a widow and children, and the question before the court is whether the widow, the appellant, is entitled to any part of the income from realty before the same came to the trustees' hands. The bill in No. 106 originally raised other questions, but the widow is the only appellant, and what we have stated is the single matter here. The Supreme Court decided against the appellant on the merits in 106, the principal case. 18 Hawaii, 34. The bill in 107 was filed after the decree in 106, on the notion that the decree did not fix the time when the widow's income from realty began. The Supreme Court regarded the matter as *res judicata*, but discussed the merits again, and then affirmed a decree dismissing the bill. 18 Hawaii, 342.

By the first clause of the will the executors were to reduce all the estate, real and personal, to possession, to collect the income thereof "pending the distribution thereof" as thereinafter provided and to have the value adjudged. By the second, they were to pay the debts and funeral expenses. By the third, there was given to the widow a sum of money equal to one-third of the value of the personal property only, adjudged as above, after payment of debts, etc. This sum was to be paid in cash, and if the condition of the estate should not warrant the payment of the whole at one time, then it was to be paid "as rapidly as the income and interests of my estate shall permit, without the sale of any real estate, or

the sacrifice of any personal property, as a means of raising such sum, but provided that the entire sum be paid within two years from the date of my decease, and no deferred payments shall, within said period of two years, draw any interest." The fourth clause gives the use and occupation of the testator's dwelling house and grounds, furniture, horses, carriages, etc., to the widow, and to the children so long as they remain unmarried, and the executors or trustees are to keep the house and grounds in suitable condition and repair at the charge of the estate; with further details. The fifth clause directs the executors to pay to the widow "for the use of herself and our children, as a family allowance, such sum, monthly," as may be decreed by the Probate Court, and the trustees after entering upon their functions are to make such further provision for the maintenance of the children as is thereinafter directed. By the sixth clause, after satisfying the second and third, the executors "shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate," and the testator gives to the trustees and to those living and resident within the Hawaiian Islands at the date of such decree all the residue of the estate not before otherwise devised or bequeathed.

The trusts, so far as material, after a further provision in clause seven as to the house and grounds and their contents, are as follows: "Eighth. With respect to all property which shall be so distributed to them," except that mentioned in seven, the trustees are to reduce it to possession and manage it, paying charges and their own commissions. "And to collect all the rents, issues, profits, income and revenue thereof" . . . "and to invest and reinvest, and keep invested," and at will to change the investment of any and all moneys that shall come to their hands by virtue hereof" not otherwise specially disposed of, "and to segregate, and keep separate and apart, (during the life of my wife,) the accounts of and pertaining to the realty of my Estate from the accounts pertaining to any and all other thereof." "Ninth: And from

and out of the net income, rents, issues and profits of and from the realty last aforesaid said Trustees shall pay the equal One Third part or portion thereof, in semiannual or, (at the discretion of said Trustees,) more frequent payments, to my said wife, for and during the remainder of her natural life." *Habendum* to her absolutely. By the tenth clause the remaining two-thirds of the net income "from said realty" are given to the children with a proviso for their minority and making surplus revenues capital. Finally the sixteenth clause states that the provision made for the widow "is intended, and shall be by her accepted, (if at all,) in lieu and full satisfaction of her dower interest in my Estate."

It will be seen from the dates of the probate of the will, June 26, 1900, and of the decree turning over the property to the trustees, July 3, 1905, that probably a longer time was taken to finish the administration than the testator expected, and that if the widow did not have a right to her third of the income from the real estate until in fact the estate went to the trustees, she will lose a considerable sum that has accumulated in the meantime. The loss is made the more aggravating that the estate seems to have been ready for distribution on February 10, 1902. Nevertheless we think that any doubts are artificial and agree with the Supreme Court of Hawaii that the language of the will is too clear to admit any interpretation but one. It is said that the provision is in lieu of dower and that the will as construed leaves her worse off than if there had been no will. Whether that would be so or not, if we take into account that she is one of the executors and trustees, getting her share of the commissions, we do not know or think of much importance. The testator seems to treat it as an open question whether she will accept the provision. However that may be, the words are explicit. The eighth clause purports to deal only with the "property which shall be so distributed to them." That phrase dominates the whole clause. It is the rents "thereof" that they are to collect, as by clause one the executors were to collect all in-

come before distribution; the accounts pertaining to the realty, that is the realty so distributed to them, are to be kept separate, and the ninth clause gives the widow one-third of the income of "the realty last aforesaid." It is argued that under the earlier clauses the realty and accrued income would be kept intact and that it is reasonable to suppose that the testator meant his wife to have one-third of the income of the land as she had one-third of the personalty. It might be reasonable to suppose so if the testator had not declared in terms what he meant. What he gave was not one-third of the income [of the realty] generally, as in *Lovering* v. *Minot*, 9 Cush. 151, and as it was taken to be by the probate judge, but one-third of the income of the realty 'last aforesaid,' that is, the realty distributed to the trustees. It was one-third of the income of the realty in the hands of the trustees, the income collected by them from it, and of which they were to keep a separate account. Perhaps the testator thought that the family allowance provided in clause five would be a sufficient substitute during the relatively short time for which he thought that the administration would last. Perhaps he did not think of the event that has happened at all. It would seem that the widow had herself partly to blame for the delay between February 10, 1902, and July 3, 1905, as she was an executrix and trustee. At all events we are of opinion that she took no income from real estate, *eo nomine*, before July 3, 1905, and did take her share from that date.

Decrees affirmed.

UNITED STATES *v.* PLOWMAN.

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

No. 96. Argued January 20, 21, 1910.—Decided February 21, 1910.

The authority for cutting timber from the public domain under the act of June 3, 1878, c. 150, 20 Stat. 88, extends only to lands valuable for minerals and not to lands adjacent thereto and not actually valuable for minerals.

Although the purpose of a statute may be defeated by its qualifications, courts, in construing it, are bound by words that are explicit and unmistakable in meaning.

151 Fed. Rep. 1022, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover the value of timber cut from the public domain in Idaho. The defendant justifies under the act of June 3, 1878, c. 150. 20 Stat. 88. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain States and Territories, including Idaho, "and all other mineral districts of the United States," to cut "for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, such lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry" in the State, Territory, or district of their residence. This authority is given subject to regulation by the Secretary of the Interior for the protection of the timber

and undergrowth, and is not given to railroads. The only question before us is how far the authority extends with reference to the specific land upon which the wood is cut.

There was a trial by jury and the issue is exhibited sufficiently by a passage or two from the charge, and the instructions asked on behalf of the Government but refused. The passages from the charge are as follows: "The law cannot be construed to limit the cutting of timber simply to ground that is known to contain mineral, or ground which is or which might be legally located as a mining claim." . . . "The law includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts." . . . "Take, for instance, a large section of country. . . . There in the lower part of the map, as you will see, is a section of country about six miles square; the upper part indicates another section six miles square. We will suppose now there is found here and there in that section of country mineral locations. They may not be contiguous; they may even be some distance apart; but you will be justified, under the law as I have given it to you, in holding all that particular section of country to be mineral ground." . . . "The question for you to decide is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether that whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant." The Government asked for instructions that it was not sufficient to show that the land in question was adjacent to lands valuable for mineral purposes, but that the authority given by the act extended only to lands valuable for minerals. It is needless to set them forth at length. There was a verdict and judg-

ment for the defendant. The ruling and refusals were excepted to, but the exceptions were overruled and the judgment affirmed by the Circuit Court of Appeals, 151 Fed. Rep. 1022, *S. C.*, 81 C. C. A. 682, on the authority of *United States* v. *Basic Co.*, 121 Fed. Rep. 504, and *United States* v. *Rossi*, 133 Fed. Rep. 380. The case then was brought to this court.

The instructions appear to us to have paid too little regard to the words of the act, defining the land on which it permits timber to be cut as "mineral, and not subject to entry under existing laws of the United States, except for mineral entry." As was said in *Northern Pacific R. R. Co.* v. *Lewis*, 162 U. S. 366, 376, "The right to cut is exceptional and quite narrow," and the party claiming the right must prove it. The only lands excluded in 1878 or now from any but mineral entry are lands "valuable for minerals" or containing "valuable mineral deposits." Rev. Stats., §§ 2318, 2319, 2302. See § 2320. The matter was much discussed in *Davis* v. *Weibbold*, 139 U. S. 507, and there it was said that the exceptions of mineral land from preëmption and settlement, etc., "are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant," p. 519. A Land Department rule is quoted, with seeming approval, that "if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver," pp. 521, 522, citing *United States* v. *Reed*, 12 Sawy. 99, 104. Again it was said, "the exception of mineral lands from grant in the Acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction," p. 524. These are the tests to which the act of 1878 must be taken to refer, since it refers to and rests upon the statutes construed to adopt these tests.

It is said that such a construction empties the statute of all its use, because if the land is known to be valuable for

minerals a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. But the objection is stated too strongly. As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply. The regulations of the Secretary of the Interior for a long time, and it would seem always, have been in accord with our opinion and the language of the act.

Judgment reversed.

MR. JUSTICE MCKENNA dissents.

SAXLEHNER *v.* WAGNER.

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

No. 81. Argued January 17, 1910.—Decided February 21, 1910.

The right to individual appropriation once lost is gone forever.

Where a geographic or family name becomes the name for a natural water coming from a more or less extensive district, all are free to try to imitate it, and the owners of one of such natural springs cannot prevent the sale of an artificial water as being similar to that of the natural spring, where there is no attempt to deceive the public as to its being artificial.

Hunyadi is now in effect a geographical expression and the owners of the Hunyadi Janos Springs cannot prevent the sale of artificial Hunyadi water where there is no deception of the public as to its being an imitation.

157 Fed. Rep. 745, affirmed.

THE facts, which involve the right of the owners of the Hunyadi Janos Springs to enjoin the sale of artificial Hunyadi water, are stated in the opinion.

Mr. Antonio Knauth and *Mr. John G. Johnson* for petitioner:

Petitioner has always been solicitous in suppressing the use of the Hunyadi name on any artificial products. See *Hunyadi Case*, 179 U. S. 19; *Flower Mills Co.* v. *Eagle*, 86 Fed. Rep. 608; *Thackeray* v. *Saxlehner*, 125 Fed. Rep. 911.

Appellees' manufactured product is not artificial Hunyadi water. See work of Count Maillard de Marafy, cited in *Singer Mfg. Co.* v. *June Co.*, 163 U. S. 169, 199.

Appellees' labels and advertisements are untruthful and designed to reap the benefits of complainant's reputation; if the word Hunyadi shall be allowed to the defendants, the door will be opened to wholesale fraud.

The name of a spring and the water bottled therefrom is protected, according to principles applied to trade-marks in general. *Congress Spring Co.* v. *High Rock Congress Spring Co.*, 45 N. Y. 291; *Apollinaris Co.* v. *Scherer*, 27 Fed. Rep. 18; *Hill* v. *Lockwood*, 32 Fed. Rep. 389; *Dunbar* v. *Glenn*, 42 Wisconsin, 118; *Carlsbad* v. *Thackeray*, 57 Fed. Rep. 18; *Northcutt* v. *Turney* (Ky.), 41 S. W. Rep. 21; *Hunyadi Cases*, 179 U. S. 19.

Such names, as can be properly called geographical names, can only be legally used by those whose products come from the geographical region in question. *Newman* v. *Alvord*, 51 N. Y. 189; *A. F. Pike Mfg. Co.* v. *Cleveland Stone Co.*, 35 Fed. Rep. 896; *Pillsbury* v. *Eagle*, 86 Fed. Rep. 608; *Anheuser* v. *Miller*, 87 Fed. Rep. 864; *California Fruit Canners' Assn.* v. *Myer*, 104 Fed. Rep. 82; *Am. Watch Co.* v. *U. S. Watch Co.*, 173 Massachusetts, 85; *Morgan Envelope Co.* v. *Walton*, 82 Fed. Rep. 469; *Key West Cigar Assn.* v. *Rosenbloom*, 171 Fed. Rep. 296; *Siegert* v. *Gandolfi* (C. C. A.), 149 Fed. Rep. 100.

A proprietary interest in the terms or symbols used is not

essential to the maintenance of any suit to enjoin the misuse of these terms or symbols. An interest in the good-will of the business or any other property threatened by such misuse is sufficient to entitle the plaintiff to an injunction. *Cohen* v. *Nagle*, 76 N. E. Rep. 276, 279; *Scriven* v. *North*, 134 Fed. Rep. 366, 376; *Collinsplatt* v. *Finlayson*, 88 Fed. Rep. 693; *Draper* v. *Skerrett*, 116 Fed. Rep. 206; *Shaver* v. *Heller*, 108 Fed. Rep. 821, 832; *Manitowoc* v. *Wm. Numsen*, 93 Fed. Rep. 196.

It is no defense that the full name "Hunyadi Janos" was dropped from the defendants' labels before the bringing of the suit. *Saxlehner* v. *Eisner*, 147 Fed. Rep. 189; *India Rubber Co.* v. *Rubber Comb Co.*, 45 N. Y. Super. Ct. 258; *Low* v. *Hart*, 90 N. Y. 457; *Plant Co.* v. *May Mercantile Co.*, 153 Fed. Rep. 229; *Hutchinson* v. *Blumberg*, 51 Fed. Rep. 829.

Even if appellees may use the word "Hunyadi" with proper correctives and explanatives, sufficient care has not been taken to distinguish. "Hunyadi" is emphasized. "Wagner" and "Artificial" are inconspicuous on the label and in advertising. Both are omitted in the price list. The distinctions are insufficient. *Fuller* v. *Huff*, 104 Fed. Rep. 141; *Hansen* v. *Siegel Cooper Co.*, 106 Fed. Rep. 691, 692; *Menendez* v. *Holt*, 128 U. S. 514, 521; *Shaver* v. *Heller*, 108 Fed. Rep. 821, 833; *Carlsbad* v. *Schultz*, 78 Fed. Rep. 469; *Baker* v. *Slack*, 130 Fed. Rep. 514.

That others have infringed is no defense. *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; *Taylor* v. *Carpenter*, 3 Story, 458; and see 2 Wood & M. 21.

The fact, even if proven, that the artificial product of appellees is better than the genuine natural water is no justification for calling it spurious "Hunyadi." The public is entitled to the very thing it expects and cannot be deceived even for its own benefit. *Singer Co.* v. *Loog*, 8 App. Cas. 29; *Coats* v. *Holbrook*, 2 Sand. Chan. 586; *Pillsbury* v. *Pillsbury Co.*, 64 Fed. Rep. 841; *McLean* v. *Fleming*, 96 U. S. 245, 252; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep. 431.

Where a manifest liability to deception exists in defend-

ant's use of plaintiff's trade name, even though there be no strict trade-mark right involved therein, it is not necessary to bring proof of an actual deception. *Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Taendsticksfabriks* v. *Myers*, 139 N. Y. 364; *Fuller* v. *Huff*, 104 Fed. Rep. 141; *City of Carlsbad* v. *Kutnow*, 71 Fed. Rep. 167; *Biscuit Co.* v. *Baker*, 95 Fed. Rep. 135; *Lee* v. *Haley*, 5 Chan. App. 155; *North Cheshire &c. Brewing Co.* v. *Manchester Brewery Co.* (1889), App. Cas. 83; *Am. Waltham Watch Co.* v. *U. S. Watch Co.*, 173 Massachusetts, 85; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, and *Elgin Nat. Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, do not militate against this rule, nor is the law established in this country different from that applied in England on this point.

Mr. Walter F. Murray for respondents:

This court in the case of *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 38, decided that the complainant has lost her title to the word "Hunyadi" as a trade-mark. *Menendez* v. *Holt*, 128 U. S. 514; *Saxlehner* v. *Nielsen*, 179 U. S. 45; *La Republic Française* v. *Saratoga Vichy Springs*, 191 U. S. 426; *Moore* v. *Auwell*, 172 Fed. Rep. 508, 513.

Where the alleged infringers of a trade-mark have been using it under a show of right, or in the absence of fraud, neglect of the owner of the right to pursue the infringers, if continued for a long period of time will cause the mark to become public property. This will be the case, especially where the infringers are numerous. *Virginia Hot Springs* v. *Hageman & Co.*, 138 Fed. Rep. 855; *S. C.*, aff'd 144 Fed. Rep. 1023; *La Republique Française* v. *Schultz*, 102 Fed. Rep. 154; *Ford* v. *Foster*, L. R. 7 Ch. 628; *Rowland* v. *Michell*, 13 R. P. C. 457; *S. C.*, 14 R. P. C. 37; *Ripley* v. *Baudey*, 14 R. P. C. 591; *Hyde & Co.'s Trade-mark*, 7 C. D. 724; Sebastian on Trade-Marks, 4th ed., 202; *Manufacturing Co.* v. *Williams*, 68 Fed. Rep. 489; *N. Y. Grape Sugar Co.* v. *Buffalo Grape Sugar Co.*, 18 Fed. Rep. 638; *Wyeth* v. *Stone*, Fed. Cas. No. 18,107;

Coats v. *Thread Co.*, 149 U. S. 562. Analogous cases are found in reports referring to patent rights. *Woodmansee & Hewitt Co.* v. *Williams*, 68 Fed. Rep. 489; *Leggett* v. *The Standard Oil Co.*, 149 U. S. 285.

A trade-mark in "Hunyadi" could not be held in common by various owners of Hungarian springs, the waters of which were sold competitively in the United States. *Del. & H. Canal Co.* v. *Clark*, 13 Wall. 311, 328; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 463; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537, 549.

It is incumbent upon complainant to show that defendants have sold their products as that of the complainant. Cases *supra* and *Canal Co.* v. *Clark*, 13 Wall. 311; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Coats* v. *Am. Thread Co.*, 149 U. S. 562; *Nat. Elgin Watch Co.* v. *Ill. Watch Co.*, 179 U. S. 665; *French Republic* v. *Saratoga Vichy*, 191 U. S. 427; *Howe Scale Co.* v. *Wyckoff, Seamans & Co.*, 198 U. S. 118; *La Republique Française* v. *Schultz*, 94 Fed. Rep. 500.

Deception of the public, as to the ingredients of an article of merchandise, is not unfair competition in trade, and is not actionable at the suit of a private individual or group of such individuals, in the absence of legislation. *American Washboard Co.* v. *Saginaw Mfg. Co.*, 103 Fed. Rep. 281; *New York & R. Cement Co.* v. *Coplay Cement Co.*, 44 Fed. Rep. 277; *Worden & Co.* v. *California Fig Syrup Co.*, 187 U. S. 517, 527.

Defendants have not deceived the public about the ingredients of their artificial "Hunyadi."

Defendants have insisted, before the public in all their literature and advertisements, that artificial mineral waters are better than the natural mineral waters.

MR. JUSTICE HOLMES delivered the opinion of the court.

The petitioner is the owner of wells in Budapest from which comes the water known throughout the world by the arbitrary name Hunyadi Janos given to it by her husband. The

respondents make a bitter water in Cincinnati and label it "W. T. Wagner's Sons Carbonated Artificial Hunyadi Conforming to Fresenius Analysis of Hunyadi Janos Springs." Formerly they for a time labeled it "W. T. Wagner's Sons Artificial Hunyadi Janos. Ofen Bitter Water. Highly Aerated," but this label had been given up before the bill was brought. The petitioner seeks an injunction against the use of either 'Hunyadi Janos' or 'Hunyadi' on any water not coming from her wells. The Circuit Court of Appeals for the Seventh Circuit in a more or less similar case granted an injunction against the use of the word Hunyadi. *Thackeray* v. *Saxlehner*, 125 Fed. Rep. 911; *S. C.*, 60 C. C. A. 562. In the present suit the Circuit Court and the Circuit Court of Appeals, treating the right of the petitioners to 'Hunyadi Janos' as admitted, refused an injunction against the use of 'Hunyadi,' and finding that no unfair competition was shown dismissed the bill. 157 Fed. Rep. 745; *S. C.*, 85 C. C. A. 321. A writ of certiorari was allowed by this court.

We see no reason for disturbing the finding of the courts below that there was no unfair competition and no fraud. The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade-mark or trade name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood what they are copying and trying to sell. But the plaintiff has no patent for the water, and the defendants have a right to reproduce it as nearly as they can. They have a right to tell the public what they are doing and to get whatever share they can in the popularity of the water by advertising that they are trying to make the same article and think that they succeed. If they do not convey, but, on the contrary, exclude the notion that they are selling the plaintiff's goods, it is a strong proposition that when the article has a well-known name they have not the right to explain by that name what they imitate. By doing so they are not trying to get the good will of the name, but the good

will of the goods. See *Flagg Manufacturing Co.* v. *Holway*, 178 Massachusetts, 83, 91; *Chadwick* v. *Covell*, 151 Massachusetts, 190, 191. Although the application is different, the principle seems to be similar to the rule that when a patent has expired descriptive words or even an arbitrary or personal name by which it has become known may be used if sufficient precautions are taken to prevent the public from being deceived. See *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169.

The plaintiff says that no one can succeed in imitating a natural water. But all are free to try. In the absence of some fraud injurious to the plaintiff, it would be going far under any circumstances to allow her to prevent advertising "Artificial Hunyadi." But it is enough to say that under the decision in *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 36, the defendants may do so in this case. In that decision it was said that 'Hunyadi,' as applied to similar water, had been public property in Hungary, and therefore had become so here, and that a later change there would not work a corresponding change in the United States. 'The right to individual appropriation once lost is gone forever.' See also *French Republic* v. *Saratoga Vichy Co.*, 191 U. S. 427, 437. At the very least the family name has become the name for any natural water of a certain type coming from a more or less extensive district, if not from anywhere in Hungary. It does not belong to the plaintiff alone in this country, even if she is the only one now sending the water here. But if there is any well-founded doubt as to the right to use a personal trade name with proper guards against deception to signify what one is imitating where one has the right to imitate, there can be none that one is at liberty to refer to a geographical expression to signify the source of one's model. 'Hunyadi' at best is now only a geographical expression in effect.

Decree affirmed.

HARRIS, TRUSTEE, *v.* FIRST NATIONAL BANK OF MT. PLEASANT.

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

No. 98. Argued January 21, 1910.—Decided February 21, 1910.

Quære, and not decided, whether under § 70*e* of the Bankruptcy Act the suits therein referred to can be brought in the bankruptcy court without the consent of the defendant. See contrary views expressed in *Hull* v. *Burr*, 153 Fed. Rep. 945; *Hurley* v. *Devlin*, 149 Fed. Rep. 268.

Section 70*e* of the Bankruptcy Act provides for avoiding transfer of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value from persons not *bona fide* holders for value. It does not, either with or without consent of defendant, give the bankruptcy court jurisdiction of a suit to recover property held by defendant but which, if the allegations of the complaint are true, belonged to the bankrupt and passed to the trustee.

The bankruptcy court has not jurisdiction of a suit against a bank to recover securities held by it for indebtedness of the bankrupt on the ground that the debt had been paid.

THE facts are stated in the opinion.

Mr. W. L. Estes, with whom *Mr. Hiram Glass*, *Mr. John J. King* and *Mr. A. L. Burford* were on the brief, for defendant in error.

Mr. Chas. S. Todd, *Mr. Geo. Q. McGown*, *Mr. Jno. A. Hurley*, *Mr. S. E. Webber*, for plaintiff in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents the single question of the jurisdiction of the District Court of the United States to entertain a suit

brought by Harris as trustee in bankruptcy against the First National Bank of Mt. Pleasant, Texas.

The petition alleged that Hargrove, the bankrupt, was indebted to the defendant bank for an overdraft in the sum of $2,000; that to secure the payment of the same Hargrove delivered into the bank's possession as collateral security certain notes; that at the time of the adjudication in bankruptcy Hargrove had paid the overdraft in full.

Further, the petition alleged that at the time Hargrove was adjudged a bankrupt the bank had in its possession two certain promissory notes, which had been signed by one McGee as principal and by Hargrove as surety. That prior to the bankruptcy Hargrove paid the notes and thus became entitled to the same. That defendant refuses to account for said notes, and wrongfully withholds them from the trustee. The prayer of the petition is that the bank be required to surrender to the trustee the notes so pledged as collateral security, and also the notes paid by Hargrove as surety, or, in default thereof, judgment against the bank in the sum of $3,500, the value of all the notes. Upon issue made as to its jurisdiction the District Court held it was without jurisdiction and dismissed the suit.

In *Bardes* v. *Hawarden Bank*, 178 U. S. 524, this court held that under § 23 of the Bankruptcy Act of 1898 the District Court of the United States could, by the consent of the defendant, and not otherwise, entertain suits by the trustee against third persons to recover property conveyed by the bankrupt before the institution of proceedings in bankruptcy.

Subsequently, Congress, by the act of February 5, 1903, 32 Stat. 797, c. 487, amended certain sections of the Bankruptcy Act. To § 23*b*, which provided that suits by the trustee should only be brought in courts where the bankrupt, whose estate was being administered by the trustee, might have brought them if proceedings in bankruptcy had not been instituted, unless by the defendant's consent, these words were added: "*Except suits for the recovery of property*

under section sixty, subdivision b, and section sixty-seven, subdivision e."

Subdivision *b* of § 60 made provision for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy. To that subdivision these words were added: "*And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Subdivision *e* of § 67 made provision for setting aside fraudulent conveyances, and the recovery of property so conveyed at the suit of the trustee. To that subdivision these words were added: "*For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

A consideration of these amendments, having reference to the recovery of preferences and of property fraudulently conveyed, shows that they cannot include the action under consideration here. Nor is it claimed that they are sufficient of themselves to authorize the present suit. Reliance is had on the amendment made by the act of February 5, 1903, of subd. *e* of § 70. We give that subdivision, putting the amendment in italics:

"*e.* The trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

It is to be noted that § 70, subd. *e*, is not mentioned in the

amendment to § 23, enlarging the jurisdiction of the Federal court to entertain suits without the consent of the defendant. And it has been held that suits under § 70, subd. *e*, can only be brought in a court of bankruptcy with the consent of the defendant. *Hull* v. *Burr*, 153 Fed. Rep. 945. The contrary view was taken in *Hurley et al.* v. *Devlin*, 149 Fed. Rep. 268.

But we do not find it necessary to pass upon that question. Assuming for this purpose that actions may be brought by trustees in the courts of bankruptcy in cases coming within the terms of § 70, subd. *e*, without the consent of defendant, we do not think the present action is one of that character.

That subdivision provides for avoiding transfers of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value, from persons who are not *bona fide* holders for value. In this action no such transfer is alleged, no attack is made upon a transfer by the bankrupt which would have been void as to creditors. The petition seeks to recover property held by the bank, if the allegations are true, which belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate. The recovery sought is of property held for the bankrupt estate which the defendant wrongfully refused to surrender. The District Court was right in denying jurisdiction of the suit, and its judgment is

Affirmed.

OLMSTED *v.* OLMSTED.

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

No. 102. Argued January 25, 1910.—Decided February 21, 1910.

The law of a State in which land is situated controls and governs its descent, alienation and transfer, and neither a decree of a court, or a statute, of another State can have any efficacy as to title of real estate beyond the jurisdiction of that State.

The full faith and credit clause of the Federal Constitution does not require the courts of a State to give effect to a statute legitimatizing children born before wedlock after marriage of their parents so as to affect interests which, under the law of the State where the property is located, had been so vested that it cannot be affected by subsequent legislation; and so held that the courts of New York are not required to give effect to a statute of Michigan so as to vest in children of the testator legitimatized by such statute property, the title to which had already vested in his other legitimate children.

190 N. Y. 458, affirmed.

THE facts are stated in the opinion.

Mr. Mortimer W. Byers for plaintiffs in error:

The plaintiffs in error became "lawful issue" of Benjamin F. Olmsted in Michigan, as the divorce recovered by him from his first wife was and is valid in all respects in that State. 2 Howell's Gen. Stat. Michigan, in force in 1882, p. 1622, §§ 6228–6231.

The proceedings having been in accordance with the statutes of Michigan, and no attempt having been made to open the judgment or appeal therefrom, the validity of the judgment in Michigan is not open to question. *Haddock* v. *Haddock,* 201 U. S. 562, 572.

The plaintiffs in error became legitimate children of Benjamin F. Olmsted by reason of that marriage, according to a

public act of Michigan. 2 Howell's Gen. Stat., in force in 1882, p. 1505, § 5775*a*.

Therefore, the said children became legitimate through the marriage of their parents, and their status as legitimate children, having once been created, continues to this day in Michigan.

Under the Federal Constitution and Revised Statutes full faith and credit must be given in New York to the Michigan decree and statute.

The standing of children is an independent consideration not to be confused with that of their parents. As stated in the opinion below, a marriage valid where rendered confers a right upon the offspring of that alliance, which, in civilized society, is not to be afterward limited and denatured in connection with a similar treatment accorded to their parents' status in obedience to the protests of the community or an injured individual.

The conflict in the law of divorce between the different States and Territories has gone to the extreme limit and the status of the parents as husband and wife in one State and as divorced in another should not be visited upon the innocent offspring of the succeeding marriages. See *Matter of Hall*, 61 App. Div. (N. Y.) 266; *Inhabitants &c.* v. *Lexington*, 18 Massachusetts, 506; and see New York Law Journal, Jan. 22, 1908; *Adams* v. *Adams*, 154 Massachusetts, 290, as to the proposition that legitimacy, once created, will be everywhere recognized; *Miller* v. *Miller*, 91 N. Y. 315; *Van Vorhees* v. *Brintnall*, 86 N. Y. 18; *Bates* v. *Virolet*, 33 App. Div. (N. Y.) 436; *Ross* v. *Ross*, 129 Massachusetts, 243; *Irving* v. *Ford*, 183 Massachusetts, 448; *Grey* v. *Stamford*, 61 Law J. Rep., New Series, Part I, p. 622; *In re Goodman's Trusts*, 1881, Law Rep. 17 Chan. Div. 266; and see to the contrary *Smith* v. *Dorr*, 34 Pa. St. 126; *Shaw* v. *Gould*, 3 H. L. 55.

As to the application of the full faith and credit clause, see *M'Elmoyle* v. *Cohen*, 13 Pet. 312; *Fauntleroy* v. *Lum*, 210 U. S. 230.

The judgment below having been against the constitutional rights of the plaintiffs in error, may be reviewed. All persons answering the description of "lawful issue" at the death of the second life tenant, then had a vested interest which could be measured as between them, and see 2 Jarman on Wills (6th Am. ed.), 168, in *Matter of Baer*, 147 N. Y. 348; *Gilliam* v. *Guaranty Trust Co.*, 186 N. Y. 127; *Bisson* v. *W. S. R. R. Co.*, 143 N. Y. 125. Such children as came into being before the period of distribution were comprehended by the terms of the devise.

Mr. Charles H. Luscomb and *Mr. Read G. Dilworth* for defendants in error:

The Circuit Court of Wayne County, Michigan, did not have jurisdiction of the subject-matter, and did not obtain jurisdiction of the defendant in the suit for divorce by Benjamin Olmsted against Mary Jane Olmsted. The Michigan decree of divorce is therefore void, and the State of New York is not bound to recognize its validity. *Olmsted* v. *Olmsted*, 190 N. Y. 458; *Matter of Kimball*, 155 N. Y. 68; *Winston* v. *Winston*, 165 N. Y. 555; *Atherton* v. *Atherton*, 155 N. Y. 129, 181 U. S. 155; *Haddock* v. *Haddock*, 201 U. S. 562.

No Federal question is involved. The sole question is the determination of the lawful issue of Benjamin Olmsted, designated as such in a devise of an interest in real estate, located in New York, under the will of Silas Olmsted, who died in the State of New York, a resident thereof, and which was probated in New York, and should be controlled and governed by the laws of that State and not those of Michigan. Each State has the exclusive right to determine the disposition and title to real estate located within its borders. The statutes and decrees of Michigan can have no extraterritorial force so far as they might affect the title to or disposition of real estate located beyond its borders. *Van Clief* v. *Burns*, 133 N. Y. 540; Story, Conflict of Laws, 359-390; 2 Kent's Commentaries, 118, 149; *Robertson* v. *Pickrell*, 109 U. S. 608.

To permit the Michigan statute to control in determining who are the lawful issue of Benjamin Olmsted, so as to divest interests in real estate located in New York, which have already become vested in favor of residents of New York, would be a recognition of the right of the legislature of Michigan to legislate with respect to the disposition of real estate located in New York, and would lead to much confusion, and tend to upset land titles. No State would be secure in protecting the rights of its citizens to real property located within its own borders, against the invasion of the legislatures of other States. See Chap. 531, Laws of N. Y. 1895; Chap. 272, Laws 1896.

Under the law of New York, regardless of the effect, if any, the subsequent marriage of the parents may have had as to the legitimacy of the plaintiffs in error, the interests already vested in the issue of the New York marriage, under the will of Silas Olmsted, are not divested, and the claim of the plaintiffs in error to participate in a share of such estate must fail.

If the Michigan statute enacted in 1881, in effect, divests and deprives the issue of the marriage of Benjamin Olmsted and Mary Jane Olmsted, of an interest in real estate vested in them in 1874, it is confiscation, and deprives them of property without due process of law and violates the United States Constitution, as well as the constitution of both States. *Matter of Baringer*, 29 Misc. (N. Y.) 462; *Westervelt* v. *Gregg*, 12 N. Y. 202, 209; *Ryder* v. *Hulse*, 24 N. Y. 372, 373; Story on Constitution, 1399, citing *Fletcher* v. *Peck*, 6 Cranch, 67–134; *Marshall* v. *King*, 24 Mississippi, 85; *McGaughey* v. *Heney*, 15 B. Mon. 383; *Miller* v. *Miller*, 3 Michigan, 393, 401.

The suggestion that the "Humanity of our law should protect the innocent from the wrongs of others," and should induce the court to grant to these children of the Michigan marriage the status of legitimacy, if it has any foundation in law at all, should not be extended so as to divest interests in real estate which have already become vested, and deprive the owner of such vested interests.

MR. JUSTICE DAY delivered the opinion of the court.

This case is brought here because of alleged violation in the judgment of the Supreme Court of New York of the full faith and credit clause of the Federal Constitution. The judgment was entered in the Supreme Court of New York by an order of the Court of Appeals of the same State. 190 N. Y. 458.

The facts, in substance, are: Silas Olmsted, a resident of the State of New York, died in that State in 1874, devising by his will, duly probated, a one-half interest in certain real estate in New York to his son, Benjamin F. Olmsted, with the remainder over to the lawful issue of said Benjamin. In 1850 Benjamin F. Olmsted, while a resident of the State of New York, married Mary Jane Olmsted of the State of New York, and lived with her in that State until January, 1870. Benjamin F. Olmsted had children by that marriage, who are defendants in error in this case. On February 28, 1874, without procuring a divorce from his first wife, Benjamin F. Olmsted went through a marriage ceremony in New Jersey with Sarah Louise Welchman. Two children, John H. and William H. Olmsted, who are the plaintiffs in error in this case, were born, in the State of New Jersey, of this attempted marriage. Thereafter, in 1880, Benjamin F. Olmsted and Sarah Louise Welchman, with their two children, went to live in the State of Michigan. In 1882, Benjamin F. Olmsted secured a divorce from his first wife, Mary Jane Olmsted, in accordance with the laws of Michigan, in the Circuit Court of Wayne County, Michigan. Service was made of process by publication in a Detroit newspaper, and no personal service was made on Mary Jane Olmsted, nor did she appear in the action, judgment being granted by default. On August 22, 1882, Benjamin F. Olmsted and Sarah Louise Welchman were married in the State of Michigan. By the provision of a statute enacted in that State in 1881 children born out of wedlock became legitimate upon the subsequent marriage of

their parents. In January, 1883, in an action in the Supreme Court of New York, a decree of separation and for alimony was granted to Mary Jane Olmsted from her husband, Benjamin F. Olmsted. Benjamin F. Olmsted did not appear in that action, and the record contains no evidence of service of summons upon him. He was represented by counsel on a motion to sequestrate his property, and upon appeal from an order thereon. The judgment was affirmed. Sarah Louise Welchman died January 30, 1900; Mary Jane Olmsted died January 22, 1902, and Benjamin F. Olmsted July 16, 1905.

The action was for partition of the New York real estate devised under the will of Silas Olmsted. The plaintiffs in error, John H. and William H. Olmsted, children of the marriage with Sarah Louise Welchman, claim the right to participate equally with the children of Benjamin F. Olmsted and Mary Jane Olmsted, as lawful issue of Benjamin F. Olmsted, in the real estate located in the State of New York, and devised under the will of Silas Olmsted. The Supreme Court of New York, by its judgment, denied the right of the plaintiffs in error to thus participate.

The opinion delivered in the New York Court of Appeals shows that its decision was rested, in part, upon the invalidity of the Michigan marriage, because the courts of Michigan had never obtained jurisdiction over Mary Jane Olmsted, the first wife of Benjamin F. Olmsted. For that view the learned court, in denying that it was bound to give full faith and credit to such a decree and to the Michigan statute of 1881, cited *In the Matter of Kimball*, 155 N. Y. 68; *Winston* v. *Winston*, 165 N. Y. 555; *Haddock* v. *Haddock*, 201 U. S. 562; *Atherton* v. *Atherton*, 155 N. Y. 129, 181 U. S. 155.

It also puts its decision on the ground that the Michigan statute of 1881, legitimating the children born previous to marriage, could not have the effect of admitting them to participate in the division of the real estate in the State of New York, as it was passed long after the death of Silas

Olmsted, and the probate of his will, under which his legitimate grandchildren had vested estates as remaindermen, subject to the life use in the father. And further, said the Court of Appeals of New York, in speaking of the contention that the Michigan act should be given full faith and credit in the State of New York:

"Should we sanction the doctrine contended for, then the legislature in any State could, in effect, nullify our own statutes and deprive our own citizens of property, which under our laws they had become lawfully vested with and entitled to receive. Not only this, but the statute of Michigan, passed in 1881, could change the provisions of a will executed here and probated in 1874, bringing in persons as remaindermen who, under the provisions of the will, were not remaindermen, nor entitled to share in the estate. We think this should not be permitted."

By the laws of New York, chap. 531, 1895, it is provided:

"SEC. 1. All illegitimate children whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for all purposes. Such children shall enjoy all the rights and privileges of legitimate children, provided, however, that vested interests or estates shall not be divested or affected by this act."

By chapter 272 of the laws of New York of 1896, vol. 1, it is provided, § 18:

"An illegitimate child whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for all purposes, entitled to all the rights and privileges of a legitimate child; but an estate or an interest vested before the marriage of the parents of such child, shall not be divested or affected by reason of such child being legitimatized."

The question, therefore, is as to the title to real estate in the State of New York. Does the full faith and credit clause of the Federal Constitution require that effect be given to the

Michigan act of 1881, under the circumstances which we have detailed?

In *Clarke* v. *Clarke*, 178 U. S. 186, 190, the question was as to the effect to be given to a judgment rendered in the Supreme Court of South Carolina in the courts of the State of Connecticut respecting real estate situated in the latter State. The South Carolina court held that a certain will worked an equitable conversion into personalty at the time of the death of the testatrix of all her real estate, wherever situated, and that the executor of the will was authorized to administer the same as personalty, and to sell and convey the same for the purpose of executing the will. The Supreme Court of Connecticut refused to follow the judgment of the Supreme Court of South Carolina, and the case was brought here under the full faith and credit clause. This court, in disposing of the question, said:

"It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in *De Vaughn* v. *Hutchinson*, 165 U. S. 566, where the court said (p. 570):

"'It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McGoon* v. *Scales*, 9 Wall. 23; *Brine* v. *Insurance Co.*, 96 U. S. 627.'"

In speaking of the contention of the plaintiffs in error, that the South Carolina judgment must be given full force and effect, the court further said:

"The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become

personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and, therefore, is equivalent to denying the correctness of the elementary proposition that the law of Connecticut, where the real estate is situated, governed in such a case."

In the case of *Fall* v. *Eastin*, decided at this term, 215 U. S. 1, the same principle was recognized. In that case it was held that a deed made by a master, by order of the court, in the State of Washington, in execution of a decree where the court had jurisdiction of the parties, did not have any efficacy as to the title to real estate beyond the jurisdiction of the court. It is unnecessary to review the previous cases from this court; a number of them are examined in the opinion in *Fall* v. *Eastin*.

After stating the principle that the disposition of real estate, whether by deed, descent, or otherwise, must be governed by the laws of the State where the real estate is situated, this court said (215 U. S. 12):

"The 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."

The principle established by these cases is applicable to the case at bar. The full faith and credit clause of the Constitu-

tion applies with no more effect to the legislative acts of a foreign State than it does to the judgments of the courts of such State. The controversy herein concerns an interest in real estate located in the State of New York. Under a will probated in the State of New York, where the land was situated, it was devised to the lawful issue of Benjamin F. Olmsted. The contention of the plaintiffs in error is that by the act of 1881 of the State of Michigan, they had become legitimate, and are accordingly entitled to participate in the division of the estate. To this contention the highest court of the State of New York has answered that neither the law of the State of Michigan nor the act of the State of New York legitimating children, under such circumstances, can have the effect and force of disturbing interests already vested when the acts were passed.

We think there is nothing in the due faith and credit clause which requires the courts of New York to give the effect contended for to the Michigan statute. The legislature of Michigan had no power to pass an act which would affect the transmission of title to lands located in the State of New York. No more had it power to legislate concerning the titles to lands in New York than the courts of Michigan, by their judgments, would have authority to adjudicate such rights.

We are not concerned with the correctness of the decision of the Court of Appeals of New York interpreting its statutes and applying the law of its jurisdiction to the construction of the will of Silas Olmsted. We hold that there is nothing in the Federal Constitution requiring the courts of the State of New York to give force and effect to the statute of the State of Michigan so as to control the devolution of title to lands in New York.

Judgment affirmed.

FORBES *v.* STATE COUNCIL OF VIRGINIA, JUNIOR ORDER UNITED AMERICAN MECHANICS OF THE STATE OF VIRGINIA.

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

No. 104. Argued January 25, 1910.—Decided February 21, 1910.

An attempt to introduce a Federal question into the record for the first time by petition for rehearing is too late unless the state court entertains and in fact passes upon it.

A denial of a petition for rehearing by the state court "after mature consideration" does not amount to any more than a denial of the motion, and does not show that the Federal question was considered or passed on. It affords no basis for jurisdiction of this court on writ of error.

Writ of error to review 107 Virginia, 853, dismissed.

THE facts are stated in the opinion.

Mr. C. V. Meredith, with whom *Mr. Preston Cocke, Mr. E. B. King* and *Mr. Smith W. Bennett* were on the brief, for plaintiffs in error.

Mr. Samuel A. Anderson for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case grows out of one heretofore in this court, *National Council of the Junior Order of United American Mechanics of the United States* v. *State Council,* 203 U. S. 151. In that case this court affirmed a judgment of the Supreme Court of Appeals of Virginia, which had affirmed a decree of the lower court of that State. The effect of that decree was to enjoin

the National Council of the Junior Order of United American Mechanics of the United States, and certain persons, officers of a voluntary association, from using in the State of Virginia the corporate name of the State Council of the Virginia Junior Order of United American Mechanics of the State of Virginia, or any other name likely to be taken for it, and from using the seal of the said Virginia order, and from carrying out under such name the objects for which the Virginia order and the voluntary association had been organized, from granting charters to subordinate councils in the State, and from interfering in any way with the pursuance of its objects by the Virginia order within the State, and from designating their officers in the State by appellations set forth as used by the plaintiff. After this decree, thus affirmed, had become final in the Virginia state court, the plaintiffs in error proceeded to obtain a charter under the name of the "Virginia Branch of the National Council of the Junior Order United American Mechanics," a name which they urged was clearly distinguishable from that of the State Council of Virginia Junior Order United American Mechanics of the State of Virginia, protected by the original decree. Having taken out the charter by the name aforesaid, the plaintiffs in error were prosecuted for contempt of court in violating the original decree. Upon hearing in the Chancery Court an order was entered finding the plaintiffs in error to be in contempt, and a fine of $20 was imposed on each of them, and the same was ordered to be paid to the clerk of the court within thirty-five days, and in default thereof each of the plaintiffs in error to stand committed to the custody of the sheriff, to remain in jail until the said sum be paid by them respectively.

A writ of error was allowed by the Supreme Court of Appeals of Virginia to this order of the Chancery Court. In the Supreme Court of Appeals a motion was made to dismiss the writ of error as having been improvidently granted. Upon consideration the Supreme Court of Appeals of Virginia sustained that motion upon the ground that it had no jurisdiction

to review the judgment complained of, and dismissed the writ of error accordingly. 107 Virginia, 853. The plaintiffs in error seek to bring the case here upon the ground that the ruling of the Supreme Court of Appeals of Virginia denies them due process of law, and deprives them of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

An inspection of the record shows that no claim of the rights now asserted under the Federal Constitution was made until the petition for rehearing was filed after the judgment in the state court of final resort. That petition embodies many objections to the opinion and judgment of the Supreme Court of Appeals of Virginia not involving the Federal Constitution. As to the Federal Constitution, it was set up that if the Virginia statute, which provides that a writ of error shall lie to the Supreme Court of Appeals of Virginia to a judgment for a contempt of court other than for the non-performance of, or disobedience to, a judgment, decree or order, was applied to deny a review in the pending case, it would violate the Fourteenth Amendment of the Constitution of the United States, in that it attempts to deprive the plaintiffs in error of a right to a writ of error from the Supreme Court of Appeals of Virginia, as given under § 88 of the constitution of Virginia, and thereby deprive plaintiffs in error of their liberty without due process of law, and denied to them the equal protection of the laws; that a denial by the Supreme Court of Appeals of Virginia of a writ of error under § 88 of the Virginia constitution, which provides that the Supreme Court of Appeals of Virginia shall have appellate jurisdiction in all cases involving the life or liberty of any person, will be in violation of the Fourteenth Amendment, in that it would deprive them of property without due process of law, and would deny to them the equal protection of the laws.

In passing upon the petition for rehearing the Supreme Court of Appeals of Virginia said: "On mature consideration of the petition of the plaintiff in error to set aside the judg-

ment entered herein on January 16, 1908, and to grant a rehearing of said cause, the prayer of said petition is denied."

It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Loeber* v. *Schroeder*, 149 U. S. 580, 585; *Pim* v. *St. Louis*, 165 U. S. 273.

There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. *Mallett* v. *North Carolina*, 181 U. S. 589; *Leigh* v. *Green*, 193 U. S. 79; *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 182; *McMillen* v. *Ferrum*, 197 U. S. 343; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 118.

But, it is alleged, the memorandum which we have quoted shows that the Virginia court must have considered and passed upon the Federal question made in the petition for a rehearing. Except that the order is said to be upon "mature" consideration, it is almost word for word the order on rehearing reviewed in *McCorquodale* v. *Texas*, 211 U. S. 432, which was held to amount to no more than a denial of the motion. See 211 U. S. 437. In that case the rule was again laid down that it was too late to raise a Federal question upon a petition for rehearing, unless the Federal question was passed upon in ruling upon the petition.

It results that the writ of error in this case must be dismissed.

Dismissed.

SOUTHERN RAILWAY COMPANY *v.* SAMUEL E. GREENE.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 450. Argued December 16, 17, 1909.—Decided February 21, 1910.

Equal protection of the laws means subjection to equal laws applying alike to all in the same situation.

A corporation is a person within the meaning of the equal protection provision of the Fourteenth Amendment.

A corporation which comes into a State other than that in which it is created, pays taxes thereto and acquires property and carries on business therein, is within the jurisdiction of that State, and, under the Fourteenth Amendment, entitled to protection against any statute of that State that denies to it the equal protection of the laws.

Arbitrary selection cannot be justified by calling it classification in the absence of real distinction on a substantial basis; and a classification for taxation that divides corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary and a denial of equal protection of the laws.

Whatever power a State may have to exclude or determine the terms of the admission of foreign corporations not already within its borders, it cannot subject a foreign corporation which has already come into the State in compliance with its laws and has acquired property of a fixed and permanent nature to a new and additional franchise tax for the privilege of doing business which is not imposed upon domestic corporations. It would be an unconstitutional denial of equal protection of the laws under the Fourteenth Amendment; and so held as to the franchise tax on foreign corporations of Alabama of 1907.

49 So. Rep. 404, reversed.

ACTION was brought in the City Court of Birmingham, Alabama, by the Southern Railway Company to recover the sum of $22,458.36, for so much money received by the defendant as judge of the Probate Court of Jefferson County, Alabama, which sum the plaintiff claimed was wrongfully exacted from

it under the provisions of the act of March 7, 1907. This sum is the amount taxed against the Southern Railway Company under the said legislative act, and, under the practice in Alabama, if illegally exacted, it may be recovered.

This act is found in the Code of Alabama of 1907, vol. 1, page 986, §§ 2391 to 2400 inclusive. It provides for the payment of an annual franchise tax to the probate judge by every foreign corporation authorized to do business within the State, in which it has a resident agent, with certain exceptions, for the use of the State, upon the actual amount of the capital stock employed by it in the State; in the amount of $25 of the first $100, 5% on the next $900, and one-tenth of 1% on all the remaining amount of capital so employed.

Provision is made for the assessment of the tax by proceedings before the probate judge, with an appeal to the Circuit Court in certain cases. The statute enacts that no foreign corporation required to pay a tax under this statute shall do any business in the State of Alabama not constituting interstate commerce, or maintain or commence any action in any of the courts of the State, upon contracts made in the State other than contracts based upon interstate commerce, unless such corporation shall have paid said tax within sixty days after the same shall have become due. The payment of the tax in one county shall be sufficient, notwithstanding the corporation shall do business or have a resident agent in more than one county.

The payment of the franchise tax, required by this statute, does not exempt any corporation paying the same from payment of the regular license or privilege tax specified or required for engaging in or carrying on business, the license for which is required from individuals, firms or corporations. In addition to the amount of the franchise tax required to be paid to the State, such foreign corporation shall pay to the county, for the use of the county, an amount equal to one-half of the amount paid by it to the State. Loans of money upon which a mortgage tax is paid are deducted from capital em-

ployed in the State upon which there shall be paid the recording privilege tax required by law.

The complaint averred that the act is unconstitutional and void, as it impaired the obligation of a contract between the plaintiff and the State of Alabama, and in that it deprived the plaintiff of its property without due process of law, and denied to it the equal protection of the laws.

Plaintiff averred that it is a corporation created under the laws of the State of Virginia, and as such authorized to lease, use, operate and acquire any railroad or transportation company, then or thereafter incorporated by the laws of the United States, or any of the States thereof. That it thus organized in February, 1894; and has since carried on the business of acquiring, owning and operating lines of railroads in various States, and conducting interstate and intrastate transportation of persons and property. That, in conformity with the laws of the State of Alabama, on July 16, 1894, it filed in the office of the Secretary of State a copy of its charter, and designated an agent upon whom service could be made, and that at the same time it paid to the treasurer of the State of Alabama the sum of $250, being the sum required as a license fee for beginning business in the State. It avers that after thus complying with the laws of Alabama it commenced carrying on its authorized business within the State, and has therein carried on the same business ever since; that between the time of entering the State as aforesaid and the year 1899 it purchased and acquired, as permitted and authorized by the laws of Alabama, various lines of railroad and the franchises under which they had been built and operated, which lines are connected with and continuous with other lines owned by the plaintiff.

The complaint states that these lines of railroad situated in the State of Alabama had been theretofore constructed under its laws by duly authorized corporations, and the complaint contains a list of such lines; that it acquired said lines, paying large sums of money therefor, in pursuance of and re-

liance upon the laws of the State of Alabama; that since such acquisition it has continued to operate such lines of railroad, transacting a large amount of business thereon, both interstate and intrastate, and has expended large sums of money in the maintenance and improvement thereof.

Plaintiff avers that from time to time ownership taxes, similar to those assessed against other persons and corporations, have been assessed against it, all of which the plaintiff has paid. It has also paid from year to year the license tax exacted of it and other persons and corporations operating railroads in the State of Alabama under § 3489 of the Code of Alabama of 1896, under § 1128 of the Code of Alabama of 1886. It has also paid on account of its ownership of such railroad, taxes assessed against it under the act of March 7, 1897, taxing the franchises or intangible property, in the State, of every person and corporation engaged in transporting persons or property of any railroad therein. It has also paid the license fee, and has procured the license provided for by the act of the legislature of the State of Alabama, approved March 7, 1907, entitled, "An act to further regulate the doing of business in Alabama by foreign or non-resident corporations, or corporations organized under or by authority of the law of any other State or government than the State of Alabama, and to fix a punishment for the violation thereof."

Plaintiff states that all these exactions have been made by the State of Alabama upon corporations owning and operating railroads in Alabama, without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized under the laws of some other State, with the sole exception of the license fee last above mentioned, which is a nominal amount ($10 per annum), exacted from foreign corporations only for mere police purposes, in order that there may be a registration of such foreign corporation, doing business in Alabama, in the office of the Secretary of State. Plaintiff avers that the legislative act of March 7, 1907, under which it was compelled to pay the said sum of

$22,458.36 does not apply to persons or corporations of the State of Alabama owning the same character of property and carrying on the same kind of business as is owned and carried on by corporations organized under the laws of other States, nor is there any similar exaction against domestic corporations owning such property and engaged in the same character of business.

Plaintiff recites the proceedings before the probate judge of Jefferson County, resulting in the finding that the capital of the plaintiff employed in the State of Alabama was $14,903,246, and the assessment thereon of the tax of $22,458.36, as aforesaid, its payment under protest, and prays judgment for its recovery. A demurrer to the complaint was sustained and judgment rendered for defendant. Upon appeal the Supreme Court of Alabama affirmed the judgment. 49 So. Rep. 404.

Mr. Alfred P. Thom, with whom *Mr. Alexander Pope Humphrey* and *Mr. James Weatherly* were on the brief, for plaintiff in error.

Mr. Gregory L. Smith, with whom *Mr. H. L. Stone* was on the brief, for Louisville and Nashville Railroad Company, plaintiff in error in No. 451, argued simultaneously herewith.[1]

Mr. Robert E. Steiner, Mr. Leon Weil, Mr. T. M. Cunningham, Jr., Mr. A. R. Lawton and *Mr. Horace Stringfellow*, for Central of Georgia Railway Company, plaintiff in error in No. 466, submitted.[1]

When a corporation is organized under a general law, the powers conferred by such law become its charter. *Granger Ins. Co.* v. *Kamper*, 73 Alabama, 242.

Generally speaking, the rights of a corporation are determined by the laws in force when it came into being. *Bibb* v. *Hall & Farley*, 101 Alabama, 98.

The domestic corporations, whose property and franchises

[1] For decisions in Nos. 451 and 466, see p. 418, *post*.

were purchased by plaintiff in error, had charter rights to do an interstate and intrastate business in Alabama, and these could not be impaired by legislation. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Alabama* v. *Bible Society*, 134 Alabama, 634.

This is true whether the corporations were formed under special or general laws. *Salt Co.* v. *East Saginaw*, 13 Wall. 378; *Stanislaus County* v. *San Joaquin*, 192 U. S. 206.

In a case involving the Constitution of the United States, the Federal courts will not follow the decisions of the state courts construing an act alleged to violate the Federal Constitution but will construe such act for themselves. *Douglas* v. *Kentucky*, 168 U. S. 500; *Vicksburg* v. *Waterworks*, 202 U. S. 467; *Powers* v. *Detroit & Grand Haven Ry.*, 201 U. S. 556.

The provisions of § 23, Art. I, const. of Alabama, of 1875, forbidding the grant of any irrevocable special franchises does not authorize the revocation at will of any franchise granted, but only their revocation upon reasonable conditions fixed by law. *Houston* v. *City Railway*, 19 S. W. Rep. 129.

When an instrument makes general provisions for a subject and then provides specially for a part of that subject, the special provisions as to such subject must prevail. *State* v. *Inhabitants of Trenton*, 38 N. J. Law, 64.

When an instrument contains two inconsistent provisions, the latter of such provisions must prevail over the former. *Hand* v. *Stapleton*, 135 Alabama, 162.

Charter rights cannot be altered, amended or revoked under the powers reserved in the constitution of Alabama, so as to work an injustice to stockholders. *Vicksburg* v. *Waterworks*, 202 U. S. 465.

Under the right reserved in a constitution to alter, amend or repeal the charter, the alterations must be reasonably made in good faith, and must be consistent with the scope and object of the incorporation. *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 213.

A State cannot, under such reserved rights, take away or

destroy rights, which by a legitimate use of the powers granted have become vested in a corporation. *Miller* v. *State*, 15 Wall. 498.

A State cannot, under the reserved rights, alter, amend or repeal a charter by imposing arbitrary burdens upon one set of persons or corporations within its jurisdiction, not imposed upon others, and not justified by the character of the business in which such corporations are engaged in reference to such burdens. *S. & N. Ala. R. R. Co.* v. *Morris*, 65 Alabama, 193; *Gulf, Col. & Santa Fe Rwy.* v. *Ellis*, 165 U. S. 151; *Phœnix Carpet Co.* v. *State*, 118 Alabama, 143; *Montgomery* v. *Kelly*, 142 Alabama, 557; *Cotting* v. *K. C. Stock Yards*, 183 U. S. 102; *Magoun* v. *Ill. Trust & Sav. Bk.*, 170 U. S. 293.

The imposition of such burdens does not constitute an alteration, amendment or repeal within the reserved power. *Vicksburg* v. *Waterworks*, 202 U. S. 465.

Where a corporation has power in its charter to sell and assign its franchises, such franchises are as inviolable in the hands of the assignee as they were in the hands of the original corporation. *Mobile* v. *L. & N. R. R. Co.*, 84 Alabama, 115; *Wilmington R. R.* v. *Reid*, 13 Wall. 267; *Pennsylvania College Cases*, 13 Wall. 212; *Willamette Mfg. Co.* v. *Bank*, 119 U. S. 191.

The effect of §§ 1169 and 1170 of the Code of Alabama of 1896 was to authorize the domestic corporations to sell their franchises, and was in the nature of an amendment of their charters. *L. & N. R. R. Co.* v. *State*, 45 So. Rep. 302.

The acceptance of a franchise granted by the State is a good consideration for its grant. *Alabama* v. *Bible Society*, 134 Alabama, 634.

The provisions of § 1169, Code, 1896, are similar to the provisions found in the case of *American Smelting Co.* v. *Colorado*, 204 U. S. 113, and constituted a contract between the State and the plaintiff in error.

The tax is upon the entire business, and it does not make any difference whether it is called a property tax or a privilege

tax. The provisions of the Constitution of the United States cannot be evaded by the name under which the tax is assessed. *Gal. & Harrisburg Ry. Co.* v. *Texas*, 210 U. S. 237; *Wilmington R. R. Co.* v. *Reid*, 13 Wall. 264.

If there was no contract between the State of Alabama and the plaintiff in error, but only a contract of sale between the domestic corporations, and the plaintiff in error, such contract would be protected by the Constitution of the United States. *Green* v. *Biddle*, 8 Wheat. 1; *Von Hoffman* v. *City of Quincy*, 4 Wall. 549.

The statute complained of denies to the plaintiff in error the equal protection of the laws.

A statute which places upon a person within the jurisdiction of the State arbitrary burdens not placed upon other persons doing the same kind of business under the same circumstances, denies to the person upon whom it is placed the full protection of the laws. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 35; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 558; *Cook* v. *Marshall County*, 196 U. S. 274; *Cotting* v. *K. C. Stock Yards*, 183 U. S. 105.

The State may tax certain property or certain callings, so long as there is no arbitrary discrimination against persons engaged in said callings under like circumstances, but when a law imposes arbitrary burdens upon one set of persons or corporations, within the jurisdiction of the State, not imposed upon others and not justified by the character of the business of such persons or corporations with reference to such burdens so as to form a just basis for their imposition, it denies to such persons or corporations the equal protection of the law. Cases *supra*, and *Armour Pkg. Co.* v. *Lacey*, 200 U. S. 235; *Kehrer* v. *Stewart*, 197 U. S. 69; *Home Ins. Co.* v. *New York*, 134 U. S. 606; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 293.

Even where a foreign corporation is within the domain of the State only by license, it cannot be arbitrarily excluded when to so exclude it would violate any provision of the Constitution of the United States. *Nat. Council* v. *State Council*,

203 U. S. 153; *Securities Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 249.

To exclude a railroad company from the domain of the State, after it has, with the permission of the State, purchased a railroad therein and is engaged in operating the same, would take its property without due process of law. *Ames* v. *Union Pac. R. R.*, 64 Fed. Rep. 170.

Where no property rights are concerned, the State may arbitrarily exclude a foreign corporation from its boundary, *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 257; *N. W. Life Ins. Co.* v. *Riggs*, 203 U. S. 255; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; but though the State may generally put such burdens upon such corporations as it sees fit, as a condition to continuing business therein, it cannot place arbitrary burdens upon a foreign railroad corporation which would operate to take its property without due process of law. *Smyth* v. *Ames*, 169 U. S. 469.

The distinction between an insurance company case and a case involving the right of a railroad company, lies in the fact that when a State permits a railroad company to acquire a railroad within its border, it impliedly agrees that it may utilize such property, and, because of the nature of the railroad business, it cannot exclude such corporation from its domain without taking this property. *Nat. Council* v. *State Council*, 203 U. S. 161; *Sea Board Air Line Co.* v. *R. R. Commission*, 155 Fed. Rep. 803; *Chicago, R. I. & P. R. R.* v. *Swanger*, 157 Fed. Rep. 791; *Erie R. R.* v. *Pennsylvania*, 153 U. S. 628.

The act interferes with the regulation by Congress of interstate commerce. Under it the State can sue for and recover the tax wholly irrespective of the clause which forfeits the right of the corporation to do an intrastate business for the non-payment of the tax. *State* v. *Fleming*, 112 Alabama, 179.

The tax is placed upon the corporation as a unit, and is, therefore, inseparable. *Pickard* v. *Pullman Pal. Car Co.*, 117 U. S. 34; *Allen* v. *Pullman Co.*, 191 U. S. 177; *Crutcher* v. *Kentucky*, 141 U. S. 50.

If the tax was imposed only on intrastate business, and if the intrastate business of plaintiff in error was separable from its interstate business, it still would interfere with the control of interstate commerce by Congress, if, under the constitution and laws of Alabama, the intrastate business could not be abandoned without abandoning the interstate business. *Pullman Co.* v. *Adams*, 189 U. S. 420.

The plaintiff in error has the right, under the Federal Constitution, to do an interstate business in Alabama. *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 1; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 315; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 695.

Plaintiff in error is a "person" within the meaning of the Fourteenth Amendment, *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, and also "within the jurisdiction" of the State, *Blake* v. *McClung*, 172 U. S. 239.

Mr. Alexander M. Garber, Attorney General of the State of Alabama, and *Mr. Samuel D. Weakley*, with whom *Mr. Henry C. Selheimer* was on the brief for defendants in error in this case and in Nos. 451 and 466.[1]

The complaints do not show any contract between the State and plaintiffs in error, the obligation whereof is impaired. Whatever right to do business the foreign corporations acquired was a mere permit or license subject to revocation at will of legislature. *Conn. Mut. Life Ins. Co.* v. *Sprattley*, 172 U. S. 602; *Security Mut. Life Ins. C.* v. *Prewitt*, 202 U. S. 246.

No authority exists by which a domestic railroad company can sell to a foreign corporation. See *Cent. Transp. Co.* v. *Pullman Co.*, 139 U. S. 24; *Am. Lumber Co.* v. *T. V. R. Co.*, 45 So. Rep. 911.

The imposition of the tax complained of is not an unjust discrimination against foreign corporations and therefore is not a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

[1] For decisions in Nos. 451 and 466, see p. 418, *post.*

It is undoubtedly true that appellants are persons within the jurisdiction of the State, within the meaning of the Fourteenth Amendment, and as such are entitled to the equal protection of the law. But they are not persons within the jurisdiction of the State because of any contract with the State, but simply because they are doing business in the State with the consent of the State and under authority of its laws. Every corporation doing business in a State other than that of its creation, with the consent and permission of that State, is a person within the jurisdiction of such State, whether that consent arises from contract or from mere license. *Santa Clara Co.* v. *So. Pac. R.*, 118 U. S. 394; *Charlotte &c. R. R.* v. *Gibbs*, 142 U. S. 386; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Gulf, Col. &c. Ry. Co.* v. *Ellis*, 165 U. S. 150.

It is not a denial of the equal protection of the law to impose on a foreign corporation a tax for the privilege of doing business in the taxing State, when no such tax, or a tax of a different amount, is imposed on domestic corporations engaged in the same business. 19 Cyc. 1227 *et seq.;* Gray on Lim. of Tax. Power, § 1318; *Ducat* v. *Chicago*, 10 Wall. 410; *New York* v. *Roberts*, 171 U. S. 662; *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305; *Fire Ass'n of Phila.* v. *New York*, 119 U. S. 110; *Commonwealth* v. *Milton*, 54 Am. Dec. 522; *Southern B. & L. Ass'n* v. *Norman*, 31 L. R. A. 41; *Hughes* v. *City of Cairo*, 92 Illinois, 339; *Scottish Un. Ins. Co.* v. *Herriott*, 77 Am. St. Rep. 548.

Laws which impose upon foreign corporations the same taxation and other restrictions as are imposed upon corporations of the taxing State by the States where such foreign corporations were created, do not infringe any provision of the Federal Constitution. *Fire Ass'n of Phila.* v. *New York*, 119 U. S. 110; *Home Ins. Co.* v. *Swigert*, 104 Illinois, 653; Gray on Lim. of Tax. Power, § 1314.

A State may impose such conditions upon permitting foreign corporation to do business within its limits as it may judge expedient; and may make the grant or privilege dependent

upon the payment of a specific license tax or a sum proportioned to the amount of its capital used within the State. *Parke, Davis & Co.* v. *Roberts,* 171 U. S. 659; *Pennsylvania R. Co.* v. *Wemple,* 138 N. Y. 1; *People* v. *Equitable Trust Co.,* 96 N. Y. 388; *Home Ins. Co.* v. *New York,* 134 U. S. 599.

The Federal Constitution imposes no restraint on the State in regard to unequal taxation. *Coulter* v. *Louisville & Nashville R. R. Co.,* 196 U. S. 599; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339; *Davidson* v. *New Orleans,* 96 U. S. 97; *Merchants' Bank* v. *Pennsylvania,* 167 U. S. 461; *Bell's Gap Railroad* v. *Pennsylvania,* 134 U. S. 232; *Savannah &c. R. R.* v. *Savannah,* 198 U. S. 392; *Met. St. Ry.* v. *New York,* 199 U. S. 1; *St. Louis &c. R. Co. Case,* 132 Fed. Rep. 629; *Columbus S. R. Co.* v. *Wright,* 151 U. S. 470; *N. Y. Central & H. R. R.* v. *Miller,* 202 U. S. 593.

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

The Supreme Court of Alabama placed its decision upon the ground that the act of March 7, 1907, should be sustained as a lawful tax, not upon the franchises of a foreign corporation, as property, but as a tax "to add to the license tax already required an additional privilege tax for the continued exercise of the corporate franchises in the State." 49 So. Rep. 408.

The errors assigned attack the validity of the act of March 7, 1907, upon grounds, among others, that it violates the Fourteenth Amendment of the Federal Constitution, in that it denies to the plaintiff the equal protection of the laws and deprives it of its property without due process of law.

The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The important Federal question for our determination in this case is: When a corporation of another State has come into the taxing State, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the State, is it liable to a new and additional franchise tax for the privilege of doing business within the State, which tax is not imposed upon domestic corporations doing business in the State of the same character as that in which the foreign corporation is itself engaged?

The Federal Constitution, it is only elementary to say, is the supreme law of the land, and all its applicable provisions are binding upon all within the territory of the United States. Whenever its protection is invoked the courts of the United States, both state and Federal, are bound to see that rights guaranteed by the Federal Constitution are not violated by legislation of the State. One of the provisions of the Fourteenth Amendment thus binding upon every State of the Federal Union prevents any State from denying to any person or persons within its jurisdiction the equal protection of the laws. If this statute, as it is interpreted and sought to be enforced in the State of Alabama, deprives the plaintiff of the equal protection of the laws, it cannot stand.

The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation.

That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion. This point was decided in *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 188, wherein this court declared:

"The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection

of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included."

And see *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, and cases cited on p. 154.

Is the plaintiff corporation a person within the jurisdiction of the State of Alabama? In the present case the plaintiff is taxed because it is doing business within the State of Alabama. The averments of the complaint, admitted by the demurrer, show it has acquired a large amount of railroad property by authority of and in compliance with the laws of the State; that it is subject to the jurisdiction of the courts of the State; that it has paid taxes upon its property, and also upon its franchises within the State; in short, that it came into the State in compliance with its laws, and at the time of the imposition of the tax in question had been for many years carrying on business therein under the laws of the State. We can have no doubt that a corporation thus situated is within the jurisdiction of the State. *Blake* v. *McClung*, 172 U. S. 239.

The argument on the part of the State of Alabama places much weight upon the cases in this court which have sustained the right of the State to exclude a foreign corporation from its borders and to impose conditions upon the entry of such corporations into the State for the purpose of carrying on business therein. That line of cases has been so amply discussed in the opinions and concurring opinions in the cases of *Western Union Telegraph Co.* v. *Kansas* and *Pullman Co.* v. *Kansas*, *ante*, pp. 1, 56, decided at the present term, that any extended discussion of them is superfluous now. It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that State; nor with one which has come into the State upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business

within the State of Alabama, with the permission of the State and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the State. This feature of the case was dealt with by Mr. Justice Brewer, then a Circuit Judge, in the case of *Ames* v. *Union Pacific R. R. Co.*, 64 Fed. Rep. 165, 177, wherein he said:

"It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

Notwithstanding the ample discussion of the questions involved in the case of the *Western Union Telegraph Co.* v. *Kansas* and *Pullman Company* v. *Kansas*, to which we have already referred, we deem it only fair to the learned counsel for the State of Alabama to notice some of the cases which it is insisted have disposed of the question herein involved and maintained the right of the State to impose a tax upon a foreign corporation, lawfully within the State, for the privilege of doing business in the State, when no such tax, or one less burdensome, is imposed upon domestic corporations engaged in the same business. The first case referred to is *Ducat* v. *Chicago*, 10 Wall. 410, in which a tax was sustained upon a foreign insurance company which had come into the State upon complying with certain terms prescribed by the State, and was thereafter subjected to a tax on all their premiums, the statute declaring it unlawful in the companies otherwise to do business in the State. It is sufficient to say of that case

that it arose before the Fourteenth Amendment had become part of the Federal Constitution, and that no reference is made in the opinion of the court to the Fourteenth Amendment, although the case was decided after that amendment went into effect.

In *New York* v. *Roberts*, 171 U. S. 658, 663, a tax was imposed upon the franchises, or business of corporations, with certain exceptions, computed upon the amount of capital stock employed within the State. It was pointed out by Mr. Justice Shiras, who delivered the opinion of the court, that the tax was imposed as well for New York corporations as for those of other States, and he said: "So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other States to the detriment of the latter, or to subject property out of the State to taxation."

In *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, 315, the tax imposed was applicable alike to corporations doing business in New York, whether organized in that State or not, and in the course of the opinion in the case Mr. Justice Field, speaking for the court, said: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In *Fire Association* v. *New York*, 119 U. S. 110, 119, a Pennsylvania corporation which was taxed in the State of New York was subjected to a license fee, which license ran for a period of a year, and it was held that the State had the power to change the conditions of admission to the State, and to impose as a condition of doing business in the State, at any time or for the future, the payment of a new or further tax. Mr. Justice Blatchford, speaking for the court, said: "If it imposes such a license fee as a prerequisite for the future the foreign corporation, until it pays such license fee, is not admitted within the State, or within its jurisdiction. It is outside of the threshold, seeking admission, with consent not yet given."

We have adverted to these cases with a view of showing that

the precise point involved herein is not concluded by any of them. It would not be frank to say that there is not much said in the opinions in those cases which justifies the argument that the power of the State to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the State. But none of the cases relied upon presents the question under the conditions obtaining in the case at bar. We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.

As we have already indicated, the discussion of the question herein involved has largely been anticipated in the recent cases from Kansas, involving the right to tax the Western Union Telegraph Company and the Pullman Company. Those cases are the latest declaration of this court upon the subject, and in one aspect of them really involve the determination of the case at bar. In the *Western Union Telegraph case* it was held that a State could not impose a tax upon an interstate commerce corporation as a condition of its right to do domestic business within the State, which tax included within its scope the entire capital of the corporation, without as well as within the borders of the State. The Kansas tax was sought to be sustained as a legal exaction for the privilege of doing domestic business within the State. It was held invalid because it violated the right secured by the Constitution of the United States, giving to Congress the exclusive power to regulate interstate commerce, and because it violated the due process clause of the Federal Constitution in undertaking to make the payment of a tax upon property beyond the borders of the State a condition of doing domestic business within the State. In that case the Fourteenth Amendment was directly applied in the due process feature. In this case we have an

application of the same Amendment, asserting the equal protection of the laws.

We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth Amendment, a person within the jurisdiction of the State of Alabama, and entitled to be protected against any statute of the State which deprives it of the equal protection of the laws.

It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155, 165; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559.

It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign

corporation to do business in the State and other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution.

The judgment of the Supreme Court of Alabama is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

Dissenting: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* GASTON.

CENTRAL OF GEORGIA RAILWAY COMPANY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Nos. 451, 466. Argued December 16, 17, 1909.—No. 466. Submitted January 3, 1910.—Decided February 21, 1910.

Decided on the authority of *Southern Railway Co.* v. *Greene, ante,* p. 400. 49 So. Rep. 412, reversed.

THE facts are stated in the opinion.

Mr. Gregory L. Smith, with whom *Mr. H. L. Stone* was on the brief, for plaintiff in error in No. 451.

Mr. Alfred P. Thom, with whom *Mr. Alexander Pope Humphrey* and *Mr. James Weatherly* were on the brief, for Southern Railway Company, plaintiff in error in No. 450, argued simultaneously herewith.

Mr. Robert E. Steiner, Mr. Leon Weil, Mr. T. M. Cunningham, Jr., Mr. A. R. Lawton and *Mr. Horace Stringfellow* for plaintiff in error in No. 466, submitted.

Mr. Alexander Garber, Attorney General of the State of Alabama, and *Mr. Samuel Weakley,* with whom *Mr. Henry C. Selheimer* was on the brief, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

No. 451 was argued and submitted with *Southern Railway Co.* v. *Greene,* No. 450, just decided. Nos. 451 and 466 were argued at the same time in the Supreme Court of Alabama with the case of *Southern Railway Co.* v. *Greene,* No. 450, and were decided on the authority of that case. That court said (49 So. Rep. 412): "These cases [Nos. 450, 451 and 466] were argued, submitted and considered together, and the points raised by the pleadings in each case are, for convenience, treated of and embodied in one opinion," referring to the opinion in the *Greene case.*

These cases are embraced within the opinion in the *Greene case* in this court. For the reasons stated in that case both of these cases are reversed, and remanded to the Supreme Court of Alabama for further proceedings consistent with that opinion.

Mr. Justice Lurton was not on the bench when Nos. 450 and 451 were argued and submitted. No. 466 was submitted after he took his seat on the bench, and I am permitted to say, for the

reasons stated in the opinion in No. 450, *Southern Railway Co.* v. *Greene*, he concurs in the judgment in No. 466.

Reversed.

Dissenting: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES.

WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA, *v.* GEORGIA RAILROAD AND BANKING COMPANY.

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

No. 70. Argued January 11, 1910.—Decided February 21, 1910.

A special charter to a railroad corporation contained a provision of exemption from taxation as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax not exceeding one-half of one per cent, per annum, on the net proceeds of their investments," in construing this provision held that:

The words "after that" are equivalent to the word "thereafter" and relate to the entire period of time after the expiration of the seven years of total exemption, and are not to be construed as limited by another provision in the charter for a definite period during which the corporation should have exclusive rights.

The capital stock of a corporation is the capital upon which the business is to be undertaken and is represented by property of every kind acquired by the company, while the shares are mere certificates representing a subscriber's contribution to the capital stock and measuring his interest in the company. This distinction is obvious, although the words "stock" and "shares" are sometimes used synonymously.

The stock exempted in this case was the capital or property of the corporation and not the shares of stock in the hands of the stockholders.

The Federal courts accord to a judgment of the state court only that effect given to it by the courts of the State in which it was rendered; and where the highest court of a State has held that a judgment in

a tax suit is not *res judicata* in a suit for taxes subsequently assessed for another year, even though it must be decided on the same questions, this court will regard such a decision only as an authority and determine the question on its merits.

Where the capital of a corporation is exempted from taxation, except as specified, the exemption continues even if the property appreciates in value; and where, as in this case, it is evident that the legislature intended that the taxation of the corporation should be measured by the income, the exemption will not be construed as limited to the then value of the property so that natural increases in value will be subject to any other method of taxation than that stipulated in the charter.

A law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law in derogation of the exemption contract.

An act of a state legislature attempting to tax the whole or any part of the capital or franchise of a corporation, whose charter contains an express limitation and method of taxation such as in this case, by any method other than that specified therein, impairs the obligation of the charter and is unconstitutional under the contract clause of the Federal Constitution.

A state statute authorizing or directing the grant or transfer of the privileges of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity in the grant or transfer. *Rochester Railway Co.* v. *Rochester*, 205 U. S. 236, 252.

While an exemption from taxation enjoyed by a corporation which acquires the franchises and property of another corporation may not be affected as to property which it already possesses, such exemption does not apply to additional property so acquired, nor do the exemptions enjoyed by the corporation whose property and franchise are acquired pass to the purchasing corporation.

The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose.

Where the decree is affirmed but modified as to a substantial contention the costs of the appeal will be divided.

THE facts are stated in the opinion.

Mr. Samuel H. Sibley and *Mr. John C. Hart*, with whom *Mr. Hooper Alexander* was on the brief, for appellant.

Mr. Joseph B. Cumming and *Mr. Joseph R. Lamar*, with

whom *Mr. Alexander C. King*, *Mr. Boykin Wright* and *Mr. Ligon Johnson*, were on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill to restrain the enforcement of certain taxes imposed by the State of Georgia, which the railroad company claims to be in violation of a contract between itself and the State. The court below sustained the contention of the railroad company, and held that the scheme of taxation found in the charter of the company was of inviolable obligation and enjoined any method of taxation conflicting with the stipulations of the charter; from this decree the comptroller has appealed.

The charter in question was granted by the State of Georgia in 1833, a time long before the imposition of any restriction upon the power of the legislature of that State to stipulate for either an entire or partial exemption from taxation. It is, therefore, not denied by the State that the charter constitutes a contract which may not be impaired by subsequent legislation. In view of this concession we are only called upon to decide the extent of the charter exemption, and, incidentally, its duration.

The controlling section of the charter is the fifteenth. The part now relevant is as follows:

"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax not exceeding one-half of one per cent, per annum, on the net proceeds of their investments."

The period of absolute exemption has, of course, long since passed. The only question is as to the duration and extent of the partial exemption which followed.

That the property exempt altogether for seven years is the same property subject to a limited tax thereafter was long

ago decided by the Supreme Court of Georgia in a case which involved the interpretation of this very contract. *City Council of Augusta* v. *Georgia Railroad & Banking Company*, 26 Georgia, 651, 661 *et seq.* The question in that case was as to the legality of municipal taxes assessed by the city of Augusta upon that part of the capital of the company employed in its banking business and upon real estate situated in that city. The taxes were held illegal. Interpreting this section, that court said:

"It means, first, that the stock of the company, was to be subject to a tax, but not to any tax exceeding one-half of one per cent on the net proceeds of its investments." Second, "That the stock of the company, as stock, as a unit, is alone what is to be subject to the tax; not parts of the stock as the part used in banking, nor the particulars in which the stock consists; as, the land, cars, rails, etc." Third, "That this tax to which the stock is to be subject, is to be a tax to be laid by the State."

We may as well turn to one side just here to deal first with the question of the duration of this commuted tax which is to follow the period of tax exemption, because we construe the words "after that," which immediately follow the exemption clause, as synonymous with "thereafter," and as fixing the time when that property which was theretofore exempt should be subject to the system of taxation provided by the succeeding clause.

It has been rather faintly urged that the duration of this commuted tax or partial exemption was limited to a term of thirty-six years after the completion of the railroad, and that this period has long since expired. This suggested limitation seems to have no other basis than that the words "and after that" do not mean "thereafter," as we have assumed, nor refer to the limitation immediately preceding, but to a more remote limitation found in the second section of the charter, and again in the earlier part of the fifteenth section. But the thirty-six year limitation is one obviously applicable

only to the grant of an exclusive right, within a defined territory, to construct and operate railroads. This was intended to protect this pioneer railroad from being paralleled within that time. The recurrence to this exclusive right in the first part of the fifteenth section is only for the purpose of placing a condition thereon which, as matter of fact, never happened, and which, therefore, never became vested, and to provide that the termination of that right should not otherwise affect the corporate existence, estate, powers or privileges of the company. This reference to the exclusive right conferred first by the second section is followed by the provision above set out, providing that "the stock of the said company and its branches shall be exempt from taxation for and during seven years from and after the completion of said railroads, or any of them, and after that shall be subject to a tax not exceeding one-half of one per cent per annum on the net proceeds of their investment." "After that" obviously refers to the last limitation, the termination of the exemption period, and it would be an indefensible construction to construe the words as referring it to the thirty-six year limitation of the exclusive right regulated by the preceding part of the same section.

Coming now to the question as to what is the meaning and scope of the partial exemption found in this clause, we are confronted, first, with the contention that only the shares in the hands of shareholders are within either the first or second clause of this contract, and that the entire property of the company is subject to the taxing power of the State, unaffected by any contract for any stipulated form of limited taxation. This claim is, of course, bottomed on the contention that "stock of the said company and its branches" refers to and means only the shares in the capital stock held by the shareholders, and that the benefit of the stipulation was intended for the shareholders in their character as such.

The word "stock" is not uniformly used to designate the capital of a corporation although its primary meaning is capital, in whatever form it may be invested. Indeed, it is

not at all unusual to find the word used synonymously with "shares," and meaning the certificates issued to subscribers to the company's stock. It is therefore important to look at the connection in which the word is used when an exemption or substituted method of taxation is involved, to see whether the legislative intent was to exempt the capital of the company, in whatever form invested, or the shares of stock in the hands of the shareholders. *Powers* v. *Detroit & Grand Haven Railway*, 201 U. S. 543, 559. There is an obvious distinction between the capital stock of an incorporated company and the "shares" of the company. The one is the capital upon which the business is to be undertaken, and is represented by the property of every kind acquired by the company. Shares are the mere certificates which represent a subscriber's contribution to the capital stock, and measure his interest in the company. The charter, plainly enough, recognized this. Thus, in the third section, it is provided that "*the stock* of the company . . . shall consist of fifteen thousand shares of one hundred dollars per share, and *the said company to be formed on that capital.*" By a later section the times and places for taking subscriptions are defined, "so that on summing up the whole it may appear whether *the stock* is filled up, *or falls short of the aforesaid capital.*" In the seventh section we find the interest of the subscribers to the "stock" recognized and described as shares, while the capital of the company in which he holds such shares is described as "the stock of the said company." Thus each subscriber is given "a number of votes equal to the number of *shares* he may hold in the *stock* of the company." That "stock," as used, means "capital" in whatever form invested, appropriate to the purpose of the company, is also plainly evidenced by the provision that after the total exemption period this stock shall be subjected to a specific tax "on the net proceeds of their investments." It has been suggested that by "their investments" was meant the investments of the shareholders in the company's stock. This interpretation is based upon

the use of the plural "their"; but in many places in this same charter the company is referred to in the plural. As this same act provides for the organization of one or more companies to construct branch lines, and extends to them the same tax exemption, it is grammatically correct to read "their" as referring to this plurality of companies. That "stock" in the first clause means capital, and "their investments," the property into which the company's capital has gone, seems in any view you take of it the most rational interpretation of the matter. That the only mode of taxation stipulated for after the period of total exemption is a tax upon the net income of the company's property is seemingly the plain and obvious meaning of this contract. That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter. Aside from at least sixty years of legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, there has been a series of cases decided by the Supreme Court of Georgia which involved the meaning of this clause. In each case the court has held, either, that the whole of the capital was exempt in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock. *City of Augusta* v. *Georgia Railroad & Banking Company*, 26 Georgia, 651, 662 *et seq.; The State of Georgia* v. *Georgia Railroad & Banking Company*, 54 Georgia, 423; *Goldsmith, Comptroller &c.*, v. *Georgia Railroad & Banking Company*, 62 Georgia, 485.

In the case of *State of Georgia* v. *The Georgia Railroad & Banking Company*, cited above, the court held that the act of 1874, which sought to assess an *ad valorem* tax against the property of the railroad company was void, as in violation of the obligation of a contract by which the State was limited to a tax which should not exceed one per cent "on its earn-

ings." *Goldsmith, Comptroller,* v. *The Georgia Railroad & Banking Company* is relied upon as overruling the earlier case. But this is a mistake for more than one reason. That case was dismissed for want of jurisdiction over the subject of the legality or illegality of the tax resisted. Hence, all that was said about the taxability of the appellee's property under this charter exemption was *obiter*. But so far as the question of the applicability of this partial exemption to the capital of the company as invested in its railroad is concerned, the opinion distinctly accepts the former case as a settlement of the question. Referring to the former case, Mr. Justice Bleckley said:

"It seems to have been the purpose of this court to hold in 54 Georgia, 423, that except as to stock issued under the amendment of 1868 authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad and Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final."

That Mr. Justice Bleckley afterward concluded that the former case had not considered or decided whether any excess of value of property over the amount of the authorized and exempt capital would be subject to an *ad valorem* tax is true; but that does not detract from the recognition of the former as an authoritative opinion upon the point that the exemption was of the capital of the company.

We come now to the question as to whether so much of the value of the company's railroad and appurtenances as exceeds in value the amount of the authorized capital stock, under the charter and amendments prior to 1863, is subject to taxation as other property of like character, under the law of the State. This value "it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said company," which excess, it is further conceded, has been "the

result of natural increase in the value of said property and by renewals, alterations and betterments of the same, from time to time, by said company."

That this is the true and proper method of taxation admissible under the charter exemption has been urged upon several grounds. First, it is said that this construction was given this very charter in *Goldsmith, Comptroller*, v. *Georgia Railroad & Banking Company*, heretofore cited, and the appellants plead the judgment in that suit as *res judicata*. Confessedly, if this is a good plea, it must operate not only for the purpose for which it has been interposed, but will be entirely fatal to the claim that the exemption now in question has expired or that it extended only to the shares in the hands of shareholders.

The opinion in that case does so construe the exemption, but, as we have already shown, the case went off wholly upon the question as to whether the trial court had any jurisdiction of the question, and the opinion, after construing the clause here involved, passed on to this matter as to whether the question could be made under the statutory remedy resorted to by the company, and concluded by holding that whether the railroad company had been taxed illegally or not, the court below ought to have dismissed the proceeding for want of jurisdiction, and that the remedy, if any, was by bill in equity. Accordingly the judgment which the Supreme Court entered was one which reversed the judgment below and directed that the proceeding be dismissed for want of jurisdiction. This judgment in no way involved the construction of this exemption contract, nor the liability of the Georgia Railroad Company to taxation upon its property, or otherwise, and does not therefore have any efficacy as an estoppel. There was therefore no error in the ruling of the Circuit Court that this plea was bad. Upon the other hand, when the plea of estoppel just disposed of came in, the complainants amended their bill and set up the judgment in the earlier case of the *State of Georgia* v. *The Georgia Railroad & Banking Company*,

54 Georgia, 423, as an adjudication concluding not only the claim that the exemption was only of the shares in the hands of shareholders, but as an adverse decision of this claim that only so much of the "investments" of the company were exempt from a general *ad valorem* tax as equalled in value the authorized capital stock of the company under the charter and amendments prior to 1863.

But in *Georgia Railroad & Banking Company* v. *Wright*, 124 Georgia, 596, the Supreme Court of Georgia seems to have definitely decided that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must be also decided.

This court, as is well settled, accords to a judgment of a State only that effect given to it by the court of the State in which it was rendered. *Union Bank* v. *Memphis*, 189 U. S. 71; *Covington* v. *First Nat. Bank*, 198 U. S. 100.

We shall therefore disregard this plea, and determine the matter upon its merits, giving to the decision of the Georgia court consideration only as an authority.

Coming then to the question on its merits: Under the original charter and certain amendments there exists to-day an authorized capital stock of $4,156,000. This leaves out of account a small increase under a later act, aggregating 440 shares, which capital is subject to taxation and is not now in dispute. The railroad property, including its railway, depots, equipments and appurtenances proper, have a present value of some four millions of dollars in excess of the authorized capital. Now the contention is that to the extent of this excess the property of the company is assessable and taxable as other property. There is not much to be gained by the reference to *Farrington* v. *Tennessee*, 95 U. S. 679, 687, and *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 137, where something is said in an argumentative way about the taxability of a bank's surplus whose capital was exempt. That

might well be if the bank should choose to enlarge its actual capital in the business by using profits as capital instead of distributing them as profits to the shareholders, where the exemption was of a specific amount of capital. The facts in this case are so different from the case presented of a bank's surplus as to make the illustration of little value, even if it was settled that in all cases a bank's surplus would be taxable although its capital was exempt. We have here nothing which corresponds very closely to a bank's surplus. An investment made nearly seventy-five years since of $4,156,000 has now a value of $4,000,000 in excess of that cost. The property is the same property. The conceded fact is that through renewals, alterations and betterments made from time to time and the natural increase in the value of the road, this appreciation has come about. There has been no suggestion that there has been any hiding away of capital added, by either new stock, or by the use of bonds or other forms of credit, nor that the improvements made from time to time, called "renewals, alterations and betterments" have been other than the necessities of an enlarging business and the improved maintenance naturally demanded. There is no suggestion that there has been any bad faith in covering up taxable assets under cover of assets immune. *Mobile & Ohio Railroad Co.* v. *Tennessee*, 153 U. S. 486, 506.

After all, the precise question is, whether the legislative purpose, as expressed, was that the railroad incorporated should pay no tax except one based upon net profits of operation, or was it the intention that a specific amount of capital only should be so relieved? Undoubtedly, the State did not intend that any other capital than that authorized and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. But is there any contingency under which this particular railroad is to be subject to any other taxation than one measured by the amount of its net profits? The contract, though one for a partial exemption from taxation, may nevertheless be read

in the light of the purpose sought to be accomplished and the public policy entertained at the time. That is true of this, as well as other contracts, namely, that the meaning may be discovered by regard to attendant circumstances. That the intent was to exempt a capital aggregating $4,156,000, is for the purpose of the present question the necessary foundation of the claim now being looked at. That was at the beginning mere subscribers' promises to pay; next, money in the treasury of the company. While money, the charter says, it may, until needed, be invested "in the public stock of the United States or of the State of Georgia." But this capital was intended to be the only means by which this line of railroad was to be constructed and equipped. Thus, the original capital was fixed at one and a half million dollars, with power to enlarge same, "so as to make their capital adequate to the work." This power of increase does not seem to have been regarded as clear enough, and when an authorized extension of the work demanded more capital the charter was amended so as to increase it to four million dollars, "to meet excess of cost of road over present capital." To insure the completion of the authorized road within the limit of the fixed capital it was provided that the engagements of the company should not exceed the company's capital, and that the officers and directors who should contract beyond that capital should be jointly and severally liable to the contractors and to the corporation. Finally, no power was given to issue bonds, the usual incident to any modern railway construction. From the plain purpose that this authorized capital should be adequate to the construction and equipment of a particular railroad, it is plainly inferable that that railroad should be subject, after a time of complete immunity, only to a tax upon the profit of its operation. That railroad is the product of the investment of the authorized capital, and is, as such, subject only to a tax based upon its "net proceeds." This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is

absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the State intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income. *State of Georgia* v. *Atlantic and Gulf R. R. Co.*, 60 Georgia, 268.

We are, therefore, of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia legislature, in so far as it provides for an *ad valorem* tax upon any part of this invested capital of the Georgia Railroad and Banking Company, does impair the obligation of the contract.

But it is said that the tax, so far as imposed upon the franchise of this company, is not in derogation of the charter, and that the decree below should be modified in this particular.

If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad. The Georgia act taxing franchises treats the franchise as property and requires that "they shall be returned and valued in the same way as returns are made by railroads of their physical property. . . ." And that "all franchises of value shall be returned for taxation and taxed as other property." That a law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law in derogation of the exemption contract

is well settled. *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Gulf & Ship Island Railroad* v. *Hewes*, 183 U. S. 67, 77.

Included in the total mileage owned and operated by the appellee railroad company is a line eighteen miles long, known as the Washington Branch. The company has all along claimed that this branch road was within the partial exemption clause of its original charter, granted in 1833. So far as appears from this transcript, this claim has not before been challenged, though no distinct issue seems ever to have been made in respect to its exclusion by reason of the legislation under which that branch was acquired. Neither does the answer of the comptroller in this case claim or set out any difference between the tax exemption applicable to the other parts of the appellee's railroad and this Washington branch, and the decree of the court below expressly finds that the original charter exemption includes this Washington branch. But the general denial that any part of the property of the railroad company was exempt from *ad valorem* taxation may well be regarded as covering the parts which make up the whole. To the decree holding the Washington branch exempt the comptroller has moreover assigned error, based upon the legislation under which that branch was constructed. The right of exemption claimed for this branch was, however, distinctly put in issue by the counties of Wilkes and Talliaferro, which, for this purpose, were allowed to intervene, having a direct interest due to the fact that that branch, passing through those counties, would be subject to county taxation if not within the tax exemption clause. These counties have appealed from the decree below and assigned error also.

The first legislative enactment in regard to the construction of the Washington branch road seems to have been in the act of 1833; but nothing was ever done under that. The same may be said in reference to another act passed in 1836. In December, 1847, an act was passed in these words:

"The power heretofore granted to the Georgia Railroad

and Banking Co. to construct a branch of their road to Washington, in the county of Wilkes, be, and the same is, hereby revived and authorized to be exercised by said company, provided that the amount of the increased stock of said company ($200,000) shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the legislature may hereafter impose."

But this was a section in an act amending the charter, and was never accepted. See 26 Georgia, 651, 654. At the same legislative session, on February 5, 1850, another act was passed in these words:

"That [naming incorporators] be and they are hereby authorized to build, construct and keep a plank or railroad from the town of Washington, in Wilkes county, to some point on the Georgia Railroad and Banking Company's railroad, and for that purpose shall be authorized to create and receive by subscription a capital stock not exceeding $200,000, and shall be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

So far as we can discover, the only legislative authority for the construction or acquirement of a branch railroad to Washington, accepted or acted under by it, is found in the act of January 21, 1852, entitled "An act to authorize the consolidation of the stocks of the Georgia Railroad and Banking Company and of the Washington Railroad or Plank Road Company, incorporated, February the fifth, eighteen hundred and fifty, and for other purposes." The first section of that act provides:

"That the Georgia Railroad and Banking Company and the Washington Rail or Plank Road Company be authorized and empowered to consolidate their stocks, the said Georgia Railroad and Banking Company issuing stocks in their said

company to the stockholders of the Washington Railroad or Plank Road Company, on terms of equality with the general stockholders in amount equal to the amount held by them respectively in the stock of the Washington Railroad or Plank Road Company, and that the two companies aforesaid, after the consolidation of their stocks, shall be known as one corporate body, under the name and style of the Georgia Railroad and Banking Company, and that said corporate body shall be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad and Banking Company, and be under all the liabilities and restrictions imposed on the same."

That this consolidation neither extinguished the Georgia Railroad and Banking Company, nor deprived it of any of its powers, privileges or immunities, is plain. No such result has been claimed. Nor is it claimed that it thereby lost any tax exemption which it then had. The act authorizing the consolidation is substantially like that under which the Central Railroad and Banking Company was consolidated with the Macon Railroad, considered in *Central Railroad Company* v. *State of Georgia*, 92 U. S. 665, where it was held that the tax exemption which the Central Railroad had enjoyed, continued after consolidation in respect of the property of that company, but that as the Macon company, consolidated with it, had no exemption, its property continued subject to taxation. That the Washington Railroad or Plank Road Company would go out of existence when this merger was accomplished is plain; it was, indeed, absorbed by the Georgia company. The purpose was to vest in the latter all of the rights, powers and privileges of the merged company without diminishing or enlarging them. See what is said by Chief Justice Fuller in commenting upon a similar merger in *W. & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 300.

Did the Washington Railroad before consolidation possess any contract tax exemption?

The claim that it did is based upon the provision in the

act under which it was incorporated, providing that it should "be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833 to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

The question, then, is, whether, under the power "to *exercise* all the *powers* and *privileges* [italics ours] conferred by the act incorporating the Georgia Railroad Company, the immunity from any other tax than one based upon a given per cent of annual net profits was granted to that company." The affirmative of this proposition finds some support in the cases of *Humphrey* v. *Pegues*, 16 Wall. 244; *Chesapeake & O. R. Co.* v. *Virginia*, 94 U. S. 718; *South Western R. Co.* v. *Georgia*, 92 U. S. 665, and *Tennessee* v. *Whitworth*, 117 U. S. 139. In later cases this doctrine of a legislative transfer of a tax immunity under the term franchise, powers, estates or privileges was questioned. Thus, in *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176, a tax immunity was held not to pass under a mortgage foreclosure sale under the provision of a statute which authorized the purchaser to become a corporation and "succeed to all such franchises, rights and privileges" pertaining to the mortgagor company. In *Picard* v. *East Tennessee &c. R. Co.*, 130 U. S. 637, 642, it was held that such an immunity would not pass to a purchasing company under a decree enforcing a statutory lien, where the sale, as confirmed, was of the "property and franchises" of the mortgagor company. In that case it was said:

"It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Wilmington & Weldon Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 297; *K. & W. R. Co.* v. *Missouri*, 152 U. S. 301, and *Phœnix Fire & Marine Insurance Co.* v. *Tennessee*, 161 U. S. 174, the earlier cases were also much shaken so far as they tended to establish that a tax exemption would be transferred by legislative enactment conferring upon one road the powers or franchises or privileges of another, in the absence of other language or pregnant circumstances, showing a plain intent to confer such exemption.

But whatever doubt upon this subject may have existed as to the effect of the transfer to one company of the powers and privileges of another in conferring a tax exemption possessed by the latter is set at rest by *Rochester R. R. Co.* v. *Rochester*, 205 U. S. 236, 252. Mr. Justice Moody, after reviewing all of the cases referred to above and others, sums the matter up by saying:

"We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity."

There is an absence of anything in the history of this branch railroad which points to a purpose to grant any exemption from taxation. Thus, in the act of December 20, 1849, reviving the authority of the Georgia Railroad and Banking Company to construct such a branch, originally authorized by earlier acts, it was expressly provided that the stock to be issued for the purpose "should not be exempt from taxation, as is secured to the present stock by the later clause of the 15th section of the charter of said company," etc. This provision was probably the very reason why the Georgia Railroad and Banking Company did not accept or act under that statute. At the same session of the legislature an independent company was created to construct and operate the same branch road. Presumably with the knowledge of the fact that the Georgia Railroad and Banking Company could

not itself construct this road with immunity from taxation, this act authorizing this new corporation to build the same branch, declared that this company should be "authorized to *exercise* [italics ours] all powers and privileges" conferred by the act originally creating the Georgia Railroad and Banking Company. It is one thing to have authority to "exercise" all the "powers and privileges" of another company, and another thing to enjoy an exemption from taxation. The "*exercise*" of the "powers and privileges" of the company referred to was reasonably essential to the construction and operation of the independent railroad. Its immunity from taxation was not. See *Wilmington & Weldon R. R.* v. *Alsbrook*, 146 U. S. 279, 295, and *National Bank* v. *United States*, 101 U. S. 1. The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose.

We conclude, therefore, that the Washington Railroad or Plank Road Company had no exemption from taxation at the time this consolidation occurred. That the consolidating act did not intend to confer any immunity from taxation which did not then exist is plain. The object was to vest in the Georgia company the property and franchises and rights and privileges of the Washington company. When the Georgia company succeeded to its property and franchises, it did so subject to whatever right the State had in the matter of taxation. The case in this aspect is controlled by *Central Railroad Co.* v. *Georgia*, 92 U. S. 665.

The decree of the court below is modified so as to exclude the eighteen miles constituting the Washington Branch Railroad, but in all other respects it is affirmed. The costs of this appeal will be divided between Wright, Comptroller General, and the Georgia Railroad and Banking Company.

Affirmed.

TOXAWAY HOTEL COMPANY *v.* SMATHERS & CO.

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

No. 88. Submitted January 18, 1910.—Decided February 21, 1910.

A corporation engaged principally in running hotels is not a corporation engaged principally in trading or mercantile pursuits within the meaning of § 4, subs. *b*. of the Bankruptcy Act of 1898.

Where Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and judicial meaning, and cases based on a declaration made by Parliament that the word has a certain meaning are not in point in determining the intent of Congress in using the word.

An occupation that is not trading is not a mercantile pursuit.

A corporation not otherwise amenable to the Bankruptcy Act does not become so because it incidentally engages in mercantile pursuit; and so held as to a hotel company which, in addition to inn-keeping in which it was principally engaged, conducted a small store as an incident to its hotel business.

FROM the facts certified it appears that the Toxaway Hotel Company was, in May, 1905, duly incorporated under the laws of Georgia. Among the purposes of the company, as stated in the application for incorporation, were these, "to conduct hotels for the accommodation of the public, . . . to keep, manage, conduct and carry on the business of running hotels, cottages, inns and restaurants, with their usual and necessary adjuncts, including the running of billiard and pool rooms, bowling alleys, buying and selling liquors and tobacco in all their forms, conducting and leasing news and book stands; baths of all kinds, to conduct livery stables, operating farm and fish hatcheries, to run omnibuses and transfer lines, together with all other pursuits incident to the operation of hotels." The company acquired and operated six hotels, situated in a thinly populated part of the mountains of western

North Carolina, having an aggregate capacity of seven hundred and fifty guests. These were carried on from March, 1905, until October, 1906, when an assignment was made. Within four months after such assignment creditors filed a petition seeking to adjudicate the corporation a bankrupt, as having been "engaged principally" in trading and mercantile pursuits. It contested adjudication and averred that it was not a corporation subject to involuntary proceedings, as it had not been principally engaged either in "trading" or "mercantile pursuits," but was a hotel company, and, as such, was not one of the class of corporations specified in the fourth section of the Bankrupt Act, as amended.

The material facts as to the character of the business done by this corporation are these:

"That the business done by the corporation at these hotels during the first season, from March to October, 1905, as shown by the receipts, amounted to $119,171.36; and that done during the second season, from January 1st to October 1st, 1906, as shown by the receipts, amounted to $127,136.01.

"That during 1905 and until June, 1906, the said corporation did no other business than conducting hotels, excepting the cultivation of a small farm connected with one of the hotels, for the purpose of supplying vegetables and garden truck.

"That in June, 1906, said corporation acquired and began conducting two country stores—one located at Toxaway Inn and the other at Lake Sapphire, and Fairfield Inn. In these stores were kept stocks of general merchandise, such as is usually carried in country stores, to wit, dry goods, groceries, notions, hats, caps, clothing, a small assortment of hardware, flour, meal, meat, feed, etc., the average value of each stock being from three to four thousand dollars.

"The said hotels were located in a thinly settled section of the mountains of North Carolina, quite a distance from any town; that the stores furnished the hotels from their stocks, and, also, with such produce and other things necessary for

the hotels as came into the stores, and they, also sold goods and merchandise to people generally; and, also, bought and sold some tanbark. That from two-thirds to three-fourths of the goods handled by these stores went as supplies to the hotels on orders from the stewards of the hotels, and the remainder were sold generally, principally to employés of the corporation, and also to the people at large. That the business of the hotels and the stores was kept without separation in one set of books. The corporation, also kept a bar in the Toxaway Inn, at which liquors were sold exclusively to the guests, and had a number of boats and launches on the lakes at Toxaway Inn and at Fairfield, which it hired to patrons when called for.

"That said corporation employed about 130 persons in and about the hotels, and four persons in and about the stores."

Upon these facts the bankrupt court adjudicated the corporation bankrupt. An appeal was allowed to the Circuit Court of Appeals, and the question certified as to whether, upon the facts stated, this hotel company is subject to the provisions of the Bankrupt Act and liable to be adjudicated a bankrupt.

Mr. T. F. Davidson, Mr. Louis M. Bourne, Mr. Haywood Parker, Mr. John M. Slaton, Mr. Ben Z. Phillips, for the Toxaway Hotel Company:

The facts show that the Toxaway Hotel Company was a corporation whose principal business was to conduct hotels which is neither a manufacturing, trading, printing, publishing, mining, or mercantile pursuit, and therefore under § 4, subd. *b* is not subject to the bankruptcy law.

The present bankruptcy law has restricted the corporations against whom proceedings can be taken, and many corporations which were in the purview of the law of 1867 are not amenable to the present law. While in *Re San Gabriel Sanitorium Co.*, 95 Fed. Rep. 271, a sanitorium company was held subject to the bankruptcy law—that case has never been followed but has been disapproved. See *Re Cameron Ins. Company*, 96 Fed. Rep. 756; and *Re N. Y. & Westchester Water*

Co., 3 Am. B. Rep. 508; aff'd *sub. nom.*, *Re Morris*, 102 Fed. Rep. 1004, which are the two leading cases on the question.

Following the reasoning of these cases, and in the twenty-six cases cited courts have held the corporations under consideration not amenable to the bankruptcy law:

Massachusetts: *Re H. J. Quimby Freight F. Co.*, 10 Am. B. Rep. 508; *Re N. Y. Building & Loan Co.*, 127 Fed. Rep. 471; *Re N. Y. & N. J. Ice Lines*, 14 Am. B. Rep. 61.

New Jersey: *Re Tontine Surety Co.*, 8 Am. B. Rep. 421.

Pennsylvania: *Re Oriental Society*, 5 Am. B. Rep. 219; *Re Woodside Coal Co.*, 5 Am. B. Rep. 186; *Re Keystone Coal Co.*, 6 Am. B. Rep. 377; *Re Phil & Lewes Co.*, 7 Am. B. Rep. 707; *First Nat. Bank* v. *Wyoming*, 14 Am. B. Rep. 448; *Gallagher* v. *Delancey Stables*, 19 Am. B. Rep. 801.

Virginia: *Re McNichol Const. Co.*, 14 Am. B. Rep. 188.

Georgia: *Re Fulton Club*, 113 Fed. Rep. 997.

Alabama: *McNamara* v. *Helena Coal Co.*, 5 Am. B. Rep. 48.

Texas: *Re Bay City Irrigation Co.*, 14 Am. B. Rep. 370.

Missouri: *Re Cameron Town Insurance Co.*, 2 Am. B. Rep. 372; *Re Chicago & Joplin Co.*, 13 Am. B. Rep. 712.

Illinois: *Re Snyder & Johnson Co.*, 13 Am. B. Rep. 325.

Michigan: *Re Toledo Cement Co.*, 19 Am. B. Rep. 117.

Wisconsin: *Re White Star Laundry Co.*, 9 Am. B. Rep. 30.

Colorado: *Re Elk Park M. & Mining Co.*, 4 Am. B. Rep. 131; *Re Chesapeake Fish & Oyster Co.*, 7 Am. B. Rep. 173.

Arizona: *Re Min. & Ar. Construction Co.*, 60 Pac. Rep. 881.

California: *Re Pacific Warehouse Co.*, 10 Am. B. Rep. 474; *Herron Co.* v. *Superior Court*, 68 Pac. Rep. 814.

The Circuit Court of Appeals in eight circuits have passed on the question in the following eighteen cases, and all, with one exception (that for the Eighth Circuit), have given a similar interpretation to the language of the act.

First Circuit: *Philpot* v. *O'Brien*, 11 Am. B. Rep. 205; *White Mountain Paper Co.* v. *Morse et al.*, 127 Fed. Rep. 643; *Burdick* v. *Dillon*, 144 Fed. Rep. 737.

Second Circuit: *Re Morris*, 102 Fed. Rep. 1004; *Re N. Y.*

& N. J. Ice Co., 16 Am. B. Rep. 832; *Re Kingston Realty Co.*, 19 Am. B. Rep. 845; *Altonwood Co.* v. *Gwynne*, 20 Am. B. Rep. 31; *Re Wentworth Lunch Co.*, 20 Am. B. Rep. 29; *Re Marine C. & D. Dock Co.*, 130 Fed. Rep. 446.

Third Circuit: *Re Zugella & Int. M. Agency*, 16 Am. B. Rep. 67; *Hall & Kaul* v. *Friday*, 19 Am. B. Rep. 841.

Fourth Circuit: *Butt* v. *McNichol Const. Co.*, 14 Am. B. Rep. 188.

Sixth Circuit: *Columbia Iron W.* v. *Nat. Lead Co.*, 62 C. C. A. 99; *United States Hotel Co.* v. *Niles*, 13 Am. B. Rep. 403, reversing the District Court, and holding that conducting a hotel is not a trading pursuit.

Seventh Circuit: *Re Surety Guaranty Trust Co.*, 9 Am. B. Rep. 129; *Re Parmlee Library*, 9 Am. B. Rep. 568; *Re E. T. Hill Co.*, 17 Am. B. Rep. 517.

Eighth Circuit: *Re First Nat. Bank of Belle Fouche*, 152 Fed. Rep. 64.

Congress did not so amend as to include water companies, insurance companies, theatrical companies, restaurant companies, saloon companies, social clubs, carrier companies, companies buying and selling stocks and bonds, or laundry companies, all of which had been decided not to be within the classes enumerated by the act, and therefore not amenable to bankruptcy; and this, too, after the very general circulation and discussion of the proposed amendments as shown above by the report of the judiciary committee. While this court may think it advisable that corporations like the one here in question should be brought within the scope of the bankruptcy act, it must be guided by what Congress has said, and not by its own view of public policy. *Re Quimby Freight Co., supra*, and for history of act in Congress, see Cong. Rec., 1897, Vol. 30, pp. 602, 606; Cong. Rec., 1898, Vol. 31, p. 1779, and same vol., pp. 1939, 6298, 6427, 6428.

The House of Representatives on February 6, 1909, passed a bill, H. R. 21,929, further amending the present law, and which shows that the House clearly understood that the in-

tention of the original law was to restrict the classes of corporations which could be adjudged bankrupts. Sixtieth Cong., 2d Sess., H. R. Report, 1834, p. 2.

A hotel corporation conducting hotels is not engaged in a trading or mercantile pursuit within the meaning of the bankruptcy act. *Re Chesapeake Oyster & Fish Co.*, 112 Fed. Rep. 960; *Re Barton Hotel Co.*, 12 Am. B. Rep. 335; *United States Hotel Co.* v. *Niles*, 134 Fed. Rep. 225; *Gallagher* v. *Delancey Stables*, 158 Fed. Rep. 381; *Re Wentworth Lunch Company*, 159 Fed. Rep. 413.

To be subject to the bankruptcy law a corporation must not only be engaged in one of the pursuits enumerated in § 4, subsection *b*, but must be "principally" so engaged, a mere incidental occupation therein will not suffice. 1 Remington on Bankruptcy, ed. 1908, § 85; *Re Mackey*, 110 Fed. Rep. 355; *Re Drake*, 114 Fed. Rep. 229; *Woodburn* v. *Drake*, 120 Fed. Rep. 493; *Re Quimby Co.*, 10 Am. B. Rep. 424; *Philpot* v. *O'Brien*, 11 Am. B. Rep. 205; *Bank* v. *Matney*, 132 Fed. Rep. 75; *Rice* v. *Bordner*, 141 Fed. Rep. 566; *Zugella* v. *Int. Mer. Agency*, 16 Am. B. Rep. 67; *McNamara* v. *Helena Coal Co.*, 5 Am. B. Rep. 48.

Mr. Julius C. Martin for J. L. Smathers & Co.:

A hotel corporation is subject to bankruptcy as a corporation engaged in trading or mercantile pursuits under § 4, subd. *b* of the act of 1898.

A trader is "one whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings." Bouvier's Law Dict.; *Re Smith*, 2 Lowell, 69; *S. C.*, 22 Fed. Cas. No. 12,981; *Re Chandler*, 1 Lowell, 478; *S. C.*, 5 Fed. Cas. No. 2,591; 4 Nat. Bankr. Reg. 213; *Wakeman* v. *Hoyt*, 28 Fed. Cas. No. 17,051.

Among persons held to be traders under former acts are: Bakers, *Re Cocks*, 5 Fed. Cas. No. 2,933; inn-keepers, *Re Ryan*, 21 Fed. Cas. No. 12,183; livery stable keepers, *Re Odell*, 18 Fed. Cas. No. 10,426.

Under the present act the following persons, among others, have been held to be traders: Livery stable keepers, *Re Morton*, 108 Fed. Rep. 791; Sanitarium Company, *Re San Gabriel Sanatorium Company*, 95 Fed. Rep. 271; *Re Barton Hotel Company*, 12 Am. B. Rep. 405; Real Estate Company, 154 Fed. Rep. 299; Laundry Company, 132 Fed. Rep. 266. Constructing and repairing vessels is a mercantile pursuit, see 127 Fed. Rep. 99; Mercantile Agency, *Re Mercantile Agency*, 111 Fed. Rep. 152.

The Toxaway Hotel Company was both a buyer and a seller. *Re Odell*, Fed. Cas. No. 10,426.

Each case will necessarily turn on its own facts. It is not to be doubted, however, in this particular, that the law is to be interpreted liberally to effectuate its purpose, that is, that all business corporations, as distinguished from public, quasi-public, money-saving or lending corporations, shall be amenable to bankruptcy. Collier on Bankruptcy, 5th ed., p. 64.

It does not appear in the record in this case, whether the debts of the creditors set out in the petition were debts contracted by the company as a merchant, for goods sold to its stores, or as a hotel keeper for provisions sold it for its hotels. These matters are important. See *Armstrong* v. *Fernandez*, 208 U. S. 324, 330; *Olive* v. *Armour Company*, 167 Fed. Rep. 517. The language of the statute, when construed according to the natural meaning of the words, would refer to the occupation of the alleged bankrupt as of the time of filing the petition in the case. *Flickenger* v. *First Nat. Bank*, 145 Fed. Rep. 162. The occupation at the time of committing the alleged act of bankruptcy is the test. At that time (November) the Hotel Company was engaged exclusively in mercantile business, as the hotels were closed. *Re Matson*, 123 Fed. Rep. 743.

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

The act of 1867 applied to "all moneyed business or com-

mercial corporations and joint-stock companies." The present act applies only to such corporations as are "principally engaged" in certain enumerated kinds of business. That of inn-keeping, though as old as civilization, is not specifically enumerated. Unless, therefore, a corporation engaged in the business of hotel keeping is embraced within one or the other of those which are enumerated, it is not liable to an involuntary adjudication.

The contention is that this was a corporation principally engaged in "trading" or "mercantile pursuits."

For the present we shall only deal with the bare question as to whether inn-keeping is within a proper definition of "trading" or "mercantile pursuits." The keeping of a bar, cigar and news stand are obviously but ordinary incidents to the main business when conducted within the inn, and primarily for the convenience of guests. The maintenance of a livery and of small pleasure boats for the accommodation of guests may also be accepted as merely incidental to that class of hotels called resorts. The significance of the fact that this company did, in addition to the ordinary business of hotel keeping, engage to a certain extent in an outside trading or mercantile business will later be considered.

Having thus narrowed the question, we must answer that a corporation engaged principally in running hotels is not a corporation engaged principally in "trading" or "mercantile pursuits." An innkeeper is one who maintains a house for the entertainment of strangers, for a reasonable compensation. To secure this compensation he is given a lien upon the property of his guests within the inn. For this property he is under liability much like that of a common carrier. So long as he has room, he must receive all who may apply and are fit persons. He may not discriminate. To say that he buys and sells articles of food and drink is only true in a limited sense. Such articles are not bought to be sold, nor are they sold again, as in ordinary commerce. They are bought to be served as food or drink, and the price includes

rent, service, heat, light, etc. To say that such a business is that of a "trader" or a "mercantile pursuit," is giving those words an elasticity of meaning not according to common usage.

Until changed by a Parliamentary declaration in 1825, Act 6, George IV, c. 16, defining the persons included under the term "trader," as used in the bankrupt and insolvency acts, it was held that an innkeeper was not a tradesman. *Newton* v. *Trigg*, 1 Showers, 96; *Luton* v. *Bigg*, Skinner, 276, 291; *Willitt* v. *Thomas*, 2 Chitty, 691.

In *Luton* v. *Bigg* it was said of an innkeeper: "He is in the nature of a public person, and his house and occupation a thing of necessity, and his gain does not arise from the victuals which he sells, but from his furniture and attendance."

In *Newton* v. *Trigg*, cited above, it was said: "An innkeeper cannot get his own prices, but is bound to a reasonable price. A tradesman may sell to whom he pleases. An innkeeper cannot refuse his guest. He doth not get by buying and selling. He gets by the price and hire of his lodging, also by the profit on the ale of kitchen. The profits from his stables do not arise from hay alone, but from the standing."

Congress having never by express legislation declared an innkeeper a "trader," it must be presumed to have used the word in its well-understood public and judicial meaning, and cases based upon a Parliamentary meaning are not in point. See *Hall* v. *Cooley*, Fed. Case No. 5,928, and *In re Cote*, Fed. Case No. 3,267, where Judge Lowell, referring to the declaratory act giving a list of occupations which should constitute trading, said that Congress "had not defined a tradesman and the question was therefore addressed to the common usage of this country and to the judge's knowledge of his own language." He defined a tradesman "as substantially the same as shopkeeper." In the case styled *In re Smith*, Fed. Case No. 12,981, the same learned judge adopted the definition of Bouvier, who defines a tradesman as "one who makes it his business to buy merchandise or goods or chattels to sell again

for the purpose of making a profit." If the occupation of inn-keeping is not "trading," it is not a "mercantile pursuit," for little more than a broader significance can be given to that term than to "trading." It is, in fact, trading in the larger sense. "Mercantile" is defined "as having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants" (Century Dictionary). To be principally engaged in a mercantile pursuit one must be carrying on commerce in some of its branches. See *In re Cameron Insurance Co.*, 96 Fed. Rep. 756; Loveland on Bankruptcy, § 48; *In re New York & W. Water Co.*, 98 Fed. Rep. 711. The conclusion we reach accords with that announced by the Sixth Circuit Court of Appeals in *In re United States Hotel Co.*, 134 Fed. Rep. 225, where the matter is considered and the cases bearing upon the subject reviewed.

But it is said that although this was a hotel company and engaged in doing the business of an innkeeper, it was in fact principally engaged in trading and mercantile pursuits. If so, that is the end of the matter, for liability under the act is dependent upon what it was actually doing rather than upon what it was organized to do or professed to be doing. See *Friday* v. *Hall & Kaul Co.*, just decided.

It may have been engaged in doing two distinct kinds of business. But unless this corporation was "engaged principally" in mercantile pursuits, it was not amenable to the act. "Engaged principally" are plain words of no ambiguous meaning. They need no construction. Amenability to the statute must turn upon the facts of the case where, as here, the same corporation was engaged in "mercantile pursuits" in addition to inn-keeping. There is no way to settle whether it was "engaged principally" in the one or the other but by a comparison of the two. When we do this it is easy to see that the mercantile business which it did was of minor character and was largely an incident to the location of the hotels of the company in a thinly settled mountainous region. The stores were country stores—that is, stores dealing in a

great variety of ordinary necessities. From two-thirds to three-fourths of the goods handled were used in the running of the hotels, upon order of the stewards. Much of the remainder were sold to the employés, and the rest to customers at large, who paid in money or bartered country supplies for goods. The average stocks carried were from three to four thousand dollars in value. They were in a large sense hotel commissaries. The business was done but for one season. If we compare the volume of that done by the inn-keeping business proper with that done by the stores the minor character of the latter is plain. The hotels employed one hundred and thirty persons; the two stores, four. The receipts of the hotel business plus the mercantile business—for all were kept upon one set of books—for the year 1906 were $127,136.01. The receipts for the previous year, when no stores were operated, were $119,171.36. The volume of mercantile business must have been small compared to the volume of the hotel business proper. That the company was "engaged principally" in the hotel business proper is plain. It was, therefore, not amenable to the act.

The answer to the interrogatory of the Circuit Court of Appeals must, therefore, be in the negative.

FRIDAY v. HALL AND KAUL COMPANY.

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

No. 68. Argued January 10, 1910.—Decided February 21, 1910.

"Manufacturing," as used in the Bankrupt Act of 1898, has no meaning from adjudication as used in former laws, nor has it any technical meaning. In construing the act the intention of Congress to include corporations engaged in manufacturing will be regarded by giving the term a liberal, rather than a narrow, meaning.

A corporation organized to construct railroads, buildings and other

structures, whose principal business is making and constructing arches, walls, bridges and other buildings out of concrete, and which buys and combines together raw materials in making the concrete and supplies labor, machinery and materials at the place that the contracts call for, is a corporation engaged principally in manufacturing within the meaning of § 4 of the Bankrupt Act as amended February 5, 1903, c. 487, 32 Stat. 797.

158 Fed. Rep. 593, reversed.

THE Monongahela Construction Company, a corporation organized under the law of Pennsylvania, was, in an involuntary proceeding, adjudged a bankrupt in the District Court for the Western District of Pennsylvania. Upon a petition for review, filed by a judgment creditor, the adjudication was set aside upon the ground that the construction company was not "a corporation engaged principally in manufacturing," as found by the bankrupt court. The opinion of the Circuit Court of Appeals is reported in 158 Fed. Rep. 593.

From the agreed statement of facts it appears:

1st. That the Monongahela Construction Company's charter sets out that it was organized "for the purpose of constructing, erecting and repairing railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility."

2d. That its principal business had been "making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete."

3d. That "in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business, of constructing and erecting concrete arches, piers, buildings and structures, and excavating therefor at such time and place, as its contracts call for."

4th. It has no permanent shop or factory, but has a warehouse.

Mr. Alexander J. Barron, with whom *Mr. Richard A. Ford* was on the brief, for appellants:

A corporation engaged in the erection of concrete walls, piers, abutments, bridges, etc., is, from the very nature of its work, of necessity, principally engaged in manufacturing. *Re Bank of Belle Fourche,* 152 Fed. Rep. 64; *Columbia Iron Works* v. *National Lead Co.,* 127 Fed. Rep. 99, 102; *Re Niagara Contracting Co.,* 127 Fed. Rep. 782; *Re Marine Const. Co.,* 130 Fed. Rep. 446; *Re Matthews Slate Co.,* 144 Fed. Rep. 737; *Re Quincy Granite Quarries Co.,* 147 Fed. Rep. 279; *Re Leighton & Co.,* 147 Fed. Rep. 311; *Re Troy Steam Laundering Co.,* 132 Fed. Rep. 266; *White Mountain Paper Co.* v. *Morse & Co.,* 127 Fed. Rep. 643; *Re Church Construction Co.,* 157 Fed. Rep. 298; *Tidewater Oil Co.* v. *United States,* 171 U. S. 216.

Manufacture is transformation—the fashioning of raw materials into a change of form for use; so held in *Kidd* v. *Pearson,* 128 U. S. 1, 20, and this definition is generally adopted by the lexicographers such as Bouvier and Anderson, Webster (1901) and Worcester. See also *Carlin* v. *Western Assurance Co.,* 57 Maryland, 526; 5 Words and Phrases, 4347.

The bankruptcy act is not limited to those merely engaged in manufacturing commodities. *Re Rutland Realty Co.,* 157 Fed. Rep. 296.

Construction companies are not necessarily excluded from the operation of the bankruptcy act. *Re Garrison,* Fed. Cases, No. 5,254. Under the act of 1898, the companies have been held to be engaged in manufacturing in *Re Columbia Iron Works,* 127 Fed. Rep. 99; *Re Niagara Contracting Co.,* 127 Fed. Rep. 782; *Re Church Construction Co.,* 157 Fed. Rep. 298; *Re Marine Construction Co.,* 130 Fed. Rep. 446. See also state courts' decisions. *People* v. *Morgan,* 70 N. Y. 516; *Commonwealth* v. *Keystone Bridge Co.,* 156 Pa. St. 500; *Commonwealth* v. *Pittsburg Bridge Co.,* 156 Pa. St. 507.

The act of 1898, § 4*b* and its amendment should receive a liberal construction. *Re Mary Hatch Riggs,* 214 U. S. 9.

Where Congress enacts legislation containing words or phrases which have been judicially construed under other acts upon the same subject, it is presumed to know of such construction and to have adopted the construction of such words and phrases previously made. *United States* v. *Hermanos y Compania*, 209 U. S. 337; *United States* v. *G. Falk & Bro.*, 204 U. S. 143, 152; *The Devonshire*, 13 Fed. Rep. 39, 42.

Acts of Congress should be construed in view of the history and circumstances surrounding their enactment. *Pratt* v. *Union Pacific Railroad*, 99 U. S. 48, 62; *United States* v. *Laws*, 163 U. S. 258, 262; *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486, 502; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 463; *Bond* v. *Hoyt*, 13 Pet. 273. In order to determine the purpose of Congress earlier legislation upon the same subject may be examined to arrive at a proper interpretation of a given act. *Lawrence* v. *Allen*, 7 How. 785, 792; *Re Morton Boarding Stables*, 108 Fed. Rep. 791, 794. The legislative intent prevails over the strict wording of the statute. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Oates* v. *National Bank*, 100 U. S. 239, 244; *Wheeler* v. *McCormick*, 8 Blatchf. 267, 276.

Mr. Geo. L. Roberts, with whom *Mr. Eugene H. Baird* was on the brief, for respondent:

The words "engaged principally in manufacturing" have their ordinary and usual significance. Manufacturing in the ordinary acceptance of the term, means the making of articles or commodities that can be transported or sold at some other place than that where they are made. Loveland's Bankruptcy, 147. See definitions of "manufacturing" by the leading lexicographers, such as Webster, Worcester, Universal, Standard. In no definition given by any lexicographer, is the term "manufacturing" applied to one engaged in the production or construction of an article which must be affixed to the realty, and whose use and value is destroyed the moment it is detached from the real estate to which it is affixed. See

Re Keystone Coal Co., 109 Fed. Rep. 872; *Re Chicago-Joplin Lead Co.*, 104 Fed. Rep. 67; *Re Columbia Iron Works* v. *National Lead Co.*, 127 Fed. Rep. 29; *Re Niagara Construction Co.*, 127 Fed. Rep. 782, and other cases cited by appellant. *Butt* v. *C. F. MacNichol Const. Co.*, 140 Fed. Rep. 840.

In arriving at the construction of the words in this case, debates in Congress are not to be considered any more than in the construction of other acts passed by it. *United States* v. *Freight Association*, 166 U. S. 290. The words in controversy should be construed according to their common and accepted meaning. *Lewis* v. *United States*, 92 U. S. 618, 621. There should be no construction where there is nothing to construe. *United States* v. *Wiltberger*, 5 Wheat. 95; *Cherokee Tobacco*, 11 Wall. 621; *United States* v. *Temple*, 105 U. S. 97.

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

Section four of the Bankrupt Act, as amended by § 3 of the act of February 5, 1903, c. 487, 32 Stat. 797, reads thus:

"Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

The single question is, whether the Monongahela Construction Company, upon the facts stated above, was a corporation principally engaged in the business of "manufacturing," within the meaning of the act. If it was, the adjudication should stand.

The corporate powers of the company were very broad. It

is possible that it might have so limited its functions as not to have come under any reasonable definition of manufacturing; but at last the question of whether it was principally engaged in manufacturing must turn more upon what it was actually doing than upon what it was authorized to do.

It must be conceded that the word "manufacturing," as used in the bankrupt act, has no definite legislative meaning by reason of adoption from other bankrupt acts, as is the case with the words "trader" or "trading," and perhaps other words with well-understood common law meanings.

Though British bankrupt acts were in existence from the time of Henry VIII, they applied only to "traders" until 1860, when they were extended to other persons. Our own original act, that of 1800, applied only to traders, bankers, brokers and underwriters. The act of 1841 added "merchants." The act of 1867 extended practically to all persons and corporations. That of 1898 limited the wide application of the act of 1867 to the class of business corporations enumerated. Thus it is that the words "manufacture" and "manufacturing" have no meaning derived from adjudications of any former law.

Undoubtedly Congress intended that that class of business corporations engaged in any class of manufacturing, as its principal business, and not as a mere minor incident to some larger work, should be subject to the law; and this intention should be regarded by giving to doubtful words and terms a liberal rather than a narrow meaning. "Manufacturing" has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced. In *Kidd* v. *Pearson*, 128 U. S. 1, 20, Mr. Justice Field said that "manufacture is transformation, the fashioning of raw material into a change of form or use."

In *Tide Water Oil Company* v. *United States*, 171 U. S. 210, 216, Mr. Justice Brown, referring to the expansion of the meaning of the word "manufacture," said that "the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product."

Concrete is an artificial stone. It is a product resulting from a combination of sand or gravel or broken bits of limestone, with water and cement; a combination which requires ordinarily the use of both skill and machinery. It is not denied that if concrete in a shape adapted to use and in finished form is supplied to others for the making of a house, bridge, pier, arch or abutment, that the corporation making such blocks or shapes would be in the most narrow sense one engaged in manufacture. But it is urged that this corporation made these blocks or shapes at the place where used, and that, as finished, they became a part of a principal structure and affixed to the realty; and that, therefore, they were not engaged in manufacturing, which, say counsel, is a business confined to those who make articles which may be "transported and sold at some other place than that where made."

The production of concrete arches, or piers, or abutments, is the result of successive steps. The combination of raw material, the sand, the limestone, the cement and the water produced a product, which undoubtedly was "manufactured." This concrete had then to be given shape. That required the manufacture of moulds, which remain in place until hardening occurs. If the concrete is reinforced, as is the case where great strength is required, then the adjustment of the bars of steel within the moulds was another step. Do all of these steps, each a step in "manufacturing," cease to be "manufacturing" because the moulds into which the concrete is poured, when in a fluid state, are upon the spot where the finished product is to remain? That the operation of making and shaping the concrete is done at the place used seems rather a matter of convenience, due to the quick hardening in moulds and difficulties of transportation. But, as we may take notice, the operation which in the end is to produce an arch, or abutment, or pier, or house, is not necessarily a single operation, but one of successive repetitions of the process. The business is not identical with that of a mere builder or constructor who puts together the brick, or stone, or wood, or

iron, as finished by another. If the builder made his brick, shaped his timbers, and joined them all together, he would plainly be a manufacturer as well as a builder; and if the former was the principal part of the business, he would be within the definition of the bankrupt act. To say that one who makes and then gives form and shape to the product made is not engaged in manufacturing because he makes his product and gives it form and shape in the place where it is to remain, is too narrow a construction.

In a case styled *In re First National Bank*, 152 Fed. Rep. 64, the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Sanborn, Circuit Judge, sustained an adjudication of bankruptcy against a precisely similar corporation.

In *Columbia Iron Works* v. *National Lead Company*, 127 Fed. Rep. 99, the Sixth Circuit Court of Appeals adjudged that a corporation engaged principally in the business of building and repairing large steel ships for sale and upon order, who prepared and gave shape to much of the raw material, was engaged in manufacturing.

The judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

PICKETT *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 270. Submitted January 3, 1910.—Decided February 21, 1910.

On the organization of a Territory into a State, Congress may—as it did by the Oklahoma enabling act—transfer the jurisdiction of general crimes committed in districts over which the United States retains exclusive jurisdiction from territorial to Federal courts, and may extend such jurisdiction to crimes committed before and after the enabling act. See *United States* v. *Brown*, 74 Fed. Rep. 43.

A statute creating a court to take jurisdiction of crimes will not be construed, if another construction is admissible, so as to leave a judicial chasm; and so held that under the Oklahoma enabling act the Federal court had jurisdiction of certain specified crimes committed after the enabling act was passed and before the State was admitted.

The reason of a law as indicated by its general terms should prevail over its letter when strict adherence to the latter will defeat the plain purpose of the law.

The granting or denying of a new trial is a matter not assignable as error. *Bucklin* v. *United States*, 159 U. S. 682.

An assignment of error that is double is bad for that reason.

Continuances are within the discretion of the trial court, and, in the absence of gross abuse, the action of the lower court will not be disturbed.

Assignments of error based on overruling objections to sufficiency of the indictment and of admission of any evidence because the indictment is bad cannot be made on writ of error for the first time.

Assignments of error for rejection or admission of evidence cannot be considered in absence of bill of exceptions. *Storm* v. *United States*, 94 U. S. 76.

THE facts are stated in the opinion.

No counsel appeared for plaintiff in error.

Mr. Assistant Attorney General Harr for the United States.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit Court of the United States for the Western District of Oklahoma, upon a conviction in a capital case, sued out by the plaintiff in error, the defendant below, by authority of the fifth section of the act of March 3, 1891, 26 Stat. 826, 827.

The plaintiff in error, Silas Pickett, a negro, was indicted in the District Court of the United States for the Western District of Oklahoma for the murder of a negro known as Walter, the Kid, within the limits of the Osage Indian Reservation. The indictment was remitted to the Circuit Court for the same

district as required by § 1039, Revised Statutes. This murder was charged as having been committed on October 14, 1907. The State of Oklahoma was admitted to the Union on November 16, 1907. The offense was, therefore, committed before its admission as a State, and for that offense the plaintiff in error was, after such admission, both indicted and convicted in a court of the United States for the Western District of Oklahoma—the Osage Indian Reservation being within that district. The jurisdiction of the court was challenged by motion to quash, by demurrer and by motion in arrest of judgment. Of course, if the offense was not one against the United States, or not committed within the territorial jurisdiction of the District Court for the Western District of Oklahoma, the indictment would be bad, and the court which tried and convicted the plaintiff in error, without jurisdiction. But the crime charged in this indictment was one against the United States. By § 5339 of the Revised Statutes, as amended by the act of January 15, 1897, c. 29, 29 Stat. 487, the crime of murder, when committed within any "place or district or country under the exclusive jurisdiction of the United States," is defined and the punishment provided. This general law was, by § 2145, Rev. Stat., extended "to the Indian Country," when not within one or the other of the exceptions of § 2146.

The averments of the indictment make it plain that the crime charged was committed within a "place or district" at that time exclusively under the jurisdiction of the United States, being Indian Country, not within any State. As it also averred that the plaintiff in error was a negro, and not an Indian, and the person slain a negro and not an Indian, the exceptions made by § 2145, Rev. Stat., do not apply.

The crime was charged to have been committed on October 14, 1907, a date subsequent to the enabling act of June 16, 1906, under which, on November 20, 1907, Oklahoma was admitted to the Union.

The jurisdiction of the District Court of the United States exercised in respect to the indictment and trial of this plaintiff

in error depends upon the provisions of that enabling act. Such a crime might have been prosecuted in the territorial court for the proper district of the Territory, sitting as a court of the United States and administering the law of the United States in the exercise of its jurisdiction conferred by Congress. *Ex parte Crow Dog*, 109 U. S. 556; *Brown* v. *United States*, 146 Fed. Rep. 975. But the function and jurisdiction of such territorial courts would naturally terminate upon the Territory becoming a State, and therefore render necessary some provision for the transfer of pending business and jurisdiction in respect of local matters to state courts and of civil and criminal business and jurisdiction arising under the laws of the United States to courts of the United States when they should come into existence. *Forsyth* v. *United States*, 9 How. 571, 576.

It was, therefore, altogether competent for Congress to provide, as it did in the 14th section of this enabling act, for the transfer of jurisdiction in respect of all crimes against the United States—for the act must be read as applying to crimes under the general criminal law of the United States—to the Federal courts provided by the same act. If this could not be done, the change from a territorial condition to that of a State would operate as an automatic amnesty for crimes committed against the general law of the United States within districts exclusively under its jurisdiction, and not within the jurisdiction of any State, for the court of the State could not be empowered to prosecute crimes against the laws of another sovereignty. *Martin* v. *Hunter*, 1 Wheat. 304, 337. The power to punish was not lost if the crime was one of the character described and the enabling act might well provide that such crime, committed either before or after the admission of the State, might be prosecuted in the courts of the United States when established within the new State. The subject is elaborately considered and decided by District Judge Marshall in *United States* v. *Baum*, 74 Fed. Rep. 43.

Section 13 of the enabling act referred to provides "that the State *when admitted* [italics ours] shall be divided into

two judicial districts," for the appointment of a district judge, clerk and marshal for each, and that the State should be attached to the Eighth Judicial Circuit. It provides also for the holding of regular terms of both the District and Circuit Courts, with all the powers and jurisdiction of similar courts. The fourteenth section was in these words:

"That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed."

There may be some doubt as to whether the section set out should be construed as applying to crimes and offenses committed before and after the passage of the enabling act or only to such crimes committed before and after the admission of the State. The reference to "the passage of this act," in the second clause, would tend to the first construction. But such a construction would leave out of consideration the fact that neither the courts nor the judicial districts referred to would exist until the admission of the State by the express terms of the preceding section, which should be read in connection with the fourteenth section. No construction should be adopted, if another equally admissible can be given, which would result in what might be called a judicial chasm. Under the first interpretation, crimes committed after the passage of this enabling act could not be prosecuted until the admission of the State and the coming into existence of the courts and judicial districts, to which jurisdiction of such crimes was to be transferred. If such crimes could only be prosecuted in courts organized upon the admission of the State there would be an indefinite period during which such crimes might go unpunished. In fact, there elapsed seventeen months between the date of this enabling act and the admission of the State

and a consequent organization of the districts and courts to which jurisdiction over such crimes was to be transferred. A construction which might result in such deplorable consequences should not be adopted if any more sensible meaning can be reasonably given. The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage. Applications of this general rule are shown in *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *United States* v. *Corbett*, 215 U. S. 233, decided at this term. The obvious intention was that this, like the preceding section, should become effective upon the State being admitted, and it should be read as applying to crimes and offenses before and after such admission. But if the section be otherwise construed, the District Court had in either case jurisdiction over this crime, for it was committed after the enabling act, and whether it might have been prosecuted in a territorial court sitting as a court of the United States before the admission of the State of Oklahoma, is not here important. It was not so prosecuted, and when the Territory ceased to be a Territory and became a State the jurisdiction of all such courts terminated, and jurisdiction was properly transferred to the courts of the United States having jurisdiction over the place of the crime.

There are a number of errors assigned. The first and tenth are for error in denying a new trial. The granting or denying of a new trial is a matter not assignable as error. *Bucklin* v. *United States*, 159 U. S. 682. The second assignment is double, and therefore bad; but it is without merit. The first error included is for overruling an objection to being tried at Oklahoma City. No such objection is shown by the record. The remainder is for denying a continuance. Continuances are within the discretion of the court, and unless great abuse is shown, the action of the court below will not be disturbed. As no bill of exceptions was taken, we have no showing of abuse upon which the action of this court may be invoked.

The third and fourth errors assigned are for overruling an objection made to the sufficiency of the indictment and to the admission of any evidence because the indictment was bad. No such objection is shown by the record. The indictment is not in form bad, nor vague, but charges the crime of murder with great particularity. There seems to have been no reason for doubt as to the crime charged. Besides, objections of this character cannot be made upon writ of error for the first time.

Aside from the question of jurisdiction, considered heretofore, the remaining assignments are for alleged errors in admitting or rejecting evidence. But as no bill of exceptions was taken, these assignments cannot be considered. *Storm* v. *United States*, 94 U. S. 76.

Judgment affirmed.

HAAS *v.* HENKEL, UNITED STATES MARSHAL.

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

No. 367. Argued January 6, 7, 1910.—Decided February 21, 1910.

Notwithstanding the hardship necessarily entailed upon the accused in being tried in a district other than that in which he resides, there is no principle of constitutional law that entitles him to be tried in the place of his residence.

Art. III, § 2 of, and the Sixth Amendment to, the Constitution secure to the accused the right to a trial in the district where the crime is committed, and one committing a crime in a district where he does not reside cannot object to his removal thereto for trial.

Where one has been indicted for the same offense in two or more districts, in one of which he resides, it is the duty of the prosecuting officer to bring the case to trial in the district to which the facts most strongly point; and if the court first obtaining jurisdiction of the person of the accused does not object, the accused cannot object

to his being removed under § 1014, Rev. Stat., from the district of his residence to the district in which the government elects to first bring the case to trial.

Where the statute is plain, and Congress has made no exception in its application, the court cannot make one.

Under § 1014, Rev. Stat., the duty of the commissioner is to determine whether a *prima facie* case is made out that a crime has been committed, indictable and triable in the district to which removal is sought, and if so determined there is no discretion; nor is the fact that the accused is under bail in the district where he resides a bar to the removal.

A conspiracy to defraud the United States under § 5440, Rev. Stat., does not necessarily involve a direct pecuniary loss to the United States. The statute includes any conspiracy to impair, obstruct or defeat the lawful function of any department of the Government, e. g., the promulgation of officially acquired information in regard to the cotton crop.

Regulations of a department of the Government promulgated under § 161, Rev. Stat., have the force of law; and bribery of an officer of the United States to violate such regulations is included under § 5451, Rev. Stat., making it a crime to bribe such officer to violate his lawful duty.

Matters exclusively relating to defense either substantive or in abatement are properly determinative by the court into which the indictments are returned, and where the case will be tried; they cannot be considered on an appeal from the order of removal made under § 1014, Rev. Stat.

Introduction before the commissioner of an indictment found in the district to which removal is sought makes a *prima facie* case for removal which is not overcome by an indictment found in another district, although the *locus* is differently stated in each indictment.

167 Fed. Rep. 211, affirmed.

THE facts are stated in the opinion.

Mr. Nash Rockwood, with whom *Mr. Max Steuer* was on the brief, for appellant:

The New York indictments are still pending; they have not been *nolle prossed* or quashed; they do not charge that the crime was committed in one district and completed in another; or, in the District of Columbia and completed in New York;

but each alleges that the completed acts of conspiracy took place within their respective jurisdictions.

The conspiracy itself is the gist of the offense, and when the Government charged the commission of the offense in New York it elected its forum and the defendant is, constitutionally, entitled to be there tried.

It has become quite the habit of late in criminal prosecutions for the Government to seek the trial in the District of Columbia, presumably because the defendants are taken to a foreign jurisdiction where they are unknown and subjected to enormous expense. This oppressive use of the criminal statutes invades the constitutional right of a citizen to a speedy trial in the district of his residence, provided, as in this case, the crime of which he stands accused was there committed.

There is no reason why he should not, and every reason—both constitutional and statutory—why he should be tried in New York. See *Tinsley* v. *Treat*, 205 U. S. 20; *United States* v. *Marx*, 122 Fed. Rep. 964; *United States* v. *Sauer*, 88 Fed. Rep. 249.

The accused should not be removed if the court to which he is to be removed has no jurisdiction, and in this case the courts of the District of Columbia have no jurisdiction as the Government alleges and has charged the same offense to have been committed and completed in New York. *Nashville &c.* v. *Alabama*, 128 U. S. 96; *In re Palliser*, 136 U. S. 257; *Horner* v. *United States*, 143 U. S. 207; *Hyde* v. *Shine*, 199 U. S. 62; *Georgia* v. *Bolton*, 11 Fed. Rep. 217; *United States* v. *Hackett*, 29 Fed. Rep. 848; *In re Rosdeitscher*, 33 Fed. Rep. 657; *Ex parte Pritchard*, 43 Fed. Rep. 915; *In re Kelley*, 46 Fed. Rep. 654; *In re King*, 51 Fed. Rep. 434; *United States* v. *Fowkes*, 53 Fed. Rep. 13; *United States* v. *Howell*, 56 Fed. Rep. 21; *United States* v. *Peterson*, 64 Fed. Rep. 145; *In re Huntington*, 68 Fed. Rep. 881; *Ex parte Ballinger*, 88 Fed. Rep. 781; *United States* v. *Murphy*, 91 Fed. Rep. 120; *In re Belknap*, 96 Fed. Rep. 614; *United States* v. *Alberty*, 24 Fed. Cas. 765; *United States* v. *Bickford*, 24 Fed. Cas. 1144; *United States* v. *Bird*, 24

Fed. Cas. 1148; *United States* v. *Britton*, 24 Fed. Cas. 1239; *United States* v. *Jackalow*, 1 Black, 484.

The indictments did not confer jurisdiction upon the commissioner to commit the defendant for removal, and there was an entire absence of probable cause as the indictments do not allege an illegal conspiracy to commit any offense against the United States.

Only crimes and offenses specifically enumerated by statute are indictable. *United States* v. *Cook*, 17 Wall. 168–174. When the crime charged is conspiracy to do a criminal act, it must be shown that the act which is the purpose and object of the conspiracy is itself a violation of law. *Conrad* v. *United States*, 127 Fed. Rep. 798; *United States* v. *Boyer*, 85 Fed. Rep. 425; Rev. Stat., § 5440. Charging conspiracy to violate § 5451 must charge an intent to accomplish certain acts which when performed would violate § 5451.

There was no bribery as defined in § 5451 in this case. A conditional offer and promise based upon the success of a future event, where speculation was not successful and the promisee receives nothing is not a violation of § 5451. *United States* v. *Greene*, 136 Fed. Rep. 651; *United States* v. *Crafton*, 25 Fed. Cas. 681; *United States* v. *Kessell*, 62 Fed. Rep. 57.

A conspiracy to do a lawful act is not an illegal conspiracy under § 5440. The conspiracy must be to commit an offense, punishable by statute. *Goldfield Mines Company* v. *Miners' Union*, 159 Fed. Rep. 500; *United States* v. *Johnson*, 26 Fed. Rep. 682; *United States* v. *Lancaster*, 44 Fed. Rep. 896; *United States* v. *Benson*, 70 Fed. Rep. 594; *Drake* v. *Stewart*, 76 Fed. Rep. 142. The intent to violate the law is the gravamen of the offense, and must be distinctly averred. *United States* v. *Cruikshank*, 92 U. S. 558; *United States* v. *Carll*, 105 U. S. 612; *Bannon & Mulkey* v. *United States*, 156 U. S. 466; *United States* v. *Jackson*, 25 Fed. Rep. 548; *United States* v. *Van Lueven*, 62 Fed. Rep. 69; *McCarty* v. *United States*, 101 Fed. Rep. 113; *United States* v. *Post*, 113 Fed. Rep. 854; *United States* v. *Greene*, 136 Fed. Rep. 658; *United States* v. *Hess*, 124

U. S. 483, 486; *Pettibone* v. *United States*, 148 U. S. 202; *United States* v. *Fox*, 95 U. S. 670; *People* v. *Lohman*, 2 Barb. (N. Y.) 218.

The indictments do not allege an illegal conspiracy "to defraud the United States in any manner or for any purpose." *Curley* v. *United States*, 130 Fed. Rep. 1; *United States* v. *Morse*, 161 Fed. Rep. 429; *Hyde* v. *Shine*, 199 U. S. 62; *United States* v. *Keitel*, 211 U. S. 370, can be distinguished, as there the government policy was interfered with and acts were performed directly contravening the spirit and letter of the statutes. To be a crime to deprive the United States of a right or an official function, the right must be one defined by law and the official function one imposed by law. See new Federal Penal Code, §§ 123 and 124.

No case has yet applied the statute unless the acts complained of constituted the deprivation of a right or duty imposed upon a department of the Government by statute, or that the acts operated to deprive the Government of property or the right of property. *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Hirsch*, 100 U. S. 35; *Dealy* v. *United States*, 152 U. S. 539; *France* v. *United States*, 164 U. S. 676; *Re Wolf*, 26 Fed. Rep. 611; *United States* v. *Reichert*, 32 Fed. Rep. 142; *United States* v. *Millner*, 36 Fed. Rep. 891; *United States* v. *Purchel*, 116 Fed. Rep. 142; *United States* v. *Thomas*, 145 Fed. Rep. 79; *United States* v. *Taffe*, 186 Fed. Rep. 113.

Penal laws must be strictly construed and if there is any doubt concerning the application of a criminal statute, it must be resolved in favor of the defendant. *Williamson* v. *United States*, 207 U. S. 425; *Hamilton* v. *United States*, 26 App. D. C. 382.

The indictments do not aver an illegal conspiracy to defraud the United States in the matter of making the reports untrue and inaccurate.

It is not a crime or offense to violate a custom, practice or regulation of the head of a department of the Government

unless such custom, practice or regulation has been authorized by statute and its violation made penal by some general or special law. A charge of crime could not be predicated upon the violation of a rule to keep information regarding the cotton crop secret as there is no statute authorizing the Secretary to make such a rule, nor any statute making its violation a criminal offense. There are no common law offenses against the United States. *United States* v. *Eaton*, 144 U. S. 677. While by Rev. Stat., § 161, the head of a department may prescribe regulations not inconsistent with law for the government of his department, it is likewise true that in order to constitute any act or set of acts, an offense, the act must be made criminal by statute. *United States* v. *Sandefuhr*, 145 Fed. Rep. 49; *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *Boyer*, 85 Fed. Rep. 425; *Wilkins* v. *United States*, 96 Fed. Rep. 837; *United States* v. *Maid*, 116 Fed. Rep. 650; *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Matthews*, 146 Fed. Rep. 306. See also *Caha* v. *United States*, 152 U. S. 211; *Williamson* v. *United States*, 207 U. S. 425.

The violation of a custom cannot be made the basis of a criminal prosecution in the absence of any statute imposing any duty.

None of the counts allege that the defendants knew, or had reason to know, of any alleged custom, practice, regulation or rule of secrecy in the department; and knowledge not being alleged, and there being no presumption of knowledge, they cannot be held liable for criminal wrong-doing. *Ignorantia facti excusat, ignorantia juris non excusat. Pettibone* v. *United States*, 148 U. S. 197; *Wilkins* v. *United States*, 96 Fed. Rep. 837. Regulations to have the force of law must be made by an executive department in pursuance of authority delegated by Congress and only when so promulgated, will the courts take judicial notice of their existence. The existence of such rule is a fact and must be pleaded and proven as any other fact. *United States* v. *Matthews*, 146 Fed. Rep. 306.

Holmes was not an officer of the United States nor a person

acting for or on behalf of the United States in an official function under or by virtue of any department or office of the Government thereof. Nothing was pending in connection with the cotton crop reports, which could by law be brought before him in an official capacity, or upon which his decision or action could be influenced. He was not charged with any duty whatever in connection with reports upon the cotton crop. As to who is an officer of the United States, see *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Smith*, 124 U. S. 525; *Auffmordt* v. *Hedden*, 137 U. S. 310; *United States* v. *McDonald*, 72 Fed. Rep. 295; *United States* v. *Cole*, 130 Fed. Rep. 614; *United States* v. *McCrory*, 91 Fed. Rep. 295; *United States* v. *Schlierholz*, 137 Fed. Rep. 616; *United States* v. *Gibson*, 47 Fed. Rep. 833; *United States* v. *Haas*, 167 Fed. Rep. 211; *United States* v. *Ingham*, 97 Fed. Rep. 935.

The words "official function," as used in § 5451, mean a duty imposed by law, and a charge of crime cannot be predicated upon an act not made an official function, obligation or duty by express command of law. If Holmes was a public officer, the indictments are defective, because he could not conspire with himself to bribe, influence, or induce himself to commit the alleged offense of misconduct. *United States* v. *Dietrich*, 126 Fed. Rep. 664. See also 2 McClain's Cr. L., § 959; *Shannon* v. *Commonwealth*, 14 Pa. St. 226; *Miles* v. *Butler*, 8 Washington, 194; *S. C.*, 35 Pac. Rep. 1093; *S. C.*, 25 L. R. A. 434; *S. C.*, 40 Am. St. Rep. 900; 2 Wharton's Cr. Law, § 1339; *Chadwick* v. *United States*, 141 Fed. Rep. 225; *United States* v. *New York Central & Hudson River Railroad Company*, 146 Fed. Rep. 298.

There was no proof of the issuance of bench warrants or that defendants were wanted within the District of Columbia. Removal proceedings must be based upon the fact that the accused is wanted in the demanding jurisdiction and the absence of such proof is a jurisdictional defect.

The history of the act and adjudicated cases show that it was the intention of Congress in this provision to assimilate all the proceedings for holding accused persons to

answer before a court of the United States to the proceedings provided for similar purposes by the laws of the State where the proceedings should take place. *United States* v. *Martin*, 17 Fed. Rep. 150; *United States* v. *Tureaud*, 20 Fed. Rep. 621; *Marvin* v. *United States*, 44 Fed. Rep. 405; *Re Gourdin*, 45 Fed. Rep. 842; *United States* v. *Sauer*, 73 Fed. Rep. 671; *United States* v. *Sapinkow*, 90 Fed. Rep. 654; *United States* v. *Rundlett*, 2 Curtis (U. S.), 41; *United States* v. *Horton*, 2 Dill. (U. S.) 94; *Ex parte Burford*, 3 Cranch, 448; *United States* v. *Burr*, 2 Whel. Crim. (N. Y.) 573; *United States* v. *Insley*, 54 Fed. Rep. 223; *Re Dana*, 68 Fed. Rep. 895; *United States* v. *Collins*, 79 Fed. Rep. 65; *Re Price*, 83 Fed. Rep. 830; *United States* v. *Price*, 84 Fed. Rep. 636; *Johnson* v. *United States*, 87 Fed. Rep. 187; *People* v. *Cramer*, 22 App. Div. 396; *Comfort* v. *Fulton*, 13 Abb. Pr. 276; *Blodgett* v. *Race*, 18 Hun, 132; *Tracy* v. *Seamens*, 7 N. Y. 146.

The law of New York requires the issuance of a bench warrant for the arrest of one indicted, and also for the arrest of one sought to be extradited to another jurisdiction.

The crimes and offenses were all barred by the statute of limitations. If any conspiracy existed at all with relation to the report of June, 1905, it was entered into in 1904, so that the acts of May 31, 1905, now alleged in the indictments as separate conspiracies, were mere overt acts of the original conspiracy, and the statute of limitations became a bar in August, 1907. The indictments were found in May, 1908. *Re Snow*, 120 U. S. 282, and see *United States* v. *Kessel and American Sugar Refining Company* (not yet reported).

A conspiracy formed under § 5440, Rev. Stat., is a completed crime when an overt act has been committed to effect the object of the conspiracy. *United States* v. *Irvine*, 98 U. S. 450; *Pettibone* v. *United States*, 148 U. S. 97; *Dealy* v. *United States*, 152 U. S. 539; *United States* v. *Owen*, 32 Fed. Rep. 534; *United States* v. *Lancaster*, 44 Fed. Rep. 896; *United States* v. *McCord*, 72 Fed. Rep. 159; *Berkowitz* v. *United States*, 93 Fed. Rep. 452; *United States* v. *Greene*, 100 Fed. Rep. 941; *United*

States v. *Biggs*, 157 Fed. Rep. 264; *United States* v. *Black*, 160 Fed. Rep. 431.

If the conspiracy is the offense and it becomes complete upon the performance of the first overt act and the defendants are then at that time subject to indictment, the bar of the statute must apply after three years from the commission of that overt act. To hold otherwise is to read into § 5440 elements as to the renewal or continuance of a conspiracy which are not therein expressed. *Ware* v. *United States*, 154 Fed. Rep. 577; *United States* v. *Lonabough*, 158 Fed. Rep. 314; *Armour Packing Company* v. *United States*, 209 U. S. 56. The general Statute of Limitations, Rev. Stat., § 1044, is applicable to the District of Columbia. *United States* v. *Callan*, 197 U. S. 477.

The alleged crime of conspiracy to bribe merged in the completed offense.

The overt act is made applicable to both counts of the indictment so that the conspiracy to bribe merged in the specific offense of bribery at the time the money was paid to Holmes. *United States* v. *Biggs*, 157 Fed. Rep. 264; *United States* v. *Black*, 160 Fed. Rep. 431; *Berkowitz* v. *United States*, 93 Fed. Rep. 452; *United States* v. *Jones*, 5 Utah, 552; 1 Bishop's Crim. Law, N. Cr. Law, § 787; 1 Whart. Cr. L. 27*a*; *United States* v. *Melfi*, 118 Fed. Rep. 900; 6 Am. & Eng. Ency. of Law, 863. See also *Thomas* v. *United States*, 156 Fed. Rep. 902; *Clune* v. *United States*, 159 U. S. 590–595; *United States* v. *Gardner*, 42 Fed. Rep. 829; *United States* v. *McDonald*, 3 Dill. 545; *United States* v. *Martin*, 4 Cliff. 166; *State* v. *Murphy*, 6 Alabama, 765; *Elsey* v. *State*, 47 Arkansas, 572; *Wright* v. *State*, 5 Indiana, 528; *State* v. *Lewis*, 48 Iowa, 579; *State* v. *Mayberry*, 48 Maine, 238; *Commonwealth* v. *Kingsbury*, 5 Massachusetts, 106; *People* v. *Richards*, 1 Michigan, 222; *People* v. *McKane*, 31 Abb. N. C. 176; 7 Misc. Rep. (N. Y.) 478; *People* v. *Mather*, 4 Wend. (N. Y.) 229; *S. C.*, 21 Am. Dec. 122.

Mr. Jesse C. Adkins, Special Assistant to the Attorney Gen-

eral, with whom *Mr. Assistant Attorney General Fowler* was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

On May 29, 1908, four indictments were found in the Supreme Court of the District of Columbia against Moses Haas, and certain others, charging them with having conspired in the District of Columbia to defraud the United States, and with having conspired to commit an offense against the United States, under § 5440, Rev. Stat. Bench warrants were issued and returned not found.

On the same day four other indictments were found in the Circuit Court of the United States for the Southern District of New York against the same Moses Haas and the others named in the District of Columbia indictments, charging them with having conspired in the Southern District of New York to commit the same offenses covered by the four District of Columbia indictments. Haas appeared in the New York courts and gave bail. Later he was arraigned and pleaded not guilty, then withdrew his plea and entered a motion to quash, which was overruled.

On June 24, 1908, and while this motion to quash was *sub judice*, proceedings were duly begun by the United States district attorney for the Southern District of New York before the United States commissioner for the arrest of Haas and his removal to the District of Columbia for trial upon the indictments there pending against him. Pending these removal proceedings, and before any hearing, the United States district attorney moved the Circuit Court in which the New York indictments were pending for consent to the prosecution of these removal proceedings, and consent was granted over the objection of Haas. This application was made by direction of the then Attorney General of the United States, who, in an official communication, said "that should the trial here [Washington] result in acquittal or conviction, the indictments in New York will be dropped." Among other

reasons for desiring the trial in Washington, aside from mere questions of convenience to Government officials and witnesses, the Attorney General said:

"1. The indictments charge a conspiracy on the part of the several defendants to cause to be issued at Washington by the Bureau of Statistics for the Department of Agriculture of false cotton crop reports, and that Holmes, who was then Associate Statistician of the Bureau of Statistics, was to furnish to his co-conspirators in advance of their official issue the information to be contained in the reports. While, owing to the commission in your district of acts in pursuance of the conspiracy, the court in your district has jurisdiction of the offense, yet the conspiracy was in all probability actually formed in Washington. The false reports were prepared and issued here and the advance information was given out here. The real situs of the crime then is in the District of Columbia, and the trials should therefore be had here.

"2. The defendant Holmes has been arrested and is now awaiting trial on the indictments pending in the District of Columbia. There are two series of these indictments, one against Price, Haas and Holmes, and the other against Haas, Peckham and Holmes. It would be a great convenience and a vast saving to the Government to try the defendants together. Even this would necessitate two trials, one in each series. If the non-resident defendants are not removed to Washington, four trials would be needed, two in Washington and two in New York."

Upon the hearing before the commissioner the Government put in evidence certified copies of the four District of Columbia indictments, and proof that bench warrants had issued in that district and been returned not found. The defendant admitted his identity and put in evidence copies of the four New York indictments and of the proceedings had thereunder. The commissioner found probable cause and directed that Haas be held to await an order of removal by a district judge. Thereupon a petition for writs of *habeas corpus* and

certiorari were filed in the Circuit Court, averring that his arrest and detention was illegal and in violation of the Federal Constitution. The Circuit Court upon a full hearing denied the writs and remanded the petitioner. 166 Fed. Rep. 621. This appeal was thereupon taken.

The facts stated present the question as to whether Haas could be lawfully removed under § 1014, Rev. Stat., over his objection, pending the proceedings against him in the Southern District of New York for similar offenses.

Section 1014 provides for the arrest and detention of any person, wherever found, "for trial" before such court of the United States as by law has cognizance of the offense, and that "where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

Haas was arrested upon a warrant duly sworn out, charging him with offenses against the United States, committed within the District of Columbia. Copies of the indictments duly returned by a grand jury were put in evidence. That made a *prima facie* case, requiring detention until an order of removal could be applied for and issued. Haas insisted upon his right to be tried in the district of his residence, and complained, with more or less justice, of the expense and hardship incident to a trial in the District of Columbia. But there is no principle of constitutional law which entitles one to be tried in the place of his residence. The right secured by Art. III, § 2 of, and the Sixth Amendment to, the Constitution is the right of trial in the district "where the crime shall have been committed." If, therefore, Haas committed a crime against the United States in the District of Columbia he had neither legal nor constitutional right to object to removal to the district where the trial was to be had. *In re Palliser,* 136 U. S. 257, 265.

If the only constitutional right secured is the right to a trial by jury in the district where the crime was committed, there is obviously no invasion of either right by the election of the Government to prosecute the offense in any district and "court of the United States as by law has cognizance of the offense." If the same accusation has been made by grand juries of different jurisdictions, it would be manifestly the duty of the prosecuting officer of the United States to determine in which the offense was most probably committed and bring the offender to trial there. Thus, if the place of the formation of the conspiracy be doubtful, and there be some facts pointing to one district and some to another, and indictments have been returned in each, it would be the plain duty of the prosecution to take steps to bring the case to trial in that district to which the facts most strongly pointed. This seems to have been the very situation of this case, and the principal motive moving the Attorney General to give the instruction shown by his letter to the district attorney for the Southern District of New York. The removal statute is plain and leaves no room for the court to make an exception, when Congress has made none.

Has the United States court for the District of Columbia jurisdiction over the accusation made in that District and is the case triable there? If so, the duty of the commissioner, assuming a showing of probable cause, was to detain and of the judge of the district to issue his warrant for the removal of the accused "to the district where the trial is to be had." The case, on principle, must be the same if the offense be one which was committed in more than one district. In such a case § 731, Rev. Stat., makes it cognizable in either. But, if indicted in two or more districts, there must be an election as to where the defendant shall be tried. Primarily, this is the right and duty of the Attorney General, or those acting by his authority. If the election require the arrest of the accused in a district other than that in which the trial is to be had, removal proceedings must, of course, be instituted.

The duty of the commissioner is then limited to the determination of the single question of whether a *prima facie* case is made that the accused has committed an offense against the United States, indictable and triable in the district to which a removal is sought. There is no discretion reposed when such a case is made out. That bail had been given would not prevent removal, for in such a situation the sureties would be exonerated by act of the law. *Beavers* v. *Haubert*, 198 U. S. 77.

But in the case before us the consent of the Circuit Court, to which the New York indictments had been returned, was granted. To say that the accused had a right to a speedy trial of the New York cases may be conceded. If unreasonable delay should result from continuances due to an election to try the same accusations in another district, a very different question might arise, calling for relief through *habeas corpus*. But such a possibility affords no legal reason for denying the right of removal. The precise question has not been before raised; but in principle the case is within *In re Palliser*, 136 U. S. 257, 267; *Hyde* v. *Shine*, 199 U. S. 62, and *Benson* v. *Henkel*, 198 U. S. 1, 15.

In the *Palliser case*, a removal from a New York district, the residence of Palliser, to a Connecticut district, was objected to because the offense had been committed in New York and not Connecticut. The court said:

"But there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut; and that, if no offense was committed in New York, an offense was committed in Connecticut; and that, in either aspect, the District Court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner. Whether he might have been indicted in New York is a question not presented by this appeal."

In *Hyde* v. *Shine* the fact that the conspiracy charged was one triable in California, the residence of the appellant, was

not considered as an answer to the demand for removal from California to the District of Columbia, the question of distance being the one pressed and decided as presenting no obstacle to the legal right of removal.

In *Beavers* v. *Haubert*, 198 U. S. 77, the appellant objected to removal from the district of his residence to another to be there tried, because he was at the time under indictment in the district of his residence, and under bail for his appearance for a different offense against the United States. But it was held that this fact afforded no reason for denying a removal upon the election to try the one case before the trial of the other.

In *Benson* v. *Henkel*, 198 U. S. 115, objection was made to a removal to the District of Columbia upon the ground that the offense, if any, was committed in California, and that, under the Constitution, the appellant was entitled to a trial in that jurisdiction. In dealing with that question Mr. Justice Brown said:

"The objection does not appear upon the face of the indictment, which charges the offense to have been committed within this district, but from the testimony of one of those clerks it seems that the money was received by him in certain letters mailed to him from San Francisco and received in Washington. Without intimating whether the question of jurisdiction can be raised in this way, the case clearly falls within that of *In re Palliser*, 136 U. S. 257, in which it was held that where an offense is begun by the mailing of a letter in one district and completed by the receipt of a letter in another district, the offender may be punished in the latter district, although it may be that he could also be punished in the former."

The next objection is that the District of Columbia indictments do not charge any offense against the United States.

The four District of Columbia indictments charge two sets of conspiracies. One conspiracy charged in indictment No. 26,088 is averred to have been formed between Haas, one

Theodore Price and one Edwin S. Holmes, Jr., who was an Associate Statistician in the Department of Agriculture. The charge in certain of these accounts is that these three defendants conspired to defraud the United States by secretly obtaining information from Holmes which he should acquire in his official character as Associate Statistician and should, in violation of his official duty, give out secretly to his co-conspirators, information as to the probable contents of certain official cotton crop reports in advance of the time when these reports were to be promulgated according to law. In one of the counts it is charged that Holmes was to falsify one of these official cotton crop reports, of which fact his associates were to be advised in advance. All of which information in advance of the publication of the official cotton crop reports was to be used for speculative purposes in the open market.

Indictment No. 26,098 charges that Haas and Price conspired to bribe Holmes to make this false report and to furnish them in advance information as to its contents.

Indictment No. 26,086 charges that Haas and one Frederick A. Peckham conspired with one Van Riper to bribe Holmes to give them advance information of the June report of 1905, while No. 26,087 charges Haas, Peckham and Holmes with conspiracy to defraud the United States by Holmes giving his co-conspirators advance information as to that report.

The indictments are of such great length that it is not feasible to set them out in full or to state the substance of their several counts. It is for the purposes of this case enough to say that it is averred that the Department of Agriculture includes a Bureau of Statistics established by law. That one of the governmental functions exercised by that department, particularly through the Statistical Bureau, is the acquirement of detailed information from time to time in respect to the condition of the cotton crop of the country. That this information comes through thousands of correspondents, some official and others not, through the reports of local agents scattered through the cotton region and through travel-

ing representatives of the department. From these and other sources a report is made estimating acreage, condition and the probable size of the crop. Comparisons with former reports are made, and every explanation furnished which may throw light upon the present condition and prospect of the growing crop. That the purpose is to complete and promulgate at stated times fair, impartial and reliable reports, and that said reports are issued about the third day of the months of June, July, August, September, October and December. That the information thus officially acquired and compiled and the estimates thereon are of value and do greatly affect the market price of the crop. That such reports are required to be submitted to and approved by the Secretary of Agriculture before publication, and that under the custom, practices and regulations of the Secretary of Agriculture all officers and employés are required to keep secret the information so gathered, and from in any way divulging same or giving out any information forecasting such report in advance of its official approval and promulgation.

It is averred that the said Holmes was an employé or an official in said Department, and in the Bureau of Statistics. That by virtue of his duty as such official and Assistant Statistician he acquired much of the information upon which such reports are based, and, as an official, came into knowledge of the probable contents of the regular reports. That neither Haas nor Price had any official connection and were not authorized to obtain information about such reports in advance of their promulgation. That the conspiracy was to obtain such information from Holmes in advance of general publicity and to use such information in speculating upon the cotton market, and thereby defraud the United States by defeating, obstructing and impairing it in the exercise of its governmental function in the regular and official duty of publicly promulgating fair, impartial and accurate reports concerning the cotton crop. One count charges, in addition, that the conspiracy included the making of a false report, the

facts to be given by Holmes to his co-conspirators in advance of its publication.

The counts charging a conspiracy to commit an offense against the United States in substance charge that this was to be accomplished by bribing the said Holmes to induce him to do certain acts in violation of his lawful duty not to give out advance information in respect to the condition of the cotton crop, acquired in the performance of his official duty.

Do the counts which charge a conspiracy to defraud the United States charge any offense?

The authority for the indictments charging a conspiracy to defraud is § 5440, Rev. Stat. Its language is plain and broad:

"If two or more persons conspire . . . 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," etc.

These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons and explanations involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government. Assuming, as we have, for it has not been challenged, that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud

the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled. *Hyde* v. *Shine*, 199 U. S. 62, 81; *United States* v. *Keitel*, 211 U. S. 370, 394; *Curley* v. *United States*, 130 Fed. Rep. 1; *McGregor* v. *United States*, 134 Fed. Rep. 195.

The counts charging a conspiracy to commit an offense against the United States, namely, the offense of bribing Holmes to violate his duty as a public official by giving out advance information about the monthly cotton reports, are said not to charge an offense against the United States, because there is no statute which prohibits the giving out of such official secrets in advance of lawful promulgation.

Section 5451, Rev. Stat., makes it a crime to bribe or offer to bribe "any officer of the United States," or "any person acting for or on behalf of the United States, in any official function, under or by authority of any department or office of the Government; . . . to induce him to do or omit to do any act in violation of his lawful duty." The head of each Department is authorized by § 161, Rev. Stat., "to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the preservation of its records, papers and property appertaining to it." Such regulations need not be promulgated in any set form, nor in writing.

In *United States* v. *Macdaniel*, 7 Pet. 1, 14, 15, it was said of departmental regulations that, "of necessity usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits."

In *Benson* v. *Henkel*, 198 U. S. 1, 11, a similar question

arose in an appeal from an order denying a writ of *habeas corpus* in a removal case. The appellant was charged with a conspiracy to commit an offense by bribing certain clerks of the land office to divulge the contents of certain reports. It was said that these clerks had not been forbidden by any statute to give out such information. Mr. Justice Brown, for the court, said:

"But it is clearly for the court to say whether every duty to be performed by an official must be designated by statute, or whether it may not be within the power of the head of a department to prescribe regulations for the conduct of the business of his office and the custody of its papers, a breach of which may be treated as an act in violation of the lawful duty of an official or clerk. *United States* v. *Macdaniel*, 7 Pet. 1, 14."

We have not dealt with certain minor objections which go to the form of the indictments rather than to the substance. These are matters to be determined in the court where they were found and are not proper for consideration upon a *habeas corpus* proceeding.

The exclusion of the evidence taken in *Price* v. *United States*, and offered in this case upon the petition for writ of *habeas corpus* in the Circuit Court, touching the history of the finding of indictment No. 26,088, is not a matter which is proper for review on such an appeal as this. So, also, the defense of the statute of limitations. The one defense is matter in abatement and the other of substantive defense, and both are properly matters for the determination of the court into which the indictments were returned and where the case will be tried.

It is enough to hold, as we do, that the indictments sufficiently charge an offense committed within the District of Columbia to require that the appellant shall be removed to that District for trial. *Benson* v. *Henkel*, 198 U. S. 1.

The introduction of certified copies of the District of Columbia indictments made a *prima facie* case for removal. That

case was not overcome by the copies of the New York indictments. That they laid the locus of the conspiracy in a different place from that laid in the District of Columbia indictments is true. But if such indictments are evidence for the purpose of showing that the place of the conspiracy was not in the District of Columbia, such evidence was not, as matter of law, sufficient to overcome the probable cause shown by the District of Columbia indictments. They certainly could not be regarded as admissions by the Government. They were at most evidence of the opinion of the New York grand jury as to the *locus* of the conspiracy. But if the fact be that the offense charged in both sets of indictments is identical and that the *locus* of the conspiracy is laid in one set as in one district and in the other as in a different district, it is still for the Government to determine in which of the two districts it will bring the accused to trial, and of the commissioner to determine whether a *prima facie* case has been shown that the accused had probably committed an offense in the District of Columbia which was indictable and triable there. This we have dealt with already and only refer to it now in connection with the use of the New York indictments as evidence that the offense was not committed in the District of Columbia.

Upon the whole case we conclude that the commissioner had jurisdiction, and that no sufficient reason is shown for discharging the appellant.

Final order denying writ

Affirmed.

BREWER, J., concurring.

I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is, and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be

settled by direct action in the court in which the indictments were returned and not in removal proceedings.

MR. JUSTICE MCKENNA concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.

PECKHAM *v.* HENKEL, UNITED STATES MARSHAL.

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

No. 366. Argued January 6, 7, 1910.—Decided February 21, 1910.

Haas v. *Henkel*, *ante*, p. 462, followed as to jurisdiction of commissioner under § 1014, Rev. Stat., in removal proceedings to remove accused who has been indicted in more than one district.

The fact that the person whose removal is sought, is under bond to appear in other removal proceedings on prior indictments, does not prevent the removal order being issued. The effect could only be to exonerate the sureties.

The rule that the jurisdiction over the person by one Federal court must be respected until exhausted is one of comity only, and has a limited application in criminal cases. It will not prevent removal under § 1014, Rev. Stat., where the cases are not the same.

Even if a second removal proceeding does amount to an election by the Government to abandon the first complaint, that fact does not affect the jurisdiction of the commissioner.

Disregard of comity between Federal courts at the instance of the Government is not an invasion of constitutional rights of the accused. It does not affect the jurisdiction of the commissioner, and even if his decision is erroneous it cannot be attacked on *habeas corpus*. *Habeas corpus* is not writ of error.

166 Fed. Rep. 627, affirmed.

THE facts are stated in the opinion.

Mr. Nash Rockwood and *Mr. Henry E. Davis*, with whom *Mr. Max Steuer* was on the brief, for appellant.[1]

[1] For abstract of argument, see p. 463, *ante*.

Mr. Assistant Attorney General Fowler, with whom *Mr. Jesse C. Adkins* was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court denying the application of the appellant to be discharged from arrest on a writ of *habeas corpus* and remanding him to the custody of the marshal.

The case differs from the case of *Haas* v. *Henkel*, just disposed of, only in certain particulars; otherwise it is governed by the opinion in that case.

1. Peckham is included in only two of the indictments against Haas, namely, Nos. 26,086 and 26,087. The first charges a conspiracy with Edwin S. Holmes, Jr., and Moses Haas to defraud the United States; the other with a conspiracy with Haas, and others unknown, to commit an offense against the United States, that of bribing Holmes, an Assistant Statistician in the Department of Agriculture, to do an act in violation of his official duty.

Neither of the indictments found in the District of Columbia against Peckham include the count charging a conspiracy to bribe Holmes to falsify one of the official cotton crop reports.

In all other matters this appeal is controlled by the opinion and judgment in the *Haas case*, unless a different result must follow from the facts now to be stated.

In 1905 three indictments were returned against Peckham, Holmes and Haas in the Supreme Court of the District of Columbia, charging them with conspiring to defraud the United States and to commit an offense against the United States. A warrant for Peckham's arrest was issued in the Northern District of New York upon a complaint filed with the commissioner for his removal to the District of Columbia for trial. Peckham appeared and waived examination, and gave bail for his appearance in the District of Columbia court to answer the indictments there pending. Subsequently his

sureties surrendered him, pursuant to § 1018, Rev. Stat., whereupon the commissioner issued a warrant recommitting him to the custody of the United States marshal for the Northern District of New York. Thereupon he applied to District Judge Ray of that district for a writ of *habeas corpus*, alleging, upon the facts stated, that his detention was contrary to law and in violation of the Constitution of the United States, for that the aforesaid indictments did not charge any crime or offense against the United States. Upon a hearing before Judge Ray the petition was dismissed, the writ denied, and Peckham remanded to the custody of the marshal, and an order made at the same time for his removal to the District of Columbia. From this judgment an appeal was at once allowed to the Circuit Court of Appeals for the Second Circuit. In consequence of this, Judge Ray directed that the execution of the removal order made by him be stayed until the appeal should be disposed of. That stay order was made January 10, 1906, and was still in force when, in November, 1908, the proceedings for his removal to answer the 1908 indictments were had. The pendency of the proceedings for his removal from the Northern District of New York to answer the District of Columbia indictments found in 1905, and of his appeal from the judgment of the Circuit Court for that district, and the order made staying the removal order made in the proceedings referred to, were shown in evidence before the commissioner in the proceedings under review in the present appeal, as a legal obstacle to any order of removal to answer the 1908 indictments, and also as evidence bearing upon the defense of the statute of limitations as a bar to those indictments. The 1905 indictments are for similar offenses to those charged in the later indictments of 1908; but they are not for the same offenses. They charge a conspiracy at a different time and with respect of different cotton reports, and were, therefore, offenses distinct from those included in the later indictments.

But it is said that while the removal proceedings in the Northern District of New York are pending appellant cannot

be removed under the later complaint without disregarding the jurisdiction over his person which first attached by virtue of the prior effort to remove him to the District of Columbia. That Peckham is under bond to appear and comply with the order of removal made by Judge Ray, and, therefore, constructively in the custody of his sureties, must be conceded. But if the performance of the condition of that bail bond is rendered impossible by his removal in these subsequent proceedings, at the instance of the United States, the effect may be to exonerate his sureties. *Taylor* v. *Taintor*, 16 Wall. 371; *Beavers* v. *Haubert*, 198 U. S. 77, 85. But it is said that removal to the District of Columbia is forbidden under Judge Ray's order of January 10, 1906, and that a removal under the order made by the commissioner in the proceedings now under review will invalidate the order of Judge Ray.

This is a fanciful claim. He will not be removed under or in pursuance of the original order of removal, execution of which has been stayed, but under an order made in an altogether distinct and subsequent proceeding to answer distinct offenses.

Finally, it is said that the jurisdiction of the court for the Northern District of New York, having attached to the person of appellant, must be respected as exclusive until its jurisdiction is exhausted.

The rule is one of comity only, and has a wide application in civil cases, but a limited one in criminal cases. See *In re Johnson*, 167 U. S. 120, 125, and *Beavers* v. *Haubert*, 198 U. S. 77, 84. But when, as here, the subsequent proceedings for the removal of appellant are to answer indictments later found for other and distinct offenses, the question is quite a different one, for the "cases" are not the same. That they are "cases" against the same offender is not of itself sufficient to constitute the second proceedings void as an unlawful interference with the jurisdiction of the District Court for the Northern District of New York. The present case differs upon this point from that of *Beavers* v. *Haubert*, in that the consent of the court of prior jurisdiction was not obtained as in that. In that case

the court reserved the question as to "whether the Government had the right of election, without such consent," to proceed in either of the two districts in which indictments were pending. But there is here no question of electing whether to try in the Northern District of New York or in the District of Columbia, but whether it would elect, between the two removal proceedings, the object of each being to remove the appellant to the same place for trial. The institution of the second removal proceeding without the consent of the Circuit Court for the Northern District of New York may very well be regarded as an election by the United States, the plaintiff in both cases to abandon the first complaint. But aside from this, and assuming, without deciding, that the removal proceedings were in disregard of the prior proceedings, and therefore erroneous, the jurisdiction of the commissioner was not affected. No constitutional right of the appellant was invaded. A petition for a writ of *habeas corpus* is not a writ of error. The error, if any, was a mere disregard of a rule of comity, which is not reversible in a proceeding of this character.

In principle, the case is governed by *Beavers* v. *Haubert*, and the final order of the Circuit Court is

Affirmed.

BREWER, J., concurring.

I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be settled by direct action in the court in which the indictments were returned and not in removal proceedings.

MR. JUSTICE MCKENNA concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.

PRICE *v.* HENKEL, UNITED STATES MARSHAL.

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

No. 385. Argued January 7, 1910.—Decided February 21, 1910.

Haas v. *Henkel, ante,* p. 462, followed as to jurisdiction of commissioner under § 1014, Rev. Stat., to remove accused who has also been indicted in the district from which removal is sought.

One good count in an indictment, under which a trial may be had in the district to which removal is sought, is enough to support an order of removal in *habeas corpus* proceedings, *Horner* v. *United States,* 143 U. S. 207, even though accused may be held to bail in the district from which removal is sought on an indictment of which some of the counts are similar.

But an indictment which alleges that the offense was committed in the district where found, does not conclusively destroy the *prima facie* case made in a removal proceeding by the indictment found in the district to which removal is sought and which alleges that the offense was committed therein, and if the commissioner also heard evidence upon which he based his decision, that decision is not open to review in *habeas corpus* proceedings.

In this case the independent evidence which was offered to show that accused was not in the district where the indictment was found was not conclusive.

163 Fed. Rep. 904, affirmed.

THE facts are stated in the opinion.

Mr. DeLancey Nicoll, with whom *Mr. John D. Lindsay, Mr. Howard S. Gans* and *Mr. Thomas Staples Fuller* were on the brief, for appellant.

Mr. Jesse C. Adkins, Special Assistant to the Attorney General, with whom *Mr. Assistant Attorney General Fowler* was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

The appellant, Theodore H. Price, was, on March 1, 1909,

committed by a United States commissioner for the Southern District of New York to the custody of the appellee, as marshal for that district, to await an order of removal to the District of Columbia, for trial upon two indictments, numbered respectively 26,088 and 26,089, being two of the indictments considered in the case of *Haas* v. *Henkel*, just disposed of. Price thereupon filed his petition in the Circuit Court of the United States for the Southern District of New York, alleging that his imprisonment was unlawful and in violation of the Constitution of the United States, and praying for a writ of *habeas corpus* and certiorari, and that he might be discharged from such arrest. Upon a hearing, his petition was dismissed and he was remanded to the custody of the marshal. From this order he has prayed this appeal.

This appeal and that of Haas were argued together, the difference between the two being slight. The two New York indictments against Price which he had been held to answer when these removal proceedings were begun were numbered 307 and 308. The first charged him with having entered into a conspiracy with Moses Haas, Edwin S. Holmes, Jr., and other persons unknown, to defraud the United States, and the other charged him with having conspired with Haas to bribe Holmes, an official in the Statistical Bureau of the Department of Agriculture, to violate his duty. These indictments allege the conspiracy to have been formed in the Southern District of New York. They are in all respects similar to the two District of Columbia indictments against the same persons, which lay the *locus* of the conspiracy in the District of Columbia, except that certain counts in the latter indictments charge particular offenses not charged in either of the New York indictments.

It is now insisted that the order of the commissioner committing appellant to the custody of the marshal to await a removal is void:

1. Because § 1014, Rev. Stat., does not authorize a removal from the district where an accused is found when he

is there under bail to answer local indictments for the same offense.

2. That the commitment to await an order of removal was illegal and an abuse of power, because the District of Columbia indictments did not substantially charge any offense against the United States.

3. That the record certified by the commissioner under the certiorari issued by the Circuit Court does not show any evidence justifying a conclusion that there was probable cause to believe that the appellant had committed any crime in the District of Columbia.

As two of the counts included in one of the District of Columbia indictments are for particular offenses, similar in character, but not identical with those covered by either of the two New York indictments, it is apparent that appellant has not been held in New York to answer all of the offenses which he is charged with having committed in the District of Columbia, and could not be brought to trial under the New York indictments for the offenses charged by the fifth and seventh counts of one of the District of Columbia indictments. This alone serves to take the case out of the precise situation presented by the first objection against the order made by the commissioner. If there is one good count under which a trial might be had in the district to which the removal is sought, it is enough to support an order in a *habeas corpus* proceeding. *Horner* v. *United States*, 143 U. S. 207, 214.

But for the reasons already stated in the opinion in the *Haas case*, just handed down, we are of opinion that absolute identity in the two sets of indictments does not operate to defeat a removal, if the Government elect to try in another district, and that the only function of a commissioner before whom a removal complaint is made in such a situation is to be satisfied that there is probable cause to believe that the accused is guilty of an offense charged to have been committed in the district to which the removal is sought. This case, upon this point, as well as upon the point that the two indictments here

involved do not sufficiently charge an offense against the United States, is governed by the opinion and judgment in the *Haas case.*

This brings us to the only question which is not necessarily concluded by the opinion in the *Haas case,* namely, whether there was any substantial evidence before the commissioner upon which he might, in the exercise of his jurisdiction, decide that there was probable cause for believing that appellant had committed, within the District of Columbia, the offenses charged in the indictments against him found in that district.

That at least a *prima facie* case for the removal was made by the introduction of the indictments returned against him in the District of Columbia is not disputable. That much efficacy is attributed to a certified copy of an indictment found in a competent court of another district when put in evidence in a removal proceeding. *Bryant* v. *United States,* 167 U. S. 104; *Greene* v. *Henkel,* 183 U. S. 249; *Hyde* v. *Shine,* 199 U. S. 62; *Beavers* v. *Henkel,* 194 U. S. 73. But the evidence of probable cause afforded by the indictment is not conclusive. For this reason it has been held that the refusal of a commissioner to hear evidence offered for the purpose of showing that no offense had been committed triable in the district to which removal was sought, would be a denial of a right secured under the Constitution. *Tinsley* v. *Treat,* 205 U. S. 20. But in this case there was no closing of the door to evidence offered to show a want of probable cause. Copies of the New York indictments against appellant for many of the same offenses were received in evidence, as tending to show that the conspiring, if any there was, had been done in New York and not in the District of Columbia. Some evidence tending to show that Price was not in the District of Columbia at the time when the conspiracies are charged to have been formed was also introduced. There was also some evidence offered questioning the identity of the appellant with the person accused by the District of Columbia indictments. The probative weight of certified copies of the New York indictments is necessarily

limited to such counts as are identical in the two sets of indictments. This would leave counts five and seven of indictment No. 26,088 unaffected as evidence of probable cause, and justify the order of commitment, although there might be conclusive evidence that the offense charged in the other counts had not been committed in the District of Columbia as charged. *Horner* v. *United States*, 143 U. S. 207.

But it cannot be conceded that the introduction of copies of the New York indictments operated to destroy the evidential effect of the indictments found in the District of Columbia, even as to the identical counts. In the case of *Haas* v. *Henkel* we held that such evidence did not so conclusively destroy the evidence afforded by copies of the District of Columbia indictments as to leave no testimony upon which the commissioner might, upon the whole case, decide that there was proof of probable cause.

The commissioner had before him competent evidence in the certified copies of the District of Columbia indictments upon which he might base a conclusion of probable cause. At most, the New York indictments, together with the evidence tending to prove that appellant had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed, only made an issue which the commissioner had jurisdiction to decide, and when we find from the proceedings before him that he did hear such evidence upon which he might base his decision, that decision is not open for review upon a petition for a writ of *habeas corpus*. *In re Oteiza y Cortes*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104; *Greene* v. *Henkel*, 183 U. S. 249, 261; *Hyde* v. *Shine*, 199 U. S. 62, 84. This is the rule as stated by Mr. Justice Brown, speaking for the court in *Hyde* v. *Shine*, cited above, where it was said:

"In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although, if there is an entire lack of evidence to support the accusation, the court may order his discharge. In this case, however, the

production of the indictment made at least a *prima facie* case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether, upon the whole testimony, there was proof of probable cause. *In re Oteiza*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104. The requirement that the usual mode of process adopted in the State shall be pursued refers to the proceedings for the arrest and examination of the accused before the commissioner, but it has no bearing upon the subsequent independent proceeding before the Circuit Court upon *habeas corpus*. In this case the commissioner did receive evidence on behalf of the appellants, and upon such evidence found the existence of probable cause and committed the defendants, and, upon application to the District Judge for the warrant of removal, he reviewed his action, but did not pass upon the weight of the evidence."

The evidence independent of that afforded by the New York indictments, relied upon to show that appellant was not in the District of Columbia when the conspiracy is charged to have been formed, has been examined. It cannot be said to be at all conclusive. First, it leaves out of consideration the fact that the indictments may be sustained by evidence of a conspiracy formed at dates before the finding of the indictment, other than those named, if not barred by the statute of limitations. *Ledbetter* v. *United States*, 170 U. S. 606, 612. Second, it does not exclude the possibility that the conspiracy may have been formed in the District of Columbia without appellant being physically present when the conspiracy was formed. *In re Palliser*, 136 U. S. 257, 265; *Burton* v. *United States*, 202 U. S. 344, 387; *United States* v. *Thayer*, 209 U. S. 39, 43. In *Burton* v. *United States*, cited above, it was said by this court that "the constitutional requirement is that the *crime* shall be tried in the State and district where committed, not necessarily in the State or district where the party happened to be at the time."

Upon the whole case, we are satisfied that there is not shown that entire absence of evidence, which, upon an appeal

like this, would require us to hold that the decision that there was probable cause was void as not based upon any evidence.

Final order affirmed.

BREWER, J., concurring.

I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be settled by direct action in the court in which the indictments were returned, and not in removal proceedings.

MR. JUSTICE MCKENNA concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.

WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 92. Argued January 19, 20, 1910.—Decided February 28, 1910.

Executive officers are not authorized to entertain and settle claims for unliquidated damages.

The Secretary of the Navy had power under the acts of June 10, 1896, c. 361, 29 Stat. 378, authorizing the building of the "Alabama," and of August 3, 1886, c. 849, 24 Stat. 215, to make a change in the terms of the contract requiring a final release to be given so that such release should not include claims arising under the contract which he did not have jurisdiction to entertain, and under a proviso in the release to that effect the contractors are not barred from

prosecuting their claim before the Court of Claims for unliquidated damages.

In this case a provision in a government contract having been treated by both parties as impracticable and therefore waived, the Secretary had power to change the terms of the release required by the contract, and leave the claims of the contractor to be presented to the Court of Claims. *Cramp & Sons* v. *United States*, 206 U. S. 118, distinguished.

Under the Tucker Act the Court of Claims has jurisdiction of a claim for unliquidated damages under a contract for building a war vessel, where a release had been given by the Secretary of the Navy with a proviso that it does not include claims arising under the contract other than those of which the Secretary has jurisdiction.

43 C. Cl. 202, reversed.

THE facts are stated in the opinion.

Mr. James H. Hayden, with whom *Mr. Robert C. Hayden* was on the brief, for appellant:

The contract did not obligate the claimant to relinquish the claim in suit, or any other claims that might accrue to it for breach of the contract by the United States. The contract itself was not a release of such claims. The acceptance by the claimant of the last payment did not create a bar to the claimant's right of action for the breach committed by the United States.

Performance by the Government of its covenant to supply armor failing, the builder's agreement to release went with it. "If part of the consideration agreed on be not performed, the whole accord fails." *City of Memphis* v. *Brown*, 20 Wall. 289; *Bank* v. *Leech*, 94 Fed. Rep. 310; 1 Smith's Leading Cases, 5th Am. ed., 445.

The elaborate and tautological expressions contained in the fifth paragraph of the release do not overcome the particular words of limitation, contained in the proviso, which limited the operation of the release to claims which the Secretary of the Navy had jurisdiction to entertain. *Texas &c. R. Co.* v. *Dashiell*, 198 U. S. 521.

The Secretary of the Navy and the Cramp Company were correct in the opinion expressed by the former and acquiesced in by the latter that the claim being one for unliquidated damages is of a kind the Department has no authority under the law to entertain. By the saving clause which was finally included in the release they adopted apt words to carry out their purpose to leave the claim in suit open and unsettled. Executive officers of the Government cannot entertain such claims, even when they grow out of contracts made by them. Op. Atty. Gen., ed. 1841, 882. See also *McKee* v. *United States*, 12 C. Cl. 514, 555; *Power* v. *United States*, 18 C. Cl. 263, 275; *McClure* v. *United States*, 19 C. Cl. 18, 28; *Brannen* v. *United States*, 20 C. Cl. 219, 223; *Pneumatic Gun Carriage Co.* v. *United States*, 36 C. Cl. 627, 630.

To give the release or the claimant's acceptance of the last payments the effect claimed for them by the Government and given them by the court below, would be to use them in a way not justified by the terms of the release, or intended by the parties, and would allow the Government to commit a fraud. *Parmlee* v. *Lawrence*, 44 Illinois, 405, 409; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 576, 582. If the terms of the release were obscure, which they are not, it would have to be interpreted in such a way as to carry out the intent of the parties, to be ascertained from the correspondence which passed between them. *United States* v. *Peck*, 102 U. S. 64; *Merriam* v. *United States*, 107 U. S. 437, 441; *United States* v. *Gibbons*, 109 U. S. 200, 203; *Chicago &c. R. Co.* v. *Denver &c. R. Co.*, 143 U. S. 596, 609; *Nash* v. *Towne*, 5 Wall. 689, 699.

The Secretary had legislative authority to make a contract for the construction of the vessel in question and while this was limited in some particulars it was broad. He was as free to exercise his judgment in the modification of the contract as to the release as he was to make the contract in the beginning. *United States* v. *Barlow*, 184 U. S. 123; *Solomon* v. *United States*, 19 Wall. 17; *Redfield* v. *Windom*, 137 U. S.

636. This case is not governed by *United States* v. *Wm. Cramp & Sons*, 206 U. S. 118, known as the "Indiana" case.

It was the builder's right and obviously it was for the best interest of the United States, as well as its own, to proceed with the work as best it could, complete it, and sue for damages caused by the breach. 2 Parsons on Contracts, 679; *Clark* v. *United States*, 6 Wall. 543; *United States* v. *Speed*, 8 Wall. 77; *United States* v. *Behan*, 110 U. S. 338, 344; *Figh* v. *United States*, 8 C. Cl. 319; *Myerle* v. *United States*, 33 C. Cl. 1; *Cornwall* v. *Henson*, 2 Ch. (1900) 298, 300; Hudson on Building Contracts, 1907, 303, 524; *Stubbings Co.* v. *Exposition Co.*, 110 Ill. App. 210; *Nelson* v. *Pickwick Co.*, 30 Ill. App. 333; *Del Genovese* v. *Third Ave. R. R. Co.*, 13 N. Y. App. Div. 412; *S. C.*, 162 N. Y. 614.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Franklin W. Collins* for the United States:

The proviso is not sufficient to confer upon appellant right of recovery.

The failure of the delivery of the armor by the Government within the times and in the order required to carry on the work properly had been fully provided for in the contract in other ways, and had nothing whatever to do either as consideration or otherwise with the release which was required by the contract. While the contract itself may not be a release of such claims as those in suit, it nevertheless provided for a release of all claims growing out of the contract. *Texas &c. R. Co.* v. *Dashiell*, 198 U. S. 521.

While the Secretary of the Navy may have power to direct the modification of a contract during the progress of the work he has not after his discretionary powers have ceased and only a plain ministerial duty remains. The Secretary was clothed with authority to close the contract in a prescribed manner. He could not make the final payment until a full and final release of all claims was given by the contractor, neither could he modify or change the form of release

required by the contract, but this does not conflict with the exercise of his discretionary powers in respect to changes and modifications while the work was in progress.

The courts will not assume to make a contract for the parties which they did not choose to make for themselves. *Morgan County* v. *Allen*, 103 U. S. 515; *Hudson Canal Co.* v. *Penna. Coal Co.*, 8 Wall. 276; *Gavinzel* v. *Crump*, 22 Wall. 308; *Robbins* v. *Rollins*, 127 U. S. 633; *Culliford* v. *Gonillo*, 128 U. S. 158; nor is the court at liberty either to disregard words used by the parties or to insert words which the parties have not made use of. *Harrison* v. *Fortlage*, 161 U. S. 63; *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 280.

Contracts are to be construed according to the intention of the parties as expressed therein, and the courts will disregard the motives, the purposes, or the expectations of a party thereto if these are not in harmony with the plain import of the words used. See 54 Texas, 65; *Clark* v. *Lillie*, 34 Vermont, 405; *Noyes* v. *Nichols*, 28 Vermont, 159; *Conn* v. *Lewis*, 15 Kentucky, 66; *Hildreth* v. *Forrest*, 27 Kentucky, 217; *Shultz* v. *Johnson*, 44 Kentucky, 497; *Salmon Falls Mfg. Co.* v. *Portsmouth Co.*, 46 N. H. 249.

Mr. Justice Brewer delivered the opinion of the court.

On September 24, 1896, the appellant entered into a contract with the United States for the building of an ironclad, afterwards known as the "Alabama." The contract was authorized by act of Congress of June 10, 1896, c. 399, 29 Stat. 361, 378. Under this act and that of August 3, 1886, c. 849, 24 Stat. 215, to which it refers, the Secretary of the Navy was charged with the duty of supervising the contract on behalf of the United States. After the completion of the vessel and the payment of the stipulated amount there was something asserted to be due to the building company as unliquidated damages on account of extra work caused by the United States, for which it brought suit in the Court of Claims. That

court found the amount to be $49,792.66. Relying upon the decision of this court in a case between the same parties for also the building of an ironclad, the "Indiana," *United States* v. *Wm. Cramp & Sons Co.*, 206 U. S. 118, the Court of Claims rendered judgment for the defendant. The controversy in this, as in the prior case, turns upon the effect of a release. In that it was in this form:

"The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby for itself and its successors and assigns, and its legal representative, remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid."

Here the same terms of release are used, but they are followed by this proviso:

"Provided, that this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain."

That release was executed on May 18, 1896; this on April 19, 1901. We held that the former release settled all disputes between the parties as to claims "under or by virtue" of the contract. Evidently the proviso was incorporated with the purpose of accomplishing some change in the effect of the release. That purpose is disclosed by prior correspondence. On February 13, 1901, the Secretary of the Navy, answering a letter enclosing a claim for extra work of $66,973.23, writes:

"I have to state that while, from a casual consideration of the matter, it might seem proper that the papers should be referred to the bureaus concerned for examination and report, it appears, after a careful consideration of the subject, that the claim, being for unliquidated damages, is of a kind the department has no authority under the law to entertain."

To which the company replied, suggesting this proviso:

"Provided, That nothing herein shall operate as a waiver of this company's right to sue for and recover judgment in the Court of Claims for damages incurred or losses sustained by the company in the prosecution of the contract work which were occasioned by delays or defaults on the part of the United States"—

and adding, in response to the statement of the Secretary, "that the claim being for unliquidated damages, is of a kind the department has no authority under the law to entertain;" that the act of March 3, 1887, c. 359, 24 Stat. 505, known as the "Tucker Act," vests the Court of Claims with jurisdiction to hear and determine such claims. Some further correspondence followed between the parties, which culminated in a letter from the company, enclosing the release as finally executed, and saying:

"This (release) contains a clause which excepts from the operation of the release claims arising under the contract, which you, as Secretary of the Navy, had not jurisdiction to entertain."

It is well understood that executive officers are not authorized to entertain and settle claims for unliquidated damages. Opinion of Attorney General Taney, in which he says:

"If the navy commissioners have refused to take the bread from Mr. Stiles, according to their contract, when he had prepared it of the quality called for by the agreement, it is not in the power of the executive branch of the Government to liquidate and pay the damages he may have sustained. If he has been damnified by the officers of the Government, Congress alone can redress the injury." (Opinions, ed. 1841, p. 882); *McKee* v. *United States*, 12 C. Cls. 504, 555–558.

In *Power* v. *United States*, 18 C. Cls. 263, 275, the court thus discussed the matter:

"The Secretary of the Interior concurred in the opinion that the claimant was equitably entitled to damages, and that he should be invited to furnish proof of the extent of his injury; but did not agree that the damages could be adjusted in

the department. He proposed to submit the case to Congress.

"In this conclusion that the department had no authority to settle such a claim the Secretary was right. The laws regulating the payment of money from the Treasury, in the current business of the Government, are reviewed at length by our brother Richardson in his opinion in *McKee's Case*, 12 Ct. Cl. R. 555. He shows clearly that the laws provide only for the settlement and payment of accounts. An account is something which may be adjusted and liquidated by an arithmetical computation. One set of Treasury officers examine and audit the accounts. Another set is entrusted with the power of reviewing that examination, and with the further power of determining whether the laws authorize the payment of the account when liquidated. But no law authorizes treasury officials to allow and pass in accounts a number not the result of arithmetical computation upon a subject within the operation of the mutual part of a contract.

"Claims for unliquidated damages require for their settlement the application of the qualities of judgment and discretion. They are frequently, perhaps generally, sustained by extraneous proof, having no relation to the subjects of the contract, which are common to both parties; as, for instance, proof concerning the number of horses and the number of wagons, and the length of time that would have been required in performing a given amount of transportation. The results to be reached in such cases can in no just sense be called an account, and are not committed by law to the control and decision of Treasury accounting officers.

"As is well said by Judge Richardson, in the opinion already referred to (12 C. Cls. 556), this construction 'would exclude claims for unliquidated damages, founded on neglect or breach of obligations or otherwise, and so, by the well-defined and accepted meaning of the word 'account' and the sense in which the same and the words 'accounting' and 'accounting officers' appear to be used in the numerous sections of the

numerous acts of Congress wherein they occur, it would seem that the accounting officers have no jurisdiction of such claims except in special and exceptional cases, in which it has been expressly conferred upon them by special or private acts. And such has been the opinion of five Attorneys General—all who have officially advised the executive officers on the subject. Attorney General Taney, in 1832, whose opinion is referred to by his successors in office; Attorney General Nelson in 1844 (4 Opins. 327); Attorney General Clifford in 1847 (4 Opins. 627); Attorney General Cushing in 1854 (6 Opins. 524); and Attorney General Williams in 1872 (14 Opins. 24). And the same views were expressed by this court in 1866 (*Carmack et al.* v. *United States*, 2 Ct. Cl. R. 126, 140.)' *McClure* v. *United States*, 19 *Id.* 28–29; *Brannen* v. *United States*, 20 *Id.* 219, 223–224; 4 Opin. Attorneys General, 327–328; *Id.* 626, 630."

But it is contended that the contract, independently of the release, provided for a settlement of all matters growing out of the delay in the completion of the vessel, although this is in apparent conflict with the opening statement of the Government in its brief, for there it says: "The issue here is whether the proviso in that release saves the contractor from the final and complete surrender of his right to recover on the claims set out in the petition." But this, although it indicates the views of the Government of the question at issue, does not preclude it from presenting other matters, and it insists that by the third clause in the contract, the vessel, when completed without the armor, was to be subjected to a trial provided for in a subsequent clause of the contract, and a board of naval officers appointed by the Secretary of the Navy was to determine the deduction from the total price of the vessel under the contract if completed with armor. It further contends that by the ninth clause of the contract the matter of possible delay was recognized by the Secretary of the Navy, and his determination as to the effect thereof was to be conclusive. Now it may be said that both the contractor and the Government had the right to insist upon the

delivery of the vessel when it was completed without the armor, and that the deduction in price should then be settled by the board of officers appointed by the Secretary. It may also be conceded that the Government could have insisted upon a release in the form specified in the contract, but neither the company nor the Government insisted on the delivery of the vessel at the time it was launched and before it was armored. The Government left the vessel with the company, waiting for armor to be put on—armor which it had not then been able to secure and tender to the company, and when the question arose as to a settlement it did not insist upon a release as specified in the contract. This contract was plainly treated by both parties as impracticable, and therefore waived. Evidently from his letter of February 13, 1901, the Secretary was of the opinion that, equitably, there was something due to the company, and yet, realizing that that question was not one for his determination, in order that full justice might be done, he consented to a change in the terms of the release, and this he had power to do. *Salomon* v. *United States*, 19 Wall. 17; *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *United States* v. *Barlow*, 184 U. S. 123, 135.

By the "Tucker Act" jurisdiction is conferred upon the Court of Claims "to hear and determine . . . all claims . . . for damages, liquidated or unliquidated, in cases not sounding in tort."

It results therefrom that a release executed in accordance with the terms of the contract would have extinguished all claims of the company against the United States growing out of the contract (206 U. S. 118); that the Secretary of the Navy had no power to pass upon and adjudicate claims for unliquidated damages; that he had power to accept a release such as was given, and that the proviso left for determination in the courts claims for unliquidated damages growing out of the contract; that under the Tucker Act the Court of Claims had jurisdiction to inquire into and determine claims for unliquidated damages, and that upon the facts found there

is due to the company from the United States for extra work caused by the United States the sum of $49,792.66.

The judgment of the Court of Claims is reversed and the case remanded to that court, with instructions to enter judgment for that amount.

J. J. McCASKILL COMPANY *v.* UNITED STATES.

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

No. 103. Argued January 25, 1910.—Decided February 28, 1910.

In this case it was held that the averments set forth in the bill of fraud and perjury in *ex parte* proceedings before the land office were sufficient to give a court of equity jurisdiction of a suit brought by the United States to cancel a patent.

In this case the testimony sustained the averments of the bill that the patent was obtained by fraud.

The rule that courts will not review decisions of the Land Department on questions of fact or reverse discretion properly exercised does not prevent the courts from setting aside a patent obtained by fraud upon the Department.

The presumption that a corporation is, in law, an entity distinct from its stockholders and officers cannot be carried so far as to enable the corporation to become a means of fraud; and knowledge of fraud on the part of the officers, who are also the principal stockholders and whose interests are identical, is properly to be imputed to the corporation itself.

In this case the testimony of an agent of the General Land Office as to conversations and admissions made by the entryman, with knowledge that he was a government officer seeking the facts as to the settlement of the land, was properly admitted, as was also the report made by such officer who testified as to the facts recited therein.

When testimony is admitted, but is not followed up by other testimony necessary to give it effect, this court will assume that the court below attributed to it no probative strength.

THE facts are stated in the opinion.

Mr. W. W. Flournoy for appellant.

Mr. Assistant Attorney General Russell for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was brought by the United States to cancel a patent issued to one William Josiah Ward and a deed made by him and his wife to J. J. McCaskill & Company, and by the latter to the J. J. McCaskill Company, the appellant. The allegations of the bill are that the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 8, township 1 N., 17 W., in the county of Walton, State of Florida, being public lands of the United States, William Josiah Ward, on the eighteenth of September, 1900, filed his application upon them for a homestead in the land office in Gainesville, Fla. That he subsequently commuted the entry by paying the Government price therefor, making proof of settlement, cultivation and improvement for the period of time required by law, and that on January 13, 1903, a cash entry certificate No. 18,026 was issued to him and a patent on the third of June, 1903. It is alleged, with detail of circumstances, that the statement of Ward and the proof presented by him on the hearing for final proof were false, fraudulent and untrue. The allegations will be given later. The bill further alleges that the land embraced in the patent was conveyed by Ward to J. J. McCaskill & Company (the bill as originally filed alleged that the conveyance had been made to the McCaskill Company), a copartnership composed of J. J. McCaskill and E. L. McCaskill, then engaged in the manufacture of lumber at Freeport, Fla. That they afterward incorporated by the corporate name of the J. J. McCaskill Company, with the said J. J. McCaskill as president and Robert E. L. McCaskill as secretary, owning a large majority of the stock of the corporation, with the entire manage-

ment and control of its business and affairs. That the company took over from the said J. J. McCaskill or J. J. McCaskill & Company the homestead entry of Ward, with full knowledge of its president and secretary of the negotiations between the company and the entryman by Warren Ward, an agent of the company, "and with all the knowledge and notice of the said McCaskill & Company of the fraud and duplicity practiced by William Josiah Ward in obtaining the patent from the United States."

The answer of the company alleged that conveyance was made by William Josiah Ward to J. J. McCaskill after the patent was issued for the sum of four hundred and twenty-five dollars; that McCaskill, for a valuable consideration, sold and conveyed the same to the McCaskill Company; that the conveyance was made in good faith, without notice or knowledge of any kind whatsoever of any irregularity or fraud upon the part of Ward, if any there was, and that he was a *bona fide* purchaser of the property; and that the company was a *bona fide* purchaser, for a valuable consideration from J. J. McCaskill, and without knowledge or notice of any irregularity or fraud practised by Ward. The usual replication was filed and an examiner was appointed to take the proofs on the issues made.

Upon report to the court a decree was entered overruling the objections of the company to the evidence and the motion to strike it out, and adjudged and decreed that the patent be declared null and void, and that it be surrendered by the company, the decree finding it to be in its possession, to the clerk of the court, to be inscribed by him "null and void." It was further adjudged and decreed that the deed from William Josiah Ward to J. J. McCaskill & Company and the deed from the latter to the J. J. McCaskill Company be vacated and annulled, and the company be enjoined forever from setting up or claiming title to the land by reason of the patent or any of the conveyances from Ward. The decree was affirmed by the Circuit Court of Appeals.

There are twenty-three assignments of errors, eighteen of which are addressed to rulings on evidence and five attack, in general terms, the decree cancelling the patent and the conveyance by Ward. These five were alone discussed in the oral argument and in the brief on file under the following divisions:

"1. Are the averments of the bill of complaint sufficient to give the court of equity jurisdiction?

"2. Do the facts proved by the Government sustain the averment that the final proof of the entryman was false, fraudulent and untrue?

"3. Will this court review decisions by the land office officials upon questions of fact?

"4. Does the appellant occupy the position of an innocent purchaser and is the Government precluded because of his rights as such?"

1. To support the first proposition it is urged that the bill does not allege the facts upon which the charge of fraud in obtaining the patent was based and therefore "presents no issue for trial and should fail upon demurrer." But there was no demurrer filed to the bill. The only answer to paragraphs four and five (set out below) was that as to the facts of the former the company was not advised; that as to the facts of the latter it had "no knowledge," and denied, therefore, that they were true, and demanded strict proof of them. The first and only explicit objection to the bill for insufficiency is made in the brief filed in this court. But, conceding it covered by the assignments of error discussed by counsel and entertaining it, we think that it is without foundation. The following are its averments:

"Your orator shows unto your honor that the said William Josiah Ward, in the commutation proof taken on the 29th day of December, 1902, alleged himself, and made it appear by the testimony of others, that he had established a residence upon said land on March 10th, 1901, and that he continuously resided thereon from that date until and up to the date of submission of final proof, except for absences on two or three

occasions of not exceeding three months, due to the illness of his wife; that he had improved the tract by erection of a house thereon and by cultivating one-half acre for two seasons, and the whole amount of improvements being alleged to be of the value of forty ($40.00) dollars, and that he had complied with the law entitling him to a patent to said lands.

"Your orator further shows unto the court that the statement of the said Ward and the proof presented by him on the hearing for final proof was false, fraudulent and untrue; that he did not have the improvements that he alleged that he had on said premises, and had not cultivated the said land; that the improvements accomplished on said entry consisted of nothing more than a pine-pole cabin, never completed, without floor, door or chimney; that there was absolutely no means of entrance or exit thereto or therefrom, unless through the unenclosed gable ends of said cabin; that the interstices between the poles of said cabin were never closed in any fashion; that the only ground on said entry which had undergone cultivation was a space within an enclosure of thirty by thirty-five feet; that the said Ward never resided upon said land, but during the period allowed for residence on the homestead entry, entryman actually resided at his home, where for a long time he had maintained his residence, three and one-half miles distant from said entry."

Appellant relies for its contention upon *United States* v. *Throckmorton*, 98 U. S. 61; *Vance* v. *Burbank*, 101 U. S. 514; *United States* v. *Maxwell Land Grant*, 121 U. S. 325, and other cases of like kind. We will not take the time to review them. It is enough to say that it was pointed out in *United States* v. *Minor*, 114 U. S. 233, that they do not apply to a case like that at bar, where the charge is that there was fraud and perjury in *ex parte* proceedings before the land office. See also *United States* v. *San Jacinto Tin Company*, 125 U. S. 273; *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *Iron Silver Mining Company*, 128 U. S. 673; *Colorado Coal Company* v. *United States*, 123 U. S. 307; *United States* v. *Beebe*, 127

U. S. 338; *United States* v. *Budd,* 154 U. S. 15; *United States* v. *American Bell Company,* 167 U. S. 224.

2. This division involves the sufficiency of the evidence to sustain the decree. The argument at bar has not kept this division separate from the first or the first from it. They are manifestly different. The first concerns the sufficiency of the bill, this the sufficiency of the evidence. In other words, whether the evidence has established the averments of the bill, assuming them to be sufficiently specific, by clear and satisfactory proof. And it may be conceded that that is the degree of proof that the cases require. It was said in *United States* v. *Maxwell Land Grant, supra,* "that when a court of equity is asked to set aside a patent for fraud or mistake, the testimony on which this is done must be clear, unequivocal and convincing, and cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

Does the case at bar fill the measure of proof required by the cases? In this inquiry we start with the finding of the two lower courts in the affirmative. Appellant attacks the finding, but, as we have said, does not keep the discussion of this inquiry separate from the consideration of the sufficiency of the bill. In both stress is put upon the same proposition. It is contended that the allegations of the bill that the proofs submitted by Ward to the land office were fraudulent and untrue was a mere legal conclusion, and that besides it was solely the province of the land office officials to determine such matter, and "thus may, in their discretion, issue patents to persons upon evidence of improvement and cultivation of greater or less value and extent, the extent in value of the improvement being solely in their discretion." It is further argued that "the statutes governing the disposition of the public lands required neither a limited amount of improvement nor an absolute continuous residence," and "that when an entryman has clearly set forth the amount of the improvements, however small, and the department has issued a patent thereupon, then the question of the amount, or extent, is for-

ever put at rest." The purpose of the law, it is further argued, "is to give a part of the public domain to the poor man, and that therefore temporary abandonment, for the purpose of earning a livelihood or support his family, or to secure funds with which to make improvements, or on account of sickness, as in the case at bar, is permissible." The value and amount of improvement, it is finally urged, is immaterial except to detract from the good faith of the entryman, "and then only when accompanied with evidence of the ability of the entryman to make more improvements than in fact were made." These tests may be accepted, *arguendo*, and the fraud of Ward is established.

The averment of the bill is that he deceived the land office by false testimony of the extent of his improvements, cultivation and residence, and secured his patent by that deception. In other words, that the judgment and discretion of the land office were invoked, not upon the actual extent of his improvements, cultivation and residence, but upon a misrepresentation of their extent. See *United States* v. *Minor*, *supra*.

It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the "application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person." That applicant will honestly endeavor to comply with the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a *home*, and to secure the gift the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses.

Residence and cultivation of the land are the price that is exacted for its payment. It is in the power of the settler to modify the terms somewhat. He may substitute for a residence and cultivation for five years a residence and cultiva-

tion for not less than fourteen months, but he must make "proof of settlement and of residence and cultivation for such period of fourteen months," and pay the price provided by law for the land entered. This is known as the "commutation" of his homestead entry.

In view of these provisions of law we may judge of what Ward did. He entered the land as a homestead, and on the eighth of September, 1900, filed the affidavit required, stating that he made his application honestly and in good faith, for the purpose of actual cultivation and settlement, and not for the benefit of any other person. On the twenty-ninth of December, 1902, he produced two witnesses to establish his residence, cultivation and character of his improvements, one of whom testified that he was well acquainted with Ward and the land embraced in Ward's claim; that it was "low piney woods land, very wet in rainy seasons." His testimony as to Ward's residence and cultivation of the land is best exhibited by the following questions and answers:

"Q. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

"A. About the 9th of March, 1901.

* * * * * * * *

"Q. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon?

"A. I don't think they have continuously. I have seen them absent from it a time or two.

"Q. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and, if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

"A. I have known of their being absent a time or two, but he has not been off of it over three months at the longest period. His wife is very feeble, and the land is so low and wet that, on account of her health as well as to make a support, he was compelled to be absent. I presume he has been on it nearly every week."

The other witness was even more definite. Answering a question as to the continuity of the residence of Ward and his family on the land, he said that he could not say "whether continuous or not, have not been there all the time, they were there every time I have been there, but on one or two occasions have seen them off the land." And further, as to the absence of Ward and his family, he said: "I don't know exactly how long, but am satisfied they have not been absent over six months at the longest for the purpose of making a support, and on account of the land being so low and wet and unfit for cultivation." Both witnesses gave the extent of cultivation to be one-half acre for two years and the improvement to consist of a house and garden of the value of forty or fifty dollars.

Ward himself testified that he established his residence on the tenth of March, 1901, and that his improvement consisted of a small dwelling house and a garden of about one-half acre of land, worth about forty dollars. He testified further as follows:

"Q. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon?

"A. Myself and wife. No, not continuously; that is, not every day and night.

* * * * * * * *

"Q. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and, if temporarily absent, did your family reside upon and cultivate the land during such absence?

"A. Was absent two or three times, not over three months at longest period, on account of my wife's health. She is very feeble, and the land is so low and wet, that it was impossible to keep her on the place all the time."

And he further testified that he had not sold, conveyed or mortgaged any portion of the land. This testimony would have established, if true, that Ward with his family took up

his residence on the land on the tenth of March, 1901, that his improvement consisted of a small dwelling house, fit for habitation, and a garden of one-half acre, cultivated two seasons, and that after making his settlement he was absent only "two or three times, not over three months," at longest, "on account of his (witness') health." This was the testimony upon which the land department acted. What is the evidence in this case? His two sons never saw him on the land, but always saw him at his residence, four or five miles from the land. He testifies himself that he never moved his family there; that the house was built of pine poles, was twelve by fourteen in dimensions, had no floor, no chimney, no "ceiling or boards on between the poles or the interstices;" that he fenced and cultivated "a small piece, not larger then the house," and this was enclosed by rails and poles and planted two years. His residence upon the land is described in the following questions and answers:

"Q. Did you ever have your family there on any night? Ever spend any night with your family there?

"A. I stayed there at night myself. My wife did not go there. She was very sickly.

"Q. About how many nights in the week did you spend there?

"A. I do not think I stayed in the same week more than one night in the week."

And there is other testimony showing that the house was unfit for habitation. A special agent of the General Land Office inspected the place. He found, he said, "a little pole cabin, 11x13, not completed, and there was no door to go in and out of. There was no window, no chimney, the openings between the poles were not closed, the gable ends were not closed." He further testified that there was no evidence of any residence or habitation there at all. And further, "there was a little enclosure, 30x35 feet, a little amount that was about a quarter of a mile from the house." This witness also testified to the conversation with Ward, in which the latter told

him that he (Ward) had not lived on the homestead entry, and that he thought that he was going to lose it. We think that this testimony sustains the averments of the bill that the patent was obtained by fraud. This is not a case where the courts are undertaking to review the decisions of the land office officials on questions of fact nor to reverse their discretion properly exercised. It is a case of fraud upon them and obtaining a patent by means of that fraud.

Does appellant occupy the position of the innocent purchaser, and is the Government precluded from receiving the relief prayed for in the bill because of such fact? The answer to the question depends upon a proposition of law, and whether J. J. McCaskill had knowledge of the fraudulent acts of Ward. This knowledge was, in effect, found by both the lower courts, and, giving to their finding the strength that should be accorded to it, we pass to the consideration of the proposition of law that the knowledge of J. J. McCaskill, though president of the McCaskill Company, cannot be imputed to it because, as appellants' argument is, while the knowledge of an agent is the knowledge of the principal, an "exception to the rule is that if the agent is acting in a matter in which he has a personal interest, or in communication with which he is interested with a third person, the presumption is that he will not communicate the facts in controversy." And it is urged that "the rule should be more rigidly applied in cases of fraud or torts." For these propositions appellant cites *Clark* v. *Metropolitan Bank*, 3 Duer (N. Y.), 241; *Frenkel* v. *Hudson*, 82 Alabama, 162; *Allen* v. *South. P. R. R. Co.*, 150 Massachusetts, 200; *Innerarity* v. *Mer. Natl. Bank*, 139 Massachusetts, 332; *Atlantic National Bank* v. *Harris*, 118 Massachusetts, 147; *Loring* v. *Brodie*, 134 Massachusetts, 453; *Hightstown* v. *Christopher*, 40 N. J. L. 435.

Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen

against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it when their interest is adverse their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, §§ 663, 664 and 727. The principle was enforced in this court in *Simmons Creek Coal Company* v. *Doran,* 142 U. S. 417. In that case a corporation claimed title to land through a deed of its corporators, one of whom became its president. Of the effect of this the court said: "Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators, and the president was the knowledge or notice of the company, and if constructive notice bound them it bound the company."

The case at bar is within the principle. The bill alleges that J. J. McCaskill and Robert E. L. McCaskill were copartners and engaged in the manufacture of lumber at Freeport, Fla. They incorporated this business, it is alleged, under the laws of Florida, "by the corporate name of J. J. McCaskill Company, with the said J. J. McCaskill as president and the said Robert E. L. McCaskill as secretary, owning a large majority of the stock of said corporation, with the entire management and control of the business and affairs of said corporation." There is no denial of this allegation. The interest of the corporators and the corporation thus shown to be identical, not adverse, we think the ruling in *Simmons Creek Coal Company* v. *Doran* is applicable.

This discussion disposes of the five assignments of error which were presented at the oral argument. The other assignments of error are based on rulings upon the admission of evidence.

These assignments are grouped by counsel in two classes: (1) one to three being based upon the action of the trial court in admitting the testimony of Antonine Paul, which we have given; (2) four to eighteen attack the ruling of the court in admitting testimony of the purchase by the company of other homestead claims.

To support the contention that the court erred in its ruling admitting the testimony of Paul it is urged that no foundation had been laid for it by an indication of time, place and circumstances. The record shows that these conditions were satisfied. The witness' attention was drawn to the statement by him to Paul, and he himself testified that it was made at his dwelling house, and testified that he signed the statement.

It is clear, therefore, that the witness was given opportunity to explain. The circumstances and occasion of making the statement were drawn to his attention and the person to whom it was made. He knew that Paul was a Government agent, seeking the exact facts as to his, the witness', settlement upon the land. He could not have underrated the importance of the relation of the statement to his testimony and the necessity of a clear explanation of it.

The statement was made the basis of a report to the land office and was introduced in evidence over the objection of the company's counsel. This seems more to have been done for a connected statement of the facts than for proof of them. The facts were testified to by Paul. We cannot see that there was prejudicial error in the ruling of the court.

The assignments of error in the second class are also without merit. The purpose of the testimony of other transactions, counsel say, was "to show a systematic course of dealing by McCaskill, such as would support a contention that he had guilty knowledge of whatever fraud might exist in the procurement of the patent in litigation." It is admitted that the testimony was competent for such purpose, but it is contended it should have been accompanied by evidence showing that such other transactions were false and fraudulent, and this,

it is insisted, was not done. If so, the testimony was harmless. In other words, if the testimony was not followed up by other testimony which was necessary to give it effect we may assume that the court below gave to it no value or probative strength. It must be kept in mind that the case was tried by the court.

Decree affirmed.

BOARD OF ASSESSORS OF THE PARISH OF ORLEANS, THE CITY OF NEW ORLEANS, *v.* NEW YORK LIFE INSURANCE COMPANY.

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

No. 112. Argued January 27, 1910.—Decided February 28, 1910.

Where a policy-holder simply withdraws a portion of the reserve on his policy for which the life insurance company is bound, and there is no personal liability, it is not a loan or credit on which the company can be taxed as such, and this is not affected by the fact that the policy-holder gives a note on which interest is necessarily charged to adjust the account.

To tax such accounts as credits in a State where the company has made the advances would be to deprive the company of its property without due process of law. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, distinguished.

Even if a State can tax a bank deposit that is created only to leave the State at once, a statute purporting to levy a tax upon all property within the State should not be construed, in the absence of express terms or a direct decision to that effect by the state court, as intending to include such a deposit; and so held as to the statute of Louisiana involved in this case.

158 Fed. Rep. 462, affirmed.

THE facts are stated in the opinion.

Mr. Geo. H. Terriberry, Mr. H. Garland Dupre and *Mr. Harry P. Sneed* for appellants:

The property here taxed falls under "credits" and "cash"

to which the terms of the act apply. The case is on all fours with *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; although complainant seeks to make a subtle distinction.

The term "loan" has not been applied to these transactions by the taxing power, but by complainant itself. It calls them loans. As to what are loans, see *Freeman* v. *Brittin*, 17 N. J. Law (2 How.), 231; *Omaha Bank* v. *Mutual Benefit Co.*, 81 Fed. Rep. 938; *New York Life Ins. Co.* v. *Curry*, 61 L. R. A. (Ky.) 270; *Union Cent. Life Ins. Co.* v. *Burn*, 49 L. R. A. 747; *N. Y. Life Ins. Co.* v. *Pope*, 68 S. W. Rep. 853; and see 80 S. W. Rep. 412; *Steele* v. *Conn. Life Ins. Co.*, 31 App. Div. 389; *Rodman* v. *Maxson*, 13 Barb. (N. Y.) 75, citing McCullough's Com. Dictionary, 96; Webster's Dictionary, and 2 Black. Com. 454. See also Standard Dictionary, *verbo* "Loan"; March's Thesaurus Dic. of Eng. Language, p. 619; Standard Dictionary, *verbo*, "Interest," third definition; Bouvier's Law Dict. *verbo* "Loan"; also see 7 Pet. 107.

In this case money is delivered from the company to the assured; there is an obligation to return this money in one of two ways; and interest is paid.

The payment is to be made in either cash or by forfeiture of the policy. As to the taxability of these loans see *Alabama Gold Life Ins. Co.* v. *Lott*, 54 Alabama, 499, 505. These transactions are loans, and, as such, taxable. Whether it is good governmental policy to tax them is a question for the legislature, and not for the courts. See *Travelers' Ins. Co.* v. *Assessors*, 47 So. Rep. 439.

The construction of a state statute by the Supreme Court of that State is binding upon this court to the extent of the precise question decided, but not further. *Southern R. Co.* v. *Simpson*, 131 Fed. Rep. 705, and 16 How. 275; 85 Fed. Rep. 180, 123 Fed. Rep. 480; but *obiter dicta* of the state court as to facts in a case which was never brought before it, and the record of which its members never saw, are entitled to no weight.

Foreign corporations doing business in Louisiana are taxable

upon their "credits, money loaned, bills receivable." *Electric Co.* v. *Assessors,* 121 Louisiana, 116; *National Ins. Co.* v. *Assessors,* 121 Louisiana, 108; *Liverpool & L. & G. Ins. Co.* v. *Assessors,* 122 Louisiana, 98; *N. E. Mut. Life Ins. Co.* v. *Board &c.,* 121 Louisiana, 1068; *Travelers' Ins. Co.* v. *Same,* 122 Louisiana, 129; *U. S. Fid. & Guar. Co.* v. *Same,* 122 Louisiana, 139; *Standard Ins. Co.* v. *Same,* 123 Louisiana, 717; *Orient Ins. Co.* v. *Same,* not yet reported.

"Cash on hand and in bank" belonging to complainant is, under the *Travelers' case, supra,* taxable by the statute, and no Federal constitutional provision interferes therewith.

The legislature has the power to tax these loans. The company can be sued in Louisiana. Service upon its agent in Louisiana is as effective as upon its president in New York.

The state statute as construed is not unconstitutional, as being in contravention of the Fourteenth Amendment and other amendments to the Constitution of the United States.

There is nothing in the Federal Constitution that prevents a State from prescribing the terms on which foreign corporations shall come within its borders and carry on business with its citizens. 13 Eng. & Am. Encyc. of Law, 2d ed., p. 860; 1 Cooley on Taxation, 3d ed., p. 94; 6 Thompson on Corporations, §§ 7900, 8087; 12 Cook on Corp., 4th ed., p. 1080; Burroughs on Taxation, p. 151; *Paul* v. *Virginia,* 8 Wall. 168, cited in 10 Wall. 573, affirming in 100 Massachusetts, 531; and see also, 99 Massachusetts, 148; 10 Wall. 415; 94 U. S. 535; 113 U. S. 739; 143 U. S. 314; 166 U. S. 154; *Parke, Davis & Co.* v. *New York,* 171 U. S. 658; *Metropolitan Life Ins. Co.* v. *Assessors,* 115 Louisiana, 708; Beale on Foreign Corporations, p. 654; *Adams Express Co.* v. *Ohio,* 166 U. S. 185; *Algeyer* v. *Louisiana,* 165 U. S. 583; *Hooper* v. *California,* 155 U. S. 648.

The State has power to tax credits, etc., of foreign corporations. *Oliver* v. *Liverpool & London Life & Fire Ins. Co.,* 100 Massachusetts, 531; Gray on Limitations of Taxation, p. 70, § 89; *Armour Packing Co.* v. *Savannah,* 41 S. E. Rep. 237;

Armour Packing Co. v. *Augusta*, 45 S. E. Rep. 424; Hammond on Taxation of Business Corp., par. 29, p. 22; Beale on Foreign Corp., p. 647, § 488; *Monongahela Coal Co.* v. *Assessors*, 115 Louisiana, 567; *State* v. *Hammond Packing Co.*, 110 Louisiana, 186; 1 Cooley on Taxation, 3d (new) ed., p. 92.

Mr. James H. McIntosh, with whom *Mr. Charles S. Rice* and *Mr. Richard B. Montgomery* were on the brief, for appellee:

Property not within the territorial jurisdiction of the State is not subject to taxation therein. *McCullough* v. *Maryland*, 4 Wheat. 316; *Buck* v. *Beach*, 206 U. S. 392; *St. Louis* v. *Wiggins Ferry Co.*, 11 Wall. 423.

The legislature cannot for purposes of taxation acquire jurisdiction over persons or property not within the limits of the State any more than the legislature can confer upon the courts power to acquire jurisdiction in such cases. *Adams Express Co.* v. *Ohio*, 165 U. S. 194. The courts of Louisiana have stated and applied this rule, *Liverpool &c. Ins. Co.* v. *Assessors*, 51 La. Ann. 1028, and the Federal and state courts generally, without exception, have recognized and enforced it. *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Tappan* v. *Bank*, 19 Wall. 490; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Corry* v. *Baltimore*, 196 U. S. 466; *Union Refrigerator Co.* v. *Kentucky*, 199 U. S. 194; *Metropolitan L. I. Co.* v. *New Orleans*, 205 U. S. 395; *Buck* v. *Beach*, 206 U. S. 392; *Augusta* v. *Kimball*, 91 Maine, 605; *Grundy County* v. *Tennessee &c. Co.*, 94 Tennessee, 295; *Bacon* v. *Tax Assessors*, 126 Michigan, 22.

If, therefore, the property in question here was not within the territorial jurisdiction of the State, this tax cannot be sustained.

The property sought to be taxed was not within the territorial jurisdiction of the State. These contracts cannot by legislation or by any act of the appellants be made taxable in Louisiana. *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Buck* v. *Beach*, 206 U. S. 392; see, also, *Bristol* v. *Washington*

County, 177 U. S. 133; *Meyer* v. *Pleasant*, 41 La. Ann. 645; *Liverpool &c. Co.* v. *Assessors*, 51 La. Ann. 760; *Grundy County* v. *Tennessee Ry. Co.*, 94 Tennessee, 295; *Worthington* v. *Sebastian*, 25 Ohio St. 1; *Barber* v. *Farr*, 54 Iowa, 57.

The rule then that credits and choses in action can only be taxed at the domicile of the owner must obtain in this case, unless there is something peculiar about the transaction to take it out of this rule.

The policy loans and the premium lien notes are not loans nor credits in the true and ordinary sense, nor are they a personal liability of the policy-holder; they are an anticipated settlement with the policy-holder based upon the accumulated value of the policy, and in no sense are they taxable property.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity to restrain the collection of a tax from the plaintiff, the appellee, on the ground that the tax is contrary to the Fourteenth Amendment. The plaintiff had a decree and the defendants appealed to this court. 158 Fed. Rep. 462. The tax is based upon an assessment of the plaintiff for credits amounting to $568,900, whereas, the plaintiff says, that it has no credits in the State; and for money on deposit, distinct from what the plaintiff admits to be taxable, amounting to $50,700. There is no dispute about the facts and the issue as to each sum is upon matter of law.

The so-called credits arise out of transactions denominated Policy Loans and Premium Lien Note Loans, which are explained at length by the judge below, but which may be summed up more shortly here. When the plaintiff's policies have run a certain length of time and the premiums have been paid as due, the plaintiff becomes bound ultimately to pay what is called their reserve value, whether the payment of premiums is kept up or not, and this reserve value increases as the payments of premiums go on. A policy-holder desiring to keep his policy on foot and yet to profit by the reserve value that it has acquired, may be allowed at the plaintiff's

discretion to receive a sum not exceeding that present value, on the terms that on the settlement of any claim under the policy the sum so received shall be deducted with interest, (the interest representing what it is estimated that the sum would have earned if retained by the plaintiff); and that on failure to pay any premium or the above-mentioned interest the sum received shall be deducted from the reserve value at once.

This is called a loan. It is represented by what is called a note, which contains a promise to pay the money. But as the plaintiff never advances more than it already is absolutely bound for under the policy, it has no interest in creating a personal liability, and therefore the contract on the face of the note goes on to provide that if the note is not paid when due it shall be extinguished automatically by the counter credit for what we have called the reserve value of the policy. In short, the claim of the policy-holder on the one side and of the company on the other are brought into an account current by the very act that creates the latter. The so-called liability of the policy-holder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs ultimately must pay. In settling that account interest will be computed on the item for the reason that we have mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. In substance it is extinct from the beginning, because, as was said by the judge below, it is a payment, not a loan. A collateral illustration of the principle will be found in *Starratt* v. *Mullen*, 148 Massachusetts, 570, and cases there cited.

Instead of receiving an advance the policy-holder may draw upon the reserve value for a premium due, again giving a note, but the transaction is similar in legal characteristics to that which we have described. It is unnecessary to set out the documents at length, because, although the same language

is not used in all, there is no nice question of construction, no doubt possible as to the effect and import of the contracts. In none of the cases is there a loan and therefore there are no credits to be taxed. In *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, so far as appeared, the Insurance Company made loans, properly so called, to its policy-holders, and the question now before the court was not raised or discussed.

What we have said disposes of the item of $568,900. The other consists of a bank account of $50,700, kept separate from a small account for current expenses, admitted to be taxable. The account in question consists of deposits made solely for transmission to New York and not used or drawn against by any one in Louisiana. We shall not inquire whether it would or would not be within the constitutional possibilities for a State to tax a person outside its jurisdiction for a bank deposit that only became his or came into existence as property at the moment of beginning a transit to him, and that thereafter left the State forthwith. It is enough to say we should not readily believe that the Supreme Court of the State would interpret the statutes of Louisiana as having that intent. See *Metropolitan Life Ins. Co.* v. *Newark*, 62 N. J. Law, 74. The Louisiana cases cited as contrary and as showing the purpose of the legislature to reach such a deposit as this do not seem to us to sustain the appellants' point. *Bluefields Banana Co.* v. *Board of Assessors*, 49 La. Ann. 43. *Parker* v. *Strauss*, 49 La. Ann. 1173. The statute purports to levy a tax upon all property within the State, and enumerates different kinds. Act 170 of 1898. We see no indication that it intended to include under that head property that becomes such only to leave the State at once.

Decree affirmed.

MR. JUSTICE BREWER dissents, believing that the case is controlled by the decision in *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395.

STARKWEATHER *v.* JENNER.

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

No. 114. Argued January 28, 1910.—Decided February 28, 1910.

In this case the charges of fraud and collusion on the part of the defendants are wholly unsupported.

The rule that equity may convert into a trustee a co-tenant who attempts to buy an outstanding hostile title does not apply where the common property is sold at *bona fide* public sale under legal process or power in a trust deed. At such a sale, and in the absence of fraud or deceit, any one of the co-tenants is as free to buy as any of the general public, and several of the co-tenants may combine without notice to the others to purchase for themselves.

A judicial sale for inadequate price resulting from combination of bidders is voidable, not void, and one who would complain must after discovery seasonably elect whether he will avoid it or not. A delay of four years where the property is of speculative character and has largely increased in value meanwhile is unreasonable.

27 App. D. C. 348, affirmed.

THE facts are stated in the opinion.

Mr. Richard P. Evans for appellant.

Mr. B. F. Leighton, with whom *Mr. R. Golden Donaldson* was on the brief, for appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

The appellant, George B. Starkweather, was the owner of a parcel of unimproved land known as the Crescent Heights, in Washington, D. C., composed of two contiguous lots, one of seven and the other of three acres. In January, 1892, pursuant to a plan arranged between himself and certain persons associated with him, and styled herein the syndicate,

he conveyed this tract to defendants Croissant and Johnson, as trustees, for the benefit of the persons who should contribute to the purchase price, as tenants in common, in the share and proportion in which they respectively contributed, with power to control, manage, lease, sell and convey, in their discretion, as should be desirable or advantageous to the parties interested. Those contributing or proposing to contribute agreed among themselves, by a separate paper, that the price, including the discharge of incumbrances resting upon the property, should be $75,000, divided into shares of $2,500 each, and each person accordingly subscribed for such number of shares as they elected to take, agreeing that Croissant and Johnson should represent them as trustees in the purchase, with full power to manage, sell and convey, receiving a commission for their service. Among those so contributing originally, or by substitution, were the trustees Croissant and Johnson, the appellant Starkweather, who was to receive, and did take, eleven shares, fully paid up, as and for part of the purchase price, and the appellee Jenner, who ultimately came to own four of such shares. The full number of thirty shares contemplated were never subscribed, six remaining unsold in the hands of the trustees. This fact, from whatever cause, seems to have led to the inability of the syndicate to pay off the incumbrances which were to be assumed and paid off as part of the price. Among these incumbrances were several deeds in trust or mortgages securing obligations of the vendor appellant.

The certificates to subscribers were issued by Croissant and Johnson, and recited, among other things, that they held the property in trust, and that the holder was a contributor to the purchase price to the extent of $2,500, and the owner of an undivided one-thirtieth interest, and that such interest "shall at all times be subject to assessment for its proportionate part of money necessary to pay expenses incurred in the execution of the trusts as provided in the deed to said trustee, . . . and in default of such payment the said

trustees . . . are hereby authorized to sell the interest of such person so in default," etc.

Out of the money paid in by the subscribers a part was used by the trustees in paying off incumbrances, keeping down interest and in other expenses, but something like eleven thousand dollars was paid over in money to or on account of the vendor Starkweather.

Among the trusts upon the property was a deed in trust upon the seven-acre parcel to the appellees, Duval and Cole, as trustees, to secure an obligation created by Starkweather for $7,553.34 to a Mr. Gaither, executed January 29, 1889, and maturing in four years. In 1893 this debt matured. By agreement the enforcement of the trust was postponed upon payment of interest. But, finally, there was a default and a sale directed by Gaither. The property was, accordingly, advertised by the trustees and sold at public outcry in 1897 and bid in by one Ricker, acting for and as agent of the appellant. The time for complying with the sale by Ricker was extended upon the payment by appellant of $300 for each of two extensions. Default in complying with the terms of sale was, however, again made, and the property readvertised. Appellant attempted to forbid such resale, and filed a bill for that purpose, which was not dismissed until February, 1898, when the property was again advertised and offered for sale by Duval and Cole, the trustees, and knocked down to one Silver, acting as an agent for Starkweather. The terms of this second sale were not complied with, and the property was at once recried and sold to the appellee Jenner for $17,100, acting, as it turned out, for himself and certain others, who, like Jenner, were members of the original purchasing syndicate, or holders of certificates acquired later from those who were. Jenner complied with the terms of sale and paid the full purchase money and accepted a deed from the trustees. After paying off the Gaither debt the remainder of the price paid by Jenner was distributed to other lienors, under a bill in equity filed for that purpose, under which final

decrees have long since been made and the trustees exonerated.

The object of the present bill is to set aside this deed by Duval and Cole to the appellee Jenner, and revest the title in Croissant and Johnson as trustees for the syndicate; or, in the alternative, declare Jenner a trustee holding the seven-acre parcel, after his reimbursement, for the benefit of the syndicate subscribers.

The charges of the bill abound in accusations of fraudulent collusion between Jenner and the other appellees to bring this seven-acre lot to sale under the Duval and Cole trust, and thereby the elimination of appellant as the largest holder of certificates in the syndicate. It is among other things said that Croissant and Johnson wilfully suffered a default. That they had certificates unsold and money in their hands and power to assess the members of the syndicate to raise means to pay off the incumbrance and thus save the property for the benefit of all concerned; but had wilfully and collusively let the property be brought to sale, and in fact, persuaded Gaither or his trustees to proceed under the trust. These charges of collusion or fraudulent conduct upon the part of either Gaither, the creditor, or his trustees, Duval and Cole, are utterly unsupported. Their course was from beginning to end, so far as this record shows, dictated by prudent business conduct, and great consideration for appellant in his natural desire to prevent an enforcement of the trust. So far as Croissant and Johnson are concerned, it is not shown that they had in any way colluded with either the creditor, his trustees, or with the purchaser at the Duval and Cole sale, or that they had the slightest interest in the acquisition of this seven-acre tract by Jenner or his associates. They are not shown to have misapplied the funds of the syndicate, or to have had any funds with which to meet and pay off either the principal or interest of the Gaither debt. That they did not assess the shareholders, as they might have done under the terms of the trust to raise money to

pay off this and other incumbrances, is true. Their excuse is that most of the members could not pay or be made to pay and that all were unwilling to pay. That a sale of their certificates would have been unavailing, as it would have been only to sell the property subject to heavy incumbrances, and a sale of a mere equity. But whether they were derelict or not, they are not shown to have acted in collusion with either Gaither, his trustees, or with Jenner and his purchasing associates.

But it is said that Jenner's relation as tenant in common to appellant and those associated with him as owner of the property sold to pay off this paramount lien, forbid his purchase. That there is such a community of interest between those who hold a common title as to forbid one such co-tenant from acquiring any benefit from the acquisition of an outstanding superior title, is undeniable. That a court of equity upon timely application will convert such a purchasing tenant into a trustee for the common benefit, is true. The doctrine is considered and applied in *Rothwell* v. *Dewees*, 2 Black, 613, and *Turner* v. *Sawyer*, 150 U. S. 578. For much the same reason one tenant may not hold adversely the common property against another, though he may do so, if he act openly, and, in that event, the statute will run in his favor. *Elder* v. *McClaskey*, 70 Fed. Rep. 529, 542.

But it is plain that the principle which turns a co-tenant into a trustee who buys for himself a hostile outstanding title, can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public.

Even a trustee has been held competent to purchase the trust property at a judicial sale, which he has no interest in, nor any part in bringing about, and which sale he in no way controls. *Twin Lick Oil Company* v. *Marbury*, 91 U. S. 587; *Allen* v. *Gillette*, 127 U. S. 589.

But it is said that if there is no absolute prohibition upon one co-owner buying at an open sale of the common property to satisfy a mortgage or other incumbrance thereon, that at least the fiduciary character and common interest due to such a cotenancy require of one who buys the utmost fairness of conduct. Concede this. It is then said, that Jenner at the bidding held a power of attorney from three others of the syndicate members, by which he was to bid the property in for their mutual benefit at the lowest price possible, and at a price not exceeding $24,000. That he held this power of attorney and had undertaken to buy at as low a price as possible was not known to appellant and that this "secret combination," as it is styled and designated, was a fraud upon him. It is plain from the facts of this case that the scheme for exploiting this Crescent Heights property, according to the agreement exhibited by the share certificates, had practically collapsed, and that for the want of means and harmony among the owners there was no practical way of clearing the property from incumbrances, which had turned out to be about $39,000, a sum larger than seems to have been originally supposed. There was nothing left but for the members of the syndicate to put their hands into their own pockets and put in a large additional sum or let the incumbrances be enforced. This latter is just what happened. In such circumstances it was plainly the right of each one to take care of himself, and if he saw fit to buy at the trust sale on the chance of making something, he was free to do so, provided only he took no undue or unfair advantage of his co-owners, and observed the rules concerning fairness at such a sale which prevails in any circumstances. If two or more of those who had been concerned should choose to unite their fortune in a new purchase, there was no principle of law or morals to forbid. That they should agree to buy at the best price obtainable was their right, if they might buy at all, provided they resorted to no artifice to deter others from bidding. *Pewabic Mining Co.* v. *Mason,* 145 U. S. 349.

Mr. Jenner's attitude at the sale was that of an open bidder acting in his own interest, and necessarily in opposition to that of the appellee and other cotenants. There were others present at the sale bidding against him, and chief among them was the appellant himself, who, although he says he intended to give the syndicate the benefit of his purchase, said nothing of it, and seemingly sought to secure himself as best he could in the apparent wreck of the joint enterprise. It was the misfortune of the appellant that he forced the bidding beyond the maximum price to which Jenner was authorized to go, and then was unable to comply with the terms of the sale. This resulted in an immediate reoffering of the property, as was to be expected. That in this second sale the property was knocked down for much less only shows that the former price had been inflated by the competition between these cotenants, each trying to save himself in the same way. That the price at which Jenner bought was probably several thousand dollars less than its then estimated market value, may be true. But it is also true that the property was of a speculative character, and at that time and for some time later was difficult of sale and much depressed. But this price was not so grossly inadequate as of itself to justify relief, even if the bill had been promptly filed. That sale was in February, 1898. This bill was filed in the spring of 1903. That appellant did not at the sale know that Jenner was buying for himself and certain other of the syndicate may be true, but he, confessedly, learned that fact when Jenner and his associates fell out and the fact came to light in a bill filed in December, 1898. At most, the sale was voidable, not void, and he who would complain must seasonably elect whether he will avoid it or not. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587.

Appellant did not act with that degree of promptness which equity demands. He has slumbered over the question of whether he should elect to let Jenner hold on to his purchase or require him to give the benefit of his bargain to his co-

tenants. A delay of not less than four years, during which there has been a large appreciation in the value of the property, is unreasonable. Two courts in succession have failed to find ground for relief, and we see no good reason for reversing the decree from which the appellant has appealed.

It is therefore

Affirmed.

INTERSTATE COMMERCE COMMISSION *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

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

No. 362. Argued February 21, 23, 1910.—Decided March 7, 1910.

Where a statute creates a new right and a commission is given power to extend relief in regard thereto at the instance of a specified class, its power is limited thereto; and so held that the Interstate Commerce Commission has power to compel switch connections with lateral branch roads under § 1 of the act of March 4, 1887, c. 104, 24 Stat. 379, as amended by § 1 of the act of June 29, 1906, c. 3591, 34 Stat. 584, only at the instance, as stated therein, of shippers; it has no power to do so on the application of a branch railroad.

Quære and not decided, whether the railroad on whose behalf the application in this case was made was a lateral branch road within the meaning of the statute.

166 Fed. Rep. 498, affirmed.

THE facts are stated in the opinion.

The Solicitor General for appellant:

Congress had power to require connecting tracks to be installed. The power of Congress to regulate interstate commerce is as broad in its scope as the power of the States

in the regulation of their internal commerce. *Wisconsin, Minn. & Pac. Railroad Co.* v. *Jacobson*, 179 U. S. 287.

The Rahway Valley Railroad Company is, with respect to appellee, a "lateral, branch line of railroad" within the meaning of § 1 of the act to regulate commerce, as amended.

The terms "lateral railroads" and "branch railroads" most frequently occur in condemnation law. They are used to distinguish between mere spurs and sidetracks, which are necessary facilities to aid in the operation of the main line, and tracks which are not necessary to the operation of the main line, but are built as feeders and outlets of the main line. *C. & E. I. Railroad Co.* v. *Wiltse*, 116 Illinois, 449. Ordinarily, the term "lateral railroad" implies a line which serves as a feeder or outlet (or both) to another main or trunk line.

If a railway is not a lateral branch line, it is entitled to a connection in a proper case under § 3 of the act to regulate commerce.

Whether the Rahway Company's right to a connection is based on § 1 or on § 3, the Commission had jurisdiction to hear and decide the controversy under §§ 12, 13, and 14 of the act to regulate commerce; and it also had that power under § 15 of the act.

The legislation is remedial, and consequently it should be liberally construed for the benefit of those to whom rights are given. The right to a connection under proper circumstances is, in terms, conferred upon the lateral roads.

The Commission having power to decide in this proceeding whether the circumstances justify a connection between the tracks of appellee and of the Rahway Company, the propriety of its decision on the facts cannot be reviewed by the courts, for there certainly has been no unreasonable or palpably abusive exercise of the Commission's power. *Interstate Comm. Comm.* v. *Illinois Cent. Railroad Co.*, 215 U. S. 452.

The bill and affidavits filed in support of it fail to show a case for relief on the merits. The conditions which entitle

a lateral road to a connection under § 1 of the act are: That the connection be reasonably practicable; that it can be made with safety; and that it will furnish sufficient business to justify its construction and maintenance. The requirements of § 3 can be no greater. Appellee not only has failed to show that the statutory conditions do not exist, but it likewise has failed to show any necessity for a preliminary injunction.

Mr. William S. Jenney for appellee:

The Rahway Valley Railroad Company is not a lateral branch line of railroad within the meaning of the clause.

Congress was careful to use the limited term "lateral branch line of railroad," in contradistinction to the general term "common carrier," or "railroad of a common carrier," which it has uniformly used in all other sections of the act to refer to railroads generally. Evidently it must have intended to differentiate between the two.

At common law the courts could not compel a physical connection between two railroads, *Wisconsin, M. & P. R. R. Co.* v. *Jacobson*, 179 U. S. 288, and the act left common carriers free to exercise to their full extent, all the rights and privileges they had under the common law, so far as those rights and privileges were not rendered unlawful by the act itself. *Gamble Robinson Mfg. Co.* v. *Chicago & N. W. R. Co.*, 168 Fed. Rep. 161; *Iowa Bridge Co.* v. *L. & N. Ry. Co.*, 37 Fed. Rep. 567.

As to the limitation to be placed upon the words "lateral branch line of railroad," see *Newhall* v. *Galena & C. U. Ry. Co.*, 15 Illinois, 273; *Blanton* v. *Richmond F. & P. Ry. Co.*, 86 Virginia, 618; *Goelet* v. *Met. Transit Co.*, 48 Hun (N. Y.), 520; 33 Cyc. 120; Standard Dictionary, under words "lateral" and "branch."

In fact a lateral branch road is a part of or an offshoot from a main line.

By the clause the Commission is empowered to order a

connection only upon complaint made by a shipper; and the Rahway Valley Railroad Company is not a shipper, within the meaning of the clause.

Congress did not intend to so add to the common law obligations of a carrier as to require it to furnish cars to another carrier connecting or competing with it.

The remedy provided for the enforcement of the right created by the clause, is confined to a proceeding before the Commission, instituted by a shipper, and that remedy is exclusive. *Pollard* v. *Bailey*, 20 Wall. 520; *Dollar Savings Bank* v. *United States*, 19 Wall. 227; *Wheaton* v. *Peters*, 8 Pet. 589; *Farmers' & Mechanics' Bank* v. *Dearing*, 91 U. S. 29; *United States* v. *Perryman*, 100 U. S. 235; *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747; *Banks* v. *Manchester*, 128 U. S. 244; *Thompson* v. *Hubbard*, 131 U. S. 123.

At common law a railroad company was not required to construct a spur track for a shipper located near its line, or to make a physical connection with another railroad. *Jones* v. *Newport News & M. V. Ry. Co.*, 65 Fed. Rep. 736; *Mercantile Trust Co.* v. *Columbus S. & H. R. Co.*, 90 Fed. Rep. 148; *Wisconsin, M. & P. R. R. Co.* v. *Jacobson*, 179 U. S. 288.

The clause in question creates a new right unknown to the common law. It provides the remedy; and that remedy is exclusive and nothing in §§ 12 and 13 of the act affect this rule. *Durant* v. *Albany County*, 26 Wend. (N. Y.) 65; *Janney* v. *Buell*, 55 Alabama, 408; *Farribault* v. *Misener*, 20 Minnesota, 396; Endlich on the Int. of Stat. 10.

Congress gave to the shipper a right to a connection between a main line and a private side track or lateral branch line of railroad on which the shipper might be located. It provided a specific and adequate remedy to enforce that right. If Congress intended to confer the same right to a connection on a lateral branch line of railroad, considered apart from the interests of the shippers along that road, it omitted to provide a specific remedy, which is not a case of failure to accomplish a clearly defined object or to give effect

to an unmistakable intent because of the use of loose, uncertain or ambiguous language, but a plain case of omission.

The courts will not be inclined to ascribe error or mistake to a coördinate branch of the Government. The presumption must be that the legislature acted advisedly, if not wisely. It must be presumed to have intended to omit just what it did in fact omit. See proceedings in Senate on adoption of the clause. Cong. Rec., May 6, 1906, p. 6761; May 17, 7225; and see also pp. 7963, 8158; *Reg.* v. *Treasury*, 20 L. J. Q. B. 312; *Jones* v. *Smart*, 1 T. R. 44; *United States* v. *Goldenberg*, 168 U. S. 95.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by the plaintiff, appellee, to prevent the enforcement of an order made by the appellant, requiring the plaintiff to establish a switch connection with the Rahway Valley Railroad Company's road. 14 I. C. C. Rep. 191. The order was made on June 24, 1908, under the Act to Regulate Commerce, February 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by the act of June 29, 1906, c. 3591, § 1, 34 Stat. 584. Then this bill was brought; the Attorney General filed a certificate that the case was of general public importance; act of June 29, 1906, c. 3591, § 5, 34 Stat. 590; act of February 11, 1903, c. 544, § 1, 32 Stat. 823; the Interstate Commerce Commission demurred; the case was brought up before three circuit judges; a preliminary injunction was issued on the ground that the appellant, the Interstate Commerce Commission, had exceeded its power, and an appeal was taken at once and directly to this court as allowed by the act of 1906. 166 Fed. Rep. 498.

The Rahway Valley road is about ten miles long. It runs southeasterly from Summit through Kenilworth to Roselle, its terminus on the Lehigh Valley Railroad, and also southwesterly from Kenilworth to Aldene, its terminus on the Central Railroad of New Jersey, all the places named being

in New Jersey. The Delaware, Lackawanna and Western Railroad Company, the appellee, is a common carrier subject to the acts of Congress regulating commerce. Between Denville, New Jersey, and Hoboken it has two branches or lines, the Northerly, the Boonton branch, being devoted specially to freight, the Southerly, the Morris and Essex line, devoted as exclusively as may be to passenger traffic. This Southerly branch passes through Summit, and the Rahway Valley Railroad Company petitioned for and got an order requiring the appellee to make a switch connection with its road at that place. As the order interferes with the just stated policy of the appellee as to its Southerly line, it resisted the petition and brought this suit.

The material part of the act of Congress upon which the Commission relies is as follows:

"Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions

of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

The question is raised whether the Rahway road is a 'lateral, branch line of railroad' relatively to the appellee. There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, which, according to the bill, the Rahway road is not. There is force in the argument that a road already having connection with the roads of two carriers subject to the act and having joint routes and through rates with them cannot be regarded as a lateral branch line of railroad of another road situated like the appellee. On the other hand, it would be going far to lay down the universal proposition that a feeder might not be a lateral, branch road of one line at one end and of another at the other. We leave this doubtful question on one side because we agree with the circuit judges in the considerations upon which they decided the case.

The statute creates a new right not existing outside of it. *Wisconsin, Minnesota & Pacific Railroad Co.* v. *Jacobson*, 179 U. S. 287, 296. It is plain from the provisions of the act, the history of the amendments and justice, that the object was not to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch. The remedy given by the section creating the right is given only on complaint by the shipper. We are of opinion that the remedy is exclusive, on familiar principles, and that the general powers given by other sections cannot be taken to authorize a complaint to the Commission by a branch railroad company under § 1. If they were applicable to a branch road they would have been equally applicable to shippers, and there was no more reason to men-

tion complaints by shippers than by others. The argument that shippers were mentioned to insure their rights in case of a refusal to connect with a lateral line is excluded by the form of the statute, which obviously is providing the only remedy that Congress has in mind. It may or may not be true that the distinction is not very effective, but it stands in the law and must be accepted as the limit of the Commission's power.

Decree affirmed.

INTERSTATE COMMERCE COMMISSION *v.* NORTHERN PACIFIC RAILWAY COMPANY.

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

No. 570. Argued February 23, 24, 1910.—Decided March 7, 1910.

Under § 4 of the act of June 29, 1906, c. 3591, 34 Stat. 589, giving the Interstate Commerce Commission power to establish through routes and joint rates where no reasonable or satisfactory through route exists, the existence of such route may be inquired into by the courts, notwithstanding a finding by the commission.

When one through route exists which is reasonable and satisfactory, the fact that the public would prefer a second which is no shorter or better cannot overcome the natural interpretation of a provision in the statute to the effect that jurisdiction exclusively depends upon the fact that no reasonable or satisfactory route exists.

As the Northern Pacific route from the points named to points between Portland and Seattle is reasonable and satisfactory, the fact that there are certain advantages in the Union Pacific or Southern route does not give the Interstate Commerce Commission jurisdiction to establish the latter as a through route against the objection of the Northern Pacific Railway Company.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, Assistant to the Attorney General, and *Mr. P. J. Farrell,* with whom *Mr. Edwin P. Grosvenor* was on the brief, for the appellant:

The order of the Commission cannot be set aside by the court merely for the reason that the court, if placed in the position of the Commission, would not have ordered the through route. Section 1 of the Hepburn Act relates to through routes and joint rates. This gives the Commission the power to establish a through route, provided *in the opinion of the Commission* no satisfactory or reasonable through route exists. Whether or not a through route already in existence is reasonable or satisfactory rests with the Commission.

Under *Interstate Comm. Comm.* v. *Ill. Cent. R. R.,* 215 U. S. 452, the courts are without authority to set aside an order of the Commission merely for the reason that the court may deem the order inexpedient. The determination of the question of fact rests with the Commission, and not with the court. Nothing can be found in the debates to indicate that it was intended by Congress that the courts should have the authority to answer the question. 40 Cong. Rec., pt. 3, pp. 2244, 3115; pt. 6, pp. 6678, 6679, 6681.

In determining whether an existing passenger route is reasonable and satisfactory, the first inquiry necessarily must be whether that route fairly meets the requirements of the traveling public. In this case the facts show that the public interests demanded the establishment of another through route to Puget Sound points via the Portland gateway.

The authority of the Interstate Commerce Commission to establish through routes rests entirely upon the provisions of the Hepburn Act above quoted. Prior to the enactment of that law, the Commission had no power to order the establishment of through routes or joint rates. *Southern Pacific Co.* v. *Interstate Comm. Comm.,* 200 U. S. 536; *O. S. L. R. R. &c.* v. *N. P. Ry. Co.,* 51 Fed. Rep. 465; *S. C.,* 61 Fed. Rep. 158; *K. & I. Bridge Co.* v. *L. & N. R. R. Co.,* 37 Fed. Rep. 565; *Little Rock & Memphis Ry. Co.* v. *St. Louis, I. M. &*

So. Ry. Co., 41 Fed. Rep. 559; *S. C.*, 59 Fed. Rep. 400; *S. C.*, 63 Fed. Rep. 975; *A. C. & S. F. Ry. Co.* v. *Miami Steamship Co.*, 86 Fed. Rep. 407.

As to what is a satisfactory route see the *Enterprise Transp. Co.* v. *Penna. R. R. Co.*, 12 I. C. C. 326.

The kind of a through route which will divest the Commission of its jurisdiction in this particular must be as beneficial to the public as the route which the Commission may otherwise establish. *Loup Creek Colliery Co.* v. *Virginian Ry. Co.*, 12 I. C. C. 471; *Chi. & Mil. El. Ry.* v. *Ill. Cent. R. R. Co.*, 13 I. C. C. 20; *Cedar Rapids & I. City Co.* v. *Chicago & N. W. Ry.*, 13 I. C. C. 250; *Cardiff Coal Co.* v. *Chi., Mil. & St. P. Ry. Co.*, 13 I. C. C. 460; *Stedman & Sons* v. *Chicago No. West. Ry. Co.*, 13 I. C. C. 167; *Pacific Coast Assn.* v. *No. Pac. Ry. Co.*, 14 I. C. C. 51; *Star Grain & Lumber Co.* v. *A., T. & S. F. Ry. Co.*, 14 I. C. C. 364; *Chamber of Commerce of Milwaukee* v. *Chicago, R. I. & Pac. Ry. Co.*, 15 I. C. C. 460.

The principles established by these cases cannot be questioned.

Under the English statute the Commission inquires whether "having regard to the circumstances," the route proposed is a reasonable one. Under our statute the language is that the Commission shall establish a route sought to be opened, "provided no reasonable or satisfactory through route exists." The provisions of the two statutes are practically the same in meaning. *E. & W. Junction Ry. Co.* v. *G. W. Ry.*, 1 Ry. & Canal Cas. 331; and see *Caledonian Ry. Co.* v. *N. British R. R.*, 3 Ry. & Canal Cas. 403; *Swindon, Mo. & A. R. R. Co.* v. *Great Western R. R.*, 4 Ry. & Canal Cas. 352.

The testimony supports the finding of fact of the Commission that as regards passenger traffic the existing through route was not reasonable or satisfactory.

In determining whether an existing through route is reasonable or satisfactory the first consideration is the public interest.

A wide difference exists between a reasonable through

route for passenger movement and one for the movement of freight. Into the former there enters a personal element which does not exist in the case of property.

The testimony adduced before the Commission supports the finding of that body that a reasonable and satisfactory through route for passengers did not already exist, and therefore the Commission was justified in opening the Portland gateway by directing the establishment of another through route.

Mr. Charles W. Bunn for appellee:

When the Hepburn Act was passed it had been settled that joint routes and tariffs were a matter of convention between carriers and that the act to regulate commerce contained no provision warranting their imposition by order of the Commission. *So. Pac. Co.* v. *Interstate Comm. Comm.*, 200 U. S. 536; *King* v. *N. Y., N. H. & H. R. R. Co.*, 4 I. C. C. 251, 262; *Independent Refiners* v. *Western N. Y. & P. R. Co.*, 5 I. C. C. 415, 458; *Clark* v. *L. S. & M. S. Ry. Co.*, 11 I. C. C. 558; *Re Alleged Unlawful Discrimination*, 11 I. C. C. 587.

Therefore the amendment of 1906 confers on the Commission a new power which cannot be enlarged by intendment or doubtful interpretation. This power was conferred on the Commission subject to the plain limitations stated in the language of the amendment provided no reasonable or satisfactory through route exists.

The Commission has held that it has no power to order a through route except where no reasonable or satisfactory one exists. *Cardiff Coal Co.* v. *C., M. & St. P. Ry. Co.*, 13 I. C. C. 460. But in *Pacific Coast Lumber Manufacturers' Assn.* v. *N. P. Ry. Co.*, 14 I. C. C. 23, the Commission *obiter* threw out the suggestion that there might be a difference between a reasonable route for freight and one for passengers.

Whether this *ought* to be the law is not the question. The case must be determined upon the language used by Congress.

The Union Pacific has not seen fit to build its railroad to

Puget Sound, and by the Commission's order the Northern Pacific is directed to give up some part of the revenue which it justly has expected to receive and to put the Union Pacific, by furnishing for its benefit the northern company's terminals at Seattle and Tacoma, in substantially as good a position as if it had built to Puget Sound. This would seem to be perilously near taking the Northern Pacific's property without due process of law. *Wisconsin, Minn. & Pac. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Louisville & Nashville R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132.

The Commission's order is novel and contrary to usage, and the testimony shows the position of the Northern Pacific to be conformable to that of railways generally.

The suggestion even that the Commission ought to have the power here exercised in the case of passenger travel, a power radically different in nature from that which it has as to freight, could not be supported historically. 40 Cong. Rec., pt. 3, p. 2244; pt. 6, pp. 6678, 6681, 1906.

The Commission says that opening the joint route through Portland would not hurt the Northern Pacific. The one fact conclusively established by the testimony of every witness examined on the point at the trial, and which the evidence leaves in no doubt, is that opening the Portland joint route would greatly increase the travel via the Union Pacific at the expense of travel via the Northern Pacific.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill to restrain the enforcement of an order of the Interstate Commerce Commission. 16 I. C. C. Rep. 300. A preliminary injunction was granted by four circuit judges, on the ground that the Commission had exceeded its powers, and the case was brought here by appeal. The order was made in a proceeding instituted by the Commission upon its own motion, and required the establishment of through routes and joint rates, for passengers and their baggage, east and

west, from and to points on the Chicago and Northwestern Railway between Chicago and Council Bluffs, Iowa, inclusive; and from and to points on the Union Pacific Railroad between Colorado common points and Omaha, Nebraska, and Kansas City, Missouri, inclusive; via Portland, Oregon; to and from points on the Northern Pacific Railway between Portland and Seattle. The joint rates are to be the same as the present rates between the same points via the Northern Pacific road and its connections. This order concerns passenger travel in one direction only. It does not affect round trips, and it does not deal with freight.

The points between Portland and Seattle can be reached from the places mentioned at the other end of the route, by way of the Northern Pacific alone from St. Paul, or by way of the Chicago, Burlington and Quincy, to Billings, Montana, and then by the Northern Pacific for the last thousand miles; the Chicago, Burlington and Quincy being jointly owned and controlled by the Northern Pacific and the Great Northern roads. But an average of 8,000 persons a year goes by way of the Union Pacific to Portland, where, to go further, passengers have to change to the Northern Pacific line. Under present arrangements the Union Pacific issues a coupon with its tickets, entitling the holder to a first-class passage on from Portland, but he has to exchange the coupon for a ticket, to recheck his baggage, and to pay the additional Pullman fare. The effect of the order is to put the Union Pacific on an equal footing with the Northern Pacific in the use, for through travel, of the road belonging to the latter between Portland and Seattle. It is said that this road, with the expensive terminals of the Northern Pacific at Tacoma and Seattle, would not be supported by local business, but depends on the traffic of the whole Northern Pacific system. Therefore the Northern Pacific objects to the order and brings this bill.

The authority of the Commission to establish through routes and joint rates is conditioned by the proviso that 'no

reasonable or satisfactory through route exists.' Act of June 29, 1906, c. 3591, § 4, 34 Stat. 584, 589. It is urged that this condition is addressed only to the opinion of the Commission and cannot be reëxamined by the courts as a jurisdictional fact. The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. But even in such a case there may be a difference of opinion, *ibid.* 245, and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense. See *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470.

We are of opinion then that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt in complex and delicate cases great weight at least would be attached to the judgment of the Commission. But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass. It is admitted that the Northern Pacific route is shorter than that of the Union Pacific by way of Portland and the running time somewhat less, and it is added by the majority that the 'passenger goes in as good a car and is provided with as good a berth and as good a meal.'

There is some suggestion that at times the northern route may not be as good as the southern, although at other times

it may be better, but the ground of the order avowedly was that the personal preferences of many travelers is to go by the Southern way. If they do, it is said, they can select from a great variety of routes as far as Ogden, Utah, they can visit cities not reached by the northern lines, they can search over a wide area for homesteads, they can behold the natural beauties that may be rivalled but not repeated on the other roads. It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route, but they are not reasons warranting the declaration that 'no reasonable or satisfactory through route exists.' Obviously that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away. Except in case of a need such as the statute implies, the injustice pointed out by the Chairman in his dissent is not permitted by the law.

Decree affirmed.

KNAPP *v.* MILWAUKEE TRUST COMPANY, TRUSTEE OF THE ESTATE OF STANDARD TELEPHONE & ELECTRIC COMPANY, BANKRUPT.

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

No. 206. Submitted January 10, 1910.—Decided March 7, 1910.

An intervention to establish his lien by a mortgagee in a petition by the trustee to sell property of the bankrupt is a controversy arising in a bankruptcy proceeding within the meaning of the Bankruptcy Act and the procedure under § 24*a* is the same as under Court of Appeals Act of 1891. General Order No. XXXVI adopted under authority of § 24*b* does not apply in such a case and no special findings of fact are required.

Under the law of Wisconsin, as construed by the highest court of that State, a mortgage of personal property is not valid as against creditors unless the possession be given to, and retained by, the mort-

gagee, or the mortgage be filed; nor can a mortgagor appropriate proceeds of sale of the mortgaged property to his own use. *Held* that the mortgages in this case, even in the absence of intentional bad faith, are fraudulent in law and void as to creditors.

Although the trustee stands in the shoes of the bankrupt, and takes the property subject to equities impressed on it while in the bankrupt's hands, he can attack a pledge which is so void as against creditors that the property could have been levied on and sold under judicial powers against the bankrupt at the time of the adjudication.

Provisions in a mortgage for the retention and use of the mortgaged property by the mortgagor which are prohibited by the law of the State render the conveyance fraudulent in law, even in the absence of intent, and as conclusively permit the trustee to attack it as though the mortgage were fraudulent in fact and intent existed.

The fact that a trustee might by suit against other parties collect enough to pay creditors is not a bar against setting aside a fraudulent conveyance on the entire property of the bankrupt in his hands.

162 Fed. Rep. 675.

THE facts are stated in the opinion.

Mr. William Duff Haynie for appellant:

The mortgages were good against the bankrupt at the date of adjudication.

The mortgagee had the legal title from the date of execution. *Ill. T. & S. Bank* v. *Stewart*, 119 Wisconsin, 54. The mortgagee had the right of possession after default. *Smith* v. *Konst*, 50 Wisconsin, 360; *Frisbee* v. *Langworthy*, 11 Wisconsin, 376. The mortgagee under certain circumstances may still retain his right to possession as though the possession was with the mortgagor. *Sexton* v. *Williams*, 15 Wisconsin, 320; *Humphrey* v. *Tatman*, 198 U. S. 91, 94. And so it is under the present bankrupt act. *Fisher* v. *Zollinger*, 149 Fed. Rep. 54; *Re Coffin*, 152 Fed. Rep. 381.

At the date of adjudication the mortgages could not have been attacked by the bankrupt, or any of its creditors, or by their trustee in bankruptcy, for any non-filing. *Bailey* v. *Costello*, 94 Wisconsin, 87; *Ullman* v. *Funcan*, 78 Wisconsin, 213; *Eastman* v. *Parkinson*, 133 Wisconsin, 375. A failure

to comply with § 2316*b* cannot be urged by the trustee in bankruptcy where there is no actual fraud.

At the date of adjudication, these creditors, under the law of Wisconsin, were not entitled to have these conveyances set aside as fraudulent. *North Hudson Bldg. & Loan Assn.* v. *Childs*, 86 Wisconsin, 292; *Hyde* v. *Chapman*, 33 Wisconsin, 391; *Turner* v. *Pierce*, 34 Wisconsin, 665; *Mueller* v. *Bruss*, 112 Wisconsin, 406, distinguished; *Thompson* v. *Fairbanks*, 196 U. S. 516, 525; *Skilton* v. *Codington*, 185 U. S. 80; *Southard* v. *Benner*, 72 N. Y. 424, are New York cases under a statute; there is no such statute in Wisconsin.

The chattel mortgage statute of Wisconsin does not apply to telephone companies; the same rules apply to them as to railroad companies, and there does not seem to be any special provision for the mortgage of telephone property outside of § 1780*c* to show that the statute has put the mortgages of all the corporations mentioned in a class distinct from those contemplated by § 2310. *Pierce* v. *St. P. & M. R. R. Co.*, 24 Wisconsin, 551, distinguished; *Chynoweth* v. *Tenney*, 10 Wisconsin, 341. Chattel mortgage statutes are inapplicable to ordinary railroad mortgages. *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77; *Southern Cal. Motor-Road Co.* v. *Union Loan & Trust Co.*, 64 Fed. Rep. 450; *Farmers' L. & T. Co.* v. *Detroit R. R. Co.*, 71 Fed. Rep. 29. There is no decision in Wisconsin on this point. *Livingston* v. *Littell*, 15 Wisconsin, 239; *Rommerdahl* v. *Jackson*, 102 Wisconsin, 144. This is also the rule in the bankruptcy court. *Union Trust Co.* v. *Bulkeley*, 150 Fed. Rep. 510.

After-acquired property was brought under the mortgages. See § 1780*c*. *Wisconsin Telephone Co.* v. *Oshkosh*, 62 Wisconsin, 32, held that the word "telegraph" embraces within its meaning the narrower word "telephone." See § 1791*b*, *supra*; *Funk* v. *Paul*, 64 Wisconsin, 35. The mortgage of after-acquired property is good against the mortgagor's trustee in bankruptcy. *Fisher* v. *Zollinger*, 149 Fed. Rep. 54; *Union Trust Co.* v. *Bulkeley*, 150 Fed. Rep. 510;

Mitchell v. *Winslow*, 2 Story, 630. These mortgages did not grant to this corporation any use of its property which it was not authorized by its charter to make, and they are not fraudulent or void. *Place* v. *Langworthy*, 13 Wisconsin, 704, distinguished, as there the support of the mortgagor and his family was for an indefinite period. *Steinart* v. *Deuster*, 23 Wisconsin, 136; *Blakeslee* v. *Rossman*, 43 Wisconsin, 116; *Anderson* v. *Patterson*, 64 Wisconsin, 557; *Bank* v. *Lovejoy*, 84 Wisconsin, 601; *Bank of Kaukauna* v. *Joannes*, 98 Wisconsin, 321; *Franzke* v. *Hitchon*, 105 Wisconsin, 11; *Durr* v. *Wildish*, 108 Wisconsin, 401, in which the mortgages were held void under § 2310, can be distinguished from this case.

There is no rule of decision in the state court under which these mortgages can be held to be fraudulent and void. Whether or not they are fraudulent and void is a question of evidence under §§ 2310 and 2323, a question "of fact and not of law;" each case is *sui juris*. See *Griswold* v. *Nichols*, 126 Wisconsin, 401; *Densmore Co.* v. *Shong*, 98 Wisconsin, 380; *Griswold* v. *Nichols*, 117 Wisconsin, 267.

The bonds were executed and delivered for a valuable consideration. Rev. Stat., § 721, is not applicable to proceedings in equity. *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Wade* v. *Travis Co.*, 174 U. S. 499, 508.

These mortgages were specially authorized by the legislature, as appears by §§ 1780*c* and 1791*b*. The effect of these sections has not been determined by the Supreme Court of Wisconsin.

Section 70*e* of the bankrupt act supplants the statute or the rule of policy in Wisconsin, whatever it may be, and requires actual, intentional fraud on the part of the mortgagee. *Coder* v. *Arts*, 213 U. S. 223.

The questions involved in this case are as much questions of commercial law and general jurisprudence as they are of a rule of property in Wisconsin, and, therefore, any Wisconsin rule that may exist is not binding upon the Federal courts. *Burgess* v. *Seligman*, 107 U. S. 20.

The trustee in bankruptcy should have alleged and proved—which it did not do—that the creditors did not have the knowledge or the time to question the validity of these mortgages prior to the bankruptcy. *Rogers* v. *Van Nortwick*, 87 Wisconsin, 414, 431; *Hamilton* v. *Quarry Co.*, 106 Wisconsin, 352; *Graham* v. *Railroad Co.*, 102 U. S. 148, 154.

The trustee in bankruptcy should have shown—which it did not do—that there were no other available assets or funds out of which the claims of creditors could be satisfied. *Mueller* v. *Bruss*, 112 Wisconsin, 406. The creditors are represented by the trustees in bankruptcy. *Viaquesney* v. *Allen*, 131 Fed. Rep. 21.

The owner of these bonds is a *bona fide* purchaser within the meaning of § 70*e* of the bankruptcy act. *Croft* v. *Bunster*, 9 Wisconsin, 503 (457); *P. & S. R. R. Co.* v. *Thompson*, 103 Illinois, 187. See *Mercer County* v. *Hacket*, 1 Wall. 83; *Pine Grove* v. *Talcott*, 19 Wall. 666.

This telephone company, under its charter powers was as much a public service corporation as a railroad company, and it was in fact operating a telephone exchange at Sheridan, Wisconsin, at the time it was thrown into bankruptcy.

Mr. George P. Miller and *Mr. Edward P. Vilas* for appellees:

The appeal should be dismissed for failure to comply with clause 3, General Order in Bankruptcy XXXVI. The decree is not appealable.

The agreement permitting the retention of possession by the mortgagor, the sale of the mortgaged property, and the application of the avails thereof to the mortgagor's own use invalidates the mortgage.

The Wisconsin Supreme Court holds that a chattel mortgage which upon its face stipulates that the mortgagor may retain possession of the mortgaged property, sell and dispose of the same in the usual course of business, and appropriate any part of such proceeds to his own use and benefit, is fraudulent and void as to creditors, and that, even where the

provision does not appear upon the face of the mortgage, but rests upon a contemporaneous agreement, express or implied, in parol or in writing, to such effect, the mortgage is likewise rendered fraudulent and void as to creditors. *Place* v. *Langworthy*, 13 Wisconsin, 629; *Steinart* v. *Deuster*, 23 Wisconsin, 136; *Blakeslee* v. *Rossman*, 43 Wisconsin, 116; *Anderson* v. *Patterson*, 64 Wisconsin, 557; *Bank* v. *Lovejoy*, 84 Wisconsin, 601, 611; *Bank of Kaukauna* v. *Joannes*, 98 Wisconsin, 321; *Baumbach Co.* v. *Hobkirk*, 104 Wisconsin, 489; *Franzke* v. *Hitchon*, 105 Wisconsin, 11, 13; *Durr* v. *Wildish*, 108 Wisconsin, 401; *In re Antigo Screen Door Co.*, 123 Fed. Rep. 249; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *Zartman* v. *First National Bank*, 189 N. Y. 267; *S. C.*, 19 A. B. R. 27; *Eastman* v. *Parkinson*, 133 Wisconsin, 375.

The mortgagor in possession cannot be given the benefits of unincumbered property, while the creditors are prevented by reason of the mortgage from collecting their claims. This vice in the instrument is as potent, so long as the mortgagor is in actual possession, whether or not the right of possession be in the mortgagee. *Missinskie* v. *McMurdo*, 107 Wisconsin, 578; *Silkman Lumber Co.* v. *Hunholz*, 132 Wisconsin, 610; *Brewing Co.* v. *Lockery*, 134 Wisconsin, 81, 82.

It is urged that general creditors and the trustee in bankruptcy representing only such creditors cannot assert this invalidity.

The Supreme Court of Wisconsin recognizes this right in the trustee and is justified in so doing by the decisions of the Federal courts. *In re Antigo Screen Door Co.*, 123 Fed. Rep. 249; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *Mueller* v. *Bruss*, 112 Wisconsin, 406; *Durr* v. *Wildish*, 108 Wisconsin, 401; *Russell* v. *St. Mart*, 180 N. Y. 355; *Re Garcewich*, 115 Fed. Rep. 87; *Mitchell* v. *Mitchell*, 147 Fed. Rep. 280.

This mortgage was not valid as to creditors. They were prevented by the bankruptcy from proceeding to avoid it. It could have been levied upon and sold under judicial process

against this bankrupt. *In re Bement,* 172 Fed. Rep. 98; *In re Rodgers,* 125 Fed. Rep. 169; *Fourth St. Nat. Bank* v. *Milbourne Mills Co.'s Trustee,* 172 Fed. Rep. 177; and see *Hewit* v. *Berlin Machine Works,* 194 U. S. 296.

It is not necessary that the trustee should show that there are not other available assets before this invalidity can be asserted.

The failure by the creditors to assert the invalidity cannot be construed as acquiescence. *Blakeslee* v. *Rossman,* 43 Wisconsin, 116.

The mortgage is void as to after-acquired property, book accounts, contracts and choses in action. *Farmers' Loan & Trust Co.* v. *Commercial Bank,* 11 Wisconsin, 207; *Dinsmore* v. *R. & M. R. R. Co.,* 12 Wisconsin, 649; *Swift* v. *Cornes,* 20 Wisconsin, 397, 398; *Mowry* v. *White,* 21 Wisconsin, 417; *Chynoweth* v. *Tenney,* 10 Wisconsin, 397; *O'Neil* v. *Wm. B. H. Kerr Co.,* 124 Wisconsin, 234; *Zartman* v. *First National Bank,* 189 N. Y. 267.

Constructive possession is forbidden by § 2310, Wisconsin Stats. There must be the *indicia* of change of possession. *Schneider* v. *Kraby,* 97 Wisconsin, 519; *Missinskie* v. *McMurdo,* 107 Wisconsin, 578; *Silkman Lumber Co.* v. *Hunholz,* 132 Wisconsin, 710; *George Walter Brewing Co.* v. *Lockery,* 134 Wisconsin, 81.

Failure to file the affidavits of renewal and the statements required by the Wisconsin statutes after the sale of stock in trade renders the mortgage void as to general creditors and the trustee in bankruptcy. *Mueller* v. *Bruss,* 112 Wisconsin, 406; *Jackman* v. *Eau Claire Nat. Bank,* 125 Wisconsin, 465; *Skilton* v. *Coddington,* 185 N. Y. 80; *S. C.,* 15 A. B. Rep. 810; *In re Shireley,* 112 Fed. Rep. 301; *In re H. G. Andrae Co.,* 117 Fed. Rep. 561; *Chesapeake Shoe Co.* v. *Seldner,* 122 Fed. Rep. 593; *In re Ducker,* 134 Fed. Rep. 43; *In re Beebe,* 138 Fed. Rep. 441, 454; *Bradley, Alderson & Co.* v. *McAfee,* 17 A. B. Rep. 495; *S. C.,* 149 Fed. Rep. 254; *Mitchell* v. *Mitchell,* 17 A. B. Rep. 382; *S. C.,* 147 Fed. Rep. 280.

MR. JUSTICE DAY delivered the opinion of the court.

The Standard Telephone and Electric Company, a Wisconsin corporation, was adjudicated a bankrupt in the District Court of the United States for the Eastern District of Wisconsin. Under its articles of association it was authorized to carry on the business of selling appliances for telephone purposes and operating telephone exchanges. It had established and was operating a telephone exchange at the village of Sheridan, Wisconsin, and was carrying on the business of manufacturing and selling telephone apparatus in the city of Milwaukee, Wisconsin, where it had a stock in trade and trade fixtures. The trustee in bankruptcy filed a petition to sell all the property of the bankrupt. Appellant Knapp, as trustee of certain mortgages, given by the telephone company, intervened, and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold, and the question is as to the lien of these mortgages upon the fund.

The trustee in bankruptcy answered the petition of Knapp, trustee under the mortgage, averring that it was a chattel mortgage, and fraudulent and void as to creditors, because of certain agreements contained therein, because it was on after-acquired property, and because of the failure to file an affidavit of renewal as required by the Wisconsin statutes. The referee in bankruptcy found the facts, and held the mortgage void. Upon hearing, the District Judge reached a like conclusion. 157 Fed. Rep. 106.

The Circuit Court of Appeals of the Seventh Circuit upon appeal affirmed the decree of the District Court, holding the mortgage void for the reasons set forth at large in the opinion of the District Judge. 162 Fed. Rep. 675.

A motion has been filed to dismiss the appeal for want of findings of fact and conclusions of law in the Circuit Court of Appeals, as required by General Order in Bankruptcy XXXVI. Whether or not such a finding of facts was required depends

upon the character of the present proceeding. General Order in Bankruptcy XXXVI, authorized under subdivision *b* of § 25 of the Bankruptcy Act, provides for appeals under the act to this court from the Circuit Court of Appeals within thirty days after the judgment or decree, and for the making and filing of a finding of facts and conclusions of law separately stated, and that the record upon such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and conclusions of law.

Section 25*b* provides for appeals from any final decision of a Court of Appeals allowing or rejecting a claim under the act, under such rules and within such time as may be prescribed by the Supreme Court of the United States. Such appeals are allowed when the amount in controversy exceeds the sum of $2,000, and the question involved might have been taken by appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or where some Justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the Bankruptcy Act throughout the United States.

Under authority of subdivision *b*, § 25, General Order XXXVI was adopted, and in the cases enumerated a finding of facts and conclusions of law must be made in the Circuit Court of Appeals, and the appeal taken within thirty days after the entry of the judgment or decree.

The case at bar is not of that class; it is an intervention in a bankruptcy proceeding, and, within the meaning of the act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the Court of Appeals Act. Bankruptcy Act, § 24*a; Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223, and cases therein cited.

As the appeal was in the manner provided for in the Court of Appeals Act no special finding of facts was required under

General Order XXXVI, and the motion to dismiss the appeal must be overruled.

The mortgages in question, which were upon all the property and estate of the mortgagor, acquired, or to be acquired in connection with or in relation to the business of the mortgagor, contain, among others, the following provisions:

"Nothing herein contained shall be construed to prevent said first party from carrying on, in the due and regular course, its said business, and collecting the indebtedness and moneys due or to become due therein and applying the same to its own use, except as hereinafter provided."

The mortgage makes provision for a sinking fund of $2,000 annually, $500 quarterly, out of the proceeds of the business, or, if necessary, from the general resources; and the mortgage contains this further provision:

"Said first party further agrees that no dividend shall be declared or paid on its capital stock at any time when any portion of said sinking fund or the interest on said bonds shall not have been duly provided for according to the terms of this indenture.

"*Provided, however*, That said trustee be and he is hereby empowered and authorized in his discretion, and in case he does not procure for the sinking fund any of said bonds at par and accrued interest, upon application in writing by said first party to waive the making by said party of full or any payment into or provision for said sinking fund for any quarter year, and in the event of said trustee electing not to require said first party to make such payment into or provision for such sinking fund, the moneys which would otherwise have been placed therein for the purchase of said bonds as aforesaid shall remain at the disposition of said first party, to be divided as dividends, or to enlarge, extend, improve, repair, renew, or rehabilitate its said described business and property."

It will be seen that under these provisions the mortgagor is allowed to remain in possession of the property, applying the proceeds thereof to his own use, except that no dividends shall

be declared or paid without first making provision for the sinking fund and the interest on the bonds, and with this important proviso—that the trustee under the mortgage may, in his discretion, in case he does not procure for the sinking fund bonds at par and accrued interest, upon the application of the mortgagor, waive the payment into or provision for the sinking fund for any quarter year, and, in such case, the moneys which would otherwise go into the sinking fund for the purchase of bonds shall remain at the disposition of the mortgagor, to be distributed as dividends, or to be used for the benefit of the business and property in the manner described.

Section 2310, Wisconsin statutes, provides:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the person claiming, under such sale or assignment, that the same was made in good faith and without any intent to defraud such creditors or purchasers."

Section 2313 provides that no mortgage or sale of personal property shall be valid against any other persons than the parties thereto, unless the possession of the mortgaged property be delivered to and retained by the mortgagee, or, unless the mortgage, or a copy thereof, be filed as required by the statute, except as otherwise provided therein.

Section 2316*b* provides that a mortgagor in possession of a stock of goods, from which he is permitted to make sales and apply the proceeds upon the debt, shall file a statement showing the amount of sales, amount applied on mortgage and amount of new stock bought every sixty days, and, upon his failure to file such statement, the debt shall become immedi-

ately due, and after fifteen days the mortgage shall cease to be a lien, except between the parties thereto.

It was found as a matter of fact that no statement was filed of the amount of the sales, amount of new stock bought, amount applied on mortgage, etc., every sixty days, as required by the Wisconsin statute, § 2316*b;* that since the execution of the mortgage the company, in the course of its business, made sales from the mortgaged property and applied the proceeds to its own use; that the property was in possession of the mortgagor; that Knapp, the trustee, knew that the business was being so transacted; that it was understood that the business should be so transacted and sales of the mortgaged property so applied to the mortgagor's use.

While there was a finding that no intentional bad faith was shown, still we agree with the Court of Appeals and the District Judge that, under the law of Wisconsin, as construed by her highest court, such conditions as were contained in these mortgages rendered them fraudulent in law and void as to creditors. *Merchants & Mechanics Bank* v. *Lovejoy,* 84 Wisconsin, 601; *Bank of Kaukauna* v. *Joannes,* 98 Wisconsin, 321; *Baumbach Co.* v. *Hobkirk,* 104 Wisconsin, 488; *Franzke* v. *Hitchon,* 105 Wisconsin, 11; *Durr* v. *Wildish,* 108 Wisconsin, 401.

In this case the stipulations of the mortgages practically permitted the mortgagor to dispose of the property for his own benefit, except that it must make certain provisions for a sinking fund and interest on the bonds; and, with the consent of the trustee, no provision need be made for the sinking fund, or interest, and the moneys which otherwise would have been placed therein for the purchase of bonds might be applied for the benefit of the mortgagor, whether as dividends or for the benefit of its business and property. Such provisions are clearly within the Wisconsin decisions, for they permit the mortgagor to have the benefit of the property, to keep it in his possession, and to appropriate the proceeds to his own use. The Wisconsin decisions render such mortgages invalid as to creditors, because the effect of such provisions is to give the

beneficial use of the mortgaged property to the mortgagor in possession, and to make possible the use of the mortgage as a protection against creditors of the mortgagor when they shall undertake to assert their rights.

But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that as to them the trustee in bankruptcy occupies no better position than the bankrupt. This question was raised and decided in *Security Warehousing Co.* v. *Hand*, 206 U. S. 415. That case arose in Wisconsin, and it was therein held that, under the Wisconsin law, an attempted pledge of property, without change of possession, was void under the laws of that State. In that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt.

But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying § 70*a* of the Bankruptcy Act, it was held that the trustee in bankruptcy was vested by operation of the bankrupt law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt. It was therefore held that as there had been no valid pledge of the property, for want of change of possession, it could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy and passed to the trustee in bankruptcy.

The principles announced in *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, when applied to the present case are decisive of the question here presented. Under the Wisconsin statutes and decisions of the highest court of that State the conditions contained upon the face of this mortgage were such as to render it fraudulent in law and void as to creditors, and prior to the filing of the petition in bankruptcy the property might have been levied upon and sold by judicial process against the bankrupt.

It is true that in *Security Warehousing Co.* v. *Hand* the court said that the attempted pledge was a "mere pretense, a sham;" but the courts of Wisconsin have held that such provisions as are in these mortgages, giving the bankrupt the right to dispose of the mortgaged property for its own benefit, rendered the conveyance fraudulent in law, and therefore void as to creditors. This brings the conveyance within the terms of the Bankrupt Act, as one which the trustee may attack, as conclusively as it would if fraudulent intent in fact were shown to exist.

In *Mueller* v. *Bruss*, 112 Wisconsin, 406, it was held that a trustee in bankruptcy could maintain an action to set aside a fraudulent conveyance, but that the complaint must aver and the trustee must show that the estate had not sufficient assets in the trustee's hands to satisfy the claims filed against the debtor. And, it is insisted, that a showing of this character is lacking in the present case. Without deciding that under the Bankruptcy Act the answer of the trustee in bankruptcy was required to make this averment, accompanied by proof if necessary, it is sufficient upon this point to say that the intervening petition of the trustee of the mortgage sought to assert a lien upon all the property of the bankrupt in the trustee's hands. The suggestion in appellant's brief, that the trustee in bankruptcy may possibly recover against directors and officers of the corporation for dereliction of duty, and against stockholders for unpaid subscriptions and additional liability on their part, presents no reason why he may not resist an

attempt to take all the available property in his hands to apply on a mortgage void as to creditors at the time of the adjudication.

We are of opinion, for the reasons stated, that the mortgages in question are void, and that under the Bankruptcy Law the trustee can assert their invalidity.

Judgment affirmed.

FRANKLIN *v.* UNITED STATES.

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

No. 736. Submitted February 21, 1910.—Decided March 14, 1910.

The sixty-second article of war does not vest, nor purport to vest exclusive jurisdiction in courts-martial, and civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished under the provisions of that article.

The effect of § 3 of the acts of March 3, 1825, c. 65, 4 Stat. 115; April 5, 1866, c. 24, 14 Stat. 13, carried forward in § 5391, Rev. Stat.; and July 7, 1898, c. 576, 30 Stat. 717, providing that the punishment of offenses in places ceded by the State to the United States not specially provided for by any law of the United States shall be the same as that provided for by the law of the State ceding the place where the offense was committed, is limited to the criminal laws in force in the several States at the time of the enactment of the legislation, and those statutes do not delegate to such States authority to in any way change the criminal law of the United States. *United States* v. *Paul*, 6 Pet. 141.

Jurisdiction of this court under the act of 1891 of a direct appeal from the Circuit Court cannot be based on constitutional points that are absolutely unfounded in substance as in this case.

THREE indictments were returned against plaintiff in error by the grand jury in the Southern District of New York. In the first of said indictments he was charged with the embezzle-

ment of certain personal property of the cadets at the United States Military Academy, upon a Government reservation, to wit, the West Point Military Reservation, in the Southern District of New York, in violation of § 5391, Rev. Stat., as amended by the act of July 7, 1898; and of §§ 528 and 531 of the New York Penal Code.

In the second indictment he was charged with making and presenting to an officer of the army, for approval, false claims upon the Government of the United States for supplies furnished to the cadet mess at West Point, in violation of § 5438, Rev. Stat.; and, in the third indictment, he was charged with making and presenting to an officer of the army, for approval and for payment, a false claim upon the United States War Department, and upon the treasurer of the United States Military Academy, in violation of § 5438, Rev. Stat.

Demurrers to the indictments were overruled and they were then consolidated. The first of said indictments contained six counts, in three of which plaintiff in error was charged with grand larceny in the second degree, under the New York Penal Code, and in the other three he was charged with embezzlement of the same funds, in violation of the New York Penal Code; but the first three of said counts were *nolle prossed.* The defendant thereupon pleaded guilty to all three of the indictments; but before judgment was pronounced he moved in arrest of judgment, the grounds of his motion being as follows:

"1. Because the said fourth, fifth, and sixth counts of the indictment against the said defendant for grand larceny under section 2, chapter 576, act of July 7, 1898, to and of which the defendant pleaded and was found guilty, do not, nor does any one of the said counts, charge a criminal offense under the laws of the United States.

"2. Because the said section 2, chapter 576, of an act of Congress approved July 7, 1898, entitled 'An act to protect the harbor defenses and fortifications constructed by the United States from malicious injury, and for other purposes,' is unconstitutional and void.

"3. Because by the Constitution and the laws of the United States this court here has no jurisdiction of the offense alleged to have been committed by this defendant in said fourth, fifth, and sixth counts of the said indictments, because he says the said section 2, chapter 576, of the said act of Congress approved July 7, 1898, confers upon this court here no jurisdiction of this cause, nor any legal power to hear, try, and determine the same, inasmuch as the punishment for the offense alleged in said indictment, and in each and every count thereof, when committed by the treasurer of the United States Military Academy, an officer of the Army of the United States, is provided for by section 1342, Revised Statutes of the United States; and inasmuch as, by the said Constitution and laws, exclusive jurisdiction over said offense, when committed by a person subject to military jurisdiction, is vested in the properly constituted and authorized courts-martial of the United States.

"4. Because the facts alleged in said counts under section 5438, Revised Statutes of the United States, do not, as alleged in said counts, or in any one of them, charge a criminal offense against the United States."

This motion was overruled, and defendant was sentenced to serve a term of imprisonment of two and one-half years in the United States penitentiary at Atlanta; and, errors being assigned which raised the questions presented in the motion in arrest of judgment, the case was removed to this court by writ of error.

The statutes under which said indictments were found are as follows:

1. Section 2 of the act of July 7, 1898, c. 576, 30 Stat. 717:

"That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the

United States, the person committing such offense shall, upon conviction, in a Circuit or District Court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution."

2. Sections 528 and 531 of the Penal Code of New York:

"SEC. 528. A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person—

"1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny.

* * * * * * * *

"SEC. 531. A person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this article, steals or unlawfully obtains or appropriates:

"1. Property of the value of more than twenty-five dollars, but not exceeding five hundred dollars, in any manner whatever; or

"2. Property of any value, by taking the same from the person of another; or

"3. A record of a court or officer, or a writing, instrument, or record kept, filed, or deposited according to law, with, or in keeping of any public office or officer."

3. Section 5438, Revised Statutes, so far as applicable to these indictments:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . . every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years or fined not less than one thousand nor more than five thousand dollars."

Mr. Holmes Conrad for plaintiff in error:

Congress exercised its power under Art. I, § 8 of the Constitution in the law that now appears as § 5391, Rev. Stat., which provides that "if any offense be committed," etc. An offense is the doing what some penal law forbids to be done, or the omitting to do what that law commands to be done. No statute law of the United States has been found under which the acts charged in these indictments have been declared to be offenses. Wharton, Crim. Law, § 253, citing these cases. There can be no constructive offenses, and be-

fore a man can be punished, his case must be plainly and unmistakably within the statute. *United States* v. *Lacher*, 134 U. S. 628; *Pettibone* v. *United States*, 148 U. S. 203, and see *Ex parte Smith*, 94 U. S. 456.

Neither § 5391 or the act of July 7, 1898, declares the acts here charged to be offenses. They do not create any offense. The statute laws of New York cannot create offenses against the United States any more than the statute laws of the United States can create offenses against the State of New York. The acts charged may be offenses under the laws of the State of New York, but they are not, for that reason, punishable by the United States. The act does not purport to adopt the penal codes of the several States of the Union as penal laws of the United States as to all acts done on government reservations within the States. As to the question of the jurisdiction to try and punish for offenses committed within Government reservations, see *Fort Leavenworth R. R. Co.* v. *Lowe*, 111 U. S. 525; *Virginia* v. *Paul*, 148 U. S. 107.

A grand jury, whether of the State, or of the United States, is empaneled and sworn to inquire into and present offenses against that government only under whose authority it is summoned. Story on Const., § 1784.

The cases cited show that the questions involved are not so manifestly frivolous as to warrant the court in affirming the judgment.

If the facts can support any theory consistent with innocence, the defendant is entitled to the adoption of that theory. Every presumption is in his favor, and he is entitled, even on demurrer, to the benefit of every reasonable doubt.

The only cases offering any information as to the statutes are *United States* v. *Paul*, 6 Pet. 141, which simply decided that the act of 1825 was to be limited to the laws of the several States in force at the time of its passage, and *United States* v. *Barney*, 24 Fed. Cas. 1011; *United States* v. *Barnaby*, 51 Fed. Rep. 23, which simply followed the above decision. The act of 1825 does not define the "offenses" but

simply provides a punishment for those offenses defined by Congress, but for which Congress may have failed to prescribe specific punishment.

Words in a statute which have acquired a particular legal meaning are, when applied to the subject-matter as to which they have acquired such meaning, to be taken in their legal meaning. *The Abbotsford*, 98 U. S. 440; *Rice* v. *Minnesota &c. R. Co.*, 1 Black (U. S.), 58; *United States* v. *Jones*, 3 Wash. (U. S.) 209; *Brocket* v. *Ohio R. Co.*, 14 Pa. St. 241; *Western Union Tel. Co.* v. *Scircle*, 103 Indiana, 229; *Buckner* v. *Real Estate Bank*, 4 Arkansas, 441; *Hillhouse* v. *Chester*, 3 Day (Conn.), 211; *United States* v. *Smith*, 4 Day (Conn.), 121.

An offense is defined, at the common law, to be an act or omission forbidden by law and punishable upon conviction. See "Offense," Am. & Eng. Enc. of Law; Bouvier Law Dictionary; *People* v. *Hanrahan*, 75 Michigan, 611; *People* v. *Police Commissioners*, 39 Hun (N. Y.), 508; *Wragg* v. *Penn Township*, 95 Illinois, 18; *Moore* v. *Illinois*, 14 How. (U. S.) 19; *State* v. *Oleson*, 26 Minnesota, 516; *Reg.* v. *Sutcliffe*, 13 A. & E. 833.

The terms "crime," "offense," and "criminal offense" are all synonymous and ordinarily used interchangeably, and include any breach of law, established for the protection of the public, as distinguished from an infringement of mere private rights for which a penalty is imposed or punishment inflicted in any judicial proceeding. *State* v. *Cantieny*, 34 Minnesota, 1; *State* v. *West*, 42 Minnesota, 147; Wharton's Crim. Law, § 14.

The Solicitor General for the United States:

No fair question exists as to the jurisdiction of the Circuit Court of the United States for the Southern District of New York over this case. *United States* v. *Clark*, 71 Fed. Rep. 710; 6 Opin. Atty. Gen. 413, 419, opinion rendered October 20, 1909; and see *Coleman* v. *Tennessee*, 97 U. S. 509, 574; *Grafton* v. *United States*, 206 U. S. 333, 348.

The difference in the language used in Art. 62, § 1342, Rev. Stat., and that used in § 5438, Rev. Stat., and in § 2 of the act of July 7, 1898, clearly shows that it was the intention of Congress that offenses committed in violation of the latter statute should be punished by the civil courts.

No real constitutional question is here presented.

The contention that § 2 of the act of July 7, 1898, is unconstitutional because it undertook to delegate the power of legislation to the state legislatures is untenable. See *United States* v. *Paul*, 6 Pet. 141, 143, which has been cited with approval in a number of subsequent cases, both state and Federal. Rose's Notes on U. S. Rep., p. 239. There is no delegation to the States of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction. The act had precisely the same effect as if all the criminal statutes of such States, creating offenses for which punishment had not been provided by congressional legislation, had been set forth *in extenso* in the body of the act.

It is not necessary, therefore, to consider whether Congress has power to provide that laws afterwards passed by state legislatures shall be effective in places within the jurisdiction of the United States.

If this court can be said to have jurisdiction, yet the decision of the lower court is so manifestly right that the case should not be kept for further argument, but the judgment of the lower court should be affirmed.

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

This is a writ of error brought directly to this court from the Circuit Court of the United States for the Southern District of New York, and the grounds upon which it is rested appear to be—

First. That under the sixty-second Article of War, § 1342, Revised Statutes, which reads:

"All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court,"

a court-martial has exclusive jurisdiction of the offenses charged herein, inasmuch as plaintiff in error was an officer of the United States army; and,

Second. That the case involved the construction or application of the Constitution of the United States, and that the constitutionality of a law of the United States was drawn in question because, as is alleged, § 2 of the act of July 7, 1898, is unconstitutional, in that it undertakes to delegate the power of legislation to the state legislatures.

1. It is well settled that the sixty-second Article of War does not vest, nor purport to vest, exclusive jurisdiction in courts-martial, and that civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished by a court-martial under the provisions of that article.

The thirtieth section of the act of March 3, 1863, c. 75, 12 Stat. 736, provided that in time of war, insurrection or rebellion certain offenses, including murder, "shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the Articles of War; and the punishments for such offenses shall never be less than those inflicted by the laws of the State, Territory, or district in which they may have been committed."

In *Coleman* v. *Tennessee*, 97 U. S. 509, it was held that this statute did not confer upon courts-martial exclusive jurisdiction for the trial of the offenses mentioned.

In *Grafton* v. *United States*, 206 U. S. 333, 348, it was expressly declared that the jurisdiction of courts-martial is not

exclusive. Undoubtedly the general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. See Opinion of Attorney-General Cushing, 6 Op. A. G. 413, 419; *United States* v. *Clark*, 31 Fed. Rep. 710.

And in the present case the language of article 62 and that of § 5438, Revised Statutes, and of § 2 of the act of July 7, 1898, demonstrates that it was the intention of Congress that offenses committed in violation of the latter statute should be punished by the civil courts; to say nothing of the fact that it was expressly provided in § 2, and prior laws, that conviction should be "in a Circuit or District Court of the United States for the district in which the offense was committed."

There is absolutely nothing in the first proposition.

2. This is equally so of the intimated constitutional point.

By § 3 of the act of March 3, 1825, c. 65, 4 Stat. 115, it was provided:

"That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dockyard, navy yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated provided for the like offense when committed within the body of any county of such State."

In *United States* v. *Paul*, 6 Pet. 141, 143, coming here on certificate of division, it was held by this court, speaking by Chief Justice Marshall, that the effect of this section was "limited to the laws of the several States in force at the time of its enactment;" and it followed that by this act Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far as said laws were not displaced by specific laws enacted by Congress.

Section 2 of the act of July 7, 1898, c. 576, 30 Stat. 717, was

to the same effect, and, moreover, by express language Congress adopted such punishment as "the laws of the State in which such place is situated *now* provide for the like offense." There is, plainly, no delegation to the States of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction.

We give below the legislation on the subject.[1]

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[1] On March 3, 1825, Congress passed, c. 65, 4 Stat. 115:

"Chap. LXV. An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes.

"SEC. 3. That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dockyard, navy yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such State."

On April 5, 1866, Congress enacted the following, c. 24, 14 Stat. 13:

"Chap. XXIV. An act more effectually to provide for the punishment of certain crimes against the United States.

"SEC. 2. That if any offense shall be committed in any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such place is, or may be situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any of the courts of the United States."

This act was carried forward as § 5391 of the Revised Statutes, as follows:

"SEC. 5391. If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States,

We are of opinion that the points attempted to be raised to justify jurisdiction are so unfounded in substance as to utterly fail of their purpose.

Writ of error dismissed for want of jurisdiction.

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such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

The act of July 7, 1898, c. 576, 30 Stat. 717, upon the same subject, reads:

"SEC. 2. That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in the Circuit or District Court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution."

This section appears in the act of Congress, approved March 4, 1909, c. 321, 35 Stat. 1145, modifying, amending and revising the penal laws of the United States, to become effective January 1, 1910, as follows:

"SEC. 289. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory or District."

OSBORN ET AL., TRUSTEES OF THE HASTINGS AND DAKOTA RAILWAY CO. *v.* FROYSETH.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 395. Submitted January 5, 1910.—Decided March 14, 1910.

A rejection of a homestead entry on the ground that the land was not open for settlement does not defeat the entry if the Secretary had no authority to withdraw the land from settlement. *Sjoli* v. *Dreschel*, 199 U. S. 564.

In an action of ejectment by a railroad company claiming lieu lands under its grant, against a homesteader, the rule applies that the plaintiff must recover on his legal title and not upon defects in defendant's entry; the question is whether the entry was properly initiated before the selection and not whether it had actually ripened into legal title.

In a contest between a *bona fide* homesteader and one claiming under selection of lieu land the former has the better claim.

The right of a homesteader settling in good faith relates back to the date of settlement.

Where a railroad company fails to comply with the statutory requirements in order to authorize selection of lieu lands in the indemnity limits, and its selection is rejected, a subsequent selection does not relate back, but preëmption or homestead rights duly initiated before the second selection have priority.

Land that is actually occupied by a qualified entryman with intent to claim it as a homestead, ceases to be public and subject to selection as lieu land, even though there be no record evidence at the time the selection is made.

107 Minnesota, 568, affirmed.

THIS was an action of ejectment to recover the southeast quarter of section 7, township 119, range 40, in Chippewa County, Minnesota. A jury was waived and the case tried by the court, which made a finding of facts upon which judgment was entered for the defendant. Upon appeal to the Supreme Court of the State this judgment was affirmed.

107 Minnesota, 568. Thereupon, in due course, this writ of error was sued out by the original plaintiffs.

The plaintiffs claimed title under a land grant made by Congress, July 4, 1866, known as the Hastings and Dakota Railway land grant. The premises are not within the place limits of that grant, but are included within the indemnity limits of the line of railroad as located, and were withdrawn from settlement for the benefit of the grant on July 12, 1866, and again by a modified order of April 22, 1868. On May 26, 1883, the Hastings and Dakota Railway Company, for whose benefit the grant was made, and hereafter referred to as the railway company, attempted to select the land in question, together with other lands within the indemnity limits of the grant, but the selection was rejected by the local land office of the district. Upon appeal this action was affirmed by the Secretary of the Interior on October 23, 1891. This attempted selection was refused, because not made in accordance with the rules of the Department, requiring, as a condition precedent, that there should be furnished by the railroad company a list of the lands lost within place limits for which lands in lieu were selected. On July 22, 1890, under the land grant adjustment act of March 3, 1887, c. 376, 24 Stat. 556, said land grant was adjusted in the Land Department of the United States, and it was found that there existed a deficiency in the place limits of the grant of 922,182 acres, and that all of the lands within the indemnity limits applicable to cover such loss aggregated less than 100,000 acres. On May 28, 1891, pursuant to instructions from the Secretary of the Interior, the Commissioner of the General Land Office directed the officers of the proper local office that, after giving notice, they should restore to the public domain and open to settlement all the lands in the indemnity limits of said land grant, "not embracing selections heretofore made and applied for by said company."

After the final rejection, on October 23, 1891, of the original selection made in 1883, the predecessor of the plaintiff in title

made a second selection on October 29, 1891, of the land in suit, together with other lands, which last selection was in due form and in full compliance with the rules of the Department, and thereafter, through steps not necessary to be stated, the title acquired by this second selection under said grant was vested in the plaintiffs in error.

The tenth, eleventh and twelfth findings of fact are in these words:

"Tenth. At the time of said selection the land in question was not vacant, but was occupied by the defendant Peter Froyseth, as hereinafter found.

"Eleventh. Said selection was not approved by the Secretary of the Interior until 1901.

"Twelfth. That the defendant, on the 1st day of November, 1888, declared his intention to become a citizen of the United States, and was after said date in all respects qualified and entitled to make a homestead entry under the laws of the United States, and, on May 15th, 1889, he settled upon and went into possession of the land in controversy, with intent to enter upon and claim the same as a homestead, and with the view of making it his home, and has continued in possession and resided thereon ever since, and his residence and improvements were at all times sufficient to comply with the requirements of the homestead laws of the United States, and at the time of the commencement of this action such improvements exceeded in value the sum of seven hundred dollars ($700); that the defendant has never owned or occupied other real estate. That he became a full citizen of the United States on June 9, 1897, and has been such citizen ever since. On the 3d day of November, 1891, the defendant offered, at the proper land office, a homestead entry in due form for said land, which filing was refused by the local land officers solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22d, 1868, from which refusal the defendant duly appealed, which appeal remained pending in the Land Depart-

ment until September 11th, 1894, on which date the rejection of said filing by the local land officers was affirmed. From the decision of the General Land officers the defendant appealed to the Secretary of the Interior, which appeal was pending until the 25th day of January, 1896, when the decision of the General Land Office of September 11th, 1894, was affirmed. That the defendant did all that was in his power to secure the land as his homestead."

Mr. Aldis B. Browne and *Mr. Alexander Britton* for plaintiff in error.

Mr. C. A. Fosnes for defendant in error.

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

The facts found show that on May 15, 1888, the defendant in error, being in every way qualified, entered upon the land in question with the intention of claiming it as a homestead, and has ever since continued in possession, residing thereon with his family, and that his improvements have at all times been such as to comply with the homestead laws and exceeded in value seven hundred dollars when this action of ejectment was started. On November 3, 1891, he offered at the proper land office a homestead entry, in due form, for said land. This was rejected. Upon appeal the decision was affirmed by the Secretary of the Interior on September 11, 1894. But the facts found in the trial court, and upon which the Supreme Court of Minnesota made its decision, show that this entry was refused by the local land office "solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22, 1868." A rejection upon the ground stated was not authorized, for the Secretary of the Interior had no authority to withdraw from settlement lands within the indemnity limits of the grant which had not been before selected and approved by

him. *Sjoli* v. *Dreschel*, 199 U. S. 564, and cases cited. It has been insisted that although the local land office rejected the application for the reason stated, the affirmance, upon his appeal, was because his homestead application, instead of alleging that he had settled upon the land at some date prior to the selection made by the railroad company on October 29, 1891, simply alleged, that "he resides on the described land." This contention as to the grounds of the affirmance is only made out by the introduction now for the first time of the decision of the Secretary of the Interior under date of January 25, 1896. But that simply affirms the decision of the Commissioner made September 11, 1894, affirming the rejection made by the local land office, and gives no reason for the affirmance. This decision is sought to be explained by what purports to be a copy of an official communication under date of September 11, 1894, from the Commissioner to the local land register and receiver, notifying him that his rejection of a number of homestead entries, including that of Froyseth, on the indemnity lands in question, had been affirmed. Among other matters in that communication, it is stated, "that none of the applicants allege that the lands were settled upon either by themselves or others at the date of the said selections in October, 1891, by the Hastings and Dakota Company, nor do the records show that the lands were otherwise than vacant and subject to such selection at said date." If this be competent for our consideration upon this writ of error, it being no part of the record, it does not appear that the applicant was ever advised of this supposed defect in his affidavit. The local office simply advised him that its decision had been affirmed. The matter was remediable, as the fact was that his settlement was made months prior to his application affidavit. But, assuming that the application in its then form was defective, it is of no legal consequence in determining the validity of the title of the plaintiff in error. This was a plain common-law action of ejectment. The plaintiff must recover, if at all, upon the

legal title. That the defendant's application for a homestead has not yet ripened into a legal title is of no moment if the plaintiffs are unable to show a complete and superior legal title. The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead. It had, by such settlement, been segregated from the lands subject to selection, and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands the claim of the former is the better claim. Under the act of May 14, 1880 (ch. 89, 21 Stat. 141, § 3), the right of one, settling in good faith for the purpose of claiming a homestead, "relates back to the date of settlement." *Nelson* v. *Northern Pacific Railway*, 188 U. S. 108; *Sjoli* v. *Dreschel*, 199 U. S. 564; *St. Paul &c. R. Co.* v. *Donohue*, 210 U. S. 21. But it is urged that the original selection made May 26, 1883, was valid, and operated to vest the title as of that date in the railroad company. There is nothing peculiar in the act of July 4, 1866, which protected indemnity lands against settlement upon the filing of a map showing definite location of the railroad. The grant was one of every alternate section of land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the road. Then follows the indemnity provision, in these words (July 4, 1866, c. 168, 14 Stat. 87):

"But in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United

States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States, nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached, as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by," etc.

The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiff in error to that selection. The right to any land within the indemnity limits of the grant, as has been often decided, depended upon the inquiry whether deficiencies had been established within the place limits, and also whether the lands selected in place of such lost lands were at the time subject to such appropriation. Thus, if either preëmption or homestead rights had been initiated before such selection, the parcels to which such right had attached were not subject to appropriation as indemnity lands. The function of the Secretary of the Interior was therefore judicial and not ministerial. *Wisconsin Railroad Company* v. *Price County*, 133 U. S. 496, 512. In the case cited above this court said:

"Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection

made no title vests in any indemnity lands, has been recognized in several decisions of this court. Thus in *Ryan* v. *Railroad Co.*, 99 U. S. 382, 386, in considering a grant of land by Congress, in aid of the construction of a railroad similar in its general features to the one in this case, the court said: 'Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.' And again, speaking of a deficiency in the land granted, it said: 'It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose.' "

In *Sjoli* v. *Dreschel*, 199 U. S. 564, 566, this court said:

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preemption and homestead laws of the United States."

But it is urged that the mere fact that there was no record evidence of the homestead claim when the selections of 1891 were made was enough to give efficacy to that selection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said, namely, that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land.

We find no error in the judgment of the Supreme Court of Minnesota, and it is

Affirmed.

MR. JUSTICE BREWER did not sit in this case.

NORTHERN PACIFIC RAILWAY COMPANY *v.* STATE OF NORTH DAKOTA EX REL. McCUE, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 553. Argued February 24, 25, 1910.—Decided March 14, 1910.

Willcox v. *Consolidated Gas Company*, 212 U. S. 19, followed to effect that where the state court has found the rate fixed by a state commission on a single commodity to be not confiscatory and has refused an injunction, the decree will be affirmed without prejudice to the right of the carrier to reopen the case if, after adequate trial of the rate, it can prove that it is actually confiscatory and amounts to a deprivation of property without due process of law.
17 Nor. Dak. 223, affirmed without prejudice.

THE facts are stated in the opinion.

Mr. Charles W. Bunn for plaintiff in error.

Mr. Andrew W. Miller, Attorney General of the State of North Dakota and *Mr. Guy C. H. Corliss*, with whom *Mr. T. F. McCue* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding by the Attorney General of North Dakota, charging the plaintiff in error with continuous violation of a law fixing rates for the carriage of coal within the State, and asking for an injunction. See Nor. Dak. Laws of 1907, c. 51. The railroad answered that the act was void under Art. I, § 8, of the Constitution, the commerce clause; and also under the Fourteenth Amendment, because the maximum rates fixed by it were inadequate and confiscatory. Evidence was taken

and reported to the Supreme Court, and that court decided that the injunction should issue as prayed. 17 Nor. Dak. 223. The grounds of its decision were that the act referred only to transportation wholly within the State and therefore was not bad under Art. I, § 8, thus removing that question; and that the evidence did not prove that the rates would entail a loss on the carriage of coal, so that it was not necessary to decide whether in that event it would be unconstitutional, if the railroad made a fair profit on its whole business within the State.

The court did however intimate its opinion that if the railroad was able to make a fair profit upon its whole business within the State it might be required to carry a particular commodity at cost or possibly below, and it expressed its opinion so strongly that the counsel for the plaintiff in error treats that doctrine as the ground of decision and the statement as to the insufficiency of the evidence as made only in the light of it and upon rather technical grounds. He argues that the evidence was undisputed, that the facts testified to and the fair inferences from them must be taken as proved, and that on those facts and inferences the constitutional question is raised. The evidence consisted of tables of rates in other States, computation as to the cost of transportation, and expert opinions, all of which were thought to converge to the conclusion that the statutory rates were unreasonable and less than the cost of carriage. But laying technical objections on one side and taking the facts as admitted, the argument for the State showed that there are too many elements of uncertainty in the calculation for us to say, if we could, as to which we intimate no opinion, that the conclusion is proved, when the Supreme Court of the State says that it is not.

The carriage of coal is a very small part of the railroad's business. The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point. We are far from saying that the argument for doing so does not seem to

us to have considerable probability on its side. We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law. But we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal.

Decree affirmed without prejudice.

Similar decrees will be entered in Nos. 554 [1] and 555.[2]

[1] *Great Northern Railway Company* v. *State of North Dakota ex rel. McCue, Attorney General.* Argued February 24, 25, 1910. *Mr. Charles W. Bunn* for plaintiff in error. *Mr. Andrew W. Miller*, Attorney General of the State of North Dakota, and *Mr. Guy C. H. Corliss*, with whom *Mr. T. F. McCue* was on the brief, for defendant in error.

[2] *Minneapolis, St. Paul & Sault Ste Marie Railway Company* v. *State of North Dakota ex rel. McCue, Attorney General.* Argued March 24, 25, 1910. *Mr. Charles W. Bunn* for plaintiff in error. *Mr. Andrew W. Miller*, Attorney General of the State of North Dakota, and *Mr. Guy C. H. Corliss*, with whom *Mr. T. F. McCue* was on the brief, for defendant in error.

WILLIAMS *v.* FIRST NATIONAL BANK OF PAULS VALLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 130. Argued March 9, 1910.—Decided March 21, 1910.

A question of a Federal nature is raised by the contention, if denied by the state court, that a right or privilege exists under a Federal statute to remove the case into the Federal court.

The power of this court to review cases removed from the United States courts for Indian Territory to the state courts of Oklahoma under the provisions of the Enabling Act as amended by act of March 4, 1907, c. 2911, 34 Stat. 1287, is controlled by § 709, Rev. Stat.

Where plaintiff's right to recover is not predicated on any Federal right, the fact that the defense is that the transaction was prohibited by Federal law does not make the case one arising under the Constitution or laws of the United States. *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185.

Compromises of disputed claims are favored by the courts, *Hennessey* v. *Baker*, 137 U. S. 78, and the consideration on which a compromise is based will be sustained unless there is an express or implied statutory prohibition against the transaction.

There is no statutory prohibition against a member of either the Choctaw or Chickasaw tribe, not holding any excess of lands subject to allotment, selling his improvements upon tribal land or abandoning his right of possession thereof to another Indian. *Thomason* v. *McLaughlin*, 103 S. W. Rep. 595, approved.

Where the asserted Federal questions are not frivolous, but are so devoid of substance as to be without merit the writ will not be dismissed but the judgment will be affirmed.

20 Oklahoma, 274, affirmed.

THE defendant in error commenced this action in the United States Court for the Southern District of Indian Territory. The now plaintiffs in error were named as defendants. S. L. and S. T. Williams are brothers, and Jennie L. Williams is the wife of the defendant S. L. Williams. Recovery was

sought by the bank, as an innocent holder for value, before maturity, upon a note for five thousand dollars, executed by the defendants, dated February 4, 1904, and payable to the order of Susan E. Mays, with interest. The consideration for the execution of the note was thus alleged in an amended complaint:

"Plaintiff further alleges and charges the truth to be that the said note was executed by the said Jennie Lee Williams for the benefit of her separate estate; that at the time of the execution of said note a contest was pending before the Commission to the Five Civilized Tribes, which said body at said time had authority under law to entertain and hear the same between the said Jennie Lee Williams, one of the makers of said note, and Susan E. Mays, the payee therein, to determine which of the said parties had a right to take in allotment a certain tract of land located adjacent to the town of Maysville, Indian Territory; that said [note] was executed by the said Jennie Lee Williams, S. L. Williams and S. T. Williams, in consideration of the abandoning of said contest by the said Susan E. Mays, the payee therein; that after said note was executed the said Susan E. Mays did abandon her contest, and permit the said Jennie Lee Williams to take the said land in allotment, which she did, and the said land thereby became and is her separate property."

The amended complaint was demurred to on the following grounds:

"1st. Because the said amended complaint does not state facts sufficient to constitute a cause of action, and does not entitle plaintiff to the relief prayed for.

"2d. Because the transferee of a nonnegotiable note must aver and prove consideration for the transfer; and the note in suit is nonnegotiable, and plaintiff fails to aver any consideration whatever for the transfer.

"3d. Because section 16 of the Atoka agreement provides the only legal way Indian lands may be sold, and where a statute positively declares a thing cannot be done the law

will not suffer its policy and purpose to be thwarted by any subterfuge or ingenious contrivance clothed with the semblance of legality. This was a short-cut attempt to sell 40 acres of land, title to which was in the Indians.

"4th. Because the Dawes Commission had exclusive jurisdiction to determine all matters in controversy between members of the tribes as to their right to select particular tracts of land for allotment, and to determine the rights, if any, of Mrs. Susan Mays in the contest for said 40 acres of land; but the original payee of the note sued on, for a bare promise violated the law in such case made and provided.

"5th. Because it appears from the allegations in said complaint that the note sued on herein and for the amount and accrued interest of which the plaintiff seeks a judgment against the defendants was executed pursuant to an alleged contract entered into by and between the defendant, Jennie Lee Williams, and Susan E. Mays, in that said complaint shows that the sole and only consideration of said note was the agreement of the said Susan E. Mays to abandon a certain contest which she had instituted against the said defendant Jennie Lee Williams, before the Commission to the Five Civilized Tribes at Tishomingo, wherein she claimed the right to select as a part of her allotment certain premises which had been filed on and selected by the said Jennie Lee Williams as a member of the tribe of Chickasaw Indians.

"6th. Said complaint upon its face shows that the said note was executed by the defendants to the said Susan E. Mays for an illegal consideration and was executed without any consideration whatever, and of all this the defendants pray the judgment of the court."

The demurrer was overruled. In an amended answer, thereafter filed, after admitting the making of the note and averring that it was executed by Jennie Lee Williams as principal and by the other defendants as sureties, the following allegations were made:

"1st. The defendants admit that heretofore, to wit, on the

4th day of February, 1904, they executed and delivered unto Susan E. Mays their promissory note for the principal sum of five thousand dollars, due ninety days from date, and they admit that said note as so executed is copied in the plaintiff's first amended complaint, and that the same is witnessed by James A. Cotner, and they admit that the defendant Jennie Lee Williams is a married woman and the wife of the defendant S. L. Williams, but they allege and charge that said note was executed by Jennie Lee Williams as principal and S. L. Williams and S. T. Williams as sureties.

"These defendants deny, as alleged in the complaint, that said note was executed by the said Jennie Lee Williams for the benefit of her separate estate; but they admit that at the time of the execution of the said note a contest was pending before the Commission to the Five Civilized Tribes between Susan E. Mays, as contestant, and Jennie Lee Williams, as contestee, and that the purpose of said contest, as instituted by the said Susan E. Mays, was to determine whether she or the said contestee had a right to take in allotment a certain tract of land located adjacent to the town of Maysville, Indian Territory; but these defendants deny that said note was executed by the said defendants Jennie Lee Williams, S. L. Williams and S. T. Williams, in consideration of the withdrawal of the said Mrs. Susan E. Mays from said contest, as aforesaid; and they deny that the said Susan E. Mays did withdraw her contest and permit the said Jennie Lee Williams to take the said lands in allotment; and that by reason of the withdrawal of the said Susan E. Mays from said contest that said land became and was the separate property of the said defendant Jennie Lee Williams; but defendants allege and charge the truth to be that since the execution and delivery of said note as aforesaid that said Commission aforesaid has duly awarded and delivered to said defendant Jennie Lee Williams certificate to said land.

"2d. But these defendants allege and charge the truth to be that sole and only consideration of said note, as aforesaid,

was the pretended and illegal sale of certain lands situated near Maysville, in the Chickasaw Nation, Indian Territory, by the said Susan E. Mays to the said Jennie Lee Williams; that said pretended sale was illegal, fraudulent and void; that the same was made, executed and delivered by said Susan E. Mays to said Jennie Lee Williams in violation of and in contravention of the provisions of a treaty made by and between the United States and the Chickasaw and Choctaw tribes of Indians in the year 1902, which said treaty was ratified by a majority vote of said tribes and by act of the Congress of the United States, and in violation of and in contravention of the provisions of a treaty of the United States and the said tribes of Indians, made, concluded and ratified by said tribes and the Congress of the United States in the year 1898, and known as the 'Atoka Agreement,' and that by reason thereof said pretended conveyance from said Susan E. Mays to said Jennie Lee Williams is illegal, fraudulent and void, and of no effect, and that by reason of the premises aforesaid the said note herein sued for, when executed, was and hitherto since has been, illegal and void and without consideration. A copy of said conveyance is hereto annexed and marked 'Exhibit A,' and made a part hereof.

"3d. And still further answering herein, the defendants say that the plaintiff ought not further prosecute and maintain this action against them because they allege and charge that at the date of the execution of said conveyance from Mrs. Susan E. Mays to Jennie Lee Williams, as aforesaid, said Susan E. Mays did not have the possession, right or title to the premises in said conveyance described, and did not own the improvements situated thereon, and had no interest therein which she could convey to the defendant Jennie Lee Williams, and that the consideration of the note herein sued on for that reason has totally failed; all of which the defendants are prepared and willing to verify, and they put themselves upon the country and pray the judgment of the court that they be discharged, with their costs."

Exhibit "A," omitting the acknowledgment, reads as follows:

"TISHOMINGO, INDIAN TERRITORY, February 4, 1904.

"Know all men by these presents:

"That I, Susan E. Mays, of Maysville, Indian Territory, for and in consideration of the sum of one dollar, ($1), cash in hand to me this day paid by Samuel L. Williams, Jennie Lee Williams, and receipt of which money is hereby acknowledged, and the further consideration of the sum of five thousand dollars, ($5,000,) to be paid me by said Samuel L. Williams, Jennie Lee Williams, on the 4th day of May, 1904, which indebtedness is evidenced by a promissory note of even date herewith, due on the 4th day of May, 1904, bearing interest at the rate of eight per cent per annum from date, signed by S. L. Williams, Jennie Lee Williams and S. T. Williams. I hereby bargain, sell, and convey and relinquish all my right, title or claim which I have in any way in and to the possession of the lands and improvements situated upon the N. ½ of the N. E. ¼ of the S. E. ¼ of sec. 16, and the N. E. ¼ of the N. W. ¼ of the S. E. ¼ sec. 16, and the S. E. ¼ of the N. E. ¼ of the S. E. ¼ of sec. 16, all in township 4 N., range 2 W., Chickasaw Nation, Indian Territory.

"Relinquishing unto the said Samuel L. Williams and Jennie L. Williams all rights which I have in and to the proceeds due or to become due, or from the sales of town property, or my interests in the said townsite, located on the above described premises, hereby relinquishing to them any claim that I have by any former agreements pertaining to any townsite on said lands above described.

"Witness my hand on this the 4th day of February, 1904.

"SUSAN E. MAYS."

A demurrer to the amended answer was sustained and, the defendant refusing to plead further, judgment was entered on April 14, 1905, in favor of the bank for the full amount of the note, with interest and costs. A writ of error was allowed

and the cause was taken to the United States Court of Appeals for the Indian Territory. While the cause was pending in that court Oklahoma became a State, and by virtue of the Enabling Act the cause was transferred to the Supreme Court of the new State. On December 24, 1907, a petition was filed on behalf of the plaintiffs in error in the Supreme Court of the State, accompanied with bond, and it was prayed that the cause be removed into the Circuit Court of the United States for the Eastern District of Oklahoma, upon the ground "that by virtue of the Enabling Act it was entitled to be so removed because the suit herein is of a civil nature at law arising under the Constitution and laws of the United States." The application was denied, and, from a judgment of affirmance thereafter entered (95 Pac. Rep. 457; 20 Oklahoma, 274), this writ of error is prosecuted.

The errors assigned in substance are that the Supreme Court of Oklahoma erred in overruling the application to remove, in holding that error was not committed by the trial court in overruling the demurrer to the amended complaint, and in deciding that error was not committed in sustaining the demurrer to the amended answer.

Mr. W. O. Davis, with whom *Mr. L. S. Dolman* and *Mr. R. E. Thomason* were on the brief, for plaintiffs in error:

While ordinarily a compromise of a disputed right will support a promise to pay, if the consideration for the promise is the doing of that which is immoral, forbidden by law or against public policy, the promise will not be enforced even though it grow out of a compromise. If Mrs. Mays did not have the right to sell unallotted land in the Chickasaw Nation, and of this there can be no question, the sale which was otherwise illegal, is not made legal by a compromise. The right of Mrs. Mays to apply for unimproved land of which she was not in possession, was a personal privilege and not the subject of bargain and sale. It would encourage strife, produce delay, and seriously interfere with the public business, if members

of the tribe were permitted to file contests in order to extort money or to be paid not to appear. Whenever there are conflicting claims to an allotment, the Dawes Commission has tried the case upon its merits regardless of the agreement of the parties.

The Secretary of the Interior has decided that any agreement made by the parties to an allotment contest may be disregarded by the Dawes Commission. *Creek Contest, No. 491, Quabner* v. *Greenleaf*, 10th Annual Report. No dismissal or confession of judgment is allowed. Testimony must be taken and the land must be awarded to the person who was the owner of the improvements thereon at the time of the filing of the first application. *Creek Contest, No. 267, Sookey* v. *Smith; Creek Contest, No. 260, Drew* v. *Conrad; Creek Contest, No. 263, Franklin* v. *Franklin; Creek Contest, No. 326, Penman* v. *Haikey.*

The Federal courts take judicial notice of the rules of the Land Department in contest cases. *Coha* v. *United States*, 152 U. S. 221.

The rights of the citizen claiming to own improvements on more land than he is entitled to take, are purely personal and he cannot convey title to any citizen as against one who is in possession of the land. *Chickasaw Allotment Contest, No. 104; Chickasaw Allotment Contest, No. 821.*

The Curtis Act was not intended to give illegal holders any vested or other right to dispose of their illegal possessions to the exclusion of other members of the tribe who have entered upon and selected their *pro rata* share prior to any attempted transfers by those whose possessions are in excess of their *pro rata* shares. *Creek Contest, No. 759; Chickasaw Contest, No. 112.*

The bill of sale after the institution of a contest is not binding on the commissioner. *Chickasaw Contest, No. 197, Jacobs* v. *Townsend;* see *Stevens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 307, and numerous other cases in which this court has had occasion

to investigate and pass upon unfortunate conditions in the Indian Territory.

The Curtis Bill and the Atoka Agreement, 30 Stat. at L. 641, sought to remedy these conditions, and to prepare the country for equal distribution among the members of the tribe, and to give to each one his rights in severalty.

Where rights are equal and each member entitled to his *pro rata* without cost and without price, one member of the tribe who had no right to sell cannot charge another member of the tribe five thousand dollars for the privilege of taking forty acres of common land in allotment. *Coombs* v. *Miller*, 103 Pac. Rep. 590; *Swanger* v. *Mayberry*, 59 California, 91; *McLaughlin* v. *Ardmore Trust Co.*, 6 Oklahoma Law Jour., No. 11, p. 463; *Lingle* v. *Snyder*, 160 Fed. Rep. 627; *Anderson* v. *Carkins*, 135 U. S. 483, hold that where the contract is against public policy it cannot be enforced.

Mr. S. T. Bledsoe, with whom *Mr. J. B. Thompson* was on the brief, for defendants in error:

The Supreme Court of Oklahoma did not err in refusing to grant the petition for removal; the petition presented no sufficient ground. *Carson* v. *Dunham*, 121 U. S. 421; *Water Co.* v. *Defiance*, 191 U. S. 190; *West. Un. Tel. Co.* v. *Ann Arbor R. Co.*, 178 U. S. 239; *Gold Washing Co.* v. *Keys*, 96 U. S. 199; *Blackburn* v. *Mining Co.*, 175 U. S. 571; *Shreveport* v. *Cole*, 129 U. S. 36; *Florida Central R. R. Co.* v. *Bell*, 176 U. S. 321. See also following decisions of the Court of Appeals for the Indian Territory: *Ikard* v. *Minter*, 4 Ind. Ter. App. 214; *Hewlitt* v. *Hyden*, 69 S. W. Rep. 839; *Turner* v. *Gilliland*, 76 S. W. Rep. 253; *Blocker* v. *McLendon*, 98 S. W. Rep. 166, *Thomason* v. *McLaughlin*, 103 S. W. Rep. 595; *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185.

Compromises are favored in law. If a case is tried one party must ultimately lose. If compromises could be avoided at the instance of the party who would have been successful if the case had been tried, no compromise would ever stand.

If, in a trial upon the compromise obligation, the merits of the original controversy could be tried, compromises would be worse than useless in the settlement of litigation. *Buckner* v. *McElroy*, 31 Arkansas, 634; 1 Parsons on Contracts, 444; *Mason* v. *Wilson*, 43 Arkansas, 177; *Richardson* v. *Comstock*, 21 Arkansas, 70; *Burton* v. *Beard*, 44 Arkansas, 556; *Springfield & Memphis Ry. Co.* v. *Allen*, 46 Arkansas, 220; *Hennessey* v. *Baker*, 137 U. S. 78; *Mills County* v. *Burlington & Missouri River R. R. Co.*, 107 U. S. 557; *Knotts* v. *Preble*, 50 Illinois, 226; *A., T. & Santa Fe Ry. Co.* v. *Starkweather*, 21 Kansas, 238, by Brewer, J.; *Little* v. *Allen*, 56 Texas, 133.

Under both the homestead and preëmption laws personal residence for a given time, as well as improving the land are conditions precedent to the right to enter the lands or preëmpt the same. This personal occupancy of the land necessarily cannot be the object of barter and sale.

There is not now, nor has there ever been, any prohibition against a member of the Indian civilized tribe selling his improvements and right of occupancy. This right has been exercised from time immemorial. These transfers have been sustained by the Court of Appeals of the Indian Territory in numerous instances.

The four Arkansas cases, *McFarland* v. *Matthews*, 10 Arkansas, 560; *Hughes* v. *Sloan*, 8 Arkansas, 149; *Carr* v. *Allen*, 5 Blatchford, 63; *Carson* v. *Clark*, 2 Scammon, 113, can be distinguished, and see *Gaines* v. *Rector*, 26 Arkansas, 192; *Gaines* v. *Hale*, 93 U. S. 3; *Randon* v. *Toby*, 11 How. 493.

The defendants seem to have repented their transaction, repentance extending to an attempted repudiation of the burden of the transaction, but not to surrendering the tainted property acquired through the alleged illegal transaction.

The transactions involved were not prohibited by law. Nothing in either agreement prohibits a member of either of said tribes from selling his improvements upon tribal lands or his right to possession thereto to another member of the tribe. In the absence of any statute to that effect Congress

will not be presumed to have intended that the members of these tribes should not be permitted to adjust their allotments by acquiring the improvements of other members upon different tracts of land. See *Thomason* v. *McLaughlin*, 103 S. W. Rep. 595; *Turner* v. *Gilliland*, 76 S. W. Rep. 253; *Blocker* v. *McLendon*, 98 S. W. Rep. 166. Not only was there nothing illegal in the transaction, but the defendants having accepted, appropriated, used, and enjoyed the benefits accruing by virtue of the settlement entered into and having appropriated the proceeds from the sale of certain property as provided on the quit-claim deed are now estopped to controvert the rights of the complainants to recover upon the note sued on herein.

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

In addition to discussing the merits, the defendant in error presses upon our attention a motion to dismiss, in substance upon the ground that no question of a Federal nature is presented. As the plaintiffs in error had no greater right to prosecute the writ of error than is possessed by suitors generally when seeking the review of a final judgment of a state court (§ 20, Enabling Act, as amended March 4, 1907, c. 2911, 34 Stat. 1287), it results that our power to review is controlled by Rev. Stat., § 709. Irrespective of other contentions, beyond peradventure a question of a Federal nature, however, was raised by the contention, denied by the state court, that a right or privilege existed under a statute of the United States to remove the cause into the Circuit Court of the United States, and the motion to dismiss cannot therefore prevail.

As to the denial of the right to remove.—The claim of plaintiffs in error is that the right to remove the cause into the Circuit Court of the United States arose from the fact that it was a suit arising under the Constitution and laws of the

United States, and that the right existed by virtue of § 16 of the Enabling Act, as amended on March 4, 1907, c. 2911, 34 Stat. 1286, the pertinent portion of which is as follows:

"SEC. 16. That all civil causes, proceedings, and matters pending in the Supreme or District Courts of Oklahoma Territory, or in the United States courts or United States Court of Appeals in the Indian Territory, arising under the Constitution, laws or treaties of the United States, or affecting ambassadors, ministers, or consuls of the United States, or of any other country or State, or of admiralty, or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same State claiming lands under grants from different States; and all cases where there is a controversy between a citizen of either of said Territories prior to admission and a citizen of any State, or between a citizen of any State, and a citizen or subject of any foreign State or country, in which cases of diversity of citizenship, there shall be more than two thousand dollars in controversy, exclusive of interest and costs, shall be transferred to the proper United States Circuit or District Court established by this act, for final disposition, and shall therein be proceeded with in the same manner as if originally brought therein: *Provided,* That said transfer shall not be made in any such case where the United States is not a party, except on application of one of the parties, in the court in which the cause is pending, at or before the second term of such court after the admission of said State, supported by oath, showing that the case is one which may be so transferred. The proceedings to effect such transfer, except as to time and parties, shall be the same as are now provided by law for the removal of causes from a State court to a Circuit Court of the United States."

In the petition for removal it was alleged in support of the right to remove—

"That the said suit involves the construction of the treaties and laws and acts of Congress concerning the allotment

of lands to the Choctaw and Chickasaw tribes of Indians under the acts of Congress approved April 29, 1898, and the act approved July 1, 1902, commonly known as the 'Atoka and the Supplemental Agreements between the Choctaw and Chickasaw tribes of Indians in the Indian Territory.'

"Petitioner shows that the controversy herein arises from the following facts:

"On February 4, 1904, appellant executed a promissory note to the assignor of appellee for five thousand ($5,000) dollars, due in ninety (90) days, with interest at 8 per cent from date.

"That the consideration for said note was that the payee thereof should cease to prosecute further and abandon a certain contest then pending before the Commission to the Five Civilized Tribes, in which the payee was contestant and the appellant herein was contestee.

"That the appellee took said note with full knowledge of the facts as disclosed by its pleadings. Appellant by demurrer and answer claims that the consideration is contrary to the letter and spirit of the act of Congress of April 29, 1898, and of July 1, 1902; that it is not a legal, valid or any consideration for the note."

The contention that the cause of action arose under the Constitution or laws of the United States is plainly untenable. Recovery by the bank was in no wise predicated upon any right conferred upon it or its assignor to contract, as was done, and the fact that the makers of the note relied for their defense upon provisions contained in certain statutes as establishing that the transaction upon which the right to recover was based was prohibited by law, "would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States." *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185, 190.

As to the asserted Federal questions claimed to arise upon the rulings in respect to the overruling of the demurrer to the

amended complaint and the sustaining of the demurrer to the amended answer.—In the light of the allegations of the complaint and the admissions (either express or implied from the failure to deny) contained in the amended answer, we think the record established that Susan E. Mays and Jennie Lee Williams were members either of the Choctaw or Chickasaw tribe of Indians; that Mrs. Williams selected for allotment and filed upon forty acres of land, upon which were improvements, situated adjacent to the town of Maysville, Indian Territory. The right of Mrs. Williams to select the land being disputed by Susan E. Mays, she filed a contest against the same before the Commission to the Five Civilized Tribes. When this was done, Susan E. Mays was not in the occupancy of any other land liable to allotment. Pending the proceedings, by way of compromise, Susan E. Mays agreed to abandon the contest instituted by her and relinquish her right to the allotment of the land in controversy and the improvements thereon, in consideration of the execution of the note in suit; that said note was executed for the benefit of the separate estate of Jennie Lee Williams and was delivered to Susan E. Mays, who thereupon abandoned the prosecution of her said contest before the Commission, and the allotment of the land to Mrs. Williams followed.

Compromises of disputed claims are favored by the courts (*Hennessey* v. *Baker*, 137 U. S. 78); and, presumptively, the parties to the compromise in question possessed the right to thus adjust their differences. We come then to consider whether, as claimed, there was a want of consideration for the note because of an express or implied statutory prohibition against the transaction which formed the consideration for the note.

In the demurrer to the amended complaint the claim advanced to defeat the right to recover on the note, which was substantially reiterated in the amended answer, was that, in truth, the sale was of the land and was illegal because not made according to the method for acquiring allottable tribal

land provided for in agreements between the Government of the United States and the Choctaw and Chickasaw governments, and because controversies as to allotments of land over which the Dawes Commission had jurisdiction could alone be determined by that body. We do not pause to consider whether these general allegations constituted such a special setting up of a right, privilege or immunity under a law or laws of the United States as is required by Rev. Stat., § 709. Considering the complaint and answer in their entirety, especially when viewed in the light of the allegations of the petition for removal, it clearly results, as stated in the petition for removal, that "the consideration for the said note was that the payee thereof should cease to prosecute further and abandon a certain contest then pending before the Commission to the Five Civilized Tribes, in which the payee was contestant and the appellant herein was contestee." In the argument at bar, while counsel has referred to statutory provisions and to various decisions which it is asserted establish that a sale by an Indian of part of an excessive holding of allottable tribal land or of improvements thereon would not be a valid consideration for a note given to evidence the price of such sale, we have been referred to no statute nor cited to any treaty or agreement made with the Indian tribes giving rise even to the suggestion that where a *bona fide* contest existed between two Indians as to right to a tract or tracts of land arising from a claim based upon selection on the one hand and on the other because of occupancy and improvements, it would be unlawful for the latter to abandon his contention as to his preferential right for a money consideration. Nor have we been referred to any statutory provision which either expressly or impliedly deprived the parties to a contest of their right to compromise simply because of the pendency of the contest before the Commission to the Five Civilized Tribes. An opinion of the United States Court of Appeals of the Indian Territory, a tribunal which was specially competent to pass upon a question of the kind

we are considering, lends support to the conclusion we have reached that a member of either the Choctaw or Chickasaw tribe, when as here there is no showing that such a member was the holder of an excess of lands subject to allotment, was not prohibited at any time from selling his improvements upon tribal land or abandoning his right to the possession thereof to another Indian. The opinion referred to was announced in the case of *Thomason* v. *McLaughlin*, 103 S. W. Rep. 595, in which case, among other questions, the court passed upon the validity of a sale of tribal land by one Indian to another after the enactment of the act of June 28, 1898, known as the Curtis Bill (June 28, 1898, ch. 517, 30 Stat. 495), wherein, in § 29, is embodied the so-called Atoka Agreement. After referring to a provision in § 17 of the act, limiting the extent of an Indian's holding before allotment to the approximate share of the lands to which he and his wife and minor children were entitled, and making it a misdemeanor to retain the possession of an excess of such share after the expiration of nine months from the passage of the act, the court said (p. 598):

"Inasmuch as the sale in this case was made within the nine months' limit, this, of course, would not affect the validity of the sale, even though Lafon had been in possession of more land than that to which he was entitled. It is a well-known fact that many Indians, at the time of the passage of this act, were in possession of large tracts of improved lands, in excess of that to which they were entitled; and under the laws and customs of the different tribes at that time this land was lawfully held. The nine months' provision was introduced into the Curtis Bill for the purpose of giving them an opportunity of disposing of the excess and thereby to get some remuneration for the improvements which they, by their labor and industry, had lawfully made upon the lands. And there is no provision in either of these sections, or anywhere else, that could be construed to deprive an Indian in this Territory of the right to dispose of his holdings to another

Indian, if he desired to do so, in order that he might select his allotment on other lands. The statute did not intend that an Indian should be compelled to take his allotment on the land then held by him. He could sell his improvements and holdings to another Indian for allotment and lay his own on other land which he might find vacant, or which he might, in turn, purchase from another Indian. This method was adopted almost universally by the Indians, and it was not unlawful as between Indians. But to hold an excess of lands after the expiration of the nine months was unlawful and a crime."

While the asserted Federal questions are not so wholly devoid of substance as to be purely frivolous, they are nevertheless without merit, and the judgment must be and it is

Affirmed.

MONSERRATE GARCIA MAYTIN *v.* VELA.

BEATRIZ DE LOS ANGELES, WIDOW OF ALÓS, *v.* MONSERRATE AND DOMINGA GARCIA MAYTIN

APPEALS FROM THE SUPREME COURT OF PORTO RICO.

Nos. 90, 245. Argued March 8, 9, 1910.—Decided March 21, 1910.

In the absence of summons and severance all defendants against whom a decree in an equity suit is entered must join in the appeal. *Hardee* v. *Wilson*, 146 U. S. 179.

In a suit coming from a Territory this court is not inclined to overthrow the assumptions of the trial court in regard to matters controlled by the local law; and so held in affirming a judgment in a case coming from Porto Rico involving questions of inheritance and prescription.

Quære, as to the effect of Article 811 of the Civil Code of Porto Rico, requiring an ascendant inheriting property under certain conditions

to reserve the property in favor of relatives belonging to the line from which the property originally came, as to property inherited before the adoption of the article by one dying after its adoption still possessed of the property.

THE facts are stated in the opinion.

Mr. N. B. K. Pettingill, with whom *Mr. Robert H. Todd* was on the brief, for appellant in No. 90, and appellee in No. 245.

Mr. Willis Sweet for appellee in No. 90 and appellant in No. 245, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are cross-appeals in a proceeding brought by Monserrate and Dominga Garcia, two sisters of Manuel Garcia Maytin, and by another plaintiff now dropped out, to establish their rights in property descended from the said Manuel Garcia. The claim is founded upon Article 811 of the former Civil Code, of which the following is the War Department translation: "The ascendant who inherits property from his descendant, acquired by the latter for a good consideration from another descendant [ascendant] or from a brother or sister, is obliged to reserve the property he may have acquired by force of law in favor of the relatives within the third degree belonging to the line from which such property originated."

The following is the course of the property concerned:

1. Complainants' brother, Manuel Garcia Maytin. Died intestate in 1886, succeeded by

2. His daughter, Mrs. Beatriz Garcia de Ibarra, as sole heir. Died intestate and without descendants 1891, succeeded by

3. Her mother, Mrs. Beatriz Alós, widow of Manuel Garcia Maytin, as sole heir. Died, 1904, leaving a will, devising to

4. Her mother, Beatriz de los Angeles, and nephews and nieces, who with Vela, the executor of the will, and with purchasers from Mrs. Beatriz Alós, are the defendants.

It will be seen that (3) Mrs. Beatriz Alós was an ascendant who inherited from her descendant (2), Mrs. Beatriz Garcia, property acquired by the latter from the ascendant (1), her father. Therefore the devisees of Mrs. Beatriz Alós would be postponed by the law just quoted in favor of the relatives within the third degree, who are the two sisters bringing this complaint.

The Supreme Court of Porto Rico, in a very lucid and persuasive opinion, established the position of the plaintiffs and answered the objections urged by the defense. It was shown that as Mrs. Beatriz Alós (3) inherited all the property of her daughter (2) as sole heir, notwithstanding the fact that the husband of the latter had the usufruct of one-third for life, the obligation extended to all the property so inherited, being the same property that the daughter had inherited from her father, she not appearing to have had any other estate, with insignificant exceptions. It was shown further that the obligation of Mrs. Beatriz Alós and Mrs. Beatriz de los Angeles was not affected by the failure of the plaintiffs and others to make it appear in the registry that the property was subject to be reserved. Mortgage Law, Art. 199. That section was not the source of the plaintiffs' rights, but only a means of securing them against *bona fide* purchasers. It did not extinguish their rights as against the relatives under Art. 811 of the Civil Code, in case of neglect. Finally, a satisfactory answer was given to the argument that the plaintiffs were barred by prescription, under an order of the military government of Porto Rico, published on April 4, 1899, by which the Civil Code, Art. 1957, was amended so that ownership should prescribe by possession for six years with good faith and a proper title. The daughter died in 1891, and her mother recorded her title in the registry and held from 1891 to her death in 1904. But it was replied that

in the first place prescription had not been pleaded, and was not open, and, secondly, that Article 1957, and therefore the amendment, referring to prescription to acquire ownership, coexists with Art. 1963, which fixes a term of thirty years for the prescription by which ownership of real property is lost through a failure to bring a real action, and that in this case the prescription relied upon (and, we may add, probably the only one that could have been relied upon) was that resulting from the plaintiffs not having sued.

For these reasons the Supreme Court affirmed a judgment of the District Court, condemning the defendants to deliver to the plaintiffs certain specified land, or, where the same had been sold, the value of the same, to be ascertained by appraisement, with the costs in the District Court. The defendant, Mrs. Beatriz de los Angeles, appealed, her appeal being number 245 in this court, but as the other defendants did not join in the appeal, and there was no summons and severance, not to speak of other possible objections, the appeal must be dismissed. *Hardee* v. *Wilson,* 146 U. S. 179. We therefore go no farther on this part of the case than to give the foregoing brief summary of an argument from which we see no reason to dissent.

The plaintiffs also appeal and this makes it necessary to mention one or two facts not noticed thus far. On the death of Manuel Garcia, his widow, in the course of proceedings for the settlement of his estate, filed what seems to have been called a petition for partition, admitting however that there were no properties belonging to the conjugal partnership. An auditor was appointed and he prepared schedules of assets and liabilities, of the portion of assets distributed to the widow for the payment of such liabilities, and of the remainder awarded to the daughter and sole heir; this last consisting of two parcels of land and some personalty of small value. Thereupon the partition was closed. The judgment appealed from gave the plaintiffs only the land inherited by the mother from the daughter and included in the last-

mentioned schedule. The plaintiffs set up that the partition proceedings were void upon their face for several reasons and that they therefore are entitled to all the property that Manuel Garcia left.

The local courts answered this claim by saying that if there were otherwise any foundation for it, it is barred by the limitation of four years set to rescissory actions and actions for nullity by Arts. 1076 and 1301 of the Civil Code. For in the first place neither the daughter nor her husband, Mr. Ibarra, ever took any steps to set the partition aside, and it is plausible to say that the plaintiffs claim by inheritance from her, since if she had left descendants the property would have gone from her to them. Hence, notwithstanding the daughter's inability to cut the plaintiffs off in the event that happened, it is questionable at least whether they are not barred by what barred her. In the next place, the plaintiffs took no steps after the daughter's death, during the whole lifetime and occupation of her mother from 1891 to 1904. Even if, as the plaintiffs say, their right would have been divested by their death during the life of the mother, Mrs. Beatriz Alós, (3), it seems to have vested at the death of the daughter, Mrs. Beatriz Garcia (2). We are not prepared to overthrow the assumption made by the court, whose experience in such questions is entitled to much consideration, *Armijo* v. *Armijo*, 181 U. S. 558, 561, *Albright* v. *Sandoval*, Feb. 21, 1910, *ante*, p. 331, that the plaintiffs had a sufficient interest to entitle them to bring an action to set aside the so-called partition on the daughter's death, and that on their failing to do so the right to dispute the same was barred by lapse of time.

If the partition stands the other questions argued, as to purchasers from the mother, Mrs. Beatriz Alós, etc., need no further answer. We deem it proper to add one remark. Article 811 created the right by which the plaintiffs recover. It did not go into effect until after the death of Manuel Garcia, so that it would seem to have been open to argument that

his daughter inherited his property by an absolute title which that law should not be construed to have disturbed. But as it did go into effect before the daughter's death, and as it has been assumed on all hands that that moment was the decisive one, we have made the same assumption under the circumstances and for the purposes of this case. It seems to us, however, that the plaintiffs have reason to be satisfied with retaining what they got by the judgment below.

No. 90. *Judgment affirmed.*

No. 245. *Appeal dismissed.*

WITHNELL *v.* WILLIAM R. BUSH CONSTRUCTION COMPANY.

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

No. 108. Argued January 26, 1910.—Decided February 28, 1910.

A decree of the Circuit Court sustaining a demurrer to a complaint praying that an assessment for construction of a street be declared void as depriving plaintiff of his property without due process of law, affirmed by a divided court without opinion.

THE brief of the appellee contains the following statement:

This is a bill in equity. The parties to the suit, plaintiff and defendants, are all residents of Missouri and of the same judicial district in that State. The subject-matter of the suit is the contention on the part of the plaintiff that the two special tax bills described in the complaint, issued against his property, by the public authorities of St. Louis, under the charter of that city, as a local assessment for the construction of a street, are void. The tax bills are claimed to be void for one of two reasons, stated in the alternative, namely, first, because the assessment district, as formed, and which includes the plaintiff's property, is not in conformity to the charter

requirements, and, second, if it shall be found that the district is correctly defined, then that the charter provision, under which it was formed is void, because in contravention of the Fourteenth Amendment to the Constitution of the United States.

The defendants below demurred to the bill upon the grounds:

1. That the plaintiff has a complete adequate remedy at law.

2. That the allegations of the bill affirmatively show that the assessment district therein referred to was established in accordance with the provisions of the charter of St. Louis.

3. That the matter stated in the bill is not a subject of Federal cognizance.

The demurrer was sustained and the complainant declining to plead further, a decree dismissing the bill was entered, from which decree the complainant appealed.

Mr. Edmund T. Allen and *Mr. Clifford B. Allen* for the appellant.

Mr. E. C. Kehr for the appellees, submitted.

Per Curiam. Decree affirmed with costs by a divided court.

HUDSON OIL & SUPPLY COMPANY *v.* BOORAEM, RECEIVER, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR DISTRICT OF NEW JERSEY.

No. 568. Ordered advanced and submitted February 28, 1910.—Decided February 28, 1910.

An appeal taken solely on the question of jurisdiction from a final decree of the Admiralty Court, allowing the expenses and claims of a receiver in bankruptcy to be first paid from the proceeds of the vessel against which proceedings were taken *in rem*, and which was

in custody of the receiver prior to the filing of the libel, affirmed without opinion.

THE following statement of facts appears in brief of appellant:

This is an appeal from a final decree in admiralty made by the District Court of the United States for the District of New Jersey.

The appeal is solely upon the question of the jurisdiction of the said District Court to render the decree.

The action in the District Court was a suit in admiralty *in rem* by the above named appellant, the Hudson Oil & Supply Company, as libelant, against the barge, *James Hughes*, her tackle, etc., for supplies furnished the said barge.

Under the libel process against the said barge, her tackle, etc., was duly issued to the marshal of the District of New Jersey; the barge was duly attached and notice given by the marshal to all persons claiming the same and the usual interlocutory decree *pro confesso*, of default, condemnation and sale with an order of reference to a commissioner to report the amount due the libelant was made and entered. The vessel was duly sold pursuant to said interlocutory decree and an order was thereupon made confirming the sale.

A number of libels having been filed by other parties against the said barge between the time of the filing of the appellant's libel and the sale of the barge, the various libelants stipulated between themselves that a reference to ascertain the respective amounts due be waived and a final decree be entered decreeing to each libelant the amount of his claim in full. It was subsequently stipulated by the proctors for the respective libelants that the commissioner report to the court the amount of the claims of all the libelants.

A final decree and order of distribution was made and entered.

This decree recites that it appeared that prior to the date of the filing of the libels the vessel was in the custody of the

court in bankruptcy, and that said court had incurred expenses for its receiver in bankruptcy and for his counsel and for other purposes in the matter of caring for and preserving said vessel.

It therefore decrees that out of the proceeds of the sale of the barge, *James Hughes*, there be first paid to Theodore B. Booraem, receiver of James Hughes, Sr., bankrupt, forty-two per cent of the net proceeds of sale for his expenses, disbursements and allowances as said receiver.

It further recites that the net proceeds of sale are insufficient to pay the receiver and the various libelants in full, and it directs the payment of the full proportionate amount of the receiver's claim, and afterwards that the balance be distributed *pro rata* among the libelants.

This decree was framed by the district judge himself.

Thereupon the appellant prayed for leave to appeal to this court, which was granted.

The appellant thereafter perfected its appeal and filed its assignment of errors.

The appellee, the receiver and trustee in bankruptcy, never appeared in the action in the District Court, never filed or presented any claim, pleading or petition. The only pleading in the case is the libel of the appellant. The decree in favor of the libelant, was, as before stated, taken by default, no one appearing, other than the libelant.

Mr. deLagnel Berier for the appellant.

Mr. George S. Silzer and *Mr. Robert Adrain* for the appellee.

Per Curiam. Decree affirmed with costs.

WEIR *v.* ROUNTREE.

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

No. 769. Motion to dismiss or affirm submitted February 21, 1910.—Decided February 28, 1910.

Where the Circuit Court would not have had jurisdiction had the allegations of diverse citizenship been stricken from the bill the decision of the Circuit Court of Appeals is final.

Appeal from 173 Fed. Rep. 776, dismissed.

Mr. Eugene F. Ware for the appellee in support of the motion.

Mr. William C. Scarritt for the appellants in opposition thereto.

Per Curiam. Bill was filed by the express company to restrain Mrs. Rountree from bringing suit against the company, which was directed to be dismissed for want of jurisdiction because there was no diversity of citizenship and no Federal ground for jurisdiction. *Rountree* v. *Adams Express Co.*, 165 Fed. Rep. 152. From this decree no appeal was taken.

A second suit on the same alleged cause of action was then brought in the name of the officers of the company, Levi C. Weir and others, alleging their diverse citizenship. The second suit was dismissed by the Circuit Court and carried to the Circuit Court of Appeals for the Eighth Circuit, and the latter court affirmed the decree of the Circuit Court. *Weir* v. *Rountree*, 173 Fed. Rep. 776.

This appeal was then prosecuted, but we are of opinion that it cannot be maintained. *Colorado Central Consolidated Mining Co.* v. *Turck*, 150 U. S. 138; *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477. If the allegations which set up diversity of citizenship were stricken from the bill, the

Federal court would have had no jurisdiction. Being relied on, the decree of the Circuit Court of Appeals was final.

Appeal dismissed.

MOORE, COMMISSIONER OF PATENTS, *v.* UNITED STATES EX REL. NEWCOMB MOTOR COMPANY.

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

No. 115. Argued March 1, 2, 1910.—Decided March 7, 1910.

A writ of error to the Court of Appeals of the District of Columbia dismissed for want of jurisdiction without opinion on the authority of *Frasch* v. *Moore*, 211 U. S. 1, and other cases cited.

Writ of error to review 33 App. D. C. 597, dismissed.

Mr. Frederick P. Fish and *Mr. Melville Church*, with whom *Mr. Albert G. Davis* was on the brief, for plaintiff in error.

Mr. Robert N. Kenyon, with whom *Mr. Walter F. Rogers* and *Mr. Charles H. Duell* were on the brief, for defendant in error.

Per Curiam. The writ of error is dismissed for want of jurisdiction. *Frasch* v. *Moore*, 211 U. S. 1; *Rousseau* v. *Browne*, 21 App. D. C. 73, 80; *Johnson* v. *Mueser*, 212 U. S. 284; *Atkins* v. *Moore*, 212 U. S. 285; *Gaines* v. *Knecht*, 212 U. S. 561; *Same* v. *Same*, 27 App. D. C. 530, 532; *Taylor* v. *Taft*, 203 U. S. 461; *United States* v. *Lynch*, 137 U. S. 280; *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210, 226. The application for certiorari is also denied.

SHINE *v.* FOX BROTHERS MANUFACTURING COMPANY.

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

No. 383. Motion to dismiss submitted February 21, 1910.—Decided March 7, 1910.

A direct appeal from the Circuit Court dismissed without opinion for want of jurisdiction.
Appeal from 156 Fed. Rep. 357, dismissed.

THE motion to dismiss was made on the ground that this court is without jurisdiction of the appeal, for the reason that the jurisdiction of the court below rested on the diversity of citizenship of the parties, and no constitutional or other question was properly presented in the court below so as to confer jurisdiction of the appeal upon this court.

Mr. Shepard Barclay, Mr. Thomas T. Fauntleroy, and *Mr. Cornelius H. Fauntleroy* for the appellants.

Mr. Herbert R. Marlatt, Mr. George S. Johnson, Mr. George M. Block and *Mr. Frank H. Sullivan* for the appellee.

Per Curiam. In the circumstances disclosed by this record we are of opinion that a direct appeal does not lie to this court from the decree of the Circuit Court, and the appeal is therefore dismissed.

DAVID KAUFMAN & SONS COMPANY *v.* SMITH, COLLECTOR OF THE PORT OF NEWARK, NEW JERSEY.

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

No. 668. Motion to dismiss or affirm submitted February 28, 1910.—Decided March 7, 1910.

To give this court jurisdiction on a direct appeal from, or writ of error to, a Circuit Court on the ground of a constitutional question, such question must be real and substantial, and not a mere claim in words.

The questions involved in this case as to the right of the Government to collect duties on merchandise coming into the United States from the Canal Zone, Isthmus of Panama, under the act of March 2, 1905, c. 1311, 33 Stat. 843, have already been settled by the case of *Downes* v. *Bidwell*, 182 U. S. 244, and the writ of error is dismissed for want of jurisdiction.

THE facts are stated in the opinion.

Mr. Frederick B. Campbell and *Mr. George Whitefield Betts, Jr.*, for the plaintiff in error.

The Attorney General, The Solicitor General and *Mr. Assistant Attorney General Lloyd* for the defendant in error.

Per Curiam. It is established that to give this court jurisdiction on a direct appeal from, or writ of error to, a Circuit Court on the ground of a constitutional question, such question must be real and substantial, and not a mere claim in words.

This was an action brought against the Collector of Customs for the recovery of duties paid under the act of March 2, 1905, 33 Stats. 843, entitled, "An act fixing the status of merchan-

dise coming into the United States from the Canal Zone, Isthmus of Panama," providing "that all laws affecting imports of articles, goods, wares, and merchandise and entry of persons into the United States from foreign countries shall apply to articles, goods, wares, and merchandise and persons coming from the Canal Zone, Isthmus of Panama, and seeking entry into any State or Territory of the United States or the District of Columbia."

Plaintiff claimed that the merchandise in question was not liable to the duties thus paid, but the Circuit Court ruled that in view of the treaty between the Republic of Panama and the United States, and the various acts of Congress relating to such Zone, the principles laid down in *Downes* v. *Bidwell*, 182 U. S. 244, were decisive of the questions raised herein. We concur in that conclusion and dismiss the writ of error for want of jurisdiction.

Writ of error dismissed.

LEWIS *v.* UNITED STATES.

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

No. 202. Motion to dismiss or affirm submitted February 28, 1910.—Decided March 14, 1910.

One cannot complain until he is made to suffer, nor can one appeal from an order dismissing him from custody.

Where the indictment has been dismissed and no new indictment has been returned for the same offense and the statutory period of limitations has elapsed, the question whether accused was entitled under the Constitution to a speedy trial becomes a moot one, and a writ of error to review an order dismissing the indictment under such circumstances will be dismissed.

THE facts are stated in the opinion.

Mr. Shepard Barclay and *Mr. Thomas T. Fauntleroy* for the plaintiff in error.

The Attorney General, The Solicitor General, and *Mr. Assistant Attorney General Harr* for the defendant in error.

Per Curiam. Lewis was indicted December 1, 1905, in the District Court of the United States for the Eastern District of Missouri, charged with depositing certain letters in a post-office of the United States in pursuance of a scheme to defraud, in violation of § 5480 of the Revised Statutes.

General orders continuing all pending criminal cases were thereafter entered at each term until November 5, 1907, when plaintiff in error, defendant below, moved for a discharge from the accusations of the indictment upon the ground that his right to a speedy trial had been denied. The court ordered that unless the cause should be proceeded with at that term the motion would be sustained, but later all pending criminal cases were again continued by general order.

At the following May term defendant below again filed a motion to discharge and the United States Attorney asked leave to enter a *nolle prosequi.* Defendant's motion was overruled and the *nolle prosequi* entered, releasing and discharging defendant from further prosecution upon the indictment. A motion to set aside the *nolle prosequi* was made and overruled, and this writ of error direct to this court sued out under § 5 of the act of March 3, 1891.

It thus appears that this is an appeal by a person indicted for crime from an order of the court releasing and discharging him from further prosecution under the indictment. Plaintiff in error could not complain until he was made to suffer, *Lloyd* v. *Dollison,* 194 U. S. 445, and when discharged from custody he is not legally aggrieved and therefore cannot appeal. *Commonwealth* v. *Graves,* 112 Massachusetts, 282; *Anglo-American Prov. Co.* v. *Davis Prov. Co.,* 191 U. S. 376.

The indictment having been dismissed, the question as to plaintiff in error's constitutional right to a speedy trial is not involved in such a real sense as to give this court jurisdiction. *Lampasas* v. *Bell*, 180 U. S. 276, 284. Plaintiff in error was indicted December 1, 1905, for certain violations of § 5480 of the Revised Statutes, alleged to have been committed on the first day of February, 1904. That indictment having been *nolle prossed* and no new indictment appearing to have been returned against him within three years from the date of the commission of the alleged offenses, or, if returned, to be still pending, it is manifest that he has been discharged by the Statute of Limitations and that this case in the circumstances disclosed has become merely a moot case.

Writ of error dismissed.

MALLERS *v.* COMMERCIAL LOAN & TRUST COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 726. Motion to dismiss or affirm submitted February 28, 1910.—Decided March 14, 1910.

Where no Federal question is raised in the state court it is too late to attempt to do so in the assignment of error in this court.
Writ of error to review 237 Illinois, 119, dismissed.

THE facts are stated in the opinion.

Mr. Charles B. Stafford for the plaintiff in error.

Mr. Horace G. Stone for the defendant in error.

Per Curiam. The Commercial Loan & Trust Company, a banking corporation organized under the laws of Illinois, in 1895, brought suit against John B. Mallers upon a promissory note, and judgment was entered therein by the appellate

court for the first district in favor of the bank against Mallers, which judgment was affirmed by the Supreme Court.

On the case being remanded to the appellate court an execution was issued by the clerk to enforce the collection of the judgment which Mallers moved to quash, and from the judgment of that court denying that motion a writ of error was prosecuted to the Supreme Court, which affirmed the judgment of the appellate court.

The case was then brought here on writ of error, which must be dismissed for want of jurisdiction. *Hulbert* v. *Chicago*, 202 U. S. 275; *Burt* v. *Smith*, 203 U. S. 129; *Bonner* v. *Gorman*, 213 U. S. 86.

No Federal question was raised in the state courts, and the attempt to raise a Federal question in the assignment of errors in this court, not only came too late, but was palpably not maintainable. *Chapin* v. *Fye*, 179 U. S. 127.

Writ of error dismissed.

UNITED STATES *v.* GRIMAUD.
UNITED STATES *v.* INDA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Nos. 490, 491. Argued February 28, 1910.—Decided March 14, 1910.

Quære and not decided by this court whether the provision in the act of June 4, 1897, c. 2, 30 Stat. 30, 35, empowering the Secretary of Agriculture to make regulations in regard to grazing sheep on a forest reserve is unconstitutional as delegating legislative power to an executive officer and empowering such officer to create a criminal offense.

170 Fed. Rep. 205, affirmed by a divided court.

THESE were writs of error to the District Court under the Criminal Appeals Act of March 2, 1907, as defendants in

error were indicted for grazing sheep upon the Sierra Forest Reserve without a permit in violation of Regulation 45, established by the Secretary of Agriculture concerning stock grazing upon forest reserves under the act of June 4, 1897, c. 2, 30 Stat. 11, 35.

The District Court sustained demurrers on the ground that the act of 1897 delegated legislative power to an executive officer and that the act is unconstitutional because it empowers an executive officer to create a criminal offense.

The Solicitor General, with whom *The Attorney General* was on the brief, for the plaintiff in error.

No appearance for the defendants in error.

Per Curiam. Judgments affirmed by a divided court.

April 18, 1910, petitions for rehearing granted and cases restored to the docket.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* HOLLAN.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 161. Motion to dismiss or affirm submitted March 14, 1910.—Decided March 21, 1910.

Writ of error to review a judgment of the state court in an action for personal injuries dismissed, without opinion, for want of jurisdiction.

Mr. James Hagerman, Mr. J. M. Bryson, and *Mr. Cecil H. Smith* for the plaintiff in error.

Mr. C. B. Randell and *Mr. Judson H. Wood* for the defendant in error.

Per Curiam. Dismissed for the want of jurisdiction.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* WISE.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 177. Motion to dismiss or affirm submitted March 14, 1910.—Decided March 21, 1910.

Writ of error to review a judgment of the state court in an action for personal injuries dismissed, without opinion, for want of jurisdiction. Writ of error to review 101 Texas, 459, dismissed.

Mr. James Hagerman, Mr. J. M. Bryson, and *Mr. Cecil H. Smith* for the plaintiff in error.

Mr. C. B. Randell and *Mr. Judson H. Wood* for the defendant in error.

Per Curiam. Dismissed for the want of jurisdiction.

CHASE *v.* PHILLIPS.

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

No. 724. Motion to dismiss or affirm submitted March 14, 1910.—Decided March 21, 1910.

Writ of error to review 201 Massachusetts, 444, dismissed, without opinion, for the want of jurisdiction.

Mr. Joseph H. Soliday, Mr. Richard Y. FitzGerald, and *Mr. Frederic D. McKenney* for the plaintiff in error.

Mr. Moorfield Storey and *Mr. Ezra Ripley Thayer* for the defendants in error.

Per Curiam. Dismissed for the want of jurisdiction.

SINGER MANUFACTURING COMPANY *v.* ADAMS, STATE REVENUE AGENT.

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

No. 727. Motion to dismiss or affirm submitted March 21, 1910.—Decided April 4, 1910.

Appeal from the Circuit Court of Appeals from a judgment reversing and remanding for further proceedings dismissed for want of final judgment.

Mr. C. H. Alexander for the appellant.

Mr. Edward Mayes for the appellees.

Per Curiam. Appeal dismissed for want of final judgment. *Schlosser* v. *Hemphill,* 198 U. S. 173; *Haseltine* v. *Central Bank of Springfield, Missouri* (No. 1), 183 U. S. 130.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY *v.* UNITED STATES.

SAME *v.* SAME.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 124, 125. Argued March 4, 1910.—Decided March 14, 1910.

Rehearing granted in cases in which judgments were affirmed by divided court and cases restored to docket.
Case below, 159 Fed. Rep. 33.

Mr. Edward Colston, Mr. Judson Harmon, Mr. A. W. Goldsmith, and *Mr. George Hoadley* for the plaintiff in error.

The Solicitor General and *The Attorney General* for the defendant in error.

Judgments affirmed by a divided court, and causes remanded to the District Court of the United States for the Southern District of Ohio.

Per Curiam. April 4, 1910. Rehearing granted, and cases restored to the docket for reargument and assigned to be heard on the first Tuesday of the next term (October 11) after the cases already assigned for that day.

Decisions on Petitions for Writs of Certiorari from February 21 to April 10, 1910.

No. 738. AMERICAN CAR & FOUNDRY COMPANY, PETITIONER, *v.* SEEGER REFRIGERATOR COMPANY. February 21, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel R. Betts, Mr. Paul Bakewell,* and *Mr. C. A. Severance* for the petitioner. *Mr. Edmund Wetmore* and *Mr. O. W. Jeffery* for the respondent.

No. 763. THE UNITED STATES, PETITIONER, *v.* HAVILAND AND COMPANY. February 21, 1910. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Lloyd* for the petitioner. *Mr. B. A. Levett* for the respondents.

No. 764. THE UNITED STATES, PETITIONER, *v.* E. J. LAVINO & COMPANY; No. 765. THE UNITED STATES, PETITIONER, *v.* O. G. HEMPSTEAD & COMPANY; and No. 766. THE

UNITED STATES, PETITIONER, *v.* J. W. HAMPTON, JR., & COMPANY. February 21, 1910. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Lloyd* for the petitioner. *Mr. Thomas S. Gates* for the respondents.

No. 743. EUGENE M. ORGAIN, TRUSTEE, ETC., PETITIONER, *v.* JULIA MARTIN. February 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles K. Bell* for the petitioner. *Mr. Walter Lyon* for the respondent.

No. 760. GREAT NORTHERN RAILWAY COMPANY, PETITIONER, *v.* WESTERN UNION TELEGRAPH COMPANY ET AL. February 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. R. Begg* and *Mr. John G. Johnson* for the petitioner. *Mr. John F. Dillon* and *Mr. Rush Taggart* for the respondents.

No. 772. GREAT FALLS & OLD DOMINION RAILROAD COMPANY, PETITIONER, *v.* GERTRUDE T. HILL. February 28, 1910. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wilton J. Lambert* for the petitioner. *Mr. John A. Kratz, Jr.*, and *Mr. A. E. L. Leckie* for the respondent.

No. 773. CHICAGO RAILWAY EQUIPMENT COMPANY, PETITIONER, *v.* THE PERRY SIDE BEARING COMPANY ET AL.

February 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George P. Fisher, Jr.*, *Mr. F. N. Judson* and *Mr. Paul Bakewell* for the petitioner. No appearance for the respondents.

No. 780. GENERAL ELECTRIC COMPANY, PETITIONER, *v.* THE RICHMOND STREET & INTERURBAN RAILWAY COMPANY. February 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. L. F. H. Betts* for the petitioner. *Mr. Thomas F. Sheridan* and *Mr. Clifton B. Edwards* for the respondent.

No. 783. THE CITY OF CHICAGO, PETITIONER, *v.* ERIE & WESTERN TRANSPORTATION COMPANY. February 28, 1910. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. C. E. Kremer* and *Mr. Edward Brundage* for the petitioner. *Mr. Harvey D. Goulder, Mr. Frank S. Masten, Mr. S. H. Holding, Mr. C. W. Greenfield* and *Mr. Frederick M. Brown* for the respondent.

No. 789. WILL F. WOODS, PETITIONER, *v.* THE UNITED STATES. February 28, 1910. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard R. McMahon* and *Mr. Charles W. Ogden* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 808. O. J. LEWIS MERCANTILE COMPANY, PETITIONER, *v.* ANNIE KLEPNER. March 7, 1910. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert H. Gibbs* for the petitioner. *Mr. Edward A. Alexander* for the respondent.

No. 817. HELVETIA SWISS FIRE INSURANCE COMPANY, PETITIONER, *v.* MAX J. BRANDENSTEIN ET AL. March 7, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William J. Wallace* and *Mr. Frederick B. Campbell* for the petitioner. *Mr. William V. Rowe* and *Mr. Royall Victor* for the respondents.

No. 818. IN THE MATTER OF BERNARD STAVRAHN, PETITIONER. March 7, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edwin P. Grosvenor* for the petitioner. *Mr. Clarence R. Freeman* for the respondent.

No. 806. SEBALD M. HOHL, PETITIONER, *v.* NORDDEUTSCHER LLOYD. March 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence Kneeland* for the petitioner. *Mr. Joseph Larocque* for the respondent.

No. 810. ROLAND P. CONKLIN, PETITIONER, *v.* THE DAIMLER MANUFACTURING COMPANY ET AL. March 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry M. Earle* for the petitioner. No appearance for the respondent.

No. 781. THE COASTWISE TRANSPORTATION COMPANY, OWNER, ETC., PETITIONER, *v.* THE STEAMSHIP EDDA, ETC. March 21, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Edward E. Blodgett* for the petitioner. *Mr. Edward S. Dodge* for the respondent.

No. 807. MRS. LEE MANER, PETITIONER, *v.* THE PENN MUTUAL LIFE INSURANCE COMPANY. March 21, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William L. Crawford* and *Mr. Jack Beall* for the petitioner. *Mr. Maurice E. Locke* for the respondent.

No. 824. D. L. HENDERSON, TRUSTEE, ETC., PETITIONER, *v.* SAM MAYER. March 21, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. John R. L. Smith* and *Mr. George S. Jones* for the petitioner. No appearance for the respondent.

No. 826. FRANK H. WASKEY, PETITIONER, *v.* J. J. CHAMBERS. April 4, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Joseph C. Campbell, Mr. Albert Fink* and *Mr. W. H. Metson* for the petitioner. No appearance for the respondent.

No. 462. NEWMAN BAUM, BANKRUPT, PETITIONER, *v.* JAMES A. COMER, TRUSTEE, ETC. April 4, 1910. Petition for a writ of certiorari to the United States Circuit Court of Ap-

peals for the Eighth Circuit denied. *Mr. J. W. Blackwood* and *Mr. M. M. Cohn* for the petitioner. No appearance for the respondent.

No. 706. WILLIAM T. HUGULEY, PETITIONER, *v.* ATLANTIC COAST LINE RAILROAD COMPANY ET AL. April 4, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John M. Thurston* and *Mr. Frederick P. Myers* for the petitioner. *Mr. John E. Hartridge* for the respondent.

No. 834. CORNELL STEAMBOAT COMPANY, PETITIONER, *v.* ANNIE V. FALLON, AS ADMINISTRATRIX, ETC. April 4, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Amos Van Etten* and *Mr. J. Parker Kirlin* for the petitioner. *Mr. Nelson Zabriskie* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM FEBRUARY 21 TO APRIL 10, 1910.

No. 803. JOAQUIN GIL, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. February 21, 1910. Docketed and dismissed on motion of *Mr. Solicitor General Bowers* for the defendant in error. *The Attorney General* and *The Solicitor General* for the defendant in error. No one opposing.

No. 178. WILLIAM SKINNER, APPELLANT, *v.* EDMUND WRIGHT, AS TRUSTEE, ETC. Appeal from the United States

Circuit Court of Appeals for the Second Circuit. February 21, 1910. Dismissed per stipulation. *Mr. Austin B. Fletcher* for the appellant. *Mr. Abram I. Elkus* for the appellee.

No. 405. THE UNITED STATES *v.* ANTON HANSEN HAUG. On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit. February 28, 1910. Certificate dismissed on motion of *Mr. Solicitor General Bowers* for the United States. *The Attorney General* and *The Solicitor General* for the United States. No appearance for Haug.

No. 134. ISRAEL ALPER, APPELLANT, *v.* WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK. Appeal from the Circuit Court of the United States for the Southern District of New York. March 7, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. Max D. Steuer* for the appellant. *The Attorney General* for the appellee.

No. 718. JOHN ALLEN HEANY ET AL., APPELLANTS, *v.* EDWARD B. MOORE, COMMISSIONER OF PATENTS. Appeal from the Court of Appeals of the District of Columbia. March 10, 1910. Dismissed with costs, on motion of counsel for the appellants. *Mr. Charles A. Douglas, Mr. Gibbs L. Baker,* and *Mr. James H. Hayden* for the appellants. *The Attorney General* for the appellee.

No. —. Original. *Ex parte:* IN THE MATTER OF ARTHUR HEWETT AND TOM A. KEATING, PETITIONERS. Motion sub-

mitted January 24, 1910. Decided March 14, 1910. Motion for leave to file a petition for a writ of *habeas corpus* denied. *Mr. Thos. F. Gatts* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 353. EDWARD THOMPSON COMPANY, APPELLANT, *v.* AMERICAN LAW BOOK COMPANY. Appeal from the United States Circuit Court of Appeals for the Second Circuit. March 18, 1910. Dismissed with costs, on motion of counsel for appellant. *Mr. Walter Large* for the appellant. *Mr. William B. Hale* for the appellee.

No. 844. IN RE CHARLES A. THATCHER, PLAINTIFF IN ERROR. In error to the Supreme Court of the State of Ohio. March 21, 1910. Docketed and dismissed on motion of *Mr. O. E. Harrison* in that behalf. No one opposing.

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ADMIRALTY.

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An appeal taken solely on the question of jurisdiction from a final decree of the Admiralty Court, allowing the expenses and claims of a receiver in bankruptcy to be first paid from the proceeds of the vessel against which proceedings were taken *in rem*, and which was in custody of the receiver prior to the filing of the libel, affirmed without opinion. *Hudson Oil & Supply Co.* v. *Booraem*, 604.

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One cannot complain until he is made to suffer, nor can one appeal from an order dismissing him from custody. *Lewis* v. *United States,* 611.

2. *Joinder, on appeal, of defendants in equity.*

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3. *Scope of review; matters of defense not considered on appeal from order of removal for trial in criminal case.*

Matters exclusively relating to defense either substantive or in abatement are properly determinative by the court into which the indictments are returned, and where the case will be tried; they cannot be considered on an appeal from the order of removal made under § 1014, Rev. Stat. *Haas* v. *Henkel,* 462.

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2. *Double assignment bad.*

An assignment of error that is double is bad for that reason. *Ib.*

3. *Time of making; too late when made on writ of error.*

Assignments of error based on overruling objections to sufficiency of the indictment and of admission of any evidence because the indictment is bad cannot be made on writ of error for the first time. *Ib.*

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BANKRUPTCY.

1. *Ancillary jurisdiction of courts of bankruptcy.*

In a case in which the original court of bankruptcy can act summarily, another court of bankruptcy, sitting in another district,

can do so in aid of the court of original jurisdiction. *Babbitt* v. *Dutcher*, 102.

2. *Ancillary jurisdiction to order examination of resident witness.*
A court of bankruptcy has jurisdiction to grant an order for examination of a witness who resides in that district although the bankrupt proceedings in which the examination is desired are being administered in another district. *Elkus, Petitioner*, 115.

3. *Ancillary jurisdiction of District Courts.*
The respective District Courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the District Court of another district. *Ib.*

4. *Jurisdiction of bankruptcy court under* § 70*e of act of* 1898, *of suit to recover property alleged to belong to bankrupt.*
Section 70*e* of the Bankruptcy Act provides for avoiding transfer of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value from persons not *bona fide* holders for value. It does not, either with or without consent of defendant, give the bankruptcy court jurisdiction of a suit to recover property held by defendant but which, if the allegations of the complaint are true, belonged to the bankrupt and passed to the trustee. *Harris* v. *First National Bank*, 382.

5. *Same.*
The bankruptcy court has not jurisdiction of a suit against a bank to recover securities held by it for indebtedness of the bankrupt on the ground that the debt had been paid. *Ib.*

6. *Corporations within meaning of* § 4, *subs. b, act of* 1898.
A corporation engaged principally in running hotels is not a corporation engaged principally in trading or mercantile pursuits within the meaning of § 4, subs. *b* of the Bankruptcy Act of 1898. *Toxaway Hotel Co.* v. *Smathers*, 439.

7. *Mercantile pursuit; what is.*
An occupation that is not trading is not a mercantile pursuit. *Ib.*

8. *Mercantile pursuit; what constitutes engagement in sufficient to bring corporation within Bankruptcy Act.*
A corporation not otherwise amenable to the Bankruptcy Act does not become so because it incidentally engages in mercantile pursuit;

and so held as to a hotel company which, in addition to innkeeping in which it was principally engaged, conducted a small store as an incident to its hotel business. *Ib.*

9. *"Manufacturing"; meaning as used in act of* 1898.
"Manufacturing," as used in the Bankrupt Act of 1898, has no meaning from adjudication as used in former laws, nor has it any technical meaning. In construing the act the intention of Congress to include corporations engaged in manufacturing will be regarded by giving the term a liberal, rather than a narrow, meaning. *Friday* v. *Hall & Kaul Co.*, 449.

10. *Manufacturing; what constitutes principally engaging in, within meaning of* § 4, *act of* 1898.
A corporation organized to construct railroads, buildings and other structures, whose principal business is making and constructing arches, walls, bridges and other buildings out of concrete, and which buys and combines together raw materials in making the concrete and supplies labor, machinery and materials at the place that the contracts call for, is a corporation engaged principally in manufacturing within the meaning of § 4 of the Bankrupt Act as amended February 5, 1903, c. 487, 32 Stat. 797. *Ib.*

11. *Suits under* § 70*e of act of* 1898; *quære as to right to bring.*
Quære, and not decided, whether under § 70*e* of the Bankruptcy Act the suits therein referred to can be brought in the bankruptcy court without the consent of the defendant. See contrary views expressed in *Hull* v. *Burr*, 153 Fed. Rep. 945; *Hurley* v. *Devlin*, 149 Fed. Rep. 268. *Harris* v. *First Nat. Bank*, 382.

12. *Controversy arising in bankruptcy proceeding within meaning of Bankruptcy Act and* § 24*a thereof.*
An intervention to establish his lien by a mortgagee in a petition by the trustee to sell property of the bankrupt is a controversy arising in a bankruptcy proceeding within the meaning of the Bankruptcy Act and the procedure under § 24*a* is the same as under Court of Appeals Act of 1891. General Order No. XXXVI adopted under authority of § 24*b* does not apply in such a case and no special findings of fact are required. *Knapp* v. *Milwaukee Trust Co.*, 545.

13. *Fraudulent transfers; mortgages void as to creditors.*
Under the law of Wisconsin, as construed by the highest court of that State, a mortgage of personal property is not valid as against

creditors unless the possession be given to, and retained by, the mortgagee, or the mortgage be filed; nor can a mortgagor appropriate proceeds of sale of the mortgaged property to his own use. *Held* that the mortgages in this case, even in the absence of intentional bad faith, are fraudulent in law and void as to creditors. *Ib.*

14. *Trustee's status; right to attack pledge so void as to make property subject to levy and judicial sale at time of adjudication.*

Although the trustee stands in the shoes of the bankrupt, and takes the property subject to equities impressed on it while in the bankrupt's hands, he can attack a pledge which is so void as against creditors that the property could have been levied on and sold under judicial powers against the bankrupt at the time of the adjudication. *Ib.*

15. *Trustee's right to attack mortgage fraudulent under local law; absence of intent not material.*

Provisions in a mortgage for the retention and use of the mortgaged property by the mortgagor which are prohibited by the law of the State render the conveyance fraudulent in law, even in the absence of intent, and as conclusively permit the trustee to attack it as though the mortgage were fraudulent in fact and intent existed. *Ib.*

16. *Trustee's right to set aside fraudulent transfer; effect of sufficiency of assets otherwise.*

The fact that a trustee might by suit against other parties collect enough to pay creditors is not a bar against setting aside a fraudulent conveyance on the entire property of the bankrupt in his hands. *Ib.*

17. *Corporate records; right of trustee to.*

Corporate records and stock-books of a corporation adjudicated a bankrupt pass to the trustee and, where there is no adverse holding, the bankruptcy court can compel their delivery by summary proceeding. *Babbitt* v. *Dutcher*, 102.

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Thomason v. *McLaughlin*, 103 S. W. Rep. 595, approved in *Williams* v. *First National Bank*, 582.

United States v. *Brown*, 74 Fed. Rep. 43, approved in *Pickett* v. *United States*, 456.

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Hijo v. *United States*, 194 U. S. 315, followed in *Sanchez* v. *United States*, 167.

Horner v. *United States*, 143 U. S. 207, followed in *Price* v. *Henkel*, 488.

Jacobson v. *Massachusetts*, 197 U. S. 11, followed in *Laurel Hill Cemetery* v. *San Francisco*, 358.

Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395, followed in *Orleans Parish* v. *New York Life Ins. Co.*, 517.

Northern Assurance Co. v. *Grand View Building Asso.*, 183 U. S. 308, followed in *Penman* v. *St. Paul Insurance Co.*, 311.

O'Reilly v. *Brooke*, 209 U. S. 45, followed in *Sanchez* v. *United States*, 167.

Pullman Car Co. v. *Kansas*, 216 U. S. 55, followed in *Ludwig* v. *Western Union Tel. Co.*, 146.

Rochester Railway Co. v. *Rochester*, 205 U. S. 236, followed in *Wright* v. *Georgia Railroad & Banking Co.*, 420.

Sjoli v. *Dreschel*, 199 U. S. 564, followed in *Osborn* v. *Froyseth*, 571.
Southern Railway Co. v. *Greene*, 216 U. S. 400, followed in *Louisville & Nashville R. R. Co.* v. *Gaston*, 418.
Storm v. *United States*, 94 U. S. 76, followed in *Pickett* v. *United States*, 456.
United States v. *Paul*, 6 Pet. 141, followed in *Franklin* v. *United States*, 559.
Western Union Tel. Co. v. *Andrews*, 216 U. S. 165, followed in *Ludwig* v. *Western Union Tel. Co.*, 146.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, followed in *Pullman Co.* v. *Kansas*, 56; *Ludwig* v. *Western Union Tel. Co.*, 146.
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19, followed in *Northern Pacific Ry. Co.* v. *North Dakota*, 579.

CASES TO BE REHEARD.

Baltimore & Ohio Southwestern R. R. Co. v. *United States*, 617.
United States v. *Grimaud*, 614.
United States v. *Inda*, 614.

CEMETERIES.

See STATES.

CHARTERS.

See CONSTITUTIONAL LAW, 11, 13.

CHATTEL MORTGAGES.

See BANKRUPTCY, 13, 14, 15.

CHICKASAW INDIANS.

See INDIANS, 6.

CHOCTAW INDIANS.

See INDIANS, 6.

CIRCUIT COURTS.

See JURISDICTION, B.

CLAIMS AGAINST UNITED STATES.

Settlement by executive officers.

Executive officers are not authorized to entertain and settle claims for unliquidated damages. *Wm. Cramp & Sons* v. *United States*, 494.

See CONTRACTS, 3, 4.

CLASSIFICATION FOR TAXATION.

See CONSTITUTIONAL LAW, 26.

COMITY.

See CRIMINAL LAW, 7;
HABEAS CORPUS.

COMMERCE.

See CONGRESS, POWERS OF, 1, 2, 3; CONSTITUTIONAL LAW, 1–10, 32; INTERSTATE COMMERCE COMMISSION: STATUTES, A 7.

COMMISSIONERS.

See CRIMINAL LAW, 8, 10, 11;
HABEAS CORPUS.

COMMISSIONS.

See INTERSTATE COMMERCE COMMISSION, 4.

COMMON CARRIERS.

See CONSTITUTIONAL LAW, 6, 7, 9, 10; INTERSTATE COMMERCE COMMISSION; RAILROADS; TAXES AND TAXATION.

COMPROMISES.

Favor in which held by courts.

Compromises of disputed claims are favored by the courts, *Hennessey* v. *Baker*, 137 U. S. 78, and the consideration on which a compromise is based will be sustained unless there is an express or implied statutory prohibition against the transaction. *Williams* v. *First National Bank*, 582.

CONFISCATION.

See CONSTITUTIONAL LAW, 32–35.

CONGRESS, POWERS OF.

1. *Navigable waters; removal of obstructions to navigation.*

The erection of a bridge over navigable waters of the United States within a State by authority of the State is subject to the paramount authority of Congress to regulate commerce among the States and its right to remove unreasonable obstructions to navigation. *Monongahela Bridge Co.* v. *United States*, 177.

2. *Navigable waters; exclusive power of Congress to regulate navigation.*

It is for Congress, under the Constitution, to regulate the right of

navigation and to declare what must be done to clear navigation from obstructions; and where this has been done in the manner required by Congress it is not the province of the jury, on the trial of one refusing to remove obstructions, to determine whether the removal was necessary. *Ib.*

3. *Navigable waters; effect of silence by Congress on power to require removal of obstruction.*

The mere silence of Congress, and its failure to interfere to prevent the construction under state authority of an obstruction to navigation does not prevent it from subsequently requiring the removal of the obstruction or impose upon the United States a constitutional obligation to make compensation therefor. *Ib.*

See CONSTITUTIONAL LAW, 1, 16, 17;
INDIANS, 3, 4;
TERRITORIES.

CONSPIRACY.

See CRIMINAL LAW, 3.

CONSTITUTIONAL LAW.

1. *Commerce clause; power of Congress; power of State to impose conditions on foreign corporations—Validity of Bush Act of Kansas.*

A statute of Kansas provided among other things, that before a corporation of another State, even one engaged in interstate business, should have authority to do local business in Kansas, it should pay "to the State Treasurer, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent of its authorized capital, upon the first $100,000 of its capital stock, or any part thereof; and upon the next four hundred thousand dollars or any part thereof, one-twentieth of one per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars, $200." The Western Union Telegraph Company, a New York corporation, engaged in commerce among the States and with foreign countries, and seeking to do local business in Kansas, had a capital stock of $100,000,000. The fee demanded of it as a condition of its right to do local business in Kansas, was $20,100. It refused to pay the required fee, and continued, as it had done for many years before to do local or intrastate business in Kansas. Thereupon, the State brought a suit in one of its own courts against the Telegraph Company and sought a decree ousting and restraining the company from doing any local business in Kansas. The state court gave the relief asked. *Held* that:

a. The right to carry on interstate commerce is not a privilege granted by the States, but a constitutional right of every citizen of the United States and Congress alone can limit the right of corporations to engage therein. (*Crutcher* v. *Kentucky*, 141 U. S. 47.)

b. The power of Congress over interstate commerce is as absolute as it is over foreign commerce.

c. The rule that a State may exclude foreign corporations from its limits or impose such terms and conditions on their doing business therein as it deems consistent with its public policy does not apply to foreign corporations engaged in interstate commerce; and the requirement that the Telegraph Company pay a given per cent of all its capital, representing all its business, interests and property everywhere, within and outside of the State, operated as a burden and tax on the interstate business of the company in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the State, which it could not tax consistently with the due process of law enjoined by the Fourteenth Amendment.

d. Such a requirement imposed a condition on the Telegraph Company forbidden by the Constitution of the United States and violative of the constitutional rights of the company.

e. The Telegraph Company was no more bound to assent to the condition required of it in order that it might do local business in Kansas, than to a condition requiring it to waive its right to invoke the benefit of the constitutional provision forbidding the denial of the equal protection of the laws or the provision forbidding the deprivation of property without due process of law.

f. The disavowal by a State enacting a regulation of intent to burden or regulate interstate commerce cannot conclude the question of fact of whether a burden is actually imposed thereby; and whatever the purpose of a statute it is unconstitutional if, when reasonably interpreted, it does, directly or by necessary operation, burden interstate commerce.

g. A court could not give the relief asked by the State without recognizing or giving effect to a condition that was in violation of the Federal Constitution. *Western Union Tel. Co.* v. *Kansas*, 1.

2. *Commerce clause—State taxation of foreign corporation doing interstate business—Regulations State may enforce.*

A corporation organized in one State and doing an interstate business is not bound to obtain the permission of another State to

transact interstate business within its limits, but can go into the latter, for the purposes of that business, without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort and convenience of the people which do not, in a real, substantial sense, burden or regulate its interstate business nor subject its property interests outside of that State to taxation. *Pullman Co.* v. *Kansas*, 56.

3. *Commerce clause—What constitutes burden on interstate commerce—State taxation of foreign corporation.*

The requirement that such a company, as a condition of its right to do intrastate business, shall, in the form of a fee, pay to the State a specified per cent of its authorized capital, is a violation of the Constitution of the United States, in that such a single fee, based on all the property, interests and business of the company, within and out of that State, is, in effect, a tax both on the interstate business of that company, and on its property outside of that State, and compels the company, in order that it may do local business in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the State. *Ib.*

4. *Commerce clause—Power of State to exact waiver of foreign corporation's right to exemption from taxation on interstate business.*

A State can no more exact such a waiver than it can prescribe as a condition of the company's right to do local business that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law. *Ib.*

5. *Commerce clause—Aid of court to enforce unconstitutional act of State affecting interstate commerce, refused.*

A decree ousting and prohibiting a company from doing intrastate business within a State for refusing to pay such a tax should not be granted, but the aid of the court should be refused because a decree would, in effect, recognize the validity of a condition which the State could not constitutionally prescribe under the guise of a fee for permission to do intrastate business. *Ib.*

6. *Commerce clause; validity of state legislation affecting interstate commerce.*

A state statute that requires a carrier to settle, within a specified time, claims for loss of or damage to freight while in its possession

within that State, is not, in the absence of legislation by Congress on the subject, an unwarrantable interference with interstate commerce; and so held that Act No. 50 of South Carolina of February 23, 1903, to that effect is not unconstitutional under the commerce law as to goods shipped from without the State but which actually are in the possession of the carrier within the State. *Atlantic Coast Line R. R. Co.* v. *Mazursky*, 122.

7. *Commerce clause—Obstruction to interstate commerce by state statute; what amounts to.*

A state statute in aid of the performance of the duty of an interstate carrier which would exist in the absence of the statute, which does not obstruct the carrier, and which relates to the delivery of goods actually in the carrier's possession within the State, is not void as a regulation or obstruction to interstate commerce, in the absence of congressional legislation on the subject. *Ib.*

8. *Commerce clause—State interference with interstate commerce by imposition of license tax on foreign corporation—Validity of Wingo law of Arkansas.*

A state statute which requires a foreign corporation engaged in interstate commerce to pay, as a license tax or fee for doing intrastate business, a given amount on its entire capital stock whether employed within the State or elsewhere, directly burdens the interstate business of such corporation and its property outside the jurisdiction of the taxing State and is unconstitutional and void; and so held as to the Wingo law of Arkansas of May 13, 1907. *Ludwig* v. *Western Union Telegraph Co.*, 146.

9. *Commerce clause; burden on interstate commerce; state regulation of foreign railroad.*

The fact that a railroad company is chartered by another State and has projected its lines through several States does not make all of its business interstate commerce and render unconstitutional, as an interference with, and burden upon interstate commerce, reasonable regulations of a State Railroad Commission applicable to a portion of the lines wholly within, and which are valid under, the laws of that State. *Missouri Pacific Ry. Co.* v. *Kansas*, 262.

10. *Commerce clause; burden upon interstate commerce; effect of order as to running of train; convenience of railroad not important.*

An order of the railroad commission of a State requiring a train to be run from a point within the State to the state line is not invalid

if otherwise legal, as an interference with, or burden upon, interstate commerce because there are no present terminal facilities at the state line and it is more convenient to the corporation to run the train to a further point in the adjoining State. *Ib.*

See CONGRESS, POWERS OF, 2.

11. *Contract clause. Effect of reserved power in charter contract to validate subsequent regulation of corporation.*

Where a contract is held subject to the reserved power to alter, amend or repeal, the right conferred, whatever be its extent, is subject to such reserved power; and so held that a charter privilege to regulate train service is subject to the reasonable and otherwise legal order of a commission created by the legislature, and such an order is not invalid under the contract clause of the Federal Constitution. *Ib.*

12. *Contract clause; what amounts to derogation of tax exemption contract.*

A law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law in derogation of the exemption contract. *Wright* v. *Georgia R. R. & Banking Co.*, 420.

13. *Contract clause; taxation of corporation amounting to impairment of obligation of charter contract.*

An act of a state legislature attempting to tax the whole or any part of the capital or franchise of a corporation, whose charter contains an express limitation and method of taxation such as in this case, by any method other than that specified therein, impairs the obligation of the charter and is unconstitutional under the contract clause of the Federal Constitution. *Ib.*

See TAXES AND TAXATION, 4, 5, 10.

14. *Criminal provisions; place of trial; right of accused as to.*

Notwithstanding the hardship necessarily entailed upon the accused in being tried in a district other than that in which he resides, there is no principle of constitutionl law that entitles him to be tried in the place of his residence. *Haas* v. *Henkel*, 462.

15. *Criminal provisions; place of trial; right of accused to object to place other than that of his residence.*

Art. III, § 2 of, and the Sixth Amendment to, the Constitution secure to the accused the right to a trial in the district where the crime is committed, and one committing a crime in a district where he does not reside cannot object to his removal thereto for trial. *Ib.*

16. *Delegation of power—Power of Congress in respect of executive officers.*

Congress may, in order to enforce its enactments, clothe an executive officer with power to ascertain whether certain specified conditions exist and thereupon to act in a prescribed manner, without delegating, in a constitutional sense, legislative or judicial power to such officer. *Monongahela Bridge Co.* v. *United States,* 177.

17. *Delegation of power; effect of action of Congress in charging executive officer with certain duties.*

Under its paramount power to regulate commerce, Congress can require navigable waters of the United States within a State to be freed from unreasonable obstructions, and it is not a delegation of legislative or judicial power to charge the Secretary of War with the duty of ascertaining, under a general rule applicable to all navigable waters and upon notice to the parties in interest, whether obstructions are unreasonable. *Ib.*

18. *Delegation of power; effect of act of Congress investing Secretary of War with power to require removal of obstructions to navigation.*

An act of Congress which invests the Secretary of War with power to require the removal of obstructions to navigation after notice to parties in interest and opportunity to be heard and reasonable time to make alterations in the obstruction, as § 18 of the River and Harbor Act of March 3, 1899, 30 Stat. 1151, does not invest the Secretary with arbitrary power beyond constitutional limitations. *Ib.*

19. *Delegation of power; quære as to.*

Quære and not decided by this court whether the provision in the act of June 4, 1897, c. 2, 30 Stat. 30, 35, empowering the Secretary of Agriculture to make regulations in regard to grazing sheep on a forest reserve is unconstitutional in delegating legislative power to an executive officer and empowering such officer to create a criminal offense. *United States* v. *Grimaud,* 614.

20. *Due process of law; state taxation.*

Consistently with the due process clause of the Fourteenth Amendment a State cannot tax property located or existing permanently beyond its limits. *Western Union Tel. Co.* v. *Kansas,* 1.

21. *Due process of law—Effect of modification by state court of its decree.*

The construction and effect of, and rights acquired by, a decree of the state court are matters of state procedure. Nothing in the Federal Constitution prevents a state court from modifying a

decree while the case remains in the court; nor is a beneficiary of a decree deprived of his property without due process of law, within the meaning of the Fourteenth Amendment, by the subsequent action of the court modifying or reversing the decree while the case is still pending therein. *King* v. *West Virginia*, 92.

22. *Due process of law; deprivation of property by abolition of office.*
The abolition of a perpetual and salable office, established under the Spanish law in Porto Rico prior to its cession to the United States, does not violate any provision of the Constitution or infringe any right of property which the holder of the office can assert against the United States. (*O'Reilly* v. *Brooke*, 209 U. S. 45.) *Sanchez* v. *United States*, 167.

See Supra, 1; ASSESSMENT AND TAXATION;
Infra, 32, 34; PRACTICE AND PROCEDURE, 9;
TAXES AND TAXATION, 8, 11.

23. *Equal protection of the laws defined.*
Equal protection of the laws means subjection to equal laws applying alike to all in the same situation. *Southern Ry. Co.* v. *Greene*, 400.

24. *Equal protection of the laws; corporation as person.*
A corporation is a person within the meaning of the equal protection provision of the Fourteenth Amendment. *Ib.*

25. *Equal protection of the laws; foreign corporation entitled to.*
A corporation which comes into a State other than that in which it is created, pays taxes thereto and acquires property and carries on business therein, is within the jurisdiction of that State, and, under the Fourteenth Amendment, entitled to protection against any statute of that State that denies to it the equal protection of the laws. *Ib.*

26. *Equal protection of the laws; validity of classification for taxation.*
Arbitrary selection cannot be justified by calling it classification in the absence of real distinction on a substantial basis; and a classification for taxation that divides corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary and a denial of equal protection of the laws. *Ib.*

27. *Equal protection of the laws; validity of Alabama franchise tax on foreign corporations.*
Whatever power a State may have to exclude or determine the terms of the admission of foreign corporations not already within its

borders, it cannot subject a foreign corporation which has already come into the State in compliance with its laws and has acquired property of a fixed and permanent nature to a new and additional franchise tax for the privilege of doing business which is not imposed upon domestic corporations. It would be an unconstitutional denial of equal protection of the laws under the Fourteenth Amendment; and so held as to the franchise tax on foreign corporations of Alabama of 1907. *Ib.*

See PRACTICE AND PROCEDURE, 9.

28. *Full faith and credit; efficacy of decree or statute to affect title to real estate situated in another State.*

The law of a State in which land is situated controls and governs its descent, alienation and transfer, and neither a decree of a court, or a statute, of another State can have any efficacy as to title of real estate beyond the jurisdiction of that State. *Olmsted* v. *Olmsted*, 386.

29. *Full faith and credit; statute of one State affecting real property rights in another State not entitled.*

The full faith and credit clause of the Federal Constitution does not require the courts of a State to give effect to a statute legitimatizing children born before wedlock after marriage of their parents so as to affect interests which, under the law of the State where the property is located, had been so vested that it cannot be affected by subsequent legislation; and so held that the courts of New York are not required to give effect to a statute of Michigan so as to vest in children of the testator legitimatized by such statute property, the title to which had already vested in his other legitimate children. *Ib.*

30. *Judicial power of United States; actions against State; suit to enjoin state officers not within prohibition of Eleventh Amendment.*

Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action; and such an action is not prohibited by the Eleventh Amendment of the Constitution of the United States. (*Ex parte Young*, 209 U. S. 123.) *Western Union Telegraph Co.* v. *Andrews*, 165.

31. *Judicial power of United States; suit against State; what amounts to.*

An action brought by a corporation against a state officer to obtain

such an injunction is not an action against the State within the meaning of the Eleventh Amendment. (*Western Union Telegraph Company* v. *Andrews, ante*, p. 165.) *Ludwig* v. *Western Union Telegraph Co.*, 146.

32. *Property rights; deprivation of property without just compensation —Effect of state regulation compelling railroad to perform duty in running trains.*

There is a difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of a public service corporation by fixing them below a remunerative standard and one compelling the corporation to render a service which it is essentially its duty to perform; and an order directing a railroad company to run a regular passenger train over its line, instead of a mixed passenger and freight train, is not, even if such train is run at a loss, a deprivation of property without due process of law, or a taking of private property for public use without compensation; nor is such an order an unreasonable exercise of governmental control. Such an order if made by the railroad commission of a State is not an interference with, or burden upon, interstate commerce if it relates to a portion of the line wholly within that State. *Missouri Pacific Ry. Co.* v. *Kansas*, 262.

33. *Property rights; effect of reasonable governmental regulation of railroad property.*

While railway property is susceptible of private ownership and protected by constitutional guarantees, these rights are not abridged by being subjected to governmental power of reasonable regulation. *Ib.*

34. *Property rights; deprivation without due process of law.*

An order cannot be said to be such an unreasonable exertion of authority as to amount to deprivation of property without due process of law, because made operative only to the limit of the right to do so. *Ib.*

35. *Property rights; deprivation without compensation; removal of obstructions to navigation.*

To require, after notice and hearing, alterations to be made within a reasonable time and in a bridge over navigable waters of the United States so as to prevent its being an obstruction to navigation, is not a taking of private property for public use which, under the Constitution, must be preceded by compensation to

the owners of the bridge. *Monongahela Bridge Co.* v. *United States*, 177.

See CONGRESS, POWERS OF, 3.

Self-incrimination. See EVIDENCE, 2.

CONSTRUCTION OF CONTRACTS.
See CONTRACTS.

CONSTRUCTION OF STATUTES.
See BANKRUPTCY, 9;
STATUTES, A.

CONTINUANCE.
See TRIAL.

CONTRACTS.

1. *Construction; application of rule of ejusdem generis to insurance contract.*

The rule of *ejusdem generis* is a rule of interpretation, and even if it should be applied more liberally to contracts of insurance than to contracts of other kinds, it cannot be so applied as to exclude "blasting powder" from a prohibition to keep or allow on insured premises certain specified explosives and "other explosives." *Penman* v. *St. Paul F. & M. Ins. Co.*, 311.

2. *Admissibility of parol testimony to alter written contract.*

Where the policy furnishes the only way by which its terms can be waived and expressly provides against modification by customs of trade or manufacture or by agents, and are unambiguous, courts cannot admit parol testimony to alter the written words of the contract. (*Northern Assurance Company* v. *Grand View Building Association*, 183 U. S. 308.) *Ib.*

3. *Government; power of Secretary of Navy under acts of June* 10, 1896, *and August* 3, 1886, *in respect of release to be given.*

The Secretary of the Navy had power under the acts of June 10, 1896, c. 361, 29 Stat. 378, authorizing the building of the "Alabama," and of August 3, 1886, c. 849, 24 Stat. 215, to make a change in the terms of the contract requiring a final release to be given so that such release should not include claims arising under the contract which he did not have jurisdiction to entertain, and under a proviso in the release to that effect the contractors are

not barred from prosecuting their claim before the Court of Claims for unliquidated damages. *Wm. Cramp & Sons* v. *United States*, 494.

4. *Same.*

In this case a provision in a government contract having been treated by both parties as impracticable and therefore waived, the Secretary had power to change the terms of the release required by the contract, and leave the claims of the contractor to be presented to the Court of Claims. *Cramp & Sons* v. *United States*, 206 U. S. 118, distinguished. *Ib.*

5. *Reformation; effect of, to create new lien.*

Where a contract is reformed to correct a mutual mistake and make it conform to the intent of the parties a new lien is not created, but the original lien is adjudicated and determined. *Zartman* v. *First Nat. Bank*, 134.

6. *Ultra vires; avoidance by national bank of liability on guaranty on ground of.*

A national bank which guarantees a loan made by another bank in pursuance of an agreement that it be paid the amount due it by the borrower out of the proceeds of the loan, cannot avoid its liability on the guaranty as to the amount actually received by it pursuant to the arrangement on the ground of *ultra vires;* it is liable for money had and received. *Citizens' Nat. Bank* v. *Appleton*, 196.

7. *Corporations; ultra vires; implied contracts.*

Although a contract made by a corporation may be illegal as *ultra vires,* an implied contract may exist compelling it to account for the benefits actually received. *Ib.*

See CONSTITUTIONAL LAW, 11, 12, 13; EQUITY, 1; JURISDICTION, G; TAXES AND TAXATION, 1, 3, 4, 10.

CONVEYANCES.

See INDIANS, 6.

CORPORATE RECORDS.

See BANKRUPTCY, 17.

CORPORATIONS.

1. *Character as entity distinct from stockholders and officers—Knowledge of officers as to fraud imputed to corporation.*

The presumption that a corporation is, in law, an entity distinct from

its stockholders and officers cannot be carried so far as to enable the corporation to become a means of fraud; and knowledge of fraud on the part of the officers, who are also the principal stockholders and whose interests are identical, is properly to be imputed to the corporation itself. *J. J. McCaskill Co.* v. *United States*, 504.

2. *Railroad; exemption from taxation; construction of charter.*

A special charter to a railroad corporation contained a provision of exemption from taxation as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax not exceeding one-half of one per cent, per annum, on the net proceeds of their investments," in construing this provision held that: The words "after that" are equivalent to the word "thereafter" and relate to the entire period of time after the expiration of the seven years of total exemption, and are not to be construed as limited by another provision in the charter for a definite period during which the corporation should have exclusive rights. *Wright* v. *Georgia R. R. & Banking Co.*, 420.

3. *Tax exemption; capital stock and not shares exempted.*

The stock exempted in this case was the capital or property of the corporation and not the shares of stock in the hands of the stockholders. *Ib.*

4. *Tax exemption limited to original corporation and does not pass to successor.*

A state statute authorizing or directing the grant or transfer of the privileges of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity in the grant or transfer. (*Rochester Railway Co.* v. *Rochester*, 205 U. S. 236, 252.) *Ib.*

5. *Tax exemption not extended to subsequently acquired property nor passed to successor.*

While an exemption from taxation enjoyed by a corporation which acquires the franchises and property of another corporation may not be affected as to property which it already possesses, such exemption does not apply to additional property so acquired, nor do the exemptions enjoyed by the corporation whose property and franchise are acquired pass to the purchasing corporation. *Ib.*

6. *Tax exemption; extension to accretions.*

Where the capital of a corporation is exempted from taxation, except as specified, the exemption continues even if the property appreciates in value; and where, as in this case, it is evident that the legislature intended that the taxation of the corporation should be measured by the income, the exemption will not be construed as limited to the then value of the property so that natural increases in value will be subject to any other method of taxation than that stipulated in the charter. *Ib.*

7. *Capital stock and shares distinguished.*

The capital stock of a corporation is the capital upon which the business is to be undertaken and is represented by property of every kind acquired by the company, while the shares are mere certificates representing a subscriber's contribution to the capital stock and measuring his interest in the company. This distinction is obvious, although the words "stock" and "shares" are sometimes used synonymously. *Ib.*

See BANKRUPTCY, 6, 8, 9, 10, 17; CONSTITUTIONAL LAW, 1–4, 8–10, 13, 24–27, 32, 33; CONTRACTS, 6, 7; TAXES AND TAXATION, 2, 3, 4.

COSTS.

1. *Award on modification and affirmance of decree.*

Where the decree is affirmed but modified as to a substantial contention the costs of the appeal will be divided. *Wright* v. *Georgia R. R. & Banking Co.*, 420.

2. *Taxation on dismissal of bill.*

In view of the circumstances of this case it is proper to dismiss the bill without costs under the provisions of the act of March 3, 1875, c. 137, § 5. *Conley* v. *Ballinger*, 84.

COURT OF CLAIMS.

See CONTRACTS, 3, 4; JURISDICTION, G.

COURTS.

1. *Federal; effect given to judgment of state court.*

The Federal courts accord to a judgment of the state court only that effect given to it by the courts of the State in which it was rendered; and where the highest court of a State has held that a judgment in a tax suit is not *res judicata* in a suit for taxes subsequently assessed for another year, even though it must be

decided on the same questions, this court will regard such a decision only as an authority and determine the question on its merits. *Wright* v. *Georgia R. R. & Banking Co.*, 420.

2. *Interference with executive departments—When duty to interfere.*
However reluctant the courts may be to interfere with the executive department, they must prevent attempted deprivation of lawfully acquired property and it is their duty to see that rights which have become vested pursuant to legislation of Congress are not disturbed by any action of an executive officer. *Ballinger* v. *Frost*, 240.

3. *Scope of rule as to reviewing decisions of Land Department—Setting aside patent for fraud.*
The rule that courts will not review decisions of the Land Department on questions of fact or reverse discretion properly exercised does not prevent the courts from setting aside a patent obtained by fraud upon the Department. *J. J. McCaskill Co.* v. *United States*, 504.

4. *State; finality of decision.*
The decision of the state court that the only portion of a statute which is unconstitutional is separable and inapplicable to the case is final. *King* v. *West Virginia*, 92.

See ARMY AND NAVY;
BANKRUPTCY, 1, 2, 3;
CRIMINAL LAW, 7;
INTERSTATE COMMERCE COMMISSION, 1;
JURISDICTION;
MAILS, 3;
PRACTICE AND PROCEDURE;
STATUTES, A 2, 3, 5.

COURTS-MARTIAL.

See ARMY AND NAVY.

CRIMINAL LAW.

1. *Application, in Federal courts, of laws of State ceding territory to United States.*
The effect of § 3 of the acts of March 3, 1825, c. 65, 4 Stat. 115; April 5, 1866, c. 24, 14 Stat. 13, carried forward in § 5391, Rev. Stat.; and July 7, 1898, c. 576, 30 Stat. 717, providing that the punishment of offenses in places ceded by the State to the United States not specially provided for by any law of the United States shall be the same as that provided for by the law of the State ceding the place where the offense was committed, is limited to the criminal laws in force in the several States at the time of the enactment

of the legislation, and those statutes do not delegate to such States authority to in any way change the criminal law of the United States. (*United States* v. *Paul*, 6 Pet. 141.) *Franklin* v. *United States*, 559.

2. *Bribery of public officer punishable under* § 5451, *Rev. Stat.*

Regulations of a department of the Government promulgated under § 161, Rev. Stat., have the force of law; and bribery of an officer of the United States to violate such regulations is included under § 5451, Rev. Stat., making it a crime to bribe such officer to violate his lawful duty. *Haas* v. *Henkel*, 462.

3. *Conspiracy under* § 5440, *Rev. Stat.; acts constituting.*

A conspiracy to defraud the United States under § 5440, Rev. Stat., does not necessarily involve a direct pecuniary loss to the United States. The statute includes any conspiracy to impair, obstruct or defeat the lawful function of any department of the Government, e. g., the promulgation of officially acquired information in regard to the cotton crop. *Ib.*

4. *Trial; right of accused to object to removal to district where crime committed where indictment in district of residence also pending.*

Where one has been indicted for the same offense in two or more districts, in one of which he resides, it is the duty of the prosecuting officer to bring the case to trial in the district to which the facts most strongly point; and if the court first obtaining jurisdiction of the person of the accused does not object, the accused cannot object to his being removed under § 1014, Rev. Stat., from the district of his residence to the district in which the Government elects to first bring the case to trial. *Ib.*

5. *Trial; removal for; sufficiency of indictment to make prima facie case before commissioner.*

Introduction before the commissioner of an indictment found in the district to which removal is sought makes a *prima facie* case for removal which is not overcome by an indictment found in another district, although the *locus* is differently stated in each indictment. *Ib.*

6. *Trial; removal for; effect of accused being under bond to appear in other removal proceedings.*

The fact that the person whose removal is sought, is under bond to appear in other removal proceedings on prior indictments, does not prevent the removal order being issued. The effect could only be to exonerate the sureties. *Peckham* v. *Henkel*, 483.

7. *Trial; removal for; effect of rule of comity between Federal courts.*
The rule that the jurisdiction over the person by one Federal court must be respected until exhausted is one of comity only, and has a limited application in criminal cases. It will not prevent removal under § 1014, Rev. Stat., where the cases are not the same. *Ib.*

8. *Trial; removal for; jurisdiction of commissioner.*
Even if a second removal proceeding does amount to an election by the Government to abandon the first complaint, that fact does not affect the jurisdiction of the commissioner. *Ib.*

9. *Trial; removal for; sufficiency of one good count in indictment to support.*
One good count in an indictment, under which a trial may be had in the district to which removal is sought, is enough to support an order of removal in *habeas corpus* proceedings, *Horner* v. *United States*, 143 U. S. 207, even though accused may be held to bail in the district from which removal is sought on an indictment of which some of the counts are similar. *Price* v. *Henkel*, 488.

10. *Trial; removal for; evidence; effect of indictment alleging commission of offense in district other than that to which removal sought—Habeas corpus to review decision of commissioner.*
But an indictment which alleges that the offense was committed in the district where found, does not conclusively destroy the *prima facie* case made in a removal proceeding by the indictment found in the district to which removal is sought and which alleges that the offense was committed therein, and if the commissioner also heard evidence upon which he based his decision, that decision is not open to review in *habeas corpus* proceedings. *Ib.*

11. *Trial; removal for; sufficiency of evidence to overcome effect of indictment.*
In this case the independent evidence which was offered to show that accused was not in the district where the indictment was found was not conclusive. *Ib.*

12. *Trial; removal for; duty of commissioner under* § 1014, *Rev. Stat.*
Under § 1014, Rev. Stat., the duty of the commissioner is to determine whether a *prima facie* case is made out that a crime has been committed, indictable and triable in the district to which removal is sought, and if so determined there is no discretion; nor is the fact that the accused is under bail in the district where he

resides a bar to the removal. *Haas* v. *Henkel*, 462; *Peckham* v *Henkel*, 483; *Price* v. *Henkel*, 488.

See APPEAL AND ERROR, 1, ASSIGNMENTS OF ERROR, 3; CONSTITUTIONAL LAW, 14, 15; STATUTES, A 5; TERRITORIES.

CUSTOM.

See PRACTICE AND PROCEDURE, 10.

CUSTOMS DUTIES.

See JURISDICTION, A 6.

DAMAGES.

See CONTRACTS, 3; JURISDICTION, G.

DEFENSES.

See APPEAL AND ERROR, 3.

DELEGATION OF POWER.

See CONSTITUTIONAL LAW, 16–19.

DELIVERY OF MAIL.

See MAILS.

DEPARTMENTAL REGULATIONS.

See CRIMINAL LAW, 2; MAILS.

DESCENT AND DISTRIBUTION.

See LOCAL LAW (PORTO RICO).

DUE FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 28, 29.

DUE PROCESS OF LAW.

See ASSESSMENT AND TAXATION; CONSTITUTIONAL LAW, 1, 20, 21, 22, 32, 34; PRACTICE AND PROCEDURE, 9; TAXES AND TAXATION, 8, 11.

DUTIES ON IMPORTS.

See JURISDICTION, A 6.

EJECTMENT.
See PUBLIC LANDS, 1, 3.

EJUSDEM GENERIS.
See CONTRACTS, 1.

ELECTION.
See CRIMINAL LAW, 4, 8.

ELEVENTH AMENDMENT.
See CONSTITUTIONAL LAW, 30, 31.

EMOLUMENTS OF OFFICE.
See OFFICE.

EQUAL PROTECTION OF THE LAWS.
See CONSTITUTIONAL LAW, 23–27;
PRACTICE AND PROCEDURE, 9.

EQUITY.

1. *Jurisdiction to reform contract; effect of bankruptcy law to suspend.* The jurisdiction which equity has to decree correction of errors in written contracts caused by mutual mistake is not suspended by the bankruptcy law; and the trustee takes property as the debtor had it at the time of the petition subject to all valid claims, liens and equities, including the power of a court of equity to correct a manifest error by mutual mistake in an agreement made prior to the petition. *Zartman* v. *First Nat. Bank*, 134.

2. *Jurisdiction to enjoin state officers from action which would cause irreparable injury to corporation engaged in interstate commerce.* Publication by proclamation by a state officer in his official capacity that a foreign corporation engaged in interstate and local business is not authorized, but is forbidden from continuing, to do local business would produce irreparable injury to such corporation; and, in order to prevent such contemplated or threatened injury a court of equity may enjoin the state officers from issuing such proclamation, if the state statute on which the contemplated action is based is unconstitutional. *Ludwig* v. *Western Union Telegraph Co.*, 146.

3. *Fraud; sufficiency of averments for purposes of jurisdiction of suit to cancel patent.* In this case it was held that the averments set forth in the bill of

fraud and perjury in *ex parte* proceedings before the land office were sufficient to give a court of equity jurisdiction of a suit brought by the United States to cancel a patent. *J. J. McCaskill Co.* v. *United States*, 504.

4. *Fraud; evidence to sustain averments of.*
In this case the testimony sustained the averments of the bill that the patent was obtained by fraud. *Ib.*

5. *Trustees; when co-tenant purchasing at public sale not deemed trustee for benefit of other co-tenants.*
The rule that equity may convert into a trustee a co-tenant who attempts to buy an outstanding hostile title does not apply where the common property is sold at *bona fide* public sale under legal process or power in a trust deed. At such a sale, and in the absence of fraud or deceit, any one of the co-tenants is as free to buy as any of the general public, and several of the co-tenants may combine without notice to the others to purchase for themselves. *Starkweather* v. *Jenner*, 524.

6. *Laches; delay in electing to avoid judicial sale for inadequacy of price.*
A judicial sale for inadequate price resulting from combination of bidders is voidable, not void, and one who would complain must after discovery seasonably elect whether he will avoid it or not. A delay of four years where the property is of speculative character and has largely increased in value meanwhile is unreasonable. *Ib.*
See APPEAL AND ERROR, 2.

ESTATES OF DECEDENTS.
See LOCAL LAW (PORTO RICO).

EVIDENCE.

1. *Admissibility, in suit to cancel patent, of testimony of agent of Land Office as to conversations and admissions made by entryman.*
In this case the testimony of an agent of the General Land Office as to conversations and admissions made by the entryman, with knowledge that he was a government officer seeking the facts as to the settlement of the land, was properly admitted, as was also the report made by such officer who testified as to the facts recited therein. *J. J. McCaskill Co.* v. *United States*, 504.

2. *Self-incrimination—What amounts to compelling accused to be witness against self.*
The retention by the prosecuting authorities, without using it on the

trial, of a statement made by the accused does not amount to compelling him to be a witness against himself within the provisions of Chap. 5 of the Philippine Act of Congress of July 1, 1902, 32 Stat. 691. *Pendleton* v. *United States*, 305.

See BANKRUPTCY, 2;
CONTRACTS, 2;
CRIMINAL LAW, 5, 9, 10, 11;
EQUITY, 4;
FRAUD;
PRACTICE AND PROCEDURE, 12.

EXECUTIVE DEPARTMENTS.

See COURTS, 2;
PRACTICE AND PROCEDURE, 7.

EXECUTIVE OFFICERS.

Duty in respect of congressional legislation.

The head of a department of the Government is bound by the provisions of congressional legislation which he cannot violate, however laudable may be his motives. *Ballinger* v. *Frost*, 240.

See CLAIMS AGAINST THE UNITED STATES;
CONSTITUTIONAL LAW, 16, 17, 18;
CONTRACTS, 3, 4;
MANDAMUS.

EXEMPTIONS.

See CONSTITUTIONAL LAW, 12;
CORPORATIONS, 2–6;
TAXES AND TAXATION.

FACTS.

See PRACTICE AND PROCEDURE, 1, 6, 7.

FEDERAL QUESTION.

1. *Timeliness of raising.*

Where no Federal question is raised in the state court it is too late to attempt to do so in the assignment of error in this court. *Mallers* v. *Commercial Loan & Trust Co.*, 613.

2. *Timeliness of raising.*

After a case has been decided below without reference to any Federal question parties may not for purpose of review by this court inject a Federal question by the suggestion that a Federal right was relied on. *Fraenkl* v. *Cerecedo*, 295.

3. *Timeliness of raising.*

An attempt to introduce a Federal question into the record for the first time by petition for rehearing is too late unless the state

court entertains and in fact passes upon it. *Forbes* v. *State Council*, 396.

4. *Sufficiency of showing that Federal question considered or passed on by state court.*

A denial of a petition for rehearing by the state court "after mature consideration" does not amount to any more than a denial of the motion, and does not show that the Federal question was considered or passed on. It affords no basis for jurisdiction of this court on writ of error. *Ib.*

5. *What constitutes—Question as to right, under Federal statute, to remove cause.*

A question of a Federal nature is raised by the contention, if denied by the state court, that a right or privilege exists under a Federal statute to remove the case into the Federal court. *Williams* v. *First National Bank*, 582.

6. *What constitutes case arising under Constitution or laws of United States.*

Where plaintiff's right to recover is not predicated on any Federal right, the fact that the defense is that the transaction was prohibited by Federal law does not make the case one arising under the Constitution or laws of the United States. (*Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185.) *Ib.*

See JURISDICTION, A 5.

FORAKER ACT.

See PORTO RICO;
TREATIES, 2.

FOREIGN CORPORATIONS.

See CONSTITUTIONAL LAW, 1, 2, 3, 8, 9, 25, 26, 27.

FOREST RESERVES.

See CONSTITUTIONAL LAW, 19.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW.

FRANCHISES.

See CONSTITUTIONAL LAW, 12, 13;
CORPORATIONS, 4, 5;
TAXES AND TAXATION.

FRAUD.

Evidence to support charge.

In this case the charges of fraud and collusion on the part of the defendants are wholly unsupported. *Starkweather* v. *Jenner*, 524.

See CORPORATIONS, 1; CRIMINAL LAW, 3; COURTS, 3; EQUITY, 3, 4, 5, 6.

FRAUDULENT CONVEYANCES.

See BANKRUPTCY, 4, 13, 14, 15, 16.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 28, 29.

GOVERNMENT CONTRACTS.

See CONTRACTS, 3, 4.

GOVERNMENTAL POWERS.

See CONGRESS, POWERS OF; CONSTITUTIONAL LAW, 16–19, 32–34.

GRANTS.

See CORPORATIONS, 4, 5.

GUARANTY.

See CONTRACTS, 6.

HABEAS CORPUS.

Not available to attack decision of commissioner in proceeding for removal for trial of an accused.

Disregard of comity between Federal courts at the instance of the Government is not an invasion of constitutional rights of the accused. It does not affect the jurisdiction of the commissioner, and even if his decision is erroneous it cannot be attacked on *habeas corpus*. *Habeas corpus* is not writ of error. *Peckham* v. *Henkel*, 483.

See CRIMINAL LAW, 9, 10; JURISDICTION, A 8.

HEALTH REGULATIONS.

See PRACTICE AND PROCEDURE, 8, 9; STATES.

HOMESTEADS.

See PUBLIC LANDS, 2–6.

HOTELS.

See BANKRUPTCY, 6, 8.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW, 11, 12, 13

IMPORTS.

See JURISDICTION, A 6.

INDIANS.

1. *Allotments; when title becomes absolute—Duty of Secretary of the Interior in respect to.*

After all the requirements of the act of Congress providing for distribution of Indian lands have been complied with, and the statutory period has elapsed without contest, the title of the allottee becomes fixed and absolute and only the ministerial duty of execution and delivery of the patent remains for the Secretary of the Interior. *Ballinger* v. *Frost*, 240.

2. *Allotments; scope of power of Secretary of the Interior in respect of.*

The power of supervision and correction vested in the Secretary of the Interior over Indian allotments is not unlimited and arbitrary; it cannot be exercised to deprive any person of land the title to which has lawfully vested. *Ib.*

3. *Lands; legislative power of United States over.*

There is no question as to the complete legislative power of the United States over the land of the Wyandotte Indians while it remained in their occupation, and parcels excepted from the general distribution under the treaty of 1855 continued under such legislative control for the benefit of the tribe. *Conley* v. *Ballinger*, 84.

4. *Lands; extent to which United States bound to protect Indian use of.*

While the United States maintains and protects Indian use of land and its occupation against others it is bound itself only by honor and not by law, and it will not be presumed to have abandoned at any time its attitude of protection towards its wards. Nor is its good faith broken by any change in disposition of property believed by Congress to be for the welfare of the Indians. *Ib.*

5. *Lands; right to enjoin disposition under act of Congress.*

Even if a suit to enjoin disposition of property reserved by the treaty of 1855 with the Wyandottes for cemetery use is not a suit against the United States, a descendant of an Indian buried in such

cemetery cannot maintain such an action to enjoin the disposition of the reserved property in accordance with an act of Congress. *Ib.*

6. *Choctaw and Chickasaw; rights in respect of tribal lands.*

There is no statutory prohibition against a member of either the Choctaw or Chickasaw tribe, not holding any excess of lands subject to allotment, selling his improvements upon tribal land or abandoning his right of possession thereof to another Indian. *Thomason* v. *McLaughlin*, 103 S. W. Rep. 595, approved. *Williams* v. *First National Bank*, 582.

See MANDAMUS.

INDICTMENT AND INFORMATION

See ASSIGNMENTS OF ERROR, 3.
CRIMINAL LAW.

INHERITANCE.

See LOCAL LAW (PORTO RICO).

INJUNCTION.

See CONSTITUTIONAL LAW, 30;
EQUITY, 2;
INDIANS, 5.

INN-KEEPERS.

See BANKRUPTCY, 6, 8.

INSURANCE.

See CONTRACTS, 1, 2;
TAXES AND TAXATION, 7, 8.

INTERSTATE COMMERCE.

See CONGRESS, POWERS OF, 1, 2, 3; CONSTITUTIONAL LAW, 1–3, 6–10, 32; INTERSTATE COMMERCE COMMISSION; STATUTES, A 7.

INTERSTATE COMMERCE COMMISSION.

1. *Establishment of through routes and joint rates; inquiry by courts after finding by commission.*

Under § 4 of the act of June 29, 1906, c. 3591, 34 Stat. 589, giving the Interstate Commerce Commission power to establish through routes and joint rates where no reasonable or satisfactory through

route exists, the existence of such route may be inquired into by the courts, notwithstanding a finding by the commission. *Interstate Com. Comm.* v. *Northern Pacific Ry. Co.*, 538.

2. *Establishment of through route; public preference of no importance where reasonable route exists.*

When one through route exists which is reasonable and satisfactory, the fact that the public would prefer a second which is no shorter or better cannot overcome the natural interpretation of a provision in the statute to the effect that jurisdiction exclusively depends upon the fact that no reasonable or satisfactory route exists. *Ib.*

3. *Establishment of through route—Commission without jurisdiction.*

As the Northern Pacific route from the points named to points between Portland and Seattle is reasonable and satisfactory, the fact that there are certain advantages in the Union Pacific or Southern route does not give the Interstate Commerce Commission jurisdiction to establish the latter as a through route against the objection of the Northern Pacific Railway Company. *Ib.*

4. *Power to compel switch connections—Sec.* 1 *of act of March* 4, 1887, *as amended by* § 1 *of act of June* 29, 1906, *construed.*

Where a statute creates a new right and a commission is given power to extend relief in regard thereto at the instance of a specified class, its power is limited thereto; and so held that the Interstate Commerce Commission has power to compel switch connections with lateral branch roads under § 1 of the act of March 4, 1887, c. 104, 24 Stat. 379, as amended by § 1 of the act of June 29, 1906, c. 3591, 34 Stat. 584, only at the instance, as stated therein, of shippers; it has no power to do so on the application of a branch railroad. *Interstate Com. Comm.* v. *Delaware, Lackawanna & Western R. R. Co.*, 531.

5. *Quære as to what constitutes lateral branch road within meaning of statute.*

Quære and not decided, whether the railroad on whose behalf the application in this case was made was a lateral branch road within the meaning of the statute. *Ib.*

JOINDER OF PARTIES.

See APPEAL AND ERROR, 2.

JUDGMENTS AND DECREES.

Conclusiveness of judgment in quo warranto proceeding.

Quære whether a judgment of ouster in *quo warranto* is conclusive

between the same parties in a suit brought by the *de jure* relator against the *de facto* incumbent. *Albright* v. *Sandoval*, 331.

See CONSTITUTIONAL LAW, 21, 28;
COURTS, 1, 4;
JURISDICTION, A 1, 3.

JUDICIAL POWER OF THE UNITED STATES.

See CONSTITUTIONAL LAW, 30, 31.

JUDICIAL SALES.

See EQUITY, 4, 6.

JUDICIARY.

See COURTS;
JURISDICTION.

JURISDICTION.

A. OF THIS COURT.

1. *Of appeal from Circuit Court of Appeals; decision of that court final.*

Where the Circuit Court would not have had jurisdiction had the allegations of diverse citizenship been stricken from the bill the decision of the Circuit Court of Appeals is final. *Weir* v. *Rountree*, 607.

2. *On appeal from Circuit Court of Appeals—When provision of Bankruptcy Law not involved.*

The judgment in this case that the vendor of goods sold to the bankrupt had a right to, and did, rescind the contract of sale on the ground that the goods were obtained by the bankrupt's fraud, and that the rescission was seasonably made on that ground, involves no provision of the bankruptcy law, but depends on principles of general law, and an appeal will not lie to this court from the judgment of the Circuit Court of Appeals. (*Chapman* v. *Bowen*, 207 U. S. 89.) *Blake* v. *Openhym*, 322.

3. *Judgment of Circuit Court of Appeals not a final one.*

Appeal from the Circuit Court of Appeals from a judgment reversing and remanding for further proceedings dismissed for want of final judgment. *Singer Mfg. Co.* v. *Adams*, 617.

4. *Of direct appeal from Circuit Court; where constitutional points unfounded.*

Jurisdiction of this court under the act of 1891 of a direct appeal

from the Circuit Court cannot be based on constitutional points that are absolutely unfounded in substance as in this case. *Franklin* v. *United States*, 559.

5. *On direct appeal from Circuit Court; sufficiency of Federal question involved.*

To give this court jurisdiction on a direct appeal from, or writ of error to, a Circuit Court on the ground of a constitutional question, such question must be real and substantial, and not a mere claim in words. *Kaufman & Sons Co.* v. *Smith*, 610.

6. *Same.*

The questions involved in this case as to the right of the Government to collect duties on merchandise coming into the United States from the Canal Zone, Isthmus of Panama, under the act of March 2, 1905, c. 1311, 33 Stat. 843, have already been settled by the case of *Downes* v. *Bidwell*, 182 U. S. 244, and the writ of error is dismissed for want of jurisdiction. *Ib.*

7. *Of direct appeal from Circuit Court.*

A direct appeal from the Circuit Court dismissed without opinion for want of jurisdiction. *Shine* v. *Fox Bros. Mfg. Co.*, 609.

8. *Direct appeal from District Court; when question of jurisdiction of lower court involved.*

Where *habeas corpus* proceedings are based on the want of jurisdiction in the trial court, and the question is whether under the statute that court had jurisdiction, the jurisdiction of the court in which the *habeas corpus* proceeding is brought is not in issue, and if the constitutionality of the statute giving the trial court jurisdiction is not involved, but only its construction, a direct appeal does not lie to this court from the final order remanding the relator. *Childers* v. *McClaughry*, 139.

9. *On appeal from territorial court where construction of territorial statute but not jurisdictional amount involved.*

Where the decision of the Supreme Court of a Territory is based upon the construction of the territorial statute involved, and not upon the power of the legislature to pass it, an appeal does not lie to this court, if the amount in controversy is less than $5,000. *Albright* v. *Sandoval* (*No.* 2), 342.

10. *Same.*

A decision of the territorial court as to who had the right to an office which depends on whether the office was or was not vacant, and

whether or not an appointment was made before the statute involved took effect, depends upon the construction of, and not the power of the legislature to pass, such statute; such a case does not involve the validity of an authority exercised under the United States and an appeal does not lie to this court if the amount in controversy is less than $5,000. *Ib.*

11. *On writ of error to Court of Appeals of District of Columbia.*

A writ of error to the Court of Appeals of the District of Columbia dismissed for want of jurisdiction without opinion on the authority of *Frasch* v. *Moore*, 211 U. S. 1, and other cases cited. *Moore* v. *Newcomb Motor Co.*, 608.

12. *To review cases removed from United States courts under provisions of Oklahoma Enabling Act.*

The power of this court to review cases removed from the United States courts for Indian Territory to the state courts of Oklahoma under the provisions of the Enabling Act as amended by act of March 4, 1907, c. 2911, 34 Stat. 1287, is controlled by § 709, Rev. Stat. *Williams* v. *First National Bank*, 582.

13. *On writ of error to state court—When Federal statute not involved; in this case the Bankruptcy Law.*

Where, after writ of replevin, the state court turns the goods over to the receiver, who so receives them, on the express condition that he assume the liabilities incurred in that court which has held that the liability under the re-delivery bond was incurred for benefit of the estate, no provision of the bankruptcy act is involved that would make the decision reviewable in this court on writ of error. *Blake* v. *Openhym*, 322.

14. *To review decision of state court—When judgment rests on sufficient non-Federal ground.*

Where the state court decides that, under the law of the State the constitutionality whereof is not attacked, the action of defendant in giving replevy bond and answering amounted to a general appearance and waiver of objection to jurisdiction based on a Federal ground, the ruling of general appearance rests on a non-Federal ground sufficient to sustain it and cannot be reviewed by this court. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Slade*, 78.

15. *To review decision of state court—When Federal question properly set up.*

Where plaintiff in error did not set up in the state court the contention that the contract of interstate shipment should be construed ac-

cording to the act of Congress regulating interstate shipments instead of by the law of the State where made, but on the contrary, contended that it should be construed by the law of the State of destination and trial of the case, the record presents no Federal question properly set up in the court below that can be considered by this court. *Ib.*

16. *Of writ of error to review judgment of state court.*

Writs of error to review judgments of the state courts in actions for personal injuries dismissed, without opinion, for want of jurisdiction. *Missouri, Kansas & Texas Ry. Co.* v. *Hollan,* 615; *Missouri, Kansas & Texas Ry. Co.* v. *Wise,* 616.

17. *When Federal question foreclosed by previous decision.*

When this court has determined the constitutionality of a state statute that question is not open, and cannot be made the basis of jurisdiction for a writ of error; and so held as to the statute of West Virginia involved in this case and sustained as constitutional in *King* v. *Mullins,* 171 U. S. 404. *King* v. *West Virginia,* 92.

18. *When Federal question asserted has become a moot one, writ of error dismissed.*

Where the indictment has been dismissed and no new indictment has been returned for the same offense and the statutory period of limitations has elapsed, the question whether accused was entitled under the Constitution to a speedy trial becomes a moot one, and a writ of error to review an order dismissing the indictment under such circumstances will be dismissed. *Lewis* v. *United States,* 611.

19. *When provision of Federal statute involved.*

Where, after replevin, the paramount authority of the bankruptcy court is conceded and the replevin suit is considered only as evidence of rescission and identification of goods, no provision of the bankruptcy law or jurisdiction of the bankruptcy court is involved on which a writ of error from, or an appeal to, this court can be based. *Blake* v. *Openhym,* 322.

20. *Writ of error to review* 201 *Massachusetts,* 444, *dismissed, without opinion, for the want of jurisdiction. Chase* v. *Phillips,* 616.

See FEDERAL QUESTION;
TAXES AND TAXATION, 11.

B. OF CIRCUIT COURTS.

Amount in controversy not sufficient when plaintiff merely assignee and not owner of separate claims.

Where a plaintiff sues as assignee of several claims, but is not in fact

the owner of all the claims sued upon, and none of the claims is sufficient in amount to confer jurisdiction on the Federal court, that court has no jurisdiction and should dismiss the case for that reason although the assigned claims may in the aggregate exceed the jurisdictional amount. *Woodside* v. *Beckham*, 117.

C. Of District Courts.

See Bankruptcy, 3.

D. Admiralty.

See Admiralty.

E. Bankruptcy.

See Bankruptcy, 1–5, 11, 17.

F. Equity.

See Equity, 1, 2, 3.

G. Court of Claims.

Of claim for unliquidated damages under contract for building war vessel.

Under the Tucker Act the Court of Claims has jurisdiction of a claim for unliquidated damages under a contract for building a war vessel, where a release had been given by the Secretary of the Navy with a proviso that it does not include claims arising under the contract other than those of which the Secretary has jurisdiction. *Wm. Cramp & Sons* v. *United States*, 494.

H. Of Interstate Commerce Commission.

See Interstate Commerce Commission.

I. Of Courts-Martial.

See Army and Navy.

J. Generally.

Time at which existence of jurisdiction determined.

Jurisdiction is determined as of the time of commencement of the suit, and even though the jurisdiction of the court be enlarged by a subsequent statute so as to include the parties, the court cannot acquire jurisdiction against objection. *Fraenkl* v. *Cerecedo*, 295.

See Criminal Law, 7, 8; Statutes, A 5; Habeas Corpus; Territories.

LACHES.

See Equity, 6.

LAND DEPARTMENT.
See COURTS, 3;
PUBLIC LANDS.

LAND GRANTS.
See COURTS;
PUBLIC LANDS.

LEGISLATIVE POWER.
See CONGRESS, POWERS OF; STATES;
INDIANS, 3, 4; TAXES AND TAXATION.

LEX LOCI.
See CONSTITUTIONAL LAW, 28;
LOCAL LAW.

LIBEL.
See ADMIRALTY.

LICENSE FEES.
See CONSTITUTIONAL LAW, 1, 2, 3, 8.

LIENS.
See CONTRACTS, 5.

LIMITATION OF POWERS.
See TAXES AND TAXATION, 1, 6.

LIMITATIONS.
See PLEADING.

LOANS AND CREDITS.
See TAXES AND TAXATION, 7, 8.

LOCAL LAW.
Alabama. Law of 1907 imposing franchise tax on foreign corporations (see Constitutional Law, 27). *Southern Ry. Co.* v. *Greene,* 400.

Arkansas. Wingo law, requiring foreign corporations to pay license fee (see Constitutional Law, 8). *Ludwig* v. *Western Union Tel. Co.,* 146.

California. Burial law of San Francisco (see States). *Laurel Hill Cemetery* v. *San Francisco*, 358.

Kansas. Bush act imposing tax on foreign corporations (see Constitutional Law, 1). *Western Union Tel. Co.* v. *Kansas*, 1.
Liability of railroads (see Railroads). *Missouri Pacific Ry. Co.* v. *Kansas*, 262.

Louisiana. Taxation (see Taxes and Taxation, 9). *Board of Assessors* v. *New York Life Ins. Co.*, 517.

Michigan. Legitimacy of children (see Constitutional Law, 29). *Olmsted* v. *Olmsted*, 386.

Minnesota. Act of 1903 taxing railroad companies (see Taxes and Taxation, 5). *Chicago Great Western Ry. Co.* v. *Minnesota*, 234.

New Mexico. Eligibility to office (see Practice and Procedure, 5). *Albright* v. *Sandoval*, 331.

Philippine Islands. Scope of review by Supreme Court of Territory (see Practice and Procedure, 15). *Pendleton* v. *United States*, 305.

Porto Rico—Inheritance; quære as to effect of Article 811, *Civil Code. Quære*, as to the effect of Article 811 of the Civil Code of Porto Rico, requiring an ascendant inheriting property under certain conditions to reserve the property in favor of relatives belonging to the line from which the property originally came as to property inherited before the adoption of Article by one dying after its adoption still possessed of the property. *Garcia* v. *Vela*, 598.

South Carolina. Act No. 50, of February 23, 1903, relative to settlement of claims by carriers (see Constitutional Law, 6). *Atlantic Coast Line R. R. Co.* v. *Mazursky*, 122.

Wisconsin. Chattel mortgages (see Bankruptcy, 13). *Knapp* v. *Milwaukee Trust Co.*, 545.

Generally. See Practice and Procedure, 2, 8, 9.

MAILS.

1. *Delivery where two or more addressees of same name.*

The management of the post office business has been placed by Congress in the hands of the Postmaster General and his assistants, and the Postal Laws and Regulations provide for the delivery of mail where two or more persons of the same name receive mail at the same post office. *Central Trust Co.* v. *Central Trust Co.*, 251.

2. *Delivery; scope of consideration in determining who entitled.*

While the benefit of one's legal name belongs to every party, in-

dividual or corporation, it may at times be necessary and proper to look beyond the exact legal name to the name by which a party is customarily known and addressed in order to properly deliver mail to the person to whom it is addressed. *Ib.*

3. *Delivery; to whom to be made; interference by court with determination of postal authorities.*

In this case the First Assistant Postmaster General having made an order directing delivery of mail addressed to Central Trust Company, Chicago, to the Central Trust Company of Illinois instead of to a South Dakota corporation having the name Central Trust Company, *held* that there was not enough clear right shown by the latter company to justify the setting aside of the order by the court. *Ib.*

MANDAMUS.

To compel executive officers to perform ministerial duty.

The performance of a ministerial duty by an executive officer can be compelled by mandamus; and so held as to the delivery of patent to land selected by a Cherokee Indian allottee after all requirements of the acts of Congress under which the selection was made had been complied with. *Ballinger* v. *Frost*, 240.

"MANUFACTURING."

See BANKRUPTCY, 9, 10.

MERCANTILE PURSUITS.

See BANKRUPTCY, 6, 7, 8.

MINERAL LANDS.

See PUBLIC LANDS, 7.

MISTAKE.

See CONTRACTS, 5;
EQUITY, 1.

MORTGAGES AND DEEDS OF TRUST.

See BANKRUPTCY, 13, 14, 15.
EQUITY, 5.

NAMES.

See MAILS, 2;
TRADE-NAMES.

NATIONAL BANKS.

See CONTRACTS, 6.

NAVIGABLE WATERS.

See CONGRESS, POWERS OF, 1, 2, 3;
CONSTITUTIONAL LAW, 17, 18, 35.

NEW TRIAL.

See ASSIGNMENTS OF ERROR, 1.

NOTICE.

See CORPORATIONS, 1.

OBSTRUCTIONS TO NAVIGATION.

See CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 17, 18, 35.

OFFENSES.

See ARMY AND NAVY;
CRIMINAL LAW.

OFFICE.

Emoluments; right of recovery by de jure officer, after judgment of ouster in quo warranto.

After judgment of ouster in *quo warranto* a *de jure* officer may recover the emoluments of the office, less the reasonable expenses incurred in earning the same, where, as in this case, the *de facto* officer entered the office in good faith and under color of title. *Albright* v. *Sandoval*, 331.

See CONSTITUTIONAL LAW, 22; PORTO RICO;
JUDGMENTS AND DECREES; TREATIES, 1.

OLEOMARGARINE ACT.

1. *Construction of act of* 1902—*Artificial coloration; use of natural ingredient.*

Where the function of a natural ingredient, such as palm oil, used in manufacturing oleomargarine is so slight that it probably would not be used except for its effect in coloring the product so as to look like butter, the product is artificially colored and subject to the tax of ten cents a pound under par. 8 of the act of May 9, 1902, chap. 784, 32 Stat. 193. *Moxley* v. *Hertz*, 344.

2. *Artificial coloration; use of natural ingredient.*

As the record in this case shows that the use of palm oil produced only a slight effect other than coloration on the product, it falls under the rule adopted in *Cliff* v. *United States*, 195 U. S. 159, that the use of a natural ingredient must be for something more substantial than coloration in order to relieve the oleomargarine of the tax of ten cents a pound. *Ib.*

PAROL EVIDENCE.

See CONTRACTS, 2.

PARTIES.

See APPEAL AND ERROR, 2.

PATENTS FOR LAND.

See COURTS, 3; INDIANS, 1, 2; EQUITY, 3, 4; MANDAMUS.

PENALTIES AND FORFEITURES.

See CRIMINAL LAW, 1.

PERJURY.

See EQUITY, 3.

PERSONS.

See CONSTITUTIONAL LAW, 24.

PLACE OF TRIAL.

See CRIMINAL LAW, 4.

PLEADING.

Bill of review; time for filing; limitations.

Where a bill of review is presented for filing within the period allowed, and the court delays passing upon the application until after that period has elapsed, the time between tendering the bill for filing and permission given to file is not counted in applying the limitation. (*Ensminger* v. *Powers*, 108 U. S. 292.) *Fraenkl* v. *Cerecedo*, 295.

See ASSIGNMENTS OF ERROR; EQUITY, 3.

PLEDGE.

See BANKRUPTCY, 14.

POLICE POWER.

See PRACTICE AND PROCEDURE, 10;
STATES.

PORTO RICO.

Office of procurador; effect of Foraker Act to abolish.

Congress recognized the action of the military authorities in Porto Rico in 1898 in abolishing the officer of procurador and validated it by the provision in the Foraker Act of 1900 continuing the laws and ordinances then in force except as altered and modified by the military orders in force. *Sanchez* v. *United States*, 167.

See CONSTITUTIONAL LAW, 22;
LOCAL LAW.

POSTAL LAWS AND REGULATIONS.

See MAILS.

POSTMASTER GENERAL.

See MAILS, 1.

POWER OF CONGRESS.

See CONGRESS, POWERS OF.

PRACTICE AND PROCEDURE.

1. *Facts not dealt with on writ of error.*

On writ of error this court cannot deal with facts, and whether the land involved is within or without certain boundaries is for the state court to determine. *King* v. *West Virginia*, 92.

2. *Deference to assumptions of trial court in respect of matters of local law.*

In a suit coming from a Territory this court is not inclined to overthrow the assumptions of the trial court in regard to matters controlled by the local law; and so held in affirming a judgment in a case coming from Porto Rico involving questions of inheritance and prescription. *Garcia* v. *Vela*, 598.

3. *Deference to decisions of state court.*

In this case this court accepts the view of the state court as to the scope of its own decisions. *Great Northern Ry. Co.* v. *Minnesota*, 206.

4. *Deference to state court's construction of state statute.*

This court will not usurp the functions of a state court of last resort in order to distort if not destroy for infirmity of state power a state statute expressly upheld as valid by the state court. *Hannis Distilling Co.* v. *Baltimore*, 285.

5. *Following territorial court's construction of local statute.*

Where the final judgment of the Supreme Court of a Territory is not based on the power of the legislature to enact the statute involved but on the construction thereof, this court is not disposed to disturb that construction; and so held, following the decisions of the territorial court, that a statute of New Mexico carving a new county out of an existing one did not create a vacancy in an office of the original county because the incumbent did not reside in that portion of the county which remained. *Albright* v. *Sandoval*, 331.

6. *Quære as to binding effect of finding by state court.*

Quære whether on writ of error where the constitutional question is whether a rate or duty prescribed by a state commission amounts to deprivation of property without due process of law, this court is bound by a finding of the state court that a rate or duty is not actually confiscatory. *Missouri Pacific Ry. Co.* v. *Kansas*, 262.

7. *Conclusiveness of findings of fact by executive officers.*

The findings of fact by officers in charge of the several departments of the Government are conclusive unless palpable error appears. *Central Trust Co.* v. *Central Trust Co.*, 251.

8. *Caution to be exercised in dealing with local decisions involving health of neighborhood.*

Great caution must be exercised by any tribunal in overruling, or allowing to be overruled, the decision of the local authorities on questions involving the health of the neighborhood; and this court is doubly reluctant to interfere with deliberate decisions of the highest court of a State confirming a specific determination on such a question previously reached by the body making the law. *Laurel Hill Cemetery* v. *San Francisco*, 358.

9. *Same.*

Where opinion is divided as to whether a practice prohibited by a police ordinance is dangerous, and if the ordinance be valid if the danger be real, this court will not overthrow the ordinance as an unconstitutional deprivation of property without due

process of law or a denial of equal protection of the law merely because of adherence to the other belief. (*Jacobson* v. *Massachusetts*, 197 U. S. 11.) *Ib.*

10. *Considerations in determining constitutionality of exercise of police power.*

Tradition and habits of the community count for more than logic in determining constitutionality of laws enacted for the public welfare under the police power. *Ib.*

11. *Who may raise constitutional question on behalf of a class.*

One not belonging to a class, cannot raise the question of constitutionality of a statute as it affects that class. *Ib.*

12. *Presumption that lower court attributed no probative strength to uncorroborated testimony.*

When testimony is admitted, but is not followed up by other testimony necessary to give it effect, this court will assume that the court below attributed to it no probative strength. *J. J. McCaskill Co.* v. *United States*, 504.

13. *Writ of error dismissed where Federal question foreclosed by previous decisions.*

Where the unsoundness of a Federal question so clearly appears from previous decisions of this court as to foreclose the subject and leave no room for controversy, the writ of error will be dismissed. *Hannis Distilling Co.* v. *Baltimore*, 285.

14. *Disposition of case where asserted Federal questions devoid of merit.*

Where the asserted Federal questions are not frivolous, but are so devoid of substance as to be without merit the writ will not be dismissed but the judgment will be affirmed. *Williams* v. *First National Bank*, 582.

15. *Action by this court in case where error committed by Court of First Instance avoided on trial de novo by appellate court.*

The Supreme Court of the Philippine Islands tries a criminal case on the record *de novo*, and if it avoids an error which may have been committed by the Court of First Instance, the judgment will not be reversed by this court on account of such error; and so held in this case in which the Court of First Instance took into consideration the fact that accused did not offer to testify on his own behalf, but the Supreme Court, on the accused's own appeal, declared that it did not take that fact into consideration but

rendered its decision on the proofs. *Pendleton* v. *United States*, 305.

See APPEAL AND ERROR, 3; ASSIGNMENTS OF ERROR; FEDERAL QUESTION, 1, 2, 3; RATE REGULATION.

PRESUMPTIONS.

See CORPORATIONS, 1; PRACTICE AND PROCEDURE, 12; TAXES AND TAXATION, 6; WORDS AND PHRASES.

PRINCIPAL AND SURETY.

See CRIMINAL LAW, 6.

PROCESS.

See BANKRUPTCY, 3.

PUBLIC HEALTH.

See PRACTICE AND PROCEDURE, 8, 9; STATES.

PUBLIC LANDS.

1. *Ejectment; rule governing right of recovery by railroad claiming lieu lands as against homesteader.*

In an action of ejectment by a railroad company claiming lieu lands under its grant, against a homesteader, the rule applies that the plaintiff must recover on his legal title and not upon defects in defendant's entry; the question is whether the entry was properly initiated before the selection and not whether it had actually ripened into legal title. *Osborn* v. *Froyseth*, 571.

2. *Homesteads; effect on entry of unauthorized withdrawal of land from settlement.*

A rejection of a homestead entry on the ground that the land was not open for settlement does not defeat the entry if the Secretary had no authority to withdraw the land from settlement. (*Sjoli* v. *Dreschel*, 199 U. S. 564.) *Ib.*

3. *Homesteads; relative value of claims.*

In a contest between a *bona fide* homesteader and one claiming under selection of lieu land the former has the better claim. *Ib.*

4. *Homesteads; time from which right relates.*

The right of a homesteader settling in good faith relates back to the date of settlement. *Ib.*

5. *Homestead claim; priority over claim of selection of lieu lands.*

Where a railroad company fails to comply with the statutory re-

quirements in order to authorize selection of lieu lands in the indemnity limits, and its selection is rejected, a subsequent selection does not relate back, but preëmption or homestead rights duly initiated before the second selection have priority. *Ib.*

6. *Public character of land ceases, when—What subject to selection as lieu land.*

Land that is actually occupied by a qualified entryman with intent to claim it as a homestead, ceases to be public and subject to selection as lieu land, even though there be no record evidence at the time the selection is made. *Ib.*

7. *Timber cutting; mineral lands open to.*

The authority for cutting timber from the public domain under the act of June 3, 1878, c. 150, 20 Stat. 88, extends only to lands valuable for minerals and not to lands adjacent thereto and not actually valuable for minerals. *United States* v. *Plowman*, 372.

PUBLIC OFFICERS.

See CONSTITUTIONAL LAW, 2;
MANDAMUS.

QUO WARRANTO.

See JUDGMENTS AND DECREES;
OFFICE.

RAILROAD REGULATION.

See CONSTITUTIONAL LAW, 32, 33, 34.

RAILROADS.

Distinction in train service between passenger and freight; effect of state statute to create.

A state statute making provisions for passengers riding on the caboose of freight trains will not be construed as a declaration of the State that there is no distinction between passenger train service and mixed train service, especially where, as in Kansas, the liability of the railroad is limited as to persons riding in cabooses. *Missouri Pacific Ry. Co.* v. *Kansas*, 262.

See CONSTITUTIONAL LAW, 6, 7, 9, 10, 11, 12, 32, 33, 34;
CORPORATIONS, 2, 3;
INTERSTATE COMMERCE COMMISSION;
PUBLIC LANDS, 5;
TAXES AND TAXATION, 3, 4, 5.

RATE REGULATION.

Practice of this court where complainant in bill to enjoin enforcement of rate fails to show that it is confiscatory.

Willcox v. *Consolidated Gas Company*, 212 U. S. 19, followed to effect that where the state court has found the rate fixed by a state commission on a single commodity to be not confiscatory and has refused an injunction, the decree will be affirmed without prejudice to the right of the carrier to reopen the case if, after adequate trial of the rate, it can prove that it is actually confiscatory and amounts to a deprivation of property without due process of law. *Northern Pacific Ry. Co.* v. *North Dakota*, 579.

See CONSTITUTIONAL LAW, 32.

REAL PROPERTY.

See CONSTITUTIONAL LAW, 28, 29.

RECEIVERS.

See ADMIRALTY.

RECORDS OF CORPORATIONS.

See BANKRUPTCY, 17.

REFORMATION OF INSTRUMENTS.

See CONTRACTS, 5;
EQUITY, 1.

REHEARINGS.

Rehearings granted in cases in which judgments were affirmed by divided court and cases restored to docket. United States v. *Grimaud*, 614; *United States* v. *Inda*, 614; *Baltimore & Ohio Southwestern R. R. Co.* v. *United States*, 617.

RELATION.

See PUBLIC LANDS, 4, 5.

REMEDIES.

See APPEAL AND ERROR, 1.

REMOVAL FOR TRIAL.

See CONSTITUTIONAL LAW, 14, 15;
CRIMINAL LAW, 4–12.

RES JUDICATA.
See COURTS, 1, 4;
CRIMINAL LAW, 10;
JUDGMENTS AND DECREES.

RIVERS.
See CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 17, 18.

ROUTES.
See INTERSTATE COMMERCE COMMISSION, 1, 2, 3.

SALES.
See EQUITY, 4, 6;
INDIANS, 6.

SECRETARY OF AGRICULTURE.
See CONSTITUTIONAL LAW, 19.

SECRETARY OF THE INTERIOR.
See INDIANS, 1, 2.

SECRETARY OF THE NAVY.
See CONTRACTS, 3, 4.

SECRETARY OF WAR.
See CONSTITUTIONAL LAW, 17, 18.

SELF-INCRIMINATION.
See EVIDENCE, 2.

SIXTH AMENDMENT.
See CONSTITUTIONAL LAW, 15.

SOVEREIGNTY.
See TREATIES, 1.

SPANISH-AMERICAN TREATY.
See TREATIES.

SPECIAL ASSESSMENTS.
See ASSESSMENT AND TAXATION.

STARE DECISIS.

See JURISDICTION, A 17;
PRACTICE AND PROCEDURE, 13;
TAXES AND TAXATION, 11.

STATES.

Police power; constitutionality of exercise in interest of public health—San Francisco burial ordinance.

An ordinance prohibiting burial of the dead within the limits of a populous city based on a determination of the city authorities that the practice is dangerous to life and detrimental to public health, and which has been sustained by the highest court of the State, will not be overthrown by this court as an unconstitutional exertion of the police power of the State; and so held as to such an ordinance of San Francisco, California. *Laurel Hill Cemetery* v. *San Francisco*, 358.

See CONSTITUTIONAL LAW, 1, 2, 3, 4, 6, 7, 8, 9, 10, 20, 21, 27, 30, 31;
CRIMINAL LAW, 1;
TAXES AND TAXATION.

STATUTE OF LIMITATIONS.

See PLEADING.

STATUTES.

A. CONSTRUCTION.

1. *Binding force of unambiguous words.*

Although the purpose of a statute may be defeated by its qualifications, courts, in construing it, are bound by words that are explicit and unmistakable in meaning. *United States* v. *Plowman*, 372.

2. *Constitutionality; scope of consideration in determining.*

An act will not be declared unconstitutional merely because an executive officer might, in another case, act arbitrarily or recklessly under it. If such a case arises the courts can protect the rights of the government or persons which are based on fundamental principles for the protection of rights of property. *Monongahela Bridge Co.* v. *United States*, 177.

3. *Exception in application; power of court to make.*

Where the statute is plain, and Congress has made no exception in its application, the court cannot make one. *Haas* v. *Henkel*, 462.

4. *Object not to be defeated by yielding to what is non-essential.*

A statute may not be evaded, nor its purpose made to yield to what is

non-essential and thus render it a means to accomplish the deception it was meant to prevent. *Moxley* v. *Hertz*, 344.

5. *Avoidance of judicial chasm.*

A statute creating a court to take jurisdiction of crimes will not be construed, if another construction is admissible, so as to leave a judicial chasm; and so held that under the Oklahoma enabling act the Federal court had jurisdiction of certain specified crimes committed after the enabling act was passed and before the State was admitted. *Pickett* v. *United States*, 456.

6. *Relative weight of reason and letter of law.*

The reason of a law as indicated by its general terms should prevail over its letter when strict adherence to the latter will defeat the plain purpose of the law. *Ib.*

7. *When substance and not form considered.*

In determining whether a statute does or does not burden interstate commerce the court will look beyond mere form and consider the substance of things. *Western Union Tel. Co.* v. *Kansas*, 1.

See BANKRUPTCY, 9; CONSTITUTIONAL LAW, 1*f*, 28, 29; PRACTICE AND PROCEDURE, 4, 5; TAXES AND TAXATION, 9; WORDS AND PHRASES.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STOCK BOOKS.

See BANKRUPTCY, 17.

STOCK AND STOCKHOLDERS.

See CORPORATIONS, 1, 2, 3, 7.

STREETS.

See ASSESSMENT AND TAXATION.

SUBROGATION.

See TAXES AND TAXATION, 4.

SUIT AGAINST STATE.

See CONSTITUTIONAL LAW, 30, 31.

SUIT AGAINST UNITED STATES.

See INDIANS, 5.

SWITCH CONNECTIONS.

See INTERSTATE COMMERCE COMMISSION, 4.

TAXES AND TAXATION.

1. *Legislative limitation of power of.*

A state legislature, unless restrained by the constitution of the State, may contract to limit its power of taxation; but, as taxation is essential to the existence and operation of government, an exemption therefrom will not be presumed from doubtful language, but must be expressed beyond reasonable doubt. *Great Northern Ry. Co.* v. *Minnesota*, 206.

2. *Exemption from taxation; power of State as to corporation; effect of former exemption.*

When a State becomes the owner by purchase of the entire property and franchises of a corporation created by itself, it can only convey the same pursuant to the provisions of the then existing constitution and it cannot reinvest either a purchaser or the original owner with any exemption from taxation prohibited by the existing constitution even if such exemption had been lawfully granted to the original owner of the franchise. *Ib.*

3. *Exemptions of corporation's earnings and real estate differentiated.*

There is a difference between a contract for a commuted system of taxation on earnings of a railroad corporation and a specific exemption from taxation of lands granted to the corporation, for a defined period; the former is personal and not assignable while the latter is attached to and follows the land. *Ib.*

4. *Exemption from taxation; effect to pass to successor of exempted corporation.*

A legislative contract of exemption from taxation in favor of a railroad company does not pass to another corporation acquiring the franchises of the former, and constitute such an irrepealable, unchangeable contract within the protection of the contract clause of the Federal Constitution that the rate of taxation cannot be subsequently altered by legislative enactment. *Chicago Great Western Ry. Co.* v. *Minnesota*, 234.

5. *Effect of Minnesota act of* 1903, *taxing railroads, as impairment of contract obligation.*

As against the plaintiff in error, the act of Minnesota of 1903, requir-

ing all railroad companies to pay a tax equal to four per cent of their gross earnings, is not an unconstitutional impairment of a legislative contract created by an act passed in 1856 imposing a tax of two per cent on a railroad company whose franchise was transferred to plaintiff in error. *Ib.*

6. *Power of taxation; presumption against surrender.*

The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose. *Wright* v. *Georgia R. R. & Banking Co.*, 420.

7. *Taxable property; what constitutes loan or credit.*

Where a policy-holder simply withdraws a portion of the reserve on his policy for which the life insurance company is bound, and there is no personal liability, it is not a loan or credit on which the company can be taxed as such, and this is not affected by the fact that the policy-holder gives a note on which interest is necessarily charged to adjust the account. *Board of Assessors* v. *New York Life Ins. Co.*, 517.

8. *Deprivation of property without due process of law.*

To tax such accounts as credits in a State where the company has made the advances would be to deprive the company of its property without due process of law. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, distinguished. *Ib.*

9. *Bank deposit temporarily within State not covered by statute purporting to tax all property.*

Even if a State can tax a bank deposit that is created only to leave the State at once, a statute purporting to levy a tax upon all property within the State should not be construed, in the absence of express terms or a direct decision to that effect by the state court, as intending to include such a deposit; and so held as to the statute of Louisiana involved in this case. *Ib.*

10. *Validity of taxation; effect of agreement by State as to method of taxation, not in comformity to state constitution, to create contract within contract clause of Federal Constitution.*

Where the constitution of the State requires equal and uniform taxation of all real and personal property in the State upon a cash basis and specifies the property that can be exempted, the legislature cannot thereafter agree that the payment of a given per cent. of the earnings of a corporation from property of a class not included among the properties that can be exempted shall be in lieu of all other taxation; and such a contract would not be pro-

tected by the impairment of obligation clause of the Constitution of the United States. *Great Northern Ry. Co.* v. *Minnesota*, 206.

11. *Question of right of State to tax tangible property therein, irrespective of residence of owner, foreclosed by prior decisions.*

This court having decided in *Carstairs* v. *Cochran*, 193 U. S. 10, that the State of Maryland can, as an exertion of its taxing power, without denial of due process of law, tax tangible property having a situs within its borders, irrespective of the residence of the owner, and can if necessary impose the obligation to pay such tax upon the custodian or possessor of such property, giving a lien thereon to secure reimbursement, the only Federal question involved and which would give this court jurisdiction in this case is so foreclosed that the writ of error is dismissed for want of jurisdiction. *Hannis Distilling Co.* v. *Baltimore*, 285.

See ASSESSMENT AND TAXATION; CONSTITUTIONAL LAW, 1, 2, 3, 8, 12, 13, 20, 26, 27; CORPORATIONS, 2–6; COURTS, 1; JURISDICTION, A 6; OLEOMARGARINE ACT.

TELEGRAPH COMPANIES.

See CONSTITUTIONAL LAW, 1, 8.

TENANTS IN COMMON.

See EQUITY, 5.

TERRITORIES.

Criminal jurisdiction; power of Congress, on organization into State, to transfer to Federal courts.

On the organization of a Territory into a State, Congress may—as it did by the Oklahoma enabling act—transfer the jurisdiction of general crimes committed in districts over which the United States retains exclusive jurisdiction from territorial to Federal courts, and may extend such jurisdiction to crimes committed before and after the enabling act. See *United States* v. *Brown*, 74 Fed. Rep. 43. *Pickett* v. *United States*, 456.

See PRACTICE AND PROCEDURE, 2.

TESTIMONY.

See BANKRUPTCY, 2; CONTRACTS, 2; EVIDENCE.

THROUGH RATES.

See INTERSTATE COMMERCE COMMISSION, 1, 2, 3.

TIMBER.

See PUBLIC LANDS, 7.

TITLE.

See CONSTITUTIONAL LAW, 28, 29;
INDIANS, 1, 2;
PUBLIC LANDS, 3.

TRADE-NAMES.

1. *Individual appropriation.*

The right to individual appropriation once lost is gone forever. *Saxlehner* v. *Wagner*, 375.

2. *Imitation of article bearing geographic or family name.*

Where a geographic or family name becomes the name for a natural water coming from a more or less extensive district, all are free to try to imitate it, and the owners of one of such natural springs cannot prevent the sale of an artificial water as being similar to that of the natural spring, where there is no attempt to deceive the public as to its being artificial. *Ib.*

3. *Right of owner of springs bearing geographic name to prevent sale of artificial water.*

Hunyadi is now in effect a geographical expression and the owners of the Hunyadi Janos Springs cannot prevent the sale of artificial Hunyadi water where there is no deception of the public as to its being an imitation. *Ib.*

TRADING PURSUITS.

See BANKRUPTCY, 6, 7, 8.

TRAIN SERVICE.

See CONSTITUTIONAL LAW, 32.

TRANSFERS.

See CORPORATIONS, 4, 5;
INDIANS, 6.

TREATIES.

1. *Spanish-American treaty of* 1898; *rights of individuals protected by; salability of official positions not within.*

The rights of private individuals recognized and protected by the Treaty of 1898 with Spain did not include the salability of official

positions, such as procurador; nor did the United States intend to so restrict its own sovereign authority that it could not abolish the system of perpetual and salable offices which is entirely foreign to the conceptions of this people. *Sanchez* v. *United States*, 167.

2. *Spanish-American treaty of* 1898; *effect of Foraker Act to modify.*
Even if Congress did not intend to modify the treaty of 1898 by the Foraker Act of April 12, 1900, 31 Stat. 77, if that act is inconsistent with the treaty it must prevail, and be enforced despite any provision in the treaty. (*Hijo* v. *United States*, 194 U. S. 315.) *Ib.*

See INDIANS, 5.

TRIAL.

Continuances; discretion of court.
Continuances are within the discretion of the trial court, and, in the absence of gross abuse, the action of the lower court will not be disturbed. *Pickett* v. *United States*, 456.

See CONSTITUTIONAL LAW, 14, 15;
CRIMINAL LAW, 4–12.

TRUSTEE IN BANKRUPTCY.

See BANKRUPTCY, 14–17;
EQUITY, 1.

TRUSTS AND TRUSTEES.

See EQUITY, 5.

ULTRA VIRES.

See CONTRACTS, 6, 7.

UNITED STATES.

See INDIANS, 3, 4.

UNITED STATES COMMISSIONERS.

See CRIMINAL LAW, 8, 10, 11;
HABEAS CORPUS.

WAIVER.

See CONSTITUTIONAL LAW, 3, 4.

WATERS.

See CONGRESS, POWERS OF, 1, 2, 3;
CONSTITUTIONAL LAW, 17, 18.

WILLS.

1. *Construction; when widow entitled to income under provision of will.*
A provision that a definite amount of net income be paid by trustees to the widow does not entitle her to income from the death of the testator, but only from after the executors have been discharged and the property turned over to the trustees. *Hawaiian Trust Co.* v. *Von Holt*, 367.

2. *Same—Considerations in determining relative advantages of election.*
In considering whether a provision in a will is as advantageous as dower interest, the fact that the widow is an executor and receives commissions may be considered. *Ib.*

3. *Same—Effect of failure to elect to take dower.*
This rule applies even if, after acceptance by the widow, of the provision in lieu of dower, it appears that the provision is not as advantageous to her as though she elected to take her dower. *Ib.*

WITNESSES.

See BANKRUPTCY, 2.

WORDS AND PHRASES.

Presumption as to intention of Congress in use of word.
Where Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and judicial meaning, and cases based on a declaration made by Parliament that the word has a certain meaning are not in point in determining the intent of Congress in using the word. *Toxaway Hotel Co.* v. *Smathers*, 439.

"*Manufacturing*," as used in Bankruptcy Act of 1898 (see Bankruptcy, 9). *Friday* v. *Hall & Kaul Co.*, 449.

"*Stock*" and "*shares*" (see Corporations, 7). *Wright* v. *Georgia R. R. & Banking Co.*, 420.

See CORPORATIONS, 2;
STATUTES, A 1.

WRIT OF ERROR.

See ASSIGNMENTS OF ERROR, 3;
HABEAS CORPUS;
JURISDICTION.

WYANDOTTE INDIANS.

See INDIANS, 3, 4, 5.