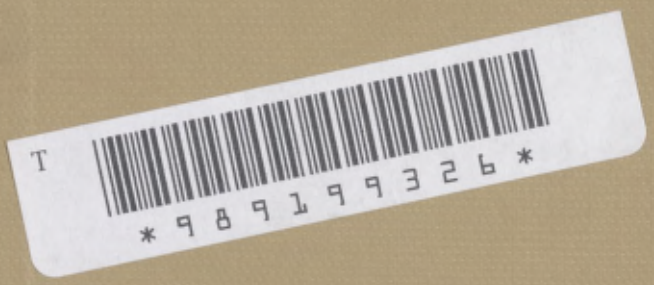
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UNITED STATES REPORTS

VOLUME 217

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1909

CHARLES HENRY BUTLER
REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1910

JUSTICES

OF THE

SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER,[2] Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER,[3] Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM,[4] Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIAM HENRY MOODY,[5] Associate Justice.
HORACE HARMON LURTON,[6] 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] The Chief Justice died July 4, 1910, at his home in Sorrento, Maine, during vacation. He was buried in Chicago, Illinois. The proceedings on his death will appear in a subsequent volume.

[3] 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. On April 25, 1910, President Taft appointed Charles Evans Hughes of New York, and Governor of that State, to succeed Mr. Justice Brewer, deceased; he was confirmed by the Senate on May 2, 1910, but did not qualify or take his seat on the bench during October Term, 1909.

[4] 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.

[5] 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, and did not participate in the decision of any of the cases reported in this volume which were argued or submitted during that Term.

[6] 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.

STATE OF MARYLAND *v.* STATE OF WEST VIRGINIA.

IN EQUITY.

No. 1, Original. Argued November 2, 3, 4, 1909.—Decided February 21, 1910.

The record in this case sustains the proposition that for many years the people of Maryland, Virginia and West Virginia, have accepted as the boundary between Maryland and West Virginia the line known as the Deakins line, and have consistently adhered to the Fairfax Stone as the starting point of such line, and that none of the steps taken to delimitate the boundary since such line was run in 1788 have been effectual, or such as to disturb the continued possession of people claiming rights up to such Deakins line on the Virginia and West Virginia side.

Whether long continued possession by a State of territory has ripened into sovereignty thereover which should be recognized by other States depends upon the facts in individual cases as they arise.

Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals.

Even if a meridian boundary line is not astronomically correct, it should not be overthrown after it has been recognized for many years and become the basis for public and private rights of property.

The decree in this case should provide for the appointment of commis-

sioners to run and permanently mark, as the boundary line between Maryland and West Virginia, the old Deakins line, beginning at a point where the north and south line from the Fairfax Stone crosses the Potomac River and running thence northerly along said line to the Pennsylvania border.

West Virginia is not entitled to the Potomac River to the north bank thereof. *Morris* v. *United States*, 174 U. S. 196.

Boundary disputes between States should be adjusted according to the facts in the case by the applicable principles of law and equity, and in such manner as will least disturb private rights and titles regarded as settled by the people most affected; and it should be the manifest duty of the lawmaking bodies of adjoining States to confirm such private rights in accordance with such principles.

THE facts, which involve that portion of the boundary line between the two States lying between Garrett County, Maryland, and Preston County, West Virginia, are stated in the opinion.

Mr. Isaac Lobe Straus, Attorney General of the State of Maryland, and *Mr. Edward H. Sincell*, with whom *Mr. William L. Rawls* was on the brief, for the plaintiff:

The charter of Maryland gave to the Lord Proprietary an absolute right of soil in and to all the territory comprehended within its specified boundaries. *Cunningham* v. *Browning*, 1 Bland Ch. Rep. 305; *Cassell* v. *Carroll*, 2 Bland Ch. Rep. 127; *Baltimore* v. *McKim*, 3 Bland Ch. Rep. 455; *Briscoe* v. *State*, 68 Maryland, 294; *Wharton* v. *Wise*, 153 U. S. 155; *Morris* v. *United States*, 174 U. S. 196.

The State of Maryland at and by the Revolution acquired all the territorial rights vested in the Proprietary before the Revolution. Cases *supra; Ringgold* v. *Malott*, 1 H. & J. 299; *Howard* v. *Moale*, 2 H. & J. 249; *Matthews* v. *Ward*, 10 G. & J. 443; *Smith* v. *Deveemon*, 30 Maryland, 374; *United States* v. *Morris*, 23 Wash. Law Rep. 759.

The State of Maryland stands upon the calls in the charter to Lord Baltimore as paramount, controlling and final in delimiting and fixing her western and southern boundaries.

The construction of this grant of territory in the charter of Maryland has been judicially settled. The courts and all other authorities have again and again declared that the charter defines the western and southern boundaries of the former province and present State of Maryland as having a common terminus at the first fountain of the Potomac River—that is to say, that the western boundary is the meridian running from the Pennsylvania line due south to the first fountain of the Potomac River, and that the southwestern and southern boundary begins at the said first fountain on the farther or southern bank or shore, and from that point runs along said farther or southern shore or bank of the river to its mouth—the southern shore or bank of the river, from its source to its mouth, being the boundary of Maryland on its southern and southwestern sides, and the whole of the river and its bed, from its source to its mouth, being within the boundaries of the State.

Every court, every jurist and every author who has ever mentioned the subject at all, unite, concur and agree in this construction and view of the boundaries called for by the charter, and not a single dissent from this construction can be found anywhere except the claim put forth for the first time in this case that the western boundary of Maryland does not run to the western source or first fountain of the Potomac, but is located on the main body of the stream, two miles (10,321.1 feet) eastward from its most western spring or source, and almost a mile (4,020 feet) distant from the spring which the defendant contends is the first spring called for by the charter.

The State of Maryland submits that it has always been understood and declared, never denied or doubted and repeatedly and uniformly adjudicated that the southern and southwestern boundaries of Maryland extend along the southern shore of the Potomac River from its mouth throughout its whole extent to its first fountain or source. In other words, the meridian which the charter calls for as its western

boundary, which is located at the first fountain of the river, runs from the Pennsylvania line to the first fountain of the river and that, accordingly, the southwestern and the southern boundaries of the State extend from the point of the meridian at its first fountain upon the southern bank of the stream at its first fountain all the way to the mouth of the stream at the Chesapeake Bay. Every court and every other authority which has had occasion to consider this subject has so construed this charter. And this is the only construction which is consonant with the manifest intention of the grant and with the rule of interpreting such grants as laid down by the foremost publicists and jurists. Cases *supra* and *Chapman* v. *Hoskins*, 2 Md. Chanc. 485; *Alexandria Canal Co.* v. *District of Columbia*, 9 Wash. Law Rep. 456; 1 Story's Comm., § 103; *O'Neal* v. *Virginia Bridge Co.*, 18 Maryland, 1, 16, and see Mr. Alvey's argument in *Doddridge* v. *Thompson*, 9 Wheat. 469; *Howard* v. *Ingersoll*, 13 How. 416, 424, 425; Vattel's Law of Nations, bk. 1, ch. 22, par. 5; 1 Bancroft's Hist. of U. S., ch. 7, p. 241; McMahon's Hist. of Maryland, 49, 51, 69; McSherry's Hist. of Maryland; Prof. Wm. H. Browne's "Maryland: The History of a Palatinate," 18; 1 Scharf's Hist. of Maryland, 409; *United States* v. *Texas*, 162 U. S. 1; *Uhl* v. *Reynolds*, 23 Ky. Law Rep. 759; 30 Am. and Eng. Ency. of Law, title "Waters and Watercourses," sub-title "Source," 351; Gould on Waters, § 41; *Wright* v. *Brown*, 1 Simon and St. 203; 2 Farnham on Waters and Watercourses, § 501, p. 1656.

In Professor Steiner's "Institutions and Civil Government of Maryland" (Ginn & Co., 1899), p. 2, the southern and western boundaries of Maryland are described as from the mouth of the Potomac, "along the south bank of that river to the source of its north branch; on the west the meridian of the source."

Where a watercourse has its source in a spring, such source is itself a part of the watercourse. 30 Am. and Eng. Ency. of Law, title "Waters and Watercourses," sub-title

"Source," pp. 351, 352; *Dudden* v. *Guardians of the Poor*, 1 H. & N. 627; *Tate* v. *Parrish*, 7 T. B. Mon. (Ky.) 325; *Colrick* v. *Swinburne*, 105 N. Y. 503; *Fleming* v. *Davis*, 37 Texas, 173; *Arnold* v. *Foot*, 12 Wend. 330; *Evans* v. *Merriweather*, 3 Scammon (Ill.), 495.

Where a natural monument is called for on a description of the boundaries of land, the identification of the object intended by the description is to be determined by a fair and reasonable construction of the whole instrument, regard being had in all cases to the true intent of the parties as expressed therein. 5 Cyc., "Boundaries," 869; *Horne* v. *Smith*, 159 U. S. 40; *Reynolds* v. *McArthur*, 2 Pet. 417; *Handley's Lessee* v. *Anthony*, 5 Wheat. 377; *Meredith* v. *Pielert*, 9 Wheat. 573; 8 Century Digest, title "Boundaries," 43.

The court must place itself as nearly as possible in the situation of the contracting parties at the time the deed was made in order to ascertain their intent. 4 Am. and Eng. Ency. of Law, title "Boundaries," 796.

The State of Maryland stands upon the calls in her charter to Lord Baltimore as paramount, controlling and final in delimiting and fixing her western and southern boundaries.

"Fairfax Stone" does not stand at the first fountain of the Potomac River.

This was unequivocally approved in *Morris* v. *United States*, 174 U. S. 225.

The location of the Fairfax Stone as the first fountain of the Potomac River is against the plain provisions of the charter to Lord Baltimore, and defeats its calls for the western and southern boundaries of Maryland.

Potomac Spring is the first fountain of the Potomac River. The first fountain of a stream is the point or source in which the water first comes to the surface. Cases *supra* and *Colrick* v. *Swinburne*, 105 N. Y. 503.

It is absolutely undisputed in this case, that Potomac Spring is the point at which the water first comes to the surface and begins to flow in a regular channel, and that

Potomac Spring rises farthest to the northwest of all the waters of Potomac River.

Every physical, geographical and topographical feature of the region surrounding the head-waters of the Potomac River unmistakably and unquestionably stamp Potomac Spring as the first fountain of the Potomac River, and a meridian line run through that spring fully and precisely satisfies and strictly conforms to every call for the initial point in the western and southern boundaries of Maryland contained in its charter.

Potomac River heading at Potomac Spring at once assumes a definite southeast course—the prevailing course of the river—with regular banks, while Fairfax Run runs directly opposite the course of the river, first flows nearly due west, thence northwest and thence northeast and east to the point of its confluence with the main body of the river shown at Station 31 on the plat.

Potomac Spring is perennial in its flow, while the springs in the vicinity of Fairfax Stone are only wet-weather springs, and have often been found entirely dry.

The waters from Potomac Spring emanate and flow from the Atlantic Watershed and from a point within only 300 feet of the summit of Backbone Mountain, which is the acknowledged watershed of the Appalachian Range, separating the waters which flow into the Atlantic from those that flow into the Mississippi and the Gulf of Mexico. Fairfax Stone stands upon a foothill of the Backbone Mountain and at a much lower elevation than Potomac Spring. Potomac Spring issues out of the east side of Backbone Mountain at a point 277.3 feet from the top of the mountain at an elevation of 3,365 feet, one of the very highest points on the Atlantic Watershed in Maryland and West Virginia.

Potomac Spring, by the undisputed testimony as ascertained by actual survey, is the westernmost source of the Potomac River, and a meridian drawn through it immediately across the crest of Backbone Mountain on the Atlantic

Watershed, at a point only 301.1 feet north of said spring, and thus leaves to the east of it all the waters of the Potomac River.

Potomac Spring as the initial point of the first fountain of the Potomac River at once gratifies the call in the charter of Maryland for both its western and southern boundaries.

Maryland is still entitled to the calls in her charter for the first fountain of the Potomac River and the meridian therefrom to the north, and no reason is shown by this record why this court should declare that she has forfeited this right.

The decree in this case will determine where the western boundary of Maryland is and will settle its location as by original right in the place decreed. *Rhode Island* v. *Massachusetts*, 12 Pet. 657.

The only "line" the defendant has attempted to set up as a boundary between the two States, and the one which, in her answer she maintains is the true boundary between the States, is the so-called Deakins "line," but these contentions are absolutely without foundation in fact, and her whole and entire position upon this question is predicated upon an absolutely baseless assumption of what Francis Deakins did, and an erroneous conception of the authority under which he acted at the time of laying out the military lots for the State of Maryland. The State of Maryland denies that the Deakins line is a true north line, and that the same was ever located as a true north line, and that the same was ever located from the Fairfax Stone, and that the same is even a continuous line between any termini, and that there is any evidence in this cause to show these alleged facts or any of them. The Deakins line, as a boundary line, is a mere myth, and in point of fact never did exist even as a continuous line between its north and south ends, and far less as a boundary line marking the western boundary of the State of Maryland.

The Deakins line never was authorized or recognized by the State of Maryland as a boundary, and there is absolutely no proof in this case tending to show that Francis Deakins laid

out said line. The State has always expressly denied that it was a boundary.

See resolutions passed by the First Constitutional Convention of Maryland in 1776, immediately after the recognition of the territorial rights of Maryland by the State of Virginia, through its representatives in its convention, and also see Act of Maryland, 1788, ch. 44, § 15.

Deakins neither mentioned nor suggested any such thing as a boundary of the State from one end of his report to the other.

None of the military lots in the western tier thereof depend upon or hang from the said Deakins line or any other line having any relation to the said Deakins line for their location.

Upon no hypothesis whatever can the Monroe line be regarded as making out or retracing or constituting in itself as an original location any boundary between Maryland and West Virginia; and it is nothing but a line of reference without any significance in this case.

The Potomac Meridian, located by the State of Maryland, with its initial point at Potomac Spring, the most western source of the Potomac River, and running thence north to Mason and Dixon's line as shown upon the plats of the plaintiff, stands as the only line located in this case by either party as a boundary between Maryland and West Virginia which is before the court and upon which as the case stands a decree can be rendered.

This case presents for final determination by this court a dispute which admittedly has been open and pending for more than a century and which during that period has been the subject of continuous discussion and controversy between the sovereign parties to this suit.

Maryland has presented her claim plainly and definitely upon her plats, shown by the result of actual survey upon the ground, and precisely indicating the boundary for which she contends as lawfully hers.

On the other hand, West Virginia fails to set up any counter location illustrative of her contention.

In view of the very great importance of this matter to both parties, we submit the inquiry to this tribunal, whether the strongest presumption ought not to obtain in favor of the clear and definite location which Maryland has made?

There has been no acquiescence upon the part of Maryland in the occupation or possession by West Virginia of any part of the territory embraced in the charter of Lord Baltimore in dispute in this case.

A State cannot be deprived of its territory by mere lapse of time or by mere occupancy, when all the while such State has challenged and denied the right of the invading party and repeatedly and persistently declared her own rights and when the right of such invasion and occupancy is universally regarded and again and again asserted to be an open, unsettled and pending question. Certainly down to 1859 Virginia recognized that the dispute was still pending and that the rights of both parties were the subject of negotiation and settlement. The Michler line was then run for the purpose of bringing the matter to a final determination. The failure of Virginia to ratify the work of Lieutenant Michler and establish the line run by him as the boundary between the two States left the controversy as it before stood and remitted Maryland to her charter rights.

There was no legal ratification by the act of 1860 or acquiescence by Maryland in any settlement or boundary. *Doddridge* v. *Thompson*, 9 Wheat. 476, 479; and see act of Congress of March, 1804; *Reynolds* v. *M'Arthur*, 2 Pet. 417; Acts of West Virginia of 1868, ch. 175, and of May 3, 1887.

It was only three years after that act was passed that this suit was instituted in this court by the Honorable William Pinkney Whyte, then Attorney General of Maryland. In no instance has this court held that the doctrine of acquiescence can be invoked or applied where the boundary between the two States has all the time before the filing of suit in this court

been recognized by both of the States concerned as unsettled and subject to future determination, and pending between two States, and is so mutually regarded and acknowledged by them, and neither can be held to have abandoned her rights to the other, nor to have acquiesced in the claims of the other, nor to have either lost or acquired title by acquiescence or prescription, which, according to every writer on public and international law, is founded upon a presumed abandonment of right, and cannot arise where presumption of abandonment is rebutted and negatived by open and express declarations to the contrary. Vattel, Chitty's ed., bk. II, ch. 11, par. 139; Marten's Law of Nations, bk. II, ch. iii, § 1, title "Law of Nature and Nations," in law bk. IV, ch. 12, § 4; 22 Cyc. sub-title "Prescription," 1728; Oppenheim, Int. Law, V. I, § 243; Heimburger, p. 151; 1 Moore's Int. Law Dig., § 107, p. 466.

The claim of adverse possession cannot prevail, as upon the face of the record itself, as made up by defendant, there is a clear recognition of the right of the plaintiff to grant title, and through its grantees and those claiming under them, to hold possession of land west of such a line or lines. Adverse possession, in order to be effectual, must be exclusive. *Beatty* v. *Mason*, 30 Maryland, 409; *Armstrong* v. *Risteau*, 5 Maryland, 256; *Baker* v. *Swan*, 32 Maryland, 355, and cases cited on p. 359; *Robinson* v. *Minor*, 10 How. 643; *Pool* v. *Fleeger*, 11 Pet. 210; *Henderson* v. *Poindexter*, 12 Wheat. 530; 5 Cyc. title "Boundaries," p. 930.

The land between Fairfax and Potomac meridians is one entire and indivisible. If the patentee of a tract and those claiming under him can refer their holding and possession to the title derived from the State of Maryland, an unassailable case of mixed possession will be made out, and when two are in mixed possession of the same tract of land, the law considers him having the title as in possession to the extent of his rights. *Cheney* v. *Ringgold*, 2 H. & J. 84; *Lowell* v. *Stephens*, 2 McCrary, 311; so where there is joint possession by the legal

owner and claimant by possession at any time within the statutory period, the running of the statute will be arrested. *Henderson* v. *Griffin*, 5 Pet. 151; *Hall* v. *Powell*, 4 S. & R. 456; *Barr* v. *Gratz's Heirs*, 4 Wheat. 223; *Deputron* v. *Young*, 134 U. S. 225; *Hunnicutt* v. *Peyter*, 102 U. S. 333.

The State of Maryland claims that it has been established:

I. That the true construction of the grant of territory of the Maryland charter, as declared by all the authorities who have discussed it, calls for a meridian line running from the southern boundary of Pennsylvania to the first fountain or source of the Potomac River as the western boundary of Maryland; and for a line extending from said first fountain or source along the southern shore or bank of the Potomac River to the mouth thereof as the southwestern and southern boundary of the State.

II. That to adopt the Fairfax Stone as marking the source or first fountain of the Potomac River would defeat the calls of the charter for the boundaries above mentioned.

III. That the North Fork of the Potomac River is clearly marked by irresistible evidence as the main stream of the Potomac River, and that the Potomac Spring, being the source of the said North Fork, is the first fountain of Potomac River.

IV. That, therefore, the western, southwestern and southern boundaries are properly ascertained by a meridian running from the Pennsylvania line to the Potomac Spring, and thence by a line along the southern bank of the stream or river flowing from said spring, to the mouth of said river.

V. That the controversy between Maryland and West Virginia as to the western and southwestern boundaries of the former having always been and being still an open, unsettled and pending question, the rights of Maryland to the boundaries called for by her charter, as above set forth, have not been forfeited or surrendered by her, and that this Honorable Court ought not to deprive her of them.

VI. That with respect to the tract in dispute between the two States growing out of the unsettled boundary line, Mary-

land has made such grants and patents of extensive lands within said tract, and has so been in possession of parts of said tract as to bar and defeat all possible pretensions upon the part of West Virginia to an adverse possession of said tract so in dispute.

VII. That the equity and justice of this case, reinforcing the law of it, sustain the claims of the State of Maryland.

Mr. George E. Price, with whom *Mr. Wm. G. Conley*, Attorney General of the State of West Virginia, was on the brief, for the defendant:

The record in this case shows:

First: That the boundaries of Maryland are to be ascertained from the language of the Baltimore charter as applied to the conditions then existing and to the topography of the country afterwards ascertained, and by the interpretation given to it by the King in Council, and subsequent acts of both parties.

Second: That the charter calls for running from the Delaware Bay in a right line in the fortieth degree of north latitude to the true meridian or the first source or fountain of the Potomac River, thence "tending downward toward the South to the farther bank of said river and following it to where it faces the Western and Southern coast as far as to a certain place called Sinquak, situate near the mouth of the same River, where it discharges itself in the forenamed Bay of Chessopeak."

Third: That as an original proposition, judging from the course of the river, the topography of the country and the size of the branches, the North Branch is the main Potomac River, and at the head of that branch is to be found the first source or fountain of the Potomac.

Fourth: That judging from the topography, the size of the branches and all the circumstances, the spring heads at which the Fairfax Stone was planted, are the first source and fountain of the river, and that if the first source or foun-

tain were to be located and established according to present conditions, these springs could be selected with more reason than any other point.

Fifth: That the question as to the first source or fountain of the Potomac River was fully investigated and judicially determined by the only competent tribunal authorized to determine it, as early as 1746, in the controversy between Lord Fairfax and the Colony of Virginia, and the Fairfax Stone was planted in accordance with that determination, at the first fountain or source of the Potomac.

Sixth: That Lord Baltimore had notice of and was bound by and fully acquiesced in that decision, and the matter, therefore, is *res adjudicata* as to him and the State of Maryland.

Seventh: That the Colony of Virginia asserted and held jurisdiction of all the territory south and west of the head spring of the North Branch of the Potomac at the Fairfax Stone from the date of the decision in 1746 until after the Revolution, and that the States of Virginia and West Virginia have held said territory and exercised governmental jurisdiction over it continuously and exclusively to the present time.

Eighth: That Lord Baltimore declined to take any steps to reopen the question after the decision in 1746, and that after the Revolution, although the State of Maryland has from time to time asserted a claim to go to the head spring of the South Branch of the Potomac, up to 1852, yet in that year and after that time she abandoned this claim, and has acquiesced in the claim of Virginia and West Virginia that the Fairfax Stone is at the first source or fountain of the Potomac, and that her western boundary line should begin at that point.

Ninth: That the belated attempt in this suit to fix the head spring of the North Branch at a point west of the Fairfax Stone is a creation of Mr. W. McCulloh Brown, the surveyor appointed in this cause, and is not maintainable upon any principle of law or equity; that whilst the spring head at

which Mr. Brown located the point for running the Brown-Potomac meridian is farther west than the spring head where the Fairfax Stone is located and is on somewhat higher ground, yet the branch of the stream running from that spring is not as long nor as large—certainly no larger, than the one running from the Fairfax Stone, and that at the point where these prongs branch off, the stream running to the Fairfax Stone is the straighter stream and has all the appearance of being the main river.

Tenth: That no claim has ever heretofore been made that this Brown-Potomac spring is the first fountain of the Potomac. No line has ever been run from it, and the territory one and a quarter miles wide and thirty-six miles in length, lying between the meridian run from this spring and that run from the Fairfax Stone is completely covered by Virginia patents settled by Virginia citizens, occupied by hundreds of farms and some villages, all of whom have, from the earliest times, adhered to the States of Virginia and West Virginia, and that Maryland has never exercised or attempted to exercise any governmental jurisdiction of any kind over it.

Eleventh: That prior to 1789, whilst at first there was some confusion in the issuing of patents for lands in that locality by the States of Virginia and Maryland, Virginia, in some instances, granting lands east of the due north line run from the Fairfax Stone, and Maryland granting some lands west of that line, yet, even before that date, a line had been run north from the Fairfax Stone and quite a number of Virginia patents had been granted as bordering upon that line, showing the claim of Virginia to go to that line as her boundary. And that Maryland had also granted several patents calling for that line as the boundary line.

Twelfth: In 1789, under the authority of the State of Maryland to lay out all of her western lands as bounty lands, Francis Deakins ran what he intended, and evidently believed, to be a due north line from the Fairfax Stone, and laid out the military lots up to and east of it, so far as the

lands had not previously been granted by the State of Maryland; that this line, so established was recognized and acquiesced in by both States from that time in 1789 until 1859, Maryland never having made a survey for any land west of the Deakins line between 1789 and 1859, but having made several grants that called for that line and Virginia having covered all the territory up to that line by her grants; having worked the roads, collected the taxes, assessed the lands, provided free schools for the children and in every other way, known to law, exercised governmental jurisdiction over the territory.

Thirteenth: That all of the territory west of this old line, which had been embraced within the old Maryland grants, based on surveys made prior to 1789, was afterwards taken up and covered by Virginia patents and has been so held under said patents ever since, with the single exception of about one-half of the Elder Spring tract of 411 acres,—one-half of which is now assessed and held as being in West Virginia and the other half assessed and taxes paid upon it in Maryland; two persons living upon it claiming Maryland as their residence and voting in Garrett County, but it is covered by a Virginia patent; that with the exception of these two persons and of Ethbell Falkenstein, who has recently attempted to change his allegiance to the State of Maryland, all the other citizens and residents of this territory, up to this old line, have always held their allegiance to and recognized the government of Virginia and West Virginia. That between 1789 and 1859 Maryland in various ways by patents, etc., recognized the Deakins line.

Fourteenth: That for some reason, not fully explained, this old boundary line is not a continuous straight line, but is broken by offsets therein, but that it is well defined on the ground and recognized by the inhabitants, and many points in it have been located and established both by Mr. Brown, the surveyor on behalf of Maryland, and Mr. Monroe, surveyor on behalf of West Virginia, and by the evidence in the cause,

so that there is no difficulty in locating and establishing it as it has always been held and claimed, and is still held and claimed by the citizens on both sides.

Fifteenth: That this old line does not run in a due north course from the Fairfax Stone, but verges to the right of the true meridian, and by reason of this divergence and of the offsets above mentioned, it reaches the Pennsylvania line about three-quarters of a mile east of the true meridian; that the Michler line, run under the direction of the commissioners of Virginia and Maryland in 1859, by careful astronomical and scientific observations, is practically a due north line from the Fairfax Stone to the Pennsylvania line, although Dr. Bauer's report in this case attempts to show that there is some variations in it from the due north line; that the commissioners, under whose direction the Michler line was run, were not authorized to establish a new boundary line, but only to trace out, locate and establish the old line already existing, and that because this was not done, a considerable part of the territory occupied by Virginia and held under her titles, was left out and thrown on the Maryland side; and because Maryland refused to recognize and protect these titles, Virginia and West Virginia did not ratify or adopt this Michler line, but continued to hold to the old line and have so held ever since.

The court does not act differently in deciding on boundary between States than on lines between separate tracts of land. If there is uncertainty where the line is, if there is a confusion of the boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded, or, if the court is satisfied without either, it decrees what and where the boundary of a farm, a manor, a province or a State is and shall be. *Rhode Island* v. *Massachusetts*, 12 Pet. 658, 734, 738; *S. C.*, 4 How. 628; and see 1 Ves. Sen. 448–450.

A boundary established and fixed by compact between nations becomes conclusive upon all the subjects and citizens thereof and binds their rights and is to be treated, to all intents and purposes, as the true real boundary. The construction of such a compact is a judicial question, and this doctrine applies to the settlement of the boundary between two States of the Union by compact between such States. *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Virginia* v. *Tennessee*, 148 U. S. 503; *Virginia* v. *West Virginia*, 11 Wall. 39.

That possession, or as it is called in books on international law, *usu caption*, for a long period of time is the best evidence of a national right. Vattel, 187, 191, etc.

Possession for a great many (more than one hundred) years becomes a rightful one by prescription, even if it had begun in wrong and injustice. The acquiescence of the adjoining State for such a lapse of time would be *conclusive* evidence that she assented to the possession thus held and had determined to relinquish her claim. *Rhode Island* v. *Massachusetts*, 14 Pet. 260, 261; *Rhode Island* v. *Massachusetts*, 4 How. 590, 591; *Louisiana* v. *Mississippi*, 202 U. S. 1.

Long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. *Indiana* v. *Kentucky*, 136 U. S. 479.

Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located, marked upon the earth and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant, and the line so established, takes effect not as an alienation of territory, but as a definition of the true and ancient boundary. *Virginia* v. *Tennessee*, opinion of Mr. Justice Field, p. 522; citing *Penn* v. *Ld. Baltimore*, 1 Ves. Sen. 444–448; *Boyd* v. *Graves*, 4 Wheat.

513; *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *United States* v. *Stone*, 2 Wall. 525, 537; *Kellogg* v. *Smith*, 7 Cush. 375, 382; *Chenery* v. *Waltham*, 8 Cush. 327; Hunt, Boundaries, 3d ed., 306; *Indiana* v. *Kentucky*, 136 U. S. 479, 516; *Rhode Island* v. *Massachusetts*, 4 How. 591, 639; Vattel, Law of Nations, bk. 2, ch. 11, § 149; Wheaton on Int. Law, pt. 2, ch. 4, § 164.

In *Virginia* v. *Tennessee*, 148 U. S. 524, it was held that an agreement, for the appointment of commissioners to run and mark the boundary line between the States, did not require the approval of Congress, under the Constitution; that such approval was not necessary until the States had passed upon the report of the commissioners, ratified their action and mutually declared the boundary established by them to be the true and real boundary between the States, and that the consent of Congress to this final compact may be either express or implied. And the assent of Congress is implied from the fact that in the laying out of Federal judicial and revenue districts, and in the holding of Federal elections the line so agreed upon has been adopted and conformed to by Congress and the Federal Government. These are held to be sufficient facts from which the consent of Congress may be implied.

This court, in a case of disputed boundary between two States of the Union, has jurisdiction and power not to make a boundary, not to create a new line, but only to ascertain from the evidence before it, what is the real and true boundary between such States, and, when ascertained, to establish it by a final decree. If there has been a compact or agreement between the States, settling and fixing the boundary between them, this court will recognize and uphold such compact and establish the boundary according to its construction of the language of the compact. *Virginia* v. *Tennessee*, 148 U. S. 503; *Poole* v. *Fleeger*, 11 Pet. 185.

The existence of a compact or agreement between the States may be established by any evidence that satisfies the

mind of the court. A compact may be proven by the doctrine of estoppel.

Independently of any such compact, a boundary line between States, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant.

Where a line has been once run and has afterwards been acquiesced in for a long number of years by two States, the court will establish it, although it varies from the original course in the charter, and although it may not be a straight or uniform line. All that the court requires is to be satisfied as to the location of the old line. Then it establishes it as final. This is not only the rule between States, but it has always been the rule between individuals when establishing a boundary line. *Bartlett &c. Co.* v. *Saunders*, 103 U. S. 316; *McIvers, Lessee*, v. *Walker*, 9 Cranch, 173; *S. C.*, 4 Wheat. 444; *Newsome* v. *Pryor*, 7 Wheat. 7; *Cavazos* v. *Trevino*, 6 Wall. 773.

Owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, wherever it may be found; nor in such case is the party precluded or estopped from claiming his own rights under the true one when discovered. *Schraeder Mining &c. Co.* v. *Packer*, 129 U. S. 688; *Hatfield* v. *Workman*, 35 W. Va. 578. But it is also held in the same cases that where a boundary line has been fixed as a settlement of a disputed boundary and possession taken and held in accordance with such settlement, the parties are bound by it, although the agreement of settlement is merely oral. Such parol agreement is not regarded as passing any land from one proprietor to the other, but as simply ascertaining the line to which their respective deeds extend. See also *Gwynn* v. *Schwartz*, 32 W. Va. 487, 488, 500; *Le Compte* v. *Freshwater*, 56 W. Va. 336.

Long acquiescence by one adjoining proprietor in a bound-

ary, as established by the other, is evidence of an agreement that such is the boundary. *Snead* v. *Osborne*, 25 California, 626; *Kip* v. *Norton*, 12 Wend. 127; *Jackson* v. *Ogden*, 7 Johns. 338; *Jackson* v. *Freer*, 17 Johns. 29; *McCormick* v. *Barnam*, 10 Wend. 104; *Dibble* v. *Rogers*, 13 Wend. 536; *Adams* v. *Rockwell*, 16 Wend. 285; *Van Wick* v. *Wright*, 18 Wend. 157; *Boyd's Lessee* v. *Graves*, 4 Wheat. 513; *Kellogg* v. *Smith*, 7 Cush. 375; *Jackson* v. *Bowen*, 1 Caines, 358–362; *Jackson* v. *Dysling*, 2 Caines, 198–200.

The action of a few isolated individuals cannot have the effect to prevent the State of West Virginia from getting the benefit of the doctrine of long continued possession and exercise of jurisdiction and governmental authority. *Virginia* v. *Tennessee*, 148 U. S. 527.

In a great controversy like this, where thousands of acres of land are involved and the rights of hundreds of people, the adverse attitude of two people claiming about 200 acres of land out of 8,000 or more cannot prevent the application of legal and equitable principles usual in such cases for the settlement of a controversy. *De minimis lex non curat.*

Great injury and loss would be inflicted upon the inhabitants living between the Deakins and the Michler lines if the Michler line should be established.

See *Coffee* v. *Groover*, 123 U. S. 1, under which case if the Michler line should be established as the true boundary line between the States, all the titles granted by Virginia east of that line will be void; that is to say, none of the several hundred inhabitants that live in that territory now, except two or three, will have any valid title to the lands which they occupy and which, in many instances, have been occupied by them and their predecessors in title for very many years; whilst the holders and claimants under the Maryland patents, which have been taken out simply to cover these lands and under which no possession or exercise of right has been had, will have the rightful legal title to these lands and will be able to turn the inhabitants now living there out of house and

home as the result of the decision of this question. This result would be so disastrous, would rend so many home ties, break up tender associations and violate so many of the most tender sentiments of the human heart and cause such great suffering and loss that we feel sure this court will not render such a decision unless there is no escape from it under the principles of law and equity.

The north bank of the Potomac is the boundary line, and not the south bank.

West Virginia claims and insists that the boundary line between her and the State of Maryland is the line of low-water-mark on the north bank of the Potomac River, from the division line between Virginia and West Virginia to the head spring of the North Branch of the Potomac, the Fairfax Stone, and thence running from said Fairfax Stone by the old Deakins line to the Pennsylvania line.

When the charter of Maryland was granted it is manifest that it was believed that the head spring of the Potomac River was north of the fortieth degree parallel.

An instrument will be construed according to the facts and circumstances and the knowledge and information of the parties to it at the time, so as to get at their intention and understanding. If the Maryland charter is construed in this way in the light of the knowledge of the parties to it at the time, then the boundary line was to run on the north, and not on the south bank of the Potomac River to the Chesapeake Bay.

The early and almost contemporary construction which was given to the Maryland charter by the King of England shows that it was understood by the King and his Council that the Potomac River had not been granted to Lord Baltimore by charter granted by Charles I. King Charles II, in 1649, in his grant of the northern neck of Virginia to the Earl of St. Albans and others, which was confirmed in 1663, granted the Potomac River and all the islands within its banks.

The treaty of peace between Great Britain and France, concluded in Paris February 10, 1763, fixed the boundaries of the several provinces of the respective sovereignties in America. The English maps made under that treaty show that the boundary line between Maryland and Virginia was distinctly laid down on the left, or the northern bank of the Potomac River.

Mitchell's map, which was made with the approbation and at the request of the Lords Commissioners for Trade and Plantation, 1750, published in 1755, shows the boundary line to be on the north bank of the Potomac.

The Virginia charters were cancelled under *quo warranto* proceedings, and the colonies became crown colonies, but her boundaries and jurisdiction were unaffected thereby and fully preserved. Lord Baltimore never regained the territory taken by Penn off the northern boundary. He never regained the territory included within the province of Delaware, and there is nothing to indicate that he ever regained the Potomac River after its grant to Lord Hopton and after the settlement with the parliamentary commissioners.

The King of Great Britain and his Council had absolute authority and control over the American colonies before the American Revolution and could change their limits and jurisdiction at his royal pleasure. It was, therefore, entirely within the power of Charles II to grant the Potomac River to Lord Hopton, as he did, although it may have been embraced within the limits of the charter previously granted to Lord Baltimore.

Mr. Justice Day delivered the opinion of the court.

This case originates in a bill filed by the State of Maryland October 12, 1891, against the State of West Virginia, invoking the original jurisdiction of this court conferred by the Constitution for the settlement of controversies between States. At its January session of 1890 the General Assembly of the

State of Maryland passed an act authorizing and directing its Attorney General to take such steps as might be necessary to obtain a decision of the Supreme Court of the United States which would settle the controversy between the States of Maryland and West Virginia concerning the true location of that portion of the boundary line between the two States lying between Garrett County, Maryland, and Preston County, West Virginia.

Preston County, West Virginia, was erected out of Monongalia County, Virginia, in the year 1818. Garrett County, Maryland, was erected out of the western portion of Allegheny County under chapter 212 of the Acts of the General Assembly of the State of Maryland of 1872.

The boundary in controversy runs between the two States from the headwaters of the Potomac to the Pennsylvania line.

The bill of complaint states the foundation of the Maryland title to be the charter granted on June 20, 1632, by King Charles I of England to Cecilius Calvert, Baron of Baltimore, all rights under which, it is averred, have vested in the complainant, the State of Maryland. Virginia, it is alleged, by her first constitution of June 29, 1776, disclaimed all rights to property, jurisdiction and government over the territory described in the charter of Maryland and the other colonies, in the following terms:

"The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon."

The bill also recites complainant's title to the South Branch of the Potomac River. It avers the failure to settle the true location of the boundary line in dispute with West Virginia, which State succeeded to the rights and title of Virginia. The bill charges that the State of West Virginia is wrongly in possession of and exercising jurisdiction over a large part of the territory rightfully belonging to Maryland; that the true line of the western boundary of Maryland is a meridian running south to the first or most distant fountain of the Potomac River, and that such true line is several miles south and west of the line which the State of West Virginia claims, and over which she has attempted to exercise territorial jurisdiction.

The State of West Virginia filed an answer and cross bill, in which she sets up her claim concerning the boundary in dispute between the States, and says that the true boundary line, long recognized and established, is the one known as the "Deakins" line, and in the answer and cross bill she prays to have that line established as the true line between the States. She also alleges in her cross bill that the north bank of the Potomac River from above Harpers Ferry to what is known as the Fairfax Stone is the true boundary between the States; that West Virginia should be awarded jurisdiction over that portion of the river to the north bank thereof.

There is much documentary and other evidence in the record bearing upon the contention that the South Branch of the Potomac River is the true southern boundary of Maryland, but in the briefs and arguments made on behalf of Maryland in this case the claim for the South Branch of the Potomac as the true boundary is not pressed and the controversy is narrowed to the differences in the location of the boundary, taking the North Branch of the Potomac River as the true southern boundary line of Maryland.

As we have already said, the contention of the State of Maryland is rested upon the construction of the charter granted by King Charles I, June 20, 1632, to Lord Baltimore.

The part of the charter necessary to consider is here given in the original Latin, and the translation thereof, as the same is contended for in the brief filed for the State of Maryland:

Western and Southern Boundaries, which calls are as follows, to wit:

Transuendo a dicto æstuario vocato Delaware Bay recta linea per gradum prædictum usque ad verum Meridianum primi Fontis Fluminis de Pottomack deinde vergendo versus Meridiem ad ulteriorem dicti Fluminis Ripam et eam sequendo qua Plaga occidentalis ad Meridianalis [qu. plagam occidentalem et meridianalem] spectat usque ad Locum quendam appelatum Cinquack prope ejusdem Fluminis Ostium scituatum ubi in præfatum Sinum de Chessopeake evolvitur ac inde per Lineam brevissimam usque ad prædictum Promontorium sive Locum vocatum Watkin's Point.

Going from the said estuary called Delaware Bay in a right line in the degree aforesaid to the true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river and following it to where it faces the western and southern coasts as far as to a certain place called Cinquack situate near the mouth of the same river where it discharges itself in the aforenamed bay of Chesapeake and thence by the shortest line as far as the aforesaid promontory or place called Watkin's Point.

There is some difference in the record as to the true Latin text and the translation thereof. For our purpose it is sufficient to consider that presented by the State of Maryland in the language above set forth. It is to be observed that the purpose of this part of the grant was to locate the northern line of the State of Maryland from Delaware Bay "to the true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of said river, and following it to where it faces the western and

southern coasts as far as to a certain place called Cinquack," etc.

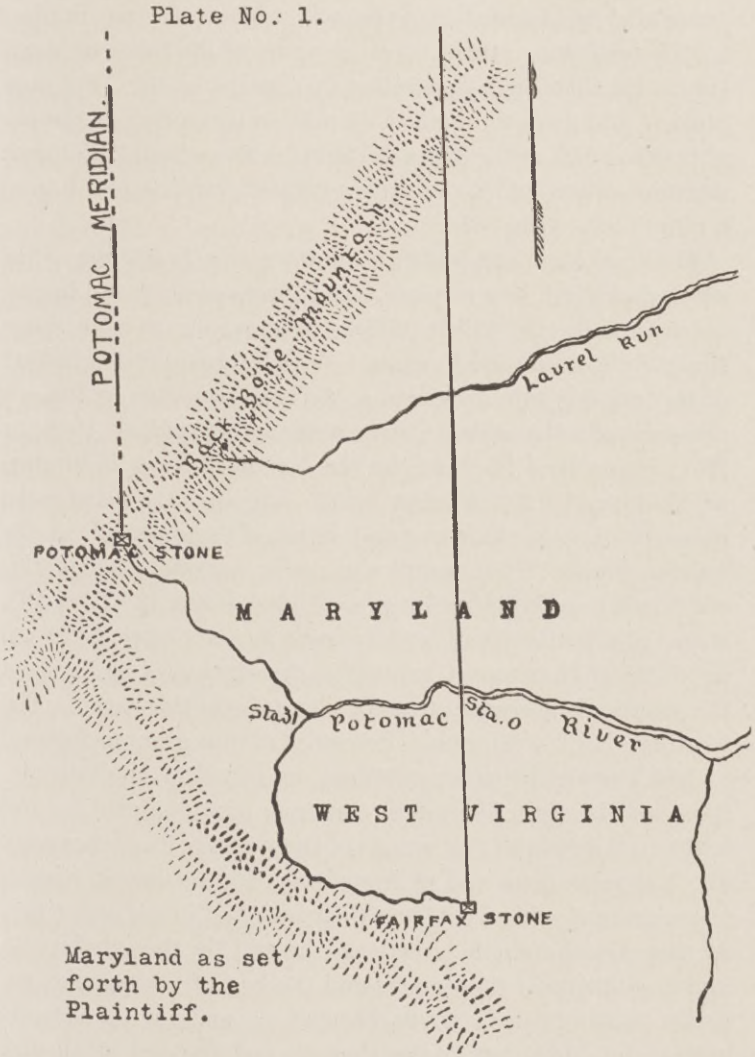
It is the contention of the State of Maryland that the controversy between her and the State of West Virginia is narrowed to a proper location of the true meridian from the first fountain head of the Potomac River, which, being located, will effectually settle the boundary line in dispute. The claim of the State of Maryland may be further illustrated by a consideration of the plate exhibited in the brief filed in behalf of that State, which is herewith given.

It is to be noted in considering this plate that the north and south line at the left is called the Potomac meridian, running from a certain point designated as the Potomac Stone. It is insisted for the State of Maryland that the spring at this point most nearly fulfills the terms of the Lord Baltimore charter, in that it properly locates the true meridian of the first fountain head of the Potomac River, and following it according to the description in the grant, embraces said river to its farther bank as the true boundary of Maryland.

On the other hand, West Virginia contends that the true head of the river Potomac is at the Fairfax Stone, and that the boundary should be located by a line from the spring at that point; and that such has long been the recognized boundary line between Virginia, West Virginia and Maryland. The distance from the Fairfax meridian to the Potomac meridian is about one and one-fourth miles, and the distance to the Pennsylvania line about thirty-seven miles.

It may be true that the meridian line from the Potomac Stone, in the light of what is now known of that region of country, more fully answers the calls in the original charter than does a meridian line starting from the Fairfax Stone. But it is to be remembered that the grant to Lord Baltimore was made when the region of the country intended to be conveyed was little known, was wild and uninhabited, had never been surveyed or charted, and the location of the upper part of the Potomac River was only a matter of conjecture.

It is said, and the record tends to show, that the only map of the country then known to be in existence was one pre-



pared and published by Captain John Smith, upon which only a very small part of the Potomac River is shown, and

from which we get no light as to the true source and course of the upper reaches of the Potomac River. The so-called Potomac Stone was neither set nor located until 1897, six years after the beginning of this suit, when it was put in place by the surveyor in this case on the part of the State of Maryland. He then set a monument designated as the "Potomac Stone," and gave the name Potomac to the spring at the origin of that fork of the Potomac River. The so-called Potomac meridian was run by the same engineer, located and named by him in the year 1897.

The Fairfax Stone, which is shown at the beginning of the north and south line in plate No. 1, has a history and importance in this case which renders it necessary to note something of its origin and location. Without going into a history of the prior grants in Virginia, we come directly to the one bearing upon this case. It was made in September, 1688, by King James II of England, for the Northern Neck of Virginia to Thomas (Lord) Culpeper, which subsequently became the property of Lord Fairfax, and is usually spoken of as the Fairfax grant. That grant was under consideration in this court in the case of *Morris* v. *The United States*, 174 U. S. 198, a case to which we shall have occasion to refer later, and from page 223 of that report we take a description of so much of the grant as is necessary to a consideration of this cause. The Northern Neck of Virginia is described in that grant as follows:

"All that entire tract, territory or parcel of land situate, lying and being in Virginia in America, and bounded by and within the first heads or springs of the rivers of Tappahannock als. Rappahannock and Quiriough als. Patawomerck Rivers, the courses of said rivers from their said first heads or springs, as they are commonly called and known by the inhabitants and description of those parts and the bay of Chesapeake, together with the said rivers themselves and all the islands within the outermost banks thereof, and the soil of all and singular the premises, and all lands, woods, underwoods, timber and trees, wayes, mountains, swamps, marshes,

waters, rivers, ponds, pools, lakes, watercourses, fishings, streams, havens, ports, harbours, bays, creeks, ferries, with all sorts of fish, as well whales, sturgeons and other royal fish. . . . To have, hold and enjoy all the said entire tract, territory or portion of land, and every part and parcel thereof, . . . to the said Thomas, Lord Culpeper, his heirs and assigns forever."

The territory embraced in this Northern Neck became subject to the jurisdiction and dominion of Virginia and the boundary lines fixed for it become important in determining the true boundary between Virginia and adjoining States. In the grant to Lord Culpeper the tract is described as lying in Virginia in America, and bounded by and within the first heads or springs of the rivers Rappahannock and Patowmack. Disputes having arisen between the Governor and Council of Virginia and Lord Fairfax, touching the true boundary of the grant, an order was made on November 29, 1733, by the King in Council, reciting that Lord Fairfax had petitioned for an order to settle the boundaries of his tract, and for a commission to issue, run out and ascertain the boundaries of the same. The King granted an order, and thereafter the Governor of Virginia on September 7, 1736, appointed certain commissioners to act for the colony of Virginia in the matter; Lord Fairfax appointed certain commissioners to act on his behalf.

The instructions to the commissioners required them to make a clearer description of the boundaries in controversy, to make exact maps of the rivers Rappahannock and Potomac, and the branches thereof to the head or spring, so-called or known, and the surveys made by them with correct maps thereof to be laid before His Majesty. The commission adopted the North Branch of the Potomac River, then known as the Cohaungoruton, and after further proceedings, which are not necessary to recite in detail, and after a reference to the Lords of Trade and Plantations, a report was made which, among other things, stated that a line run from the first head

or spring of the south or main branch of the Rappahannock River to the first head or spring of the Potomac River is, and ought to be, the boundary line determining the tract or territory of land commonly called the Northern Neck. Ultimately the matter was laid before the King in Council, and commissioners were appointed to mark and run the line between the head spring of the rivers Rappahannock and Potomac, and the stone called the Fairfax Stone was planted in September, 1746, at the head spring of the Potomac River. In 1748 the location of the stone was approved by the Virginia assembly and the King in Council. This Fairfax Stone has been an important monument in settling and establishing boundaries since that time.

It was found still in place in 1859 by Lieutenant Michler, who made a survey on behalf of the boundary commissioners of Maryland and Virginia, to which we shall have occasion to refer later on. In his report Lieutenant Michler describes the stone as follows:

"The initial point of the work, the oft-mentioned, oft-spoken of 'Fairfax Stone,' stands on a spot encircled by several small streams flowing from the springs about it. It consists of a rough piece of sandstone indifferent and friable, planted to a depth of a few feet in the ground and rising a foot or more above the surface. Shapeless in form, it would scarcely attract the attention of the passerby. The finding of it was without difficulty and its recognition and identification, by the inscription 'Ffx,' now almost obliterated by the corroding action of water and air."

Without stopping to mention the cases in which Virginia has recognized this monument in creating counties and otherwise, it is to be noted that it was recognized as a boundary point by the State of Maryland in erecting Garrett County, the boundary between which and Preston County, West Virginia, it was the purpose of the act of the legislature of Maryland to have settled by the filing of the bill and proceedings in the present case.

By the constitution of Maryland of 1851 it is provided (article 8, § 2):

"When that part of Alleghany County lying south and west of a line beginning at the summit of Big Back Bone or Savage Mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage River where it empties into the Potomac River, thence by a straight line to the nearest point or boundary of the State of Virginia, thence with said boundary to the Fairfax Stone, shall contain a population of ten thousand, and if the majority of the electors thereof shall desire to separate and form a new county and make known their desire by petition to the legislature, the legislature shall direct, at the next succeeding election, that the judges shall open a book at each election district in said part of Alleghany County and have recorded therein the vote of each elector 'for or against' a new county. In case the majority are in favor then said part of Alleghany County to be declared an independent county, and the inhabitants whereof shall have and enjoy all such rights and privileges as are held and enjoyed by the inhabitants of the other counties in this State."

In the act of 1872, creating Garrett County, it is provided:

"That all that part of Alleghany County lying south and west of a line beginning at the summit of Big Back Bone or Savage Mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage River where it empties into the Potomac River; thence by a straight line to the nearest point or boundary of the State of West Virginia, then with the said boundary to the Fairfax Stone, shall be a new county, to be called the county of Garrett, provided," etc.

It appears that not infrequent attempts have been made to settle the controversy between the States now at the bar of this court. In the years 1795, 1801 and 1810 certain commissioners were provided for by the State of Maryland to meet commissioners to be appointed by the State of Virginia, with

power to adjust the boundary between the southern and western limits of the State of Maryland and the dividing line between it and Virginia. Nothing seems to have come of these attempts.

In 1818 the State of Maryland passed an act proposing to Virginia the appointment of a commission, to run a line from the most western source of the North Branch of the Potomac.

In February, 1822, the legislature of Virginia expressed its willingness to appoint commissioners, who were to locate the western boundary by a stone located by Lord Fairfax at the headwaters of the Potomac River. The commissioners met, but the divergency in their instructions prevented any action.

In 1825 Maryland passed an act for the settlement of the boundary, providing that the Governor of Delaware should act as umpire. In 1833 Virginia passed an act providing for commissioners to run the lines from the Fairfax Stone, or, at the first fountain of the Cohangoruton or North Branch of the Potomac River. In default of Maryland appointing commissioners, Virginia commissioners were to run and mark the line.

In October, 1834, the State of Maryland filed a bill in this court against the State of Virginia, which bill was subsequently dismissed without any action being taken thereon. In 1859 a line was run by Lieutenant Michler, of the United States Topographical Engineers, to which we shall have occasion to refer more in detail later on.

By an act of 1781 the State of Maryland appropriated land within the State in Washington County west of Fort Cumberland, with certain exceptions, to discharge the engagements of the State to the officers and soldiers thereof, and, by a resolution passed in April, 1787, the Governor and Council were requested "to appoint and employ some skilful person to lay out the manors, and such parts of the reserve and vacant lands, belonging to this State, lying to the west of Fort Cumberland, as he may think fit and capable of being settled

and improved, in lots of fifty acres each, bounded by a fixed beginning and four lines only, unless on the sides adjoining elder surveys; that the beginning of each lot be marked with marking irons, or otherwise, with the number thereof, and that a fair book of such surveys, describing the beginning of each lot by its situation, as well as number, be returned and laid before the next general assembly."

Under this resolution Francis Deakins was appointed to make the survey, and, in 1788, an act of the general assembly of Maryland was passed. It reads, in part, as follows:

"And whereas, in pursuance of a resolve of the general assembly, at April session, seventeen hundred and eighty-seven, authorizing the governor and council to appoint and employ some skilful person to lay out the manors, and such parts of the reserves and vacant land belonging to this State, lying to the westward of Fort Cumberland, as he might think fit and capable of being settled and improved, in lots of fifty acres each, Francis Deakins was appointed and employed by the governor and council for that purpose, and has finished the said survey, and has returned a general plot of the county westward of Fort Cumberland, on which four thousand one hundred and sixty-five lots of fifty acres each are laid off, besides sundry tracts which have been patented, distinguishing on the plot those lots which have been settled and improved from those which remain uncultivated; and the said Francis Deakins has also returned two books, entitled A and B, in which are entered certificates of all of the lots before mentioned."

And further enacted that 2,575 of the aforesaid lots were contained in the following limits: "Beginning at the mouth of Savage River and running with the North Branch of the Potomac River to the head thereof, then with the present supposed boundary line of Maryland until the intersection of an east line to be drawn from said boundary line with a north course from the mouth of Savage River, will include the number of lots aforesaid to be distributed by lot among

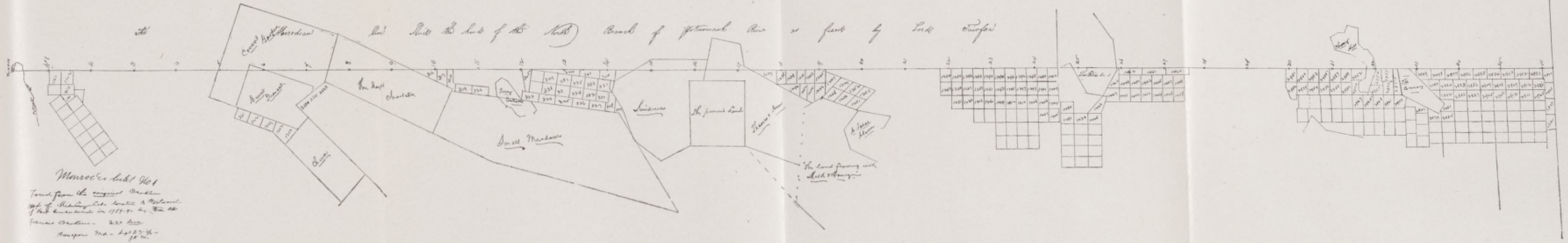
the said soldiers and recruiting officers, and their legal representatives," etc.

And it further provides that lots granted to officers should be adjacent to those distributed to the soldiers, within the following limits: "By extending the aforesaid north course from the mouth of Savage River, until its intersection with an east line to be drawn from the aforesaid supposed boundary line of Maryland will include the necessary number allowing to each officer or his representatives four lots aforesaid."

The act also contains the following language:

"And be it enacted, that the line to which the said Francis Deakins has laid out the said lots, is in the opinion of the general assembly, far within that which this State may rightfully claim as its western boundary; and that at a time of more leisure the considerations of the legislature ought to be drawn to the western boundaries of the State, as objects of very great importance."

Deakins filed a map, which is in evidence in this case and which shows a large number of lots laid out and also certain outlines of deeds and grants. This line in the briefs and records is sometimes mentioned as having been run in 1787, sometimes 1788, and sometimes 1789. In view of the act of 1788 the line was probably run in that year. As in our view of the case, the action of Deakins in the location of this line and his evident adoption of the Fairfax Stone as a starting point, is an important feature of this controversy, we insert herein a tracing from the original Deakins map put in evidence on the part of the State of West Virginia. An inspection of this map shows a north and south line upon the west side thereof, and also some of the military lots laid out by Deakins in that part of the tract. It is to be noted that this north and south line is marked: "The meridian line and the head of the North Branch of the Potowmack River as fixed by Lord Fairfax." This could mean but one thing, and that is, an attempted meridian line north from the Fairfax Stone, located to the Pennsylvania line.



Monroe's Lot 961

Found from the original Draft in the Office of Holding Lots situate N. Westward of Fort Dunmore made in 1774-5 by Wm Nelson

Francis Dunbar - 220 Acres

Thompson Md - Lot 27 - 96 W.

We shall have occasion to recur to this line.

In 1852 the legislature of the State of Maryland passed an act concerning the disputed boundary, which act provides:

"Whereas it is of great importance that the western territorial limit of the State of Maryland be clearly defined and her boundary be permanently established; and whereas, the true location of the western line of Maryland between the States of Maryland and Virginia beginning at or near the Fairfax Stone on the North Branch of the Potomac River, at or near its source, and running in a due north line to the State of Pennsylvania, is now lost and unknown and all the marks have been destroyed by time or otherwise; and whereas, the States of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits of ejectment are now pending in the Circuit Court of Alleghany County, in the State of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the State of Virginia, which cannot be justly settled without establishing said boundary line:

"Therefore, Section 1. Be it enacted by the General Assembly of Maryland, that the governor be and he is requested to open a correspondence with the governor of Virginia in relation to tracing, establishing and marking the said line, and in case the legislature of Virginia shall pass an act providing for the appointment of a commissioner to act in conjunction with a commissioner on the part of Maryland in the premises, then and in such case, the governor be and he is hereby authorized and requested to appoint a commissioner who, together with the commissioner who shall be appointed on the part of Virginia, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments beginning therefor at the said Fairfax Stone and running thence due north to the line of the State of Pennsylvania.

"SEC. 2. And be it enacted, that it shall be the joint duty

of the commissioners after running, locating, establishing and marking the said line, to make a report setting forth all the facts touching, locating and marking said line; and it shall be the duty of the commissioner of each respective State to forward copies of the joint report to each of their respective legislatures; and upon the ratification of said report by the State of Virginia and the State of Maryland, through their respective legislatures, the said boundary lines shall be fixed and established so to remain forever, unless changed by mutual consent of the two States."

In 1854 the general assembly of Virginia met this action upon the part of the State of Maryland by the passage of an act, which provides:

"Whereas the general assembly of Maryland has passed an act for running and marking the boundary line between that State and the State of Virginia, beginning therefor at the Fairfax Stone on the Potomac River, sometimes called the North Branch of the Potomac River at or near the source and running thence due north to the line of the State of Pennsylvania; and whereas the legislature of Maryland has requested the appointment of a commissioner on the part of this State to act in conjunction with the commissioner of Maryland to run and mark said line: therefore, be it enacted,

"1. That the governor appoint a commissioner who, together with the Maryland commissioner, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments, beginning therefor at the Fairfax Stone, situated as aforeaid, and running thence due north to the line of the State of Pennsylvania."

And the act concludes:

"Upon the ratification of such report by the legislatures of the States of Virginia and Maryland the said boundary line shall be fixed and established to remain forever, unless changed by mutual consent of the said States."

Under these acts of the legislatures of the respective States commissioners were appointed, who made application to the

Secretary of War for the services of an officer of the United States Engineers to aid them in carrying out the purposes of the acts. Upon this application the Secretary of War detailed Lieutenant N. Michler, of the United States Topographical Engineers. As directed in both the acts, Lieutenant Michler commenced his work at the Fairfax Stone, and ran a line northwardly, marking it at certain places. This line intersected the Pennsylvania line at a point about three-fourths of a mile west from the northern extremity of the Deakins line, which had been run in 1788, as we have already stated. There was a triangle between the Deakins and Michler lines, having its apex at the Fairfax Stone, and lines diverging thence, until there was a difference of three-fourths of a mile at the base of the triangle at the Pennsylvania line.

It appears that the commissioners of the two States differed, the commissioner of Virginia contending that by the act of the legislature, above referred to, that State had not adopted the meridian line from the Fairfax Stone as the boundary. The commissioner of Maryland contended for that meridian line. On March 5, 1860, the legislature of Maryland passed an act adopting the Michler line, commencing at the Fairfax Stone at the head of the North Branch of the Potomac River, and running thence due north to the southern line of Pennsylvania, as surveyed in the year 1859 by commissioners appointed by the States of Maryland and Virginia, and thereafter the State of Maryland provided for the marking of the Michler line.

Virginia did not approve of the Michler line, but in 1887 West Virginia passed an act confirming the line as run by Lieutenant Michler in 1859 as the true boundary line between West Virginia and Maryland, but the act was not to take effect until and unless Maryland should pass an act or acts confirming and rendering valid all the entries, grants, patents and titles from the Commonwealth of Virginia to any person, or persons, to lands situate and lying between the new Maryland line and the old Maryland line heretofore claimed by

Virginia and West Virginia, to the same extent and with like legal effect as though the said old Maryland line was confirmed and established.

The divergence between Michler's line and the line shown on Deakins' map probably arises from the fact that Lieutenant Michler ran a true astronomical line, and that his line is a true north and south line, whereas the Deakins line was probably run with a surveyor's compass, and with less accuracy than the Michler line.

It is the contention of the State of Maryland that Deakins never attempted to run a true north and south line; that he never had any authority from the State of Maryland so to do; and, that in the act confirming the laying out of the lots by Deakins it was especially declared by the State of Maryland that it did not show the true western boundary of the State; furthermore, that the attempts which have been made to trace the Deakins line show that it is not a true north and south line, but a broken line, having offsets in various places.

The State of Maryland insists that the evidence shows that a number of old grants made prior to the Deakins survey would extend west of the boundary line, as shown either by Deakins or Michler. It is the contention of the State of Maryland that when these grants were made she indicated a line further to the west than either of these lines, and that the ancient grants of large tracts of land show that fact. But the evidence contained in this record leaves no room to doubt that after the running of the Deakins line the people of that region knew and referred to it as the line between the State of Virginia and the State of Maryland. Lieutenant Michler in the frank and able report filed with his survey, recognizes this situation, for he says:

"The meridian as traced by me last summer differs from all previous lines run; some varying too far to the east, others too far to the west. The oldest one, and that generally adopted by the inhabitants as the boundary line, passes to

the east; and from measurements made to it I found that it was not very correctly run. The surveyor's compass was used for the purpose, and some incorrect variation of the needle allowed. Owing to the thick and heavy growth of timber, it is utterly impossible to run a straight line through it without first opening a line of sight. It could only be approximately done.

"When north of the railroad, and the nearer the Pennsylvania line is approached the settlements and farms become more numerous; and if the meridian line is adopted as the boundary, it will cause great litigation, as the patents of most of the lands call for the boundary as their limits. On the Pennsylvania boundary the new line is about three-quarters of a mile west of the old; on the railroad — feet; at Weill's field, 85 feet; on the northwestern turnpike, about 40 feet, and on the backbone, about 20 feet."

These recitals from Lieutenant Michler's report, if the record were lacking in other evidence, would leave little doubt that there was an old boundary line, generally adopted, and that the adoption of the true meridian line, which Lieutenant Michler ran, would cause great litigation because of the acquiescence of the people in the old boundary line, the Deakins line.

The report of the committee of the Maryland Historical Society, an exhibit in this case, contains a history of the boundary dispute, and it is therein said:

"The provisional line of 1787, or 'Deakins line,' as it was called, had long done duty as a boundary; and as the State granted no lands beyond it, it came to be looked upon—despite the emphatic protest of the assembly of 1788, as the true boundary line of the State. In process of time the marks became obliterated, and conflicts of title and litigation arose between the holders of Maryland and the holders of Virginia patents for lands in the debatable territory. So in May, 1852, the Maryland legislature passed an act reciting these facts and requesting the governor to open a correspondence with

the governor of Virginia about the matter; and authorizing him to appoint a commissioner, if the legislature of Virginia would also appoint one, which joint commission should run and mark a line due north from the Fairfax Stone, which line, when ratified by both legislatures, should be the boundary between the States."

The State of Maryland has herself, in sundry grants, recognized this old line. In a grant by the State of Maryland for a tract called "Maryland," dated January 23, 1823, among other calls is this one: "Running thence south thirty-six degrees west, eighty-six perches to the Virginia and Maryland line, as run under the directions of Francis Deakins at the time of laying out the lots to the westward of Fort Cumberland, and thence running," etc.

In the Deakins description of the first lot north of the Fairfax Stone the following language is used in describing military lot No. 1101:

"Beginning at a bounded maple marked 1100, *standing one mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Powtomack River*, and running north 89½ perches; east, 89½ perches; south, 89½ perches; then to the beginning, containing 50 acres."

This record leaves no doubt as to the truth of the statement contained in the report of the committee of the Maryland Historical Society, that the Deakins line, before the passage of the act under which the Michler line was run, had long been recognized as a boundary and served as such. Even after the Michler line was run and marked the testimony shows that the people generally adhered to the old line as the true boundary line. There are numerous Virginia grants and private deeds of land given in the record, which call for this old Maryland line as the boundary.

The testimony shows that the people living along the Deakins line worked and improved the roads on the Virginia side, as a general rule, up to this line. Correspondingly, Maryland worked the roads on the other side of this line. On the

west of the line the people paid taxes on their lands in Preston County, West Virginia. They voted in that county, and with rare exceptions regarded themselves as citizens of West Virginia. As a general rule, the schools established there were West Virginia schools. The allegiance of nearly all these people has been given to West Virginia.

It is true there has been more or less contention as to the true boundary line between these States. Attempts have been made to settle and adjust the same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society. In the proposed settlements, for many years, Virginia and West Virginia have consistently adhered to the Fairfax Stone as a starting point for the disputed boundary. When West Virginia passed the act of 1887, ratifying the Michler line, it was upon condition that Virginia titles granted between the Michler line and the old Maryland line should be validated. Maryland, in the act of 1852, recognized the same starting point.

And the fact remains that after the Deakins survey in 1788 the people living along the line generally regarded that line as the boundary line between the States at bar. In the acts of the legislatures of the two States, to which we have already referred, resulting in the survey and running of the Michler line, it is evident from the language used that the purpose was not to establish a new line, but to retrace the old one, and we are strongly inclined to believe that had this been done at that time the controversy would have been settled.

A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored. In the case of *Virginia* v. *Tennessee*, 148 U. S. 503, 522, 523,

Mr. Justice Field, speaking for the court, had occasion to make certain comments which are pertinent in this connection, wherein he said:

"Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke in *Penn* v. *Lord Baltimore*, 1 Vesey Sen. 444, 448; *Boyd* v. *Graves*, 4 Wheat. 513; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 734; *United States* v. *Stone*, 2 Wall. 525, 537; *Kellogg* v. *Smith*, 7 Cush. 375, 382; *Chenery* v. *Waltham*, 8 Cush. 327; Hunt on Boundaries (3d ed.), 396.

"As said by this court in the recent case of the *State of Indiana* v. *Kentucky*, 136 U. S. 479, 510, 'it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' In the case of *Rhode Island* v. *Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be in-

voked with greater justice and propriety than a case of disputed boundary.' "

And quoting from Vattel on the Law of Nations to the same effect (§ 149, p. 190):

"The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."

And adds from Wheaton on International Law (§ 164, p. 260):

"The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner, as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the articles or property in question."

And it was said:

"There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to the country, to home and to family, on which is based all that is dearest and most valuable in life."

In *Louisiana* v. *Mississippi*, 202 U. S, 1, 53, this court said:

"The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and

the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations.

True it is, that, after the running of the Deakins line, certain steps were taken, intended to provide a more effectual legal settlement and delimitation of the boundary. But none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line.

The effect to be given to such facts as long continued possession "gradually ripening into that condition which is in conformity with international order," depends upon the merit of individual cases as they arise. 1 Oppenheim International Law, § 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon States and individuals. *Rhode Island* v. *Massachusetts*, 12 Pet. 657.

It may be true that an attempt to relocate the Deakins line will show that it is somewhat irregular, and not a uniform, astronomical north and south line; but both surveyors appointed by the States represented in this controversy were able to locate a number of points along the line, and the northern limit thereof is fixed by a mound, and was located by the commissioners who fixed the boundary between West Virginia and Pennsylvania by a monument which was erected at that point, and we think from the evidence in this record

that it can be located with little difficulty by competent commissioners.

We think, for the reasons which we have undertaken to state, that the decree in this case should provide for the appointment of commissioners whose duty it shall be to run and permanently mark the old Deakins line, beginning at a point where the north and south line from the Fairfax Stone crosses the Potomac River and running thence northerly along said line to the Pennsylvania border.

As to the contention made by West Virginia in her cross bill, that she is entitled to the Potomac River to the north bank thereof, we think that claim is disposed of by the case of *Morris* v. *United States*, 174 U. S. 196, already referred to. In that case, among other things, there was a controversy between the heirs of James H. Marshall and the heirs of John Marshall as to the ownership of the bed of the Potomac River from shore to shore, including therein certain reclaimed lands. Claims of the one set of heirs were based upon the charter of Lord Baltimore of June, 1632, and that of the others upon the grant of King James II to Lord Culpeper, afterwards owned by Fairfax, to which we have already referred.

After making reference to the award of the commission to fix the Virginia and Maryland boundary, appointed in 1877, fixing the line and boundary at low-water-mark on the Virginia shore, to which arbitration the State of West Virginia was not a party, this court disposed of the controversy, irrespective of that award, in the following language, used by Mr. Justice Shiras in delivering the opinion of the court:

"Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac River, or as establishing a compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord

Baltimore, by Charles I, in 1632, of the territory known as the province of Maryland, embraced the Potomac River and soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.

"The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to property rights in the Potomac River, or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river to private persons. Her claim seems to have been that of political jurisdiction."

We think this decision disposes of and denies this claim of the State of West Virginia in her cross bill.

Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. If this decision can possibly have a tendency to disturb titles derived from one State or the other, by grants long acquiesced in, giving the force and right of prescription to the ownership in which they are held, it will no doubt be the pleasure as it will be the manifest duty of the lawmaking bodies of the two States to confirm such private rights upon principles of justice and right applicable to the situation.

A decree should be entered settling the rights of the States to the western boundary, and fixing the same, as we have hereinbefore indicated, to be run and established along the old line known as the Deakins or old state line; and commissioners should be appointed to locate and establish said line as near as may be. The cross bill of the State of West Virginia should be dismissed in so far as it asks for a decree fix-

ing the north bank of the Potomac River as her boundary. Counsel for the respective States are given forty days from the entry hereof to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the States.[1]

Decree accordingly.

WILL *v.* TORNABELLS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 63. Submitted December 10, 1909.—Decided March 14, 1910.

Findings of the lower court will not, where another construction is possible, be so construed as to cause them to be silent on an issue so controlling that the cause could not have been decided on the merits without a finding thereon.

Where findings are so irresponsive to the case made by the pleadings and the facts as to be no findings at all this court must affirm on account of absence of any findings to review. *Gray* v. *Smith*, 108 U. S. 12.

A finding that the evidence does not entitle the plaintiff to a decree that the conveyance attacked was made to hinder and delay creditors construed in this case to mean that there had been a failure of proof and that the judgment did not rest on a conclusion of law that the local law did not afford a remedy if the plaintiff had proved his case.

Under the law of Porto Rico contracts made by an insolvent debtor which are not fraudulent simulations are not susceptible of rescission merely because they operate to prefer a creditor.

While the privilege of communication may not extend to the concealment of crime, where an attorney testifies that the vendor disclosed

[1] For proceedings on settlement of decree and final decree, see p. 000, *post.*

to him a plan to make fraudulent conveyances to hinder and delay creditors, but the court finds that the conveyances as made were not under the local law illegal, the testimony is properly excluded, as there is no sufficient foundation to relieve the witness from the professional obligation of secrecy.

The statements made by the widow of the vendor whose conveyances were attacked to the effect that such conveyances were fraudulent were properly excluded in this case by the lower court.

THE facts are stated in the opinion.

Mr. Frederick L. Cornwell and *Mr. N. B. K. Pettengill* for appellant.

No brief was filed for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

This appeal is taken to secure the reversal of a decree of the court below dismissing the bill of complaint. The court sustained its action by an elaborate opinion, and subsequently stated, in a formal way, its findings of fact and conclusions of law.

The evidence is not in the record, although a portion of the testimony is contained in the formal findings of fact, upon the theory that this was necessary to preserve the right to review the action of the court concerning objection urged by the defendants to the admission of certain testimony tendered on behalf of the complainants. The record, we are constrained to say, is unsatisfactory and confused, a condition which we assume has resulted from circumstances referred to by the court below in the opening passage of its opinion, as follows (3 Porto Rico, 125, 126):

"This is a creditors' bill filed June 23, 1902, and permitted to remain on the docket of this court during the five years that have since intervened, without any apparent proper or sufficient cause for the unwarranted delay and with infinite inconvenience to many parties connected with the subject-

matter of the controversy. The first two years and a half of the time seem to have been taken up with a battle over the proceedings, trying to get the answers of the several respondents settled, and during which time complainants' exceptions to several of the answers were referred to a master, arguments had before him, his report filed, exceptions to the same presented, arguments had on the latter and briefs submitted in support thereof, and so on, in an interminable and fruitless contest of petitions, motions, exceptions, pleas, demurrers, orders, affidavits and rules to show cause, without result or real merit as we see it. The next year and a half seem to have been taken up somewhat in the same way, and also partly in an application for a receivership and in opposing efforts to the same, and in efforts to prevent outside parties from foreclosing several mortgages they had on some of the premises involved, that they had secured in the meantime, in enjoining them from so proceeding and in issuing rules as for contempts against them for their actions in that behalf, etc."

In order to in some measure dispel the obscurity which must arise from the circumstances just referred to we briefly state, in their chronological order, certain unquestioned facts which gave rise to the controversy, and also outline the pleadings and proceedings, the whole for the purpose of enabling us to adequately test the sufficiency of the errors assigned.

For many years the firm of J. Tornabells & Co., composed of Joaquin Tornabells and Carlos Doitteau, was established in Porto Rico and there carried on a mercantile business. The firm was the owner of various trading establishments and warehouses, and was, besides, the owner of considerable real estate, embraced in which were extensive coffee plantations which the firm carried on, including the buildings, machinery and appurtenances incident thereto. It is not disputed that, presumably as the result of losses occasioned by a disastrous hurricane which devastated the island of Porto Rico the firm, prior to 1900, had become temporarily embarrassed, and, under provisions of the local law, had obtained in a local court

an extension of time for the payment of its debts. While we state the fact as to the suspension we shall nevertheless indulge in the assumption that such fact has no material bearing upon the questions here to be decided. We do this because no rights based upon such fact were asserted in the bill of complaint or passed upon by the court, and no right of such a character is asserted in the assignments of error or referred to in the elaborate argument filed on behalf of the appellants, the appellees not having appeared in this court either orally or by brief.

On May 9, 1900, Tornabells & Co., by deed before a notary public, conveyed to Luis Aran y Lanci the following property, as stated by the court below: "Its place of business and other town property, its stock of merchandise and twenty-six several pieces of real estate, most of them being coffee plantations and their appurtenances." The stated price was 197,700 pesos, provincial money, 30,000 declared to have been paid in cash, and the remainder to be paid in ten installments of 16,700 pesos, bearing no interest, maturing respectively from one to ten years. A few days thereafter, on May 11, 1900, Aran y Lanci mortgaged for 150,000 pesos nineteen of the twenty-six pieces of real estate thus conveyed to him. This mortgage was in favor of one Baudelio Duran y Cat and a firm styled Duran & Coll. The mortgage in favor of the first was for 130,000 pesos, divided into ten annual installments of 13,000 pesos each, evidenced by notes to the order of the mortgagee, maturing in each of the ten years, the whole being secured on fourteen of the twenty-six pieces of real estate. The mortgage in favor of Duran & Coll was on five of the pieces of real estate acquired as aforesaid, and secured twenty thousand pesos, divided into five installments of four thousand pesos each, maturing in each of five years. These mortgages were not indivisible, as the amount of each was apportioned among the various pieces of real estate, so that each piece was liable only for the sum secured on it. The sale to Aran y Lanci was recorded on May 21, and the mortgages just stated

on May 24, 1900. On June 25, 1900, the mortgage for 20,000 pesos, which had been executed in its favor by Aran y Lanci, was assigned by the firm of Duran & Coll to Raimundo Valdecillo to secure an indebtedness due him by the firm of 6,000 pesos provincial money, and this assignment was duly registered on July 5, 1900. Sixteen months after the conveyance to Aran y Lanci—that is, on September 16, 1901—the firm of Tornabells & Co. acknowledged by notarial act that Aran y Lanci had by anticipation fully paid the deferred purchase price (167,700 pesos). Nine months after such acknowledgment Aran y Lanci mortgaged in favor of the Banco de Solleir to secure 32,780 pesetas, Spanish money, one of the pieces of property previously mortgaged to Duran y Cat. On July 5, 1902, this mortgage was put upon record. A few days after it was so put upon record, viz., on June 23, 1902, the suit before us was commenced.

The bill—which was not sworn to—was originally filed on behalf of three commercial firms, Will & Co. of Cuba, David Midgley & Sons of Manchester, England, and Ramon Cortado & Co. of Ponce, Porto Rico, and the members of said firms, in their own behalf and in behalf of all others similarly situated who might intervene in the cause. It was alleged that the complainants were creditors of the firm of Tornabells & Co. at the time of the conveyance to Aran y Lanci and the execution of the mortgages by Aran y Lanci above recited, and that subsequent to said transactions the claims of the complainants had been merged into judgments against the firm, obtained in the court where the bill was filed, and that on such judgments executions had issued and been returned unsatisfied. It was further alleged that the conveyance made by Tornabells & Co. to Aran y Lanci, and the mortgages put by the latter upon the property in favor of Duran y Cat, and the firm of Duran & Coll, were fraudulent simulations, and that the property covered by the conveyance and the mortgages continued to belong to the firm, and was held by Aran y Lanci under a secret trust in favor of Tornabells & Co., the con-

veyance and mortgages being mere fictitious devices adopted between the parties for the purpose of screening the property from creditors or hindering and delaying them in the recovery of their claims. It was further charged that at the time of the transactions referred to Tornabells & Co. was insolvent, that the alleged price mentioned in the conveyance to Aran y Lanci was largely below the real value of the property, and that, despite the alleged conveyance and mortgages, the firm of Tornabells & Co. continued to control the property conveyed and enjoy the fruits thereof. The prayer of the bill in substance was that a receiver of the property might be appointed, that the conveyance and subsequent mortgages and transfers should be declared to be fraudulent and void and be vacated and annulled, and that the property and each and every parcel thereof should be decreed to be subject to the lien of the several judgments. Tornabells and Doitteau, the members of that firm, Aran y Lanci, Duran y Cat, and Duran & Coll, and the members of that firm, were made defendants to the bill. Valdecillo, to whom the mortgage executed by Aran y Lanci in favor of Duran & Coll had been assigned, was also joined as defendant, he being called upon to establish the verity of his alleged lien. Alfredo Saliva, who was alleged to be the attorney in fact of and to have acted for Aran y Lanci in the transactions set out in the bill, was also made a defendant.

Separate sworn answers were filed on behalf of the members of the firm of Tornabells & Co., traversing the allegations of insolvency and of simulation and fraud, both as respected the conveyance to Aran y Lanci and the mortgages executed by the latter. The answers contained affirmative allegations as to the good faith of the conveyance to Aran y Lanci, the adequacy of the consideration and full payment thereof prior to the commencement of suit. The taking possession by and the exclusive control and management of the property conveyed, and receipt of the fruits thereof by Aran y Lanci for his exclusive use and benefit was also averred. An answer

substantially of like tenor, also sworn to, was filed on behalf of Aran y Lanci. Juan Coll, a partner in the firm of Duran & Coll, also answered, and averred the *bona fides* of the mortgage executed by Aran y Lanci to his firm and the transfer thereof made to Valdecillo.

On October 31, 1904, the firm of L. W. & P. Armstrong of New York City, unsecured creditors of Tornabells & Co., were made parties complainant to the bill. Thereafter, Ruffer & Sons, a firm doing business in London, England, and the Caja de Ahorros de Mayaguez, a Porto Rican corporation, as creditors of Tornabells & Co., were also allowed to intervene and become parties complainant.

Early in 1905 Tornabells died and the cause was revived as to him against his widow and children as his heirs. In November of the same year Aran y Lanci died, and the cause was revived against his widow, as administratrix of his estate. Doitteau, the surviving partner of Tornabells & Co., died on January 22, 1907, and the cause was revived against his widow and children.

Duran y Cat, an original defendant to the bill—in whose favor, as we have stated, Aran y Lanci had mortgaged fourteen of the pieces of real estate for 130,000 pesos—was not served with process and did not enter his appearance. He also died during the pendency of the cause. On February 12, 1907, upon motion of the complainants, an order was entered dismissing the cause as to the heirs of said Duran y Cat, "on the ground that said heirs, being out of the jurisdiction and having entirely disposed of their interest in the cause, are not indispensable parties thereto."

Journal entries are contained in the record, showing that more than a dozen firms or individuals became additional defendants in the cause. The time when they came in and the nature of the pleadings by them filed or the proceedings had concerning their rights do not distinctly appear. It is, however, fairly inferable that these new defendants came in long after the commencement of the suit, either during or

subsequent to the dilatory and confused proceedings referred to by the court in the excerpt heretofore made from its opinion, and that such defendants asserted rights claimed to have been acquired, after the filing of the bill, in the property affected by the suit, either as purchasers or as holders of mortgage notes. In this connection it is to be observed that neither when the suit was commenced nor at any time during its progress was the court requested by the complainants to award a cautionary notice, to be placed upon the public records, as a means of warning to parties who might deal with the property in controversy, thus preserving against them, *pendente lite*, the rights which might be ultimately established as existing in the complainants, and which would not have been preserved by the mere pendency of the suit, unaccompanied with the allowance and registry of the statutory cautionary notice.

Answers or amended answers were filed on behalf of the widow and administratrix of Tornabells, and by the guardian *ad litem* who was appointed for his minor children. An answer was also filed on behalf of the widow and administratrix and minor children of Doitteau. This also was the case as to the widow and administratrix of Aran y Lanci. These various answers were substantially in accord with those which had been previously filed on behalf of the original defendants, except that in one of them the prescription of one year was pleaded. It is inferable from the record that at this stage of the proceedings, or at all events at a time not earlier than four years after the commencement of the suit, certain persons who had acquired rights in or to the property, either directly from Aran y Lanci or through the mortgage executed in favor of Duran y Cat and Duran & Coll, sought to enforce their claims and were enjoined from so doing. At about the same time a receiver was appointed. The record is silent, however, as to whether the receivership was intended to apply to all the property in controversy or whether the receiver attempted to take possession under his appointment, although it would seem that to some extent he did so, since by the

final decree the receiver was ordered to settle his accounts, etc.

It came at last to pass in the spring of 1907 that the cause was heard and taken under advisement. It was disposed of in the summer of that year by the entry of a final decree dismissing the bill, and was followed nearly six months thereafter, on December 19, 1907, by the making of formal findings of fact and conclusions of law applicable thereto.

The facts found are embraced in fourteen numbered paragraphs. The first merely states in general terms the filing of the bill, makes allusion to the complicated proceedings which followed, the dismissal as to some of the defendants (presumably the heirs of Duran y Cat), the coming in of other parties, the ultimate joinder of issue and the submission of the cause. In the second is stated the fact that evidence was heard on behalf of the complainants and the submission of a motion for a decree dismissing the bill on two grounds, viz., the failure to prove the allegations of the bill and the prescription of one year. The third finding is as follows:

"3. The documentary evidence introduced on behalf of complainants and the testimony of all the witnesses do not prove the allegations of the bill so as to entitle the complainants to a decree in their favor declaring the conveyance from defendants Tornabells & Co. to defendant Aran, and the mortgage from defendant Aran to defendants Duran y Coll and Duran personally to be voluntary or made to hinder and delay the complainants in the collection of their debts."

The fourth, fifth, sixth, seventh, eighth and ninth paragraphs, in a summary way, find substantially, as we have stated them, the facts concerning the conveyance by Tornabells & Co. to Aran y Lanci, the execution of the mortgages in favor of Duran y Cat and Duran & Coll, and the divisibility of those mortgages, as well as the fact that the claims upon which the complainants sued, although in existence, were not reduced to judgment until some time after the execution of the conveyance and mortgages in question. In

one of the paragraphs it is stated that the property conveyed by Tornabells & Co. was substantially all that was owned by the firm at the time of the conveyance, and that Duran y Cat was a relative of the senior member of Tornabells & Co. By the tenth paragraph it is found that the mortgage asserted by the Banco de Sollier was one which Aran y Lanci had executed in favor of that bank on one of the properties acquired by him from Tornabells & Co., and was given to secure a debt due by that firm to the bank, that Aran y Lanci incurred no personal responsibility, and that he produced, as paid, the mortgage note identified with the act of mortgage executed in favor of Duran y Cat, which had been released or extinguished so far as the particular property was concerned. The eleventh paragraph stated that the mortgage asserted by the firm of Fritze, Lundt & Co., on one of the pieces of property conveyed to Aran y Lanci, was executed by the latter in favor of Fritze, Lundt & Co. to secure the payment of a current account for supplies furnished for the cultivation of properties included in the conveyance from Tornabells & Co. to Aran y Lanci, and that previous to the giving of the mortgage the advances made by the firm were secured by a pledge of one of the mortgage notes executed by Aran y Lanci in favor of Duran y Cat, which, when Aran y Lanci mortgaged the property in favor of the firm of Fritze, Lundt & Co., was produced by him as the owner thereof and cancelled. In this case, also, no personal responsibility was assumed by Aran y Lanci. The twelfth and thirteenth paragraphs state sales by Aran y Lanci, in 1903 and 1905, to named persons, of pieces of the property acquired by him from Tornabells & Co., and the production by Aran y Lanci, as extinguished and paid, of the mortgage notes resting upon the property so conveyed, identified with the mortgage in favor of Duran y Cat. The fourteenth paragraph simply embraced a general statement of the release of the Duran y Cat mortgage on the properties referred to in the tenth to the thirteenth paragraphs, inclusive, and that the mortgages and conveyances referred to in

such paragraphs "were, in each and every case, duly recorded in the Registry of Property prior to any record in the Registry of Property of the judgments obtained by complainants herein against Tornabells & Co., referred to in paragraph nine."

From the facts thus found the court drew the following conclusions of law:

"1. That the proof on behalf of complainants is not sufficient to entitle them to any relief under their bill of complaint.

"2. That there is not now, and never was, any such statute in Porto Rico as the statute of 13th Elizabeth in England, referring to fraudulent conveyances, because we have the civil law rule here instead of the common law. Every State in the Union has a reënactment of the statute of Elizabeth in some form or other among its laws. In the absence of it there is no rule of law preventing a debtor, even when insolvent, for even that does not take from him the power of disposition of his property, and paying his debts with it, or a portion of his debts, and preferring one or more of his creditors with absolute intent to hinder, delay or even to defeat other creditors. If the favored creditor receives no more than is due him, and permits the debtor to secure no advantage to himself, the transaction will be upheld.

"3. That the statute of limitations of one year, as fixed by article 37 of the mortgage law, is applicable to suits like the one at bar.

"4. That complainants, under the pleadings and proofs herein, are not entitled to subject the properties described in the bill of complaint herein to any lien, interest or decree, by which the complainants would be entitled to have the conveyance and mortgages described in said bill of complaint cancelled and annulled for the benefit of the said complainants.

"5. That the bill of complaint should be dismissed."

These conclusions were followed by the reproduction of portions of the testimony to preserve the right to review cer-

tain rulings of the court respecting testimony offered on behalf of the complainants.

The assignments of error are seven in number. The seventh we at once put out of view, as it only charges generally that the court erred in dismissing the bill of complaint.

The sixth, fifth and fourth assignments concern rulings as to the admissibility of testimony, and the third complains of the action of the court maintaining the plea of prescription of one year. As these assignments cannot be disposed of without in some respect appreciating the merits, we temporarily forego considering them.

The remaining assignments, that is, the first and second, are as follows:

"First, the court erred in finding as matter of law that in Porto Rico there was no rule of law preventing a debtor, even though insolvent, from preferring one creditor over others with absolute intent to hinder, delay or even defeat the just claims of said others.

"Second, the court erred in finding as matter of law, from the facts found, that the above rule of law was applicable and in not finding as matter of law that the applicable rule was that a debtor could not transfer his property without any consideration for the purpose of delaying or defeating the just claims of his creditors."

It is apparent that these propositions assert that a twofold error was committed, first, in not applying to the facts as found the legal principle rightfully applicable; and, second, by erroneously stating the law in the irrelevant proposition which was mistakenly applied in deciding the cause. The first contention rests upon the theory that the facts found established that the conveyance and mortgages which the bill assailed were mere fraudulent simulations, and upon this assumption insists that the case should have been controlled by the law applicable to that state of fact instead of being governed, as it was, by considering how far, as a matter of law, a debtor, being insolvent, had a right, through a real and

bona fide transaction, to prefer one or more of his creditors. But when the findings of facts are considered it is manifest that the premise upon which the proposition rests is a false one, since it cannot be indulged in without disregarding the findings. We say this is manifest, because the third finding of fact, which we have already quoted, expressly declares that the documentary evidence introduced on behalf of the complainants and the testimony of all the witnesses did not establish that the conveyance from Tornabells & Co. to Aran y Lanci and the mortgage made by him to the firm of Duran & Coll and to Duran y Cat individually were "voluntarily made to hinder and delay the complainants in the collection of their debts." The error which would have resulted from applying the doctrine applicable to a mere simulated transfer to a case where the findings established that simulation was not shown is self-evident. This result, which necessarily arises from a consideration of the mere text of the third finding, is also demonstrated, if that finding be contemplated in the light of the issues which the cause presented in connection with the other findings and all the conclusions of law which were deduced therefrom and applied in deciding the cause. The essential charge which the complaint made was the fraudulent and simulated character of the conveyance and mortgages which were assailed. That issue was, therefore, the controlling question to be decided. Considering the findings, as we have previously fully stated them, it is, we think, clear that the third finding was intended by the court as a statement of its conclusion of fact as to that controlling issue, and that the first conclusion of law which the court stated, that is, the insufficiency of the proof to justify recovery by the complainants, was intended as the legal resultant of the finding which had established that there had been a failure to prove the charge of simulation.

We think it is also clear that the second proposition of law which the court announced, that is, the right of a debtor under the Porto Rican law, although insolvent, to give a

preference, in no way detracted from or modified the previous finding and conclusion as to the absence of proof of simulation or purpose to hinder and delay creditors in the conveyance from Tornabells & Co. to Aran y Lanci and the Duran y Cat and the Duran & Coll mortgage, but was solely intended as responsive to the findings in other respects. That is to say, we think the second finding of law was responsive to the facts found in the paragraphs other than number three, which tended to establish that, even although the sale from Tornabells & Co. to Aran y Lanci was not simulated and not intended to hinder and delay creditors, nevertheless Aran y Lanci had discharged a portion of the credit price which he had agreed to pay by making payments to third persons, creditors of the firm of Tornabells & Co., in extinguishment of the indebtedness of the firm to such creditors, and thus to the extent of such payments preferring the creditors paid out of the price due to Tornabells & Co. as the result of the sale.

Indeed, unless the appreciation which we have just made of the findings and the conclusions of law deduced therefrom be correct, it would cause the findings of fact to be absolutely silent on the issue of simulation, although that issue was the controlling one in the cause, an issue indeed so essential that it is impossible to conceive that the cause could have been disposed of on its merits without a finding on the subject. But if the findings could be thus envisaged the inquiry would be at once suggested whether they were not so manifestly irresponsive to the case as made by the pleadings and to the facts necessarily involved in the decision rendered as to cause them to be no findings at all, and therefore to require at our hands an affirmance of the judgment because of the substantial absence of any finding to enable us to review. *Gray* v. *Smith*, 108 U. S. 12. Concerning this suggestion, however, we express no opinion, since we do not consider that the findings are of the unsubstantial and irrelevant character which would result from attributing to them the construction contended for by the appellants.

Our conclusion that the findings of fact exclude the contention concerning the simulated character of the assailed contracts renders it unnecessary to review the authorities cited in argument to establish the proposition, which is not challenged, that under the law of Porto Rico creditors possess the right to set aside mere fraudulent and simulated contracts or conveyances made by their debtor to or in favor of an interposed person, in order to place the property of the debtor apparently in the name or under the control of such person for the purpose of defeating creditors.

The substantial foundation upon which the cause was based, that is, the issue as to the simulation of the conveyance to Aran y Lanci and the mortgage to Duran y Cat and the firm of Duran & Coll being disposed of, the remaining contentions are free from difficulty. We say this because, although it is elaborately insisted that putting the question of simulation out of view, the court was wrong in its second legal conclusion, to the effect that the law of Porto Rico did not avoid a real and otherwise valid contract merely because its result was to prefer one or more creditors of the debtor making the contract, we think such contention is shown by the record to be an afterthought, or if not is unsupported by the provisions of law which are cited to maintain it. An afterthought because the entire theory of the bill was opposed to the conception that the assailed transactions merely embodied preferences giving rise to a revocatory action that is merely to have an otherwise valid contract revoked. Indeed, it is difficult to imagine that the action in any aspect was considered as but revocatory in character when it is borne in mind that although the mortgage in favor of Duran y Cat covered fifteen pieces of real estate securing 130,000 pesos, he was not served with process, and after his death, on motion of the complainants, the cause was dismissed as to his heirs, upon the theory that they had no interest in the result. We say that the contention as to preference, if not an afterthought, is unsupported by the provisions of law relied upon,

since those which are referred to plainly relate to cases of simulation, and even if applicable to a question of preference, tend to support the view stated by the court in its second conclusion of law. For instance, the military order of March 5, 1899, deals but with simulated transfers, and when its context is considered we think also concerns alone sales made seemingly for cash, and therefore, for a twofold reason, is inapposite to the question of mere preference arising from a contract for a legal consideration, although not immediately payable in cash. So also the general provisions of article 1101 of the Civil Code, providing that those who fraudulently neglect to fulfill their obligations are liable in damages, those of article 1275, declaring that contracts without a consideration or with an illicit consideration can have no legal effect, and the terms of article 1276, providing that the statement of a false consideration in contracts shall render them void unless it be proven that they were based on another and licit consideration, may be put out of view, since they simply announce undisputed propositions of law which are not involved in the case before us, and which are not disputed by any one. And a like reason is also adequate to dispose of the contention based upon the third paragraph of article 1291 of the Civil Code, which embraces in the enumeration of contracts which may be rescinded "those executed in fraud of creditors when the latter cannot recover in any other manner what is due them." We say this, since this provision clearly limits the right of the creditor to rescind to cases where he cannot otherwise recover his debt without resorting to an action for rescission, and even in such case only confers such right where the contract sought to be rescinded is one which is in fraud of his rights. To contend, as is in effect done in the argument at bar, that the article gives to a creditor a right to sue to rescind any contract made by his insolvent debtor, simply because without rescission the creditor cannot otherwise recover his debt, is to distort the clause by misconceiving its obvious meaning. The power to seek rescission being thus

limited to contracts which are in fraud of the rights of the creditor, the question is, Did the court below err in holding that under the law of Porto Rico contracts made by an insolvent debtor which were not fraudulent simulations, because made upon adequate consideration, are not susceptible of being rescinded merely because their execution operated a preference in favor of a creditor? We are cited to no express provision of the local law, or referred to any decision so interpreting that law, and we think an analysis of the provisions of the local law relied upon for the purpose of inferentially showing that the court below erred, clearly not only do not support but refute the contention we are considering. Thus the provision expressly authorizing the right to rescind payments made by an insolvent debtor on account of obligations which, at the time of making the payments, the debtor could not be compelled to make (Civil Code, art. 1292), plainly import the validity of such a payment under other circumstances. So, also, the provision creating a presumption of fraud as to alienations for valuable consideration made by an insolvent debtor against whom a condemnatory judgment has been rendered or a writ of seizure of property has been issued (Civil Code, art. 1297), also gives rise to the inference that where these circumstances do not exist the contrary rule would apply. And the inferences which are deducible from the text of the code are cogently fortified by a consideration of the mortgage law. Thus, while the law contains an enumeration of the suits which may be brought for the rescission of conveyances made for the purpose of defrauding creditors, and includes those made without consideration when the third person was a party to the fraud (Mortgage Law, arts. 36 and 37), it does not mention the case of a mere preference resulting from a contract made for an otherwise valuable consideration. So, also, in article 39, the conveyance without consideration to defraud creditors is expressly limited to those where "there was no price or its equivalent, or any preëxisting obligation which had fallen

due," an affirmative prohibition which would seem necessarily to exclude a right to rescind a contract because of mere preference where there was a price or its equivalent, or where the consideration was a preëxisting obligation which had fallen due.

The foregoing considerations cause it to be unnecessary to pass on the error which it is alleged was committed in maintaining the plea of prescription of one year. It remains therefore only to dispose of the errors based upon the action of the court in disposing of objections to testimony. They relate to two subjects, the first to objections made to the admissibility of the testimony of Mr. Cornwell, one of the attorneys of record of the complainants, concerning statements made to him by members of the firm of Tornabells & Co. in reference to their intention to dispose of or mortgage their property, and the other to the testimony of the same witness concerning statements made to him by the widow of Tornabells after the death of her husband, and during the pendency of the cause, as to alleged conversations had by her with her husband tending to show the simulation of the contracts which were assailed. To pass upon the contentions on these subjects a statement of what transpired at the time the evidence in question was proffered and of the action of the court thereon is essential. While testimony was being taken in open court Mr. Cornwell, one of the attorneys for the complainants, was offered as a witness on their behalf. It developing at once from the questions put to him that the purpose was to draw from the witness statements made to him by the members of the firm of Tornabells & Co. shortly before the assailed conveyance and mortgage were executed, objection was made that such statements were incompetent, because at the time they were made Cornwell was the attorney for the firm and its members, and therefore the statements were not admissible because privileged communications. Thereupon the examining counsel, while not denying that at the time the statements were made the relation of attorney and client existed, insisted that the

statements were admissible, because their character was such as to cause them to be outside of the privilege. The court declaring that it would reserve its ruling on the objection until it had an opportunity to examine the subject during the noon recess, the examination of the witness proceeded for the purpose of showing his professional relation to the firm of Tornabells & Co. at the time of the making of the statements. When the court convened after the recess the subject of the admissibility of the offered testimony was at once taken up. The court intimating doubt on the subject, the counsel making the objection declared that he had witnesses present by whom he expected to prove that Mr. Cornwell not only was the confidential legal adviser of Tornabells & Co. at the time the statements were made to him concerning which it was desired to question him, but that he continued to act for that firm as their attorney after the assailed contracts were made up to the time of the bringing of this suit. Answering this statement, the counsel for complainants declared that his position was that the offered proof was irrelevant in view of the ruling in *Dent* v. *Ferguson*, 132 U. S. 50, to the effect that the privilege did not extend to statements made by a client to his attorney of the intention of the client to commit a fraud. The court then announced as follows: "I am going to permit Mr. Cornwell to testify, reserving the right to see what it is, giving to all the counsel a right to except." Upon this announcement counsel for the defendants insisted upon being permitted to call witnesses to establish the existence of the professional relation of the witness with the firm as previously stated and proceeded to do so. After testimony had been given and documentary evidence introduced without objection, tending to show the existence of the relation of attorney and client between the witness and the firm of Tornabells & Co., in accordance with the previous declaration as to what was proposed to be proven on that subject, the court interrupted the taking of the testimony as follows:

The Court: It doesn't change the court's mind as to admitting the testimony in the way it intimates. It will let it in.

"Mr. Dexter: I desire to except against that ruling.

"The Court: Give an exception to all counsel that wish it.

"Mr. Dexter: I want my objection to clearly appear: (1) It is incompetent because of the relation of attorney and client; (2) It is incompetent under the United States statute; and (3) Because of the party being dead.

"Mr. Boerman: I want an exception to every question given."

The witness Cornwell was then recalled and was fully examined and cross-examined, not only in regard to the alleged statements, but as to his professional relations with the firm of Tornabells & Co. when the statements as to which he testified were made, and thereafter up to or nearly about the time of the bringing of this suit.

Beyond question, the testimony established that the witness had been the confidential legal adviser of the firm of Tornabells & Co. up to and at the time when the statements as to which he testified were made. Without reproducing the testimony as to the statements, we think it suffices to say that on the examination-in-chief of the witness he repeated a conversation had with both members of Tornabells & Co. a short while before the making of the conveyance to Aran y Lanci and the mortgage by the latter of the property, which conversation was occasioned by the fact that the members of the firm called upon the witness as their legal adviser, either to consult him or to state to him the purpose of the firm to convey or mortgage its property, and that the witness, on his examination, stated that he construed the statements made to him by his clients as unfolding a purpose on their part to make a simulated transfer of their property to defraud their creditors, and that he, the witness, declared he could not represent them in the matter or have anything to do with it. The second statement testified to a conversation had with Doitteau, one of the members of the firm, after

the assailed conveyance and mortgage had been put upon the record, which the witness considered was an admission by Doitteau of the fraud and an explanation on the ground that he consented to it because of the influence of his partner Tornabells. It is also true, however, that the statements made by the witness on cross-examination tended to qualify the impression as to the conversation resulting from his statements-in-chief, and to indicate that the purpose of the members of the firm, as disclosed by them in the conversation, was either to sell or mortgage their property in order to raise money to apply to their debts, and that the witness thought that this purpose was illegal, because it was intended with the funds which might be raised to prefer particular creditors. It was established that at the time of the first conversation the witness, although the attorney of the firm, had to its knowledge the claim of one of its creditors in his hands professionally. It was also stated that after the conversations above referred to and after the witness had knowledge of the existence of the assailed conveyance and mortgage, he continued both to have personal and professional relations with the firm. He brought a number of suits in its behalf during the two years which elapsed between the making of the assailed conveyance and mortgage and the bringing of this suit. In fact, the claim which was in the witness' hands at the time of the conversation with the members of the firm was some time afterwards merged to judgment by a confession by the members of the firm, which was written in the office of the witness by one of his associates. Precisely when the witness became the counsel for all the complainants does not exactly appear, but certain is it that he stated in his testimony that he was to receive a large contingent fee, amounting in several of the cases to fifty per cent of the amount recovered. The case, as we have at the outset said, was decided some months after its submission, and six months thereafter the statement of facts to which we have referred, accompanied with extracts from the evidence, was

certified by the court. After reproducing in the statement the extracts from the testimony the court said:

"As appears from the above the court tentatively allowed the foregoing evidence of said witness Cornwell to be admitted, but subsequently, upon the consideration of the testimony as a whole and upon making its findings of fact and law and rendering its decision herein, the court did determine and rule that defendants' objections to the testimony of said witness, Cornwell, in so far as same related to conversations between said witness and Joaquin Tornabells, Carlos Doitteau and Luis Aran, should be sustained and said testimony excluded, because the plan outlined by said Tornabells during said conversation did not constitute a fraud upon creditors under the laws of Porto Rico at that time in force, hence the privilege existing as to confidential communications between attorney and client was applicable thereto, and further, because such testimony involved admissions of a dead man against the interests of his own heirs, who are parties to the suit."

It is upon this statement that the contention is based that the court illegally rejected the testimony of the witness Cornwell. But, when the statement is accurately considered, it appears that instead of rejecting the testimony the court weighed and considered it, and but declared that on its face it did not tend to establish a fraud within the meaning of the Porto Rico law, and hence that the statements were privileged. As the fraud on the part of the firm of Tornabells & Co. which was charged in the bill, and the fraud which it was insisted was demonstrated by the statements made to the witness were in substance one and the same, it necessarily follows that the finding of the court, that the statements testified to did not tend to show the fraud which it was asserted they did show, was but an expression of the conclusion of the court upon the facts involved in the merits of the controversy, and therefore is embraced in its finding of fact which we may not review. If, however, we could otherwise consider the action of the court, we are constrained to say, upon an examination of the

testimony of the witness, made part of the certificate, that we think the court was right in concluding that the testimony did not establish a sufficient foundation to relieve the witness from the obligation resting upon him as the result of his professional relations.

The error which it is insisted the court committed as to the statements of the widow of Tornabells need only be briefly noticed. In the course of his examination the witness Cornwell was asked concerning statements made to him by Mrs. Tornabells of conversations which she stated she had with her husband, tending to show that the assailed contracts were simulated, the statements to the witness having been made after the death of Mr. Tornabells. In reference to the motives which induced Mrs. Tornabells to make to him the statements about which the witness was asked, he said that she represented herself to be in great pecuniary distress and was desirous of ascertaining whether she and her children could not in some way be benefited if the pending suit assailing the conveyance and mortgage of the property was successful. Indeed, on cross-examination, the witness said:

"Q. Is it a fact, Mr. Cornwell, that a contract was made between your firm and this woman to give her either money or property?

"A. If it was, it was made afterwards by Judge Pettingill and Mr. Horton.

"Q. I am asking you if it was.

"A. I don't know. I am out at the mill the most of the time."

On objection being made to the witness testifying to the statements of Mrs. Tornabells as to the conversations with her deceased husband, the court declared that the objection would be overruled *pro forma*, with a right to sustain it later, and gave counsel for the defendants an exception. Thereupon the counsel for the complainants declared as follows:

"I want to get on the record that it is not claimed by the complainants that this statement, whatever it may be, made

by the widow of Tornabells as a defendant in this case, binds any defendant or is admissible against any defendant except herself and the minor children whom she represents."

After this declaration the witness testified as to the statements made to him by Mrs. Tornabells concerning conversations with her husband, the substance of which tended to show that the assailed contracts were fraudulent simulations. Although the testimony was thus in the case when it was submitted to the court for decision, in its certificate appended to the statement of facts to which we have already referred the court said that in disposing of the case it, in effect, concluded that the statement by Mrs. Tornabells as to the conversations with her husband were inadmissible, because they were hearsay, Mrs. Tornabells not having been called as a witness, and because, in any event, it was incompetent to establish the want of good faith in written contracts made by a deceased person by repeating conversations had with him during his lifetime. Conceding that the action of the court can be construed as indicating that it rejected the testimony instead of simply weighing it, and found it insufficient to prove the alleged fraud, we think it suffices to say, without further elaboration, that the reasons stated by the court are, on their face, adequate to sustain its conclusion. Besides, as the testimony of the witness Cornwell concerning the statements made by the widow Tornabells was offered only as against her and her children and not against the other defendants, it clearly results that no prejudicial error could in any event have resulted from the ruling, even on the hypothesis that the administratrix was competent by a mere admission to injuriously affect the estate of her minor children, which the court made, in view of its finding as to the rights of the other defendants.

Affirmed.

FRELLSEN AND COMPANY *v.* CRANDELL, REGISTER OF THE STATE LAND OFFICE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 129. Argued March 7, 8, 1910.—Decided April 4, 1910.

Whether a patent is wrongfully issued or can be set aside is a matter to be settled between the State and the patentee, but no individual is authorized to act for the State.

Even if the State could set aside a patent for having been issued on illegal or inadequate consideration the matter is between it and the patentee; and, until set aside, one tendering the statutory price does not thereby become entitled to receive such land from the State, nor does the tender create a contract with the State within the protection of the contract clause of the Federal Constitution.

Where the state court so holds, public land of a State, as is the case of public land of the United States, held under patent or certificate of location, is not, until such patent or certificate be set aside at the instance of the State, subject to other entry or purchase.

In the matter of sale and conveyance each State may administer its public lands as it sees fit so long as it does not conflict with rights guaranteed by the Federal Constitution; nor is any State obliged to follow the legislation or decisions of the Federal Government or of any other State.

120 Louisiana, 712, affirmed.

CONGRESS, by an act entitled "An act to Aid the State of Louisiana in Draining the Swamp Lands therein," approved March 2, 1849 (9 Stat. 352, c. 87), granted to that State "the whole of those swamp and overflowed lands" in her borders, "which may be or are found unfit for cultivation." See also act of September 28, 1850, 9 Stat. 519. In 1880 the general assembly of the State of Louisiana, by an act known as "Act 23 of 1880," approved March 8, 1880 (Laws La., 1880, c. 84, p. 25), authorized the governor of the State to institute proceedings to recover all of those lands not already conveyed to the State, or, if improperly failed to be conveyed, their value in money or government scrip, "provided, that the State shall

incur no cost or expense in the prosecution of the said claims other than an allowance to be made by the governor out of the lands, money or scrip that may be recovered." On March 20, 1880, the governor made a contract with John McEnery to recover from the United States the unconveyed balance of the lands, or their value in money or scrip, and agreed to pay him "fifty per centum of the lands, money or scrip recovered, to be paid as provided in said Act 23." It also provided: "Where lands in kind are recovered, the compensation as aforesaid, of the said McEnery, shall be represented in scrip or certificates, to be issued by the register of the land office of the State, and locatable upon any lands owned by the State." A large amount of lands were recovered, and the register of the state land office issued to John McEnery certificates in terms made locatable upon any vacant land granted to the State by the act of Congress heretofore referred to. These certificates were sold and assigned by McEnery, and his assignees located them upon public lands, some of which had not been recovered by McEnery under his contract. To some of the assignees patents were thereafter issued, while others held simply certificates of location. By Act 106 of 1888 (Laws La., 1888, p. 171) Act 23 of 1880 was repealed, and by § 2 of the repealing act it was provided "that the act or agreement made between Louis A. Wiltz, governor of the State, and John McEnery, made March 20, 1880, purporting to be under the authority of said Act No. 23, is hereby abrogated and terminated." This repealing act took effect January 1, 1889. By Act No. 125, approved July 8, 1902 (Laws La., 1902, p. 209), it was provided that the swamp and overflowed lands donated by Congress to the State should be subject to entry and sale at the rate of $1.50 per acre. On July 7, 1906, the legislature passed Act No. 85 of 1906 (Laws La., 1906, p. 141), declaring "that present holders and owners of patents for public lands, issued by the State of Louisiana, their heirs, assignees or transferees, shall be confirmed as applicants for said lands, from the date of the issuance of said patents, where the said patents

were not paid for in money, but were paid for by certificates or warrants for scrip, which were not legally receivable in payment for such patents, and authorizing such present holders and owners, their heirs, assignees or transferees, of said patents to validate and perfect their title to the lands covered by said patents, or to any part or subdivision of such lands, within one year from date of passage of this act, by paying therefor, in cash, the price of one dollar and fifty cents per acre." The act further provided that upon payment of such amount "the said patents shall be valid and legal for all purposes, as if payment therefor had been made in cash at the date of their issuance."

Petitioners, claiming that the location of these certificates upon lands not recovered by McEnery and the issuance of patents therefor were illegal, tendered on March 28, 1905, to the proper officers $1.50 per acre for a large body of lands which were covered by these certificates and patents. They demanded that warrants should be issued to them for the lands, which was refused. On July 11, 1906, they filed their petition in the Twenty-second Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, averring that they were the first and only applicants for said lands under the provisions of said Act No. 125 of 1902, or of any other law of the State since the date of the issuance of said illegal certificates and patents, and that by making the legal tender they became vested with the right to acquire said lands.

The District Court sustained the exception of no cause of action and entered judgment dismissing the suit. This judgment was affirmed by the Supreme Court of the State, 120 Louisiana, 712, and from that court was brought here on writ of error.

Mr. P. M. Milner, with whom *Mr. H. G. Morgan* was on the brief, for plaintiffs in error:

While a voidable patent might segregate land from the public domain, a patent null and void cannot have that effect.

In *Emblen* v. *Lincoln Land Co.*, 184 U. S. 660, *Re Emblen*, 161 U. S. 52, and *Small* v. *Crandell*, 118 Louisiana, 1052, the patents were not actually null and void. *United States* v. *Throckmorton*, 98 U. S. 70, can also be distinguished. If, however, the patent is actually null and void the land is not segregated but remains open to entry. *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 645; *Doolan* v. *Carr*, 125 U. S. 625.

The patents issued for McEnery scrip being void, plaintiffs in error acquired a vested interest in the land covered by such patents when they made formal application and tender in compliance with the law of the State. *Pennoyer* v. *McConnaughy*, 140 U. S. 1.

The McEnery certificates were issued in pursuance of a contract of compensation and related solely to the lands recovered through McEnery. Making them locatable on any public lands including those not recovered through him was illegal and the locations made thereunder on land not so recovered were actually void and did not operate to segregate.

Defendants in error rely on *Western R. R. Co.* v. *United States*, 108 U. S. 510; *McLaughlin* v. *United States*, 107 U. S. 526; *United States* v. *San Jacinto Co.*, 125 U. S. 273; but in none of these cases was the patent void. And see *United States* v. *Stone*, 2 Wall. 535, in which the effect of a void patent is referred to. See also *Mowry* v. *Whitney*, 14 Wall. 439; *McMichael* v. *Murphy*, 197 U. S. 304. *Goodloe* v. *Register*, 47 La. Ann. 568, can also be distinguished. In *McEnery* v. *Nichols*, 42 La. Ann. 209, no scrip was before the court and its invalidity was not noticed, and the only lands involved in that case were those recovered by McEnery.

Mr. J. Blanc Monroe, *Mr. R. G. Pleasant* and *Mr. A. P. Pujo*, with whom *Mr. Walter Guion*, Attorney General for the State of Louisiana, *Mr. Bernard Titche*, *Mr. Leland H. Moss*, *Mr. Wynne G. Rogers*, *Mr. C. D. Moss*, *Mr. C. A. McCoy*, *Mr. R. L. Knox*, *Mr. E. D. Miller*, *Mr. Harry H. Hall* and *Mr. Monte M. Lemann* were on the brief, for defendants in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court, after reading the following memorandum:

This opinion, including the preliminary statement, was prepared by our Brother Brewer, and had been approved before his lamented death. It was recirculated and again agreed to, and is adopted as the opinion of the court.

Petitioners contend that by their tender they made a contract with the State for a conveyance of the lands in controversy; that this contract was broken, and that they were deprived of their rights thereunder by the legislation of the State and the action of its officers in pursuance thereof; that thus a Federal question arises under Art. I, § 10, of the Constitution of the United States, which forbids a State to pass a "law impairing the obligation of contracts." Their argument is briefly this: The lands were not obtained by McEnery under his contract with the State; the statute authorizing that contract provided that his payment should be solely out of the lands obtained by him from the United States. Notwithstanding this limitation, certificates were issued to him authorizing location upon any lands included within the grant of Congress by the act of 1849, and they were in fact located upon the lands in controversy—lands which were not obtained by McEnery; that this location, even when followed by patent, did not segregate these lands from the public domain of the State, and they remained therefore open to purchase by any one complying with the statutes; that petitioners were the first and only parties who tendered to the State the prescribed price; that thereby they acquired a vested right to a conveyance by the State of the legal title.

But it is not contended that the patents were not signed by the proper officers and in due form to convey the title of the State to the patentees. It is not suggested that McEnery received any greater amount of lands than he was entitled to receive under his contract, and it does not appear from the

record that the patents, on their face, disclosed any invalidity in the title conveyed. While an examination of the records would, if the facts stated in the petition are true, show that they were improperly issued yet this could be ascertained only by looking beyond the face of the patent. Now, whether the patents were wrongfully issued or could be set aside was a matter to be settled between the State and the patentee. The State undoubtedly received something, for the acceptance of every McEnery certificate released the State *pro tanto* from its obligation under the contract to McEnery. Whether it should remain satisfied with that payment or not was for the State to determine. If it were not satisfied it could take proper proceedings to set aside the patent, but no individual was authorized to act for the State.

The rule in respect to the administration of the public domain of the United States is well settled. In *Doolan* v. *Carr*, 125 U. S. 618, 624, Mr. Justice Miller said:

"There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided."

In *Hastings &c. Railroad Company* v. *Whitney*, 132 U. S. 357, 363, Mr. Justice Lamar, who had been Secretary of the

Interior, discussed the question of a homestead entry, and, after referring to *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S. 629, added:

"Counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference being that in that case the entry existing at the time of the location of the road was an entry valid in all respects, while the entry in this case was invalid on its face, and in its inception; and that this entry having been made by an agent of the applicant, and based upon an affidavit, which failed to show the settlement and improvement required by law, was, on its face, not such a proceeding in the proper land office, as could attach even an inchoate right to the land.

"We do not think this contention can be maintained. Under the homestead law three things are needed to be done in order to constitute an entry on public lands. . . . If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the Commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the department; and on failure to do so the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

In *In re Emblen*, 161 U. S. 52, 56, Mr. Justice Gray thus stated the law:

"After the patent has once been issued, the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentee; and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies. *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Smelting Company* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Company*, 106 U. S. 447; *Monroe Cattle Company* v. *Becker*, 147 U. S. 47; *Turner* v. *Sawyer*, 150 U. S. 578, 586."

See also *McMichael* v. *Murphy*, 197 U. S. 304, 311.

Obviously, in this case the Supreme Court of Louisiana followed the practice obtaining in respect to the public lands of the United States. But if it had not and had declared simply the law of the State of Louisiana its decision would, doubtless, be controlling on this court, for, in the matter of the sale and conveyance of lands belonging to the public no one State is obliged to follow the legislation or decisions of another State, or even those of the United States, but may administer its public lands in any way that it sees fit, so long as it does not conflict with rights guaranteed by the Constitution of the United States.

Counsel criticize the opinion of the Supreme Court of Louisiana, in that it speaks of all the lands as having gone to patent while it is said in the petition that some of the assignees "stood upon the certificates." Whether the language of the petition technically justifies the construction placed upon it by the Supreme Court of the State, is immaterial. Certainly, there is no naming of any single tract as covered by certificate alone and not patented, and if any tract was held under a certificate of location it was, within the scope of the rul-

ing of the Supreme Court, not subject to other entry or purchase.

We see no error in the ruling of the Supreme Court, and its judgment is

Affirmed.

WILLIAMS *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 138. Submitted March 11, 1910.—Decided April 4, 1910.

State legislation which in carrying out a public purpose is limited in its application, is not a denial of equal protection of the laws within the meaning of the Fourteenth Amendment if within the sphere of its operation it affects alike all persons similarly situated. *Barbier* v. *Connolly*, 113 U. S. 27.

When a state legislature has declared that, in its opinion, the policy of the State requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can clearly see that there is no reason why the law should not be extended to classes left untouched. *Missouri, Kansas & Texas Railway Co.* v. *May*, 194 U. S. 267.

A classification in a state statute prohibiting drumming or soliciting on trains for business for any "hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeon or other medical practitioner" will not be held by this court to be unreasonable and amounting to denial of equal protection of the laws, after it has been sustained by the state court as meeting an existing condition which was required to be met; and so held that the anti-drumming or soliciting law of Arkansas of 1907 is not unconstitutional because it relates to the above classes alone and does not prohibit drumming and soliciting for other purposes.

85 Arkansas, 470, affirmed.

THE facts, which involve the constitutionality of the anti-drumming law of Arkansas of 1907, are stated in the opinion.

Mr. George B. Rose, with whom *Mr. U. M. Rose*, *Mr. W. E. Hemingway*, *Mr. D. H. Cantrell* and *Mr. J. P. Loughborough* were on the brief, for plaintiff in error:

The act is unconstitutional as it deprives appellant of the liberty and the equal protection of the laws guaranteed by the Fourteenth Amendment.

It is an unlawful restriction upon the liberty of the citizen. The guaranty of life, liberty and the pursuit of happiness, secures to the citizen the right to pursue any calling not injurious to the public and to protect him against all interference with his business not in the lawful exercise of the police power. The police power is limited to those things essential to the safety, health, comfort and morals of the community, and any enactment seeking to restrict the liberty of a citizen in matters not falling within the scope of the police power as thus defined, is unconstitutional and void.

The occupation of drumming or soliciting for legitimate forms of business is not merely a lawful, but a most important, calling. In this particular instance, the appellant is earning his livelihood by drumming and soliciting for his own boarding house.

This is not a case of an occupation tax. The drummers are not taxed; they are forbidden altogether to exercise their callings. As to the right to pursue any lawful business, see *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 757; *Mugler* v. *Kansas*, 123 U. S. 623; *Lawton* v. *Steele*, 152 U. S. 137; *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Lochner* v. *New York*, 198 U. S. 57. The principles announced by this court have frequently been applied by the state courts. See *Bassett* v. *People*, 193 Illinois, 334; 62 N. E. Rep. 219, 220; *Bailey* v. *People*, 190 Illinois, 28; *People* v. *Gillison*, 98 N. Y. 108; 17 N. E. Rep. 343; *Ritchie* v. *People*, 155 Illinois, 88; 40 N. E. Rep. 454; *Ex parte Jacobs*, 98 N. Y. 105; *Ex parte Whitewell*, 98 California, 73; 32 Pac. Rep. 872; *People* v. *Beattie*, 89 N. Y. Supp. 193; *State* v. *Peel Splint Coal Co.*, 36 W. Va. 856; *State* v. *Goodwill*, 33 W. Va. 179; *Bracewell* v. *People*, 147 Illinois,

66; *People* v. *Warden*, 157 N. Y. 116; 51 N. E. Rep. 1006; 2 Hare's Am. Law, 777; Cooley's Const. Lim., 6th ed., 738.

The claim that this act merely prevents appellant from soliciting custom for his boarding house, and does not interfere with his right to conduct it, begs the question. The right to advertise a business and to solicit custom is essentially an incident to the right to do business. See *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, which has been approved in *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 143; *Brennan* v. *Titusville*, 153 U. S. 289; *McCall* v. *California*, 136 U. S. 104; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Gunn* v. *White Sewing Machine Co.*, 57 Arkansas, 24; *Hurford* v. *State*, 91 Tennessee, 673; 20 S. W. Rep. 201; *Coit* v. *Scott*, 98 Tennessee, 258; 39 S. W. Rep. 1; *Clements* v. *Casper*, 9 Wyoming, 497; 35 Pac. Rep. 473; *Overton* v. *State*, 70 Mississippi, 559; 13 So. Rep. 227; *Pegues* v. *Ray*, 50 La. Ann. 579; 23 So. Rep. 904; *McLaughlin* v. *South Bend*, 126 Indiana, 472; 26 N. E. Rep. 185; *Bloomington* v. *Bourland*, 137 Illinois, 536; 27 N. E. Rep. 692; *Toledo Com. Co.* v. *Glenn Mfg. Co.*, 55 Ohio St. 222; 45 N. E. Rep. 197; *Mershon* v. *Pottsville Lumber Co.*, 187 Pa. St. 16; 40 Atl. Rep. 1018; *Simons Hdw. Co.* v. *McGuire*, 39 La. Ann. 850; 2 So. Rep. 592; *State* v. *Agee*, 83 Alabama, 112; 3 So. Rep. 856; *Stratford* v. *Montgomery*, 110 Alabama, 626; 20 So. Rep. 129; *State* v. *Bracco*, 103 N. C. 350; 9 S. E. Rep. 404; *Wrought Iron Range Co.* v. *Johnson*, 84 Georgia, 758; 11 S. E. Rep. 233; *Emmons* v. *Lewiston*, 132 Illinois, 382; 24 N. E. Rep. 58; *State* v. *Rankin*, 11 S. Dak. 148; 76 N. W. Rep. 299; *Ames* v. *People*, 25 Colorado, 511; 56 Pac. Rep. 725; *Ex parte Rosenblatt*, 19 Nevada, 441; 14 Pac. Rep. 298; *Fort Scott* v. *Pelton*, 39 Kansas, 766; 18 Pac. Rep. 954; *State* v. *Hickox*, 64 Kansas, 654; 68 Pac. Rep. 35; *Talbutt* v. *State*, 39 Tex. Crim. 65; 44 S. W. Rep. 1091; *French* v. *State*, 42 Tex. Crim. 224; 58 S. W. Rep. 1015; *State* v. *Hanaphy*, 117 Iowa, 18; 90 N. W. Rep. 601; *Adkins* v. *Richmond*, 98 Virginia, 101; 34 S. E. Rep. 967; *Stone* v. *State*, 117 Georgia, 296; 43 S. E. Rep. 740; *Commonwealth* v.

Pearl Laundry Co., 49 S. W. Rep. 28; *Wagner* v. *Meakin*, 92 Fed. Rep. 76; *In re Tinsman*, 95 Fed. Rep. 648; *In re Kimmel*, 41 Fed. Rep. 775; *In re Houston*, 47 Fed. Rep. 539; *In re Mitchell*, 62 Fed. Rep. 576; *In re Hough*, 69 Fed. Rep. 330; *Ex parte Loeb*, 72 Fed. Rep. 657; *Louisiana* v. *Lagarde*, 60 Fed. Rep. 186; *Ex parte Green*, 114 Fed. 959; *Delamater* v. *South Dakota*, 205 U. S. 100; *People* v. *Armstrong*, 73 Michigan, 288.

The statute cannot be justified on the principle that it applies only to persons traveling upon railroads. Passengers who avail themselves of their services do not surrender their liberty as citizens; nor can the act be justified on the ground that it tends to secure the comfort of other passengers. Cooley's Const. Lim., 6th ed., 510–518.

Under the common law, to solicit a person's patronage for a hotel or boarding house was not a crime, and therefore it is not within the power of the legislature to make such use of the right of free speech an offense.

The act also deprives the citizen of the equal protection of the law. It applies only to the keepers of hotels, lodging, eating and bath houses, among pursuits open to all the world. It applies also to medical practitioners; but as their vocation is one which concerns the public health and which is not pursued as of right, but only by leave of the State, they are legitimately subject to police regulation, and for the purposes of this case, they may be dismissed from our consideration.

Acts which single out one class of citizens and impose upon them burdens or restraints not imposed upon others, can only be justified by inherent differences. If they are merely arbitrary, they deny to the citizen the equal protection of the law guaranteed by the Fourteenth Amendment. The equal protection of the laws is a pledge of the protection of equal laws. See *Yick Wo* v. *Hopkins*, 118 U. S. 368. The requirement of equal laws does not exclude classification, but the classification must not be arbitrary. It must be based on reason. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S.

150; *Atchison, Topeka & Kansas R. R.* v. *Mathews*, 174 U. S. 96; *Railroad Tax Cases*, 13 Fed. Rep. 733; *Walley's Heirs* v. *Kennedy*, 2 Yerger, 554; 24 Amer. Dec. 512; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 555. See also *State* v. *Conlon*, 65 Connecticut, 478; 33 Atl. Rep. 521; *Millett* v. *People*, 117 Illinois, 284; 7 N. E. Rep. 635; *Ritchie* v. *People*, 155 Illinois, 88; 40 N. E. Rep. 456; *Frorer* v. *People*, 141 Illinois, 171; 31 N. E. Rep. 397; *Braceville Coal Co.* v. *People*, 147 Illinois, 66; 35 N. E. Rep. 63; *Dobbins* v. *Los Angeles*, 195 U. S. 236.

This court has of late refused to set aside a number of state laws on the ground that they were in conflict with the equality clause; but it seems that the case now presented shows an oppressive and inexcusable violation of the equality clause, and that the act should be held unconstitutional in so far as it applies to keepers of boarding houses.

Mr. Hal. L. Norwood, Attorney General of the State of Arkansas, *Mr. C. A. Cunningham* and *Mr. William F. Kirby*, for defendant in error:

The statute is a police regulation and clearly within the power of the State. The State has the inherent power to make all laws necessary for the protection of the health, safety, morals and comfort of its citizens and to promote the public convenience and general welfare.

The rights of property and liberty even, guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restraints under the police power as the common good or general welfare may require. It is within the province of the legislature to declare the public policy and it has broad discretion to determine what the public interests require and what measures are necessary for their protection.

The purpose of the act is apparent. It was to promote the comfort of the public traveling upon railroad trains in the State, and especially of passengers journeying to Hot Springs,

where the halt, the lame, the sick and diseased of the earth, pain-laden, come to seek relief from their burden of suffering, in the justly world-famed healing waters, and protect them from annoyance from the insistent, harassing, persistent and continuous solicitations and importunities of the pestiferous drummer who made himself an insufferable nuisance.

The act was necessary, was within the power of the law-making body and is a wholesome regulation. *McLean* v. *Arkansas*, 211 U. S. 546; *Gundling* v. *Chicago*, 177 U. S. 183; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Adair* v. *United States*, 208 U. S. 172; *Lochner* v. *New York*, 198 U. S. 45, 53, 56; *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christenson*, 137 U. S. 86; *In re Converse*, 137 U. S. 624; *Chicago, Burlington & Quincy Ry.* v. *Drainage Commissioners*, 200 U. S. 584; *Bacon* v. *Walker*, 204 U. S. 311. See also *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527; *Offield* v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372; *Plessy* v. *Ferguson*, 163 U. S. 537.

Railroads are vast enterprises, great highways of commerce, public highways, that are permitted to be organized and exist for the public convenience and benefit and are subject to such regulation as the public good may require. *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 293, 296; *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 651.

The hotel drummer and hackman have long been regarded as belonging to that class of persons whose occupation or business may be regulated for the public good and the railroad companies themselves have the right to prohibit drumming or soliciting for hotels, boarding houses and hack lines upon their trains and depot platforms. *St. Louis, I. M. & S. Ry.* v. *Osborn*, 67 Arkansas, 399; *Landrigan* v. *State*, 31 Arkansas, 51; *Lindsay* v. *Anniston*, 104 Alabama, 261; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; McQuillan on Municipal Ordinances, §§ 28, 184; *Emerson* v. *McNeil*, 84 Arkansas, 552.

The act does not deny plaintiff the equal protection of the law. The State has the power of classification in legislation, and as this court has said, "may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion." *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283; *Farmers' & Merchants' Ins. Co.* v. *Debney*, 189 U. S. 301; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Bacon* v. *Walker*, 204 U. S. 311; *McLean* v. *Arkansas*, 211 U. S. 546; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 256; *New York, N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 268; *Clark* v. *Kansas City*, 176 U. S. 114; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Mo., Kan. & Texas Ry. Co.* v. *May*, 194 U. S. 276.

This law operates alike upon all whom it affects and equal protection is not denied where the law operates alike upon all persons similarly situated. *McLean* v. *Arkansas*, 211 U. S. 546; *New York* v. *Van De Carr*, 199 U. S. 552; *Western Turf Association* v. *Greenburg*, 204 U. S. 359; *Bacon* v. *Walker*, 204 U. S. 311; *Watson* v. *Nervin*, 128 U. S. 578; *State* v. *Schlemmer*, 42 La. Ann. 8; *State* v. *Moore*, 104 N. C. 714; *Ex parte Swann*, 96 Missouri, 44; *Barbier* v. *Connolly*, 113 U. S. 32; *Soon Hing* v. *Crawley*, 113 U. S. 709; *Hayes* v. *Missouri*, 120 U. S. 68; *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Ky. Ry. Tax Cases*, 115 U. S. 321; *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 282.

Statutes are presumed to be constitutional and it is the duty of the courts in testing their validity to resolve all doubts in favor of legislative action. *Mo., Kan. & Tex. Ry. Co.* v. *May*, 194 U. S. 267; *McLean* v. *Arkansas, supra.*

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

Plaintiff in error was convicted for violating a statute of the State of Arkansas, entitled "An act for the protection of passengers, and for the suppression of drumming and soliciting upon railroad trains and upon the premises of common

carriers," approved April 30, 1907. Acts of General Assembly, 1907, p. 553, Act, 236.

The first and second sections of that act are as follows:

"SEC. 1. That it shall be unlawful for any person or persons, except as hereinafter provided in section 2 of this act, to drum or solicit business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, on the train, cars, or depots of any railroad or common carrier operating or running within the State of Arkansas.

"Any person or persons plying or attempting to ply said vocation of drumming or soliciting, except as provided in section 2 of this act, upon the trains, cars, depots of said railroads or common carriers, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty ($50) nor more than one hundred dollars ($100) for each offense.

"SEC. 2. That it shall be unlawful for any railroad or common carrier operating a line within the State of Arkansas knowingly to permit its trains, cars or depots within the State to be used by any person or persons for drumming or soliciting business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, or drumming or soliciting for any business or profession whatsoever; except, that it may be lawful for railroads or common carriers to permit agents of transfer companies on their trains to check baggage or provide transfers for passengers, or for persons or corporations to sell periodicals and such other articles as are usually sold by news agencies for the convenience and accommodation of said passengers.

"And it shall be the duty of the conductor or person in charge of the train of any railroad or common carrier to report to the prosecuting attorney any person or persons found violating any of the provisions of this act, and upon a wilful failure or neglect to report any such person or persons known to be violating the provisions of this act by drumming

or soliciting said conductor or other person in charge of such train shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars."

The case was tried upon the following agreed statement of facts:

"The defendant has for six years been keeping a boarding house in the city of Hot Springs and was keeping the same on the 10th day of December, 1907, when he entered a train of the Little Rock and Hot Springs Western Railway Company while running in the county of Garland and State of Arkansas, and solicited and drummed the passengers on said train to induce them to come to his said boarding house to board during their sojourn in said city; and said defendant was so engaged in drumming and soliciting upon said train when he was arrested. He had paid his fare as a passenger on said train, and was riding as such passenger while engaged in drumming and soliciting."

Plaintiff in error challenged the act as unconstitutional on the grounds that it deprived him of liberty and property without due process of law, and also of the equal protection of the law guaranteed by the Fourteenth Amendment.

The principles that govern this case have been settled by very many adjudications of this court. They were sufficiently set forth in *McLean* v. *State of Arkansas*, 211 U. S. 546, in which a statute making it unlawful for mine owners, employing ten or more men underground in mining coal and paying therefor by the ton mined, to screen the coal before it was weighed, was held valid; and also that it was not an unreasonable classification to divide coal mines into those where less than ten miners were employed and those where more than that number were employed, and that a state police regulation was not unconstitutional under the equal protection clause of the Fourteenth Amendment, because only applicable to mines where more than ten miners were employed. This court in that case, discussing the police power, said:

"In *Gundling* v. *Chicago*, 177 U. S. 183, this court summarized the doctrine as follows:

"'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary interfered with or destroyed, without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.'

"In *Jacobson* v. *Massachusetts*, 197 U. S. 11, this court said:

"'But the liberty secured by the Constitution of the United States to every person within its jurisdiction, does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is subject for the common good.'

"It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people. . . .

"The legislature being familiar, with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.

* * * * * * * *

"If the law in controversy has a reasonable relation to the

protection of the public health, safety or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

And see *Donovan* v. *Pennsylvania Company*, 199 U. S. 279.

In the present case the Supreme Court of Arkansas (*Williams* v. *State*, 85 Arkansas, 470) said:

"The legislature clearly has the power to make regulation for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers. It is suggested in argument that the statute was especially aimed at the protection of travelers to the city of Hot Springs. If this be so, we can readily see additional reason why the regulation is a wholesome one. A large percentage of those travelers are persons from distant States, who are mostly complete strangers here, and many are sick. Drummers who swarm through the trains soliciting for physicians, bath houses, hotels, etc., make existence a burden to those who are subjected to their repeated solicitations. It is true that the traveler may turn a deaf ear to these importunities, but this does not render it any the less unpleasant and annoying. The drummer may keep within the law against disorderly conduct, and still render himself a source of annoyance to travelers by his much beseeching to be allowed to lead the way to a doctor or a hotel.

"It is also argued that the act, literally construed, would prevent any person of the classes named from carrying on a private conversation on a train concerning his business. This is quite an extreme construction to place upon the statute, and one which the legislature manifestly did not intend. We have no such question, however, before us on the facts presented in the record.

"This statute is not an unreasonable restriction upon the privilege one should enjoy to solicit for his lawful business,

which, it is rightly urged, is an incident to any business. It does not prevent any one from advertising his business or from soliciting patronage, except upon trains, etc. This privilege is denied him for the public good. It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare."

As to the objection that the act discriminated against plaintiff in error and denied him the equal protection of the law, because forbidding the drumming or soliciting business or patronage on the trains for any "hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner," which it was contended was an unreasonable classification, the state Supreme Court said:

"The legislature, in framing this statute, met a condition which existed, and not an imaginary or improbable one. The class of drummers or solicitors mentioned in the act are doubtless the only ones who ply their vocation to any extent on railroad trains. It is rare that the commercial drummer finds opportunity to meet customers and solicit trade on trains, therefore the lawmakers deemed it unnecessary to legislate against an occasional act of that kind."

It is settled that legislation which "in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarily situated, is not within the amendment," *Barbier* v. *Connolly*, 113 U. S. 27, and "When a State legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the court under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267.

Judgment affirmed.

INTERNATIONAL TEXTBOOK COMPANY *v.* PIGG.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 15. Argued April 21, 1909.—Decided April 4, 1910.

The reasonable construction of a state statute relating to foreign corporations doing business within the State does not include the doing of a single act or the making of a single contract, but does include a continuous series of acts by an agent continuously within the State. *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S. 727.

A foreign corporation engaged in teaching by correspondence and which continuously has an agent in a State securing scholars and receiving and forwarding the money obtained from them, is doing business in the State; and such a corporation does business in Kansas within the meaning of § 1283 of the general statutes of that State of 1901.

Commerce is more than traffic; it is intercourse, and the transmission of intelligence among the States cannot be obstructed or unnecessarily encumbered by state legislation. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1.

Intercourse or communication between persons in different States through the mails and otherwise, and relating to matters of regular continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the States within the commerce clause of the Federal Constitution.

A state statute which makes it a condition precedent to a foreign corporation engaging in a legitimate branch of interstate commerce to obtain what practically amounts to a license to transact such business is a burden and restriction upon interstate commerce and as such is unconstitutional under the commerce clause of the Federal Constitution; and so held as to the requirements of § 1283, General Laws of Kansas of 1901, when applied to a foreign corporation carrying on the business of teaching persons in that State by correspondence conducted from the State in which it is organized.

Quære how far a foreign corporation carrying on business in a State may claim equality of treatment with individuals in respect to the right to sue and defend in the courts of that State; but where a condition precedent to a foreign corporation doing business at all in a State is unconstitutional, the further condition that it cannot

maintain any action in the courts of the State until it has complied with such unconstitutional condition is also stricken down as being inseparable therefrom.

Where a statute is unconstitutional in part the whole statute must be deemed invalid except as to such parts as are so disconnected with the general scope that they can be separably enforced; and so held as to the provisions in § 1283 of the General Laws of Kansas of 1901 against a foreign corporation maintaining any action until it has complied with another provision as to filing a detailed statement which is unconstitutional as to foreign corporations engaged in interstate commerce.

76 Kansas, 328, reversed.

THE facts, which involve the constitutionality of § 1283 of the General Statutes of Kansas of 1901, are stated in the opinion.

Mr. James M. Beck, with whom *Mr. Seth T. McCormick* and *Mr. David C. Harrington* were on the brief, for plaintiff in error:

The contract between the plaintiff and the defendant for the shipment by the plaintiff from Scranton, Pennsylvania, to the defendant in Topeka, Kansas, of printed and documentary merchandise for a pecuniary consideration, was a transaction of interstate commerce. *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *Swift* v. *United States*, 196 U. S. 375, 398.

Plaintiff's business is essentially and practically that of compiling, printing, selling and shipping educational publications. As such it is one of the greatest, if not the greatest, educational publication house in the world.

It was formed in October, 1891, and it now has $6,000,000 of paid up capital; 2,800 employees, including an instruction staff of 400 trained teachers; 200 courses of study; its pamphlets and text-books are protected by 5,700 copyrights; it has three home office buildings, of seven acres floor space, and its annual expenditures include $100,000 for postage, $350,000 for printing and $250,000 for preparation and revision of courses. It has enrolled to April 1, 1909, over 1,100,000 purchasers of its educational literature. Its printing establish-

ment issues over 25,000,000 separate pieces of printed matter each year. In the first fifteen years of its existence, its receipts were over $28,000,000.

The case presents every element of a transaction of interstate commerce. There is a vendor and a vendee, a thing bought and a thing sold, a price paid and merchandise delivered. Such merchandise is physically delivered by the vendor directly to the vendee and such delivery is effected, as in the case under consideration, by a continuous and unbroken shipment from a destination in one State to a destination in another, forming "a current of commerce among the States." *Swift* v. *United States,* 196 U. S. 375, 399.

Even if the "instruction papers" were not regarded in common with all other educational publications as printed merchandise but simply as printed information of a peculiar or special character it would nevertheless be within the commerce clause of the Constitution. To sell information in a concrete and tangible form, as in a printed pamphlet, is as much a commercial transaction as to sell a bushel of wheat or a pound of iron. *Gibbons* v. *Ogden,* 9 Wheat. 1; and see Mr. Justice Johnson's concurring opinion in *Gibbons* v. *Ogden,* p. 222; *Passenger Cases,* 7 How. 282; *Covington Bridge Company* v. *Kentucky,* 154 U. S. 204, 218. Indeed, the mere transmission of intelligence or information is commerce, even without regard to its strictly commercial purpose. *Pensacola Tel. Co.* v. *Western Un. Tel. Co.,* 96 U. S. 1; *West. Un. Tel. Co.* v. *Pendleton,* 122 U. S. 347; *Lottery Cases,* 188 U. S. 321. While policies of insurance have been held not to be articles of commerce, this is wholly for the reason that they are mere contracts for the ultimate and possible payment of money.

Shipping newspapers from New York to Texas is a transaction of interstate commerce, *Preston* v. *Finley,* 27 Fed. Rep. 850, 857; also shipment of books from one State to another. *In re Nichols,* 48 Fed. Rep. 164; *In re White,* 43 Fed. Rep. 914; *Culberson* v. *Am. T. & B. Co.,* 107 Alabama, 457.

Anything which can be bought and sold is a subject of commerce and it cannot be reasonably questioned that these educational pamphlets, prepared at so much expense, could be bought and sold like any other commodity. *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, 156 Fed. Rep. 1, 17.

The right to engage in interstate commerce includes the right to employ representatives to solicit contracts for the purchase of interstate commodities, and the mere fact that such an agent solicits a contract, and collects the price, does not give the State any larger power to burden or restrain such business by license taxes or police regulations. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 491, 493; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Crutcher* v. *Kentucky*, 141 U. S. 47, 57–59; *Caldwell* v. *North Carolina*, 187 U. S. 622, 623.

The statutes of Kansas, requiring plaintiff to obtain its "permission" to engage in interstate commerce and burdening the exercise of its constitutional right to do so with license taxes, and fees, and penalizing the plaintiff for engaging in interstate commerce without the "permission" of the State by denying to the plaintiff equality of judicial relief in its courts, are unconstitutional.

The right of a State altogether to exclude foreign corporations or to impose conditions upon their right to do business within the State, is so far modified and restricted by the commerce clause of the Constitution that the State cannot exclude any foreign corporation from entering said State to engage in interstate commerce with its citizens. *Stockton* v. *Balt. R. R. Co.*, 32 Fed. Rep. 9; *Pensacola Tel. Co.* v. *Western Un. Tel. Co.*, 96 U. S. 1; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 118; *Crutcher* v. *Kentucky*, 141 U. S. 47, 57; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Brennan* v. *Titusville*, 153 U. S. 289. See also *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v.

Hennick, 129 U. S. 142; *Pembina Mining Co.* v. *Pennsylvania*, 128 U. S. 190.

In the absence of congressional action, the Constitution provides that interstate commerce be free. This rule applies no matter how salutary the police regulations might otherwise be, or however insignificant the tax. Any burden or condition is void except such purely local police regulations as refer strictly to the health or morals of the community.

The requirements of §§ 1260 and 1283 may not in themselves be unreasonable, but their fatal defect is that they exercise a power which belongs exclusively to Congress. Section 1283 is so inseparably linked with the other statutory requirements that the burden is much greater than merely filing these annual statements.

When the Kansas statutes state that a foreign corporation engaged in interstate commerce cannot as to a transaction in such commerce enforce its claims in the courts of Kansas, it in part, and in many cases altogether, prohibits the making of such contracts and therefore the carrying on of such commerce.

The judicial enforcement of a contract is as much a part of the contract as vital motion is a part of vital existence. It cannot be argued that while Kansas could not prohibit the making of a contract in interstate commerce it could destroy its very life.

It matters not whether an attempted regulation of such commerce by the State is through its executive or judiciary, for the State may not "by any of its agencies, legislative, executive or judicial," impair or destroy a right under the Constitution of the United States. *San Diego Land Co.* v. *National City*, 174 U. S. 739, 753; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 234.

A judicial regulation which directly burdens interstate commerce, is as invalid as an act of the executive. *Security Ins. Co.* v. *Prewitt*, 202 U. S. 246, distinguished, as not applying to a case where a Federal right was sought to be indirectly

nullified through a destruction of judicial relief. *Ex parte Young*, 209 U. S. 123.

The Kansas statute clearly operates to deny to the plaintiff the full and equal protection of the laws. The plaintiff is within its constitutional rights in declining to comply with the requirements thereof. *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 736. With the exception of the Supreme Court of Kansas it has been uniformly held by state courts that such a law is unconstitutional. *Underwood Typewriter Co.* v. *Pigott*, 60 W. Va. 532; *S. C.*, 55 S. E. Rep. 664; *Woessner* v. *Cottam & Co.*, 47 S. W. Rep. 678; *Lane Co.* v. *City Electric Co.*, 72 S. W. Rep. 425; *Texas Railway Co.* v. *Davis*, 54 S. W. Rep. 381; *Coweta Fertilizer Co.* v. *Brown*, 163 Fed. Rep. 162, 168; *Greek-American Sponge Co.* v. *Drug Co.*, 124 Wisconsin, 469, 476; *Haldy* v. *Tomoor-Haldy Co.*, 4 Ohio Decs. 118; *Hargraves Mills* v. *Harden*, 25 N. Y. Misc. 665; *Coit & Co.* v. *Sutton*, 102 Michigan, 324; *Gunn* v. *Sewing Mach. Co.*, 57 Arkansas, 24; *Hovey's Estate*, 198 Pa. St. 385; *Savage* v. *Atlanta Home Ins. Co.*, 66 N. Y. Supp. 1105; *S. C.*, 55 App. Div. 20.

The right to contract within a State implies necessarily the right to use the courts of the State to enforce the contract. *Von Hoffman* v. *Quincy*, 4 Wall. 535.

While a State is competent to regulate the procedure of its courts it cannot so regulate them as to discriminate against those who are engaged in interstate commerce by denying to them judicial remedies on terms of absolute equality with other litigants. A State cannot discriminate against citizens or products of other States, *Railroad* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Voight* v. *Wright*, 141 U. S. 62; *Tiernan* v. *Rinker*, 102 U. S. 123; *Guy* v. *Baltimore*, 100 U. S. 434; *Welton* v. *Missouri*, 91 U. S. 275; *Walling* v. *Michigan*, 116 U. S. 446; nor impose a tax on interstate commerce either by a tax laid on the transportation of the subjects of that commerce, *State Freight Tax*, 15 Wall. 232, 279; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 465; *People* v. *Compagnie &c. Trans-*

atlantique, 107 U. S. 59; or by a tax on the receipts derived from that transportation or upon the capital stock of the carrier, *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *West. Un. Tel. Co.* v. *Alabama*, 132 U. S. 472; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411; *West. Un. Tel. Co.* v. *Pennsylvania*, 128 U. S. 39; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Fargo* v. *Michigan*, 121 U. S. 230; *California* v. *Central Pacific*, 127 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; or by means of a license fee on the privilege or occupation of engaging in interstate commerce, *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Leloup* v. *Mobile*, 127 U. S. 640; *Harman* v. *Chicago*, 147 U. S. 396; *Brennan* v. *Titusville*, 153 U. S. 289; *Moran* v. *New Orleans*, 112 U. S. 69; *Asher* v. *Texas*, 128 U. S. 129; *McCall* v. *California*, 136 U. S. 104; *N. & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Henderson* v. *Mayor*, 92 U. S. 259; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Webber* v. *Virginia*, 103 U. S. 344; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; nor can a State in any way attempt to regulate interstate commerce by imposing burdensome conditions under which it may be conducted whether by fixing rates, *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, or preventing the introduction of certain articles of commerce, *Bowman* v. *Chicago Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; or by requiring telegraphic messages to be sent in the order received and delivered by messengers within one mile of the office, *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; or by requiring common carriers to give equal passenger accommodations without distinction on account of race or color. *Hall* v. *DeCuir*, 95 U. S. 485.

A State may not destroy a Federal right by a threatened denial of judicial relief in the courts of the State. *Ex parte Young*, 209 U. S. 123; *Cotting* v. *Stockyards*, 183 U. S. 79.

To the extent that this plaintiff conducts its business

through the mails, it is not important whether the subject-matter, which is transmitted from Pennsylvania to Kansas, was an article of commerce or not, or whether its mere transmission was strictly interstate commerce, for the State of Kansas was powerless to invade the exclusive power of the Federal Government to determine what should and what should not be transported through the mails. See *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Horner* v. *United States* (No. 1), 143 U. S. 207.

As to how the words in § 1260 "doing business" or "engaged in business" have been judicially construed by the courts of other States than Kansas, see *Bertha Zinc Co.* v. *Clure*, 7 Misc. Rep. (N. Y.) 23; *Washington Mills Co.* v. *Roberts*, 8 App. Div. (N. Y.) 201; *Southern Cotton Oil Co.* v. *Roberts*, 25 App. Div. (N. Y.) 13; *Soda Fount Co.* v. *Roberts*, 20 App. Div. (N. Y.) 585; *Kellogg Newspaper Co.* v. *Roberts*, 30 App. Div. (N. Y.) 150; *Ware Cattle Co.* v. *Anderson et al.*, 77 N. W. Rep. 1026; *Holder* v. *Aultman*, 169 U. S. 81; *Sullivan* v. *Sullivan Timber Co.*, 15 So. Rep. 941; *Toledo Commercial Co.* v. *Glen Mfg. Co.*, 45 N. E. Rep. 197; *Mearshon & Co.* v. *Lumber Co.*, 187 Pa. St. 12; *Wolff-Dryer Co.* v. *Bigler & Co.*, 192 Pa. St. 466; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *David & Rankin Mfg. Co.* v. *Dix*, 64 Fed. Rep. 406–412; *Brewing Co.* v. *Roberts*, 22 App. Div. (N. Y.) 282; *Smith Co.* v. *Roberts*, 27 App. Div. (N. Y.) 455; *Beard* v. *Publishing Co.*, 71 Alabama, 60; *Murphy Varnish Co.* v. *Connell*, 10 Misc. Rep. (N. Y.) 553; *Harlan & Hollingsworth Co.* v. *Campbell*, 139 N. Y. 68; *Chicago Stock Yards Company* v. *Roberts*, 154 N. Y. 1; *Havens & Geddes Co.* v. *Diamond*, 93 Ill. App. 557.

These cases hold that a corporation incorporated to do a manufacturing business, and exercising all its corporate franchises in the State where it is incorporated and manufactures the article which it sells in the State where it is incorporated, although it sends agents to other States to sell its goods, does not engage in business in the other States.

It can only be stated "doing business" in other States when it opens its manufacturing establishment and manufactures its goods in another State.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the International Textbook Company in one of the courts of Kansas—the court of Topeka—to recover from Pigg, the defendant in error, the sum of $79.60 with interest as due the plaintiff under a written contract between him and that company made in 1905. The case was tried upon agreed facts and judgment was rendered in favor of the defendant for his costs. That judgment was affirmed in a state District Court, which held that the plaintiff was not entitled to maintain the action, and the latter judgment was affirmed by the Supreme Court of Kansas.

It is assigned for error that the final judgment—based upon certain provisions of the statutes of Kansas, to be presently referred to—was in violation of the company's rights under the Constitution of the United States.

The facts agreed to—using substantially the language of the parties—make substantially the following case:

The International Textbook Company is a Pennsylvania corporation, and the proprietor of what is known as the International Correspondence Schools at Scranton in that Commonwealth. Those Schools have courses in Architecture, Chemistry, Civil, Mechanical, Electrical and Steam Engineering, English Branches, French, German, Mathematics and Mechanics, Pedagogy, Plumbing, Heating, Telegraphy and many other subjects. It has a capital stock, and the profits arising from its business are distributed in dividends or applied otherwise as the company may elect. The executive officers of the company, as well as the teachers and instructors employed by it, reside and exercise their respective functions at Scranton.

Its business is conducted by preparing and publishing instruction papers, textbooks and illustrative apparatus for courses of study to be pursued by means of correspondence, and the forwarding, from time to time, of such publications and apparatus to students. In the conduct of its business the company employs local or traveling agents, called Solicitor-Collectors, whose duties are to procure and forward to the company at Scranton, from persons in a specified territory, on blanks furnished by it, applications for scholarships in its Correspondence Schools, and also to collect and forward to the company deferred payments on scholarships. In order that applicants may adopt applications to their needs each Solicitor-Collector is kept informed by correspondence with the company of the fees to be collected for the various scholarships offered and of the contract charges to be made for cash or deferred payments, as well as the terms of payment acceptable to the company. In conformity with the contract between the company and its scholars, the scholarship and instruction papers, text-books and illustrative apparatus called for under each accepted application are sent by the company from Scranton directly to the applicant and instruction is imparted by means of correspondence through the mails between the company at its office in that city and the applicant at his residence in another State.

During the period covered by the present transaction the company had a Solicitor-Collector for the territory that included Topeka, Kansas, and he solicited students to take correspondence courses in the plaintiff's schools. His office in Kansas was procured and maintained at his own expense, for the purpose of furthering the procuring of applications for scholarships and the collection of fees therefor. The company had no office of its own in that State. The Solicitor-Collector was paid a fixed salary by the company and a commission on the number of applications obtained and the collections made. He sent daily reports to the company for his territory, those reports showing that for March, 1906, the aggregate collections

on scholarships and deferred payments on subscriptions approached $500.

At the date of the agreement sued on, and at the time this suit was brought, numerous persons in Topeka were taking the plaintiff's course of instruction by correspondence through the mails. The contracts for those courses were procured by its Solicitor-Collector assigned to duty in Kansas, and, as stated, payments thereon were collected and remitted by him to the plaintiff at Scranton.

The written contract in question, signed by the defendant at Topeka, Kansas, and accepted by the company at Scranton showed that he had subscribed for a scholarship covering a course of instruction by correspondence in Commercial Law, and had agreed to pay therefor $84, in installments. When this suit was brought there remained unpaid on the principal of that subscription the sum of $79.60.

The present action was brought to recover that sum, with interest, as due the company under the defendant's contract with it. The defendant did not deny making the contract nor that he was indebted to the company in the amount for which he was sued. But it was adjudged, in conformity with his contention, that by reason of the company's *failure to comply with certain provisions of the statutes of Kansas*, it was not entitled to maintain this action in a court *of Kansas*.

We will now refer to the provisions of the Kansas statute under which the Textbook Company was held not to be entitled to maintain the present action in the courts of the State. The statute, the plaintiff alleges, cannot be applied to it without violating its rights under the Constitution of the United States.

By § 1260 of the Kansas General Statutes of 1901 it is provided, among other things, that a corporation organized under the laws of any other State, Territory or foreign country and seeking to do business in Kansas, may make application to the State Charter Board, composed of the Attorney General, the Secretary of State and the State Bank Commissioner, for "per-

mission" to engage in business in that State as a foreign corporation. It is necessary that the application should be accompanied by a fee of $25, and as a condition precedent to obtaining authority to transact business in the State, a corporation of another State was required to file in the office of the Secretary of State its written consent, irrevocable, that process against it might be served upon that officer. § 1261. In passing upon the application the Charter Board is authorized to make special inquiry in reference to the solvency of the corporation, and if they determined that such corporation was properly organized in accordance with the laws under which it was incorporated, "that its capital is unimpaired and that it is organized for a purpose for which a domestic corporation may be organized" in Kansas, then its application is to be granted, and a certificate issued, setting forth the fact that "the application has been granted and that such foreign corporation may engage in business in this State." Before filing its charter, or a certified copy thereof, with the Secretary of State the corporation is required to pay to the State Treasurer for the benefit of the "permanent school fund" a specified per cent of its capital stock. §§ 1263, 1264. The last-named section was the subject of extended examination in *Western Union Tel. Co.* v. *Kansas,* recently decided (216 U. S. 1), and was held to be unconstitutional in its application to the Western Union Telegraph Company seeking to do local business in Kansas.

But the section which controlled the decision by the state court in the present case is § 1283, which is as follows: "It shall be the duty of the president and secretary or of the managing officer of each corporation for profit doing business in this State, except banking, insurance and railroad corporations, annually, on or before the 1st day of August, 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 post-office address of each, and the number of shares held and paid for by each. 6th. The names and post-office addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held . . . and the failure of any such corporation to file the statement in this section provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this State, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture it shall be the duty of the attorney-general to apply to the District Court of the proper county for the appointment of a receiver to close out the business of such corporation; 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* (§ 1283) have been properly made." L. 1898, ch. 10, § 12, as amended by L. 1901, ch. 126, § 3.

1. In view of the nature and extent of the business of the International Textbook Company in Kansas, the first inquiry is whether the statutory prohibition against the maintaining of an action in a Kansas court by "any corporation *doing business in this* [that] *State*" embraces the plaintiff corporation. It must be held, as the state court held, that it does; for,

it is conceded that the Textbook Company did not, before bringing this suit, make, deliver and file with the Secretary of State either the statement or certificate required by § 1283; and upon any reasonable interpretation of the statute that company, both at the date of the contract sued on, and when this action was brought, must be held as "*doing business*" in Kansas. It had an agent in the State who was employed to secure scholars for the schools conducted by correspondence from Scranton, and to receive and forward any money obtained from such scholars. Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many States for the benefit of its Correspondence Schools. While the Supreme Court of Kansas has distinctly held that the statute did not embrace single transactions that were only incidentally necessary to the business of a foreign corporation, it also adjudged that the business done by the Textbook Company in Kansas was not of that kind, but indicated a purpose to regularly transact its business from time to time in Kansas, and therefore it was to be regarded as doing business in that State within the meaning of the statute; and that it "was the intention of the legislature that the State should reach every continuous exercise of a foreign franchise," and that it should apply even where the business of the foreign corporation was "purely interstate commerce." *Deere* v. *Wyland*, 69 Kansas, 255, 257, 258; *State* v. *Book Co.*, 65 Kansas, 847; *Commission Co.* v. *Haston*, 68 Kansas, 749. In our judgment, those rulings as to the scope of the statute were correct. They were in substantial harmony with the construction placed by this court upon a Colorado statute somewhat similar to the Kansas act. A statute passed in execution of a provision in the Colorado constitution required foreign corporations as a condition of their authority "to do business" in that State, to make and file with the Secretary of

State a certificate covering certain specified matters. An Ohio corporation having made in Colorado a contract for the sale of machinery to be sent to it from the latter State to Ohio and the vendor having failed to perform the contract, a suit was brought against him in the Federal court, sitting in Colorado. One of the defenses was the failure of the Ohio, corporation to make and file with the Secretary of State the certificate required by the Colorado statute before it should be "authorized or permitted to do any business" in Colorado. It became necessary to inquire whether the Ohio corporation, by reason of the above isolated contract, did business in Colorado within the meaning of the constitution and laws of the latter State. This court said: "Reasonably construed, the constitution and statute of Colorado forbid, not the doing of a single act of business in the State, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. . . . The making in Colorado of the *one* contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado. . . . To require such a certificate as a prerequisite to the doing of *a single act of business* when there was no purpose to do any other business or have a place of business in the State, would be unreasonable and incongruous." *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 728, 734.

In view of the agreed facts and the principles announced both by the Kansas Supreme Court and by this court we hold that, within the meaning of § 1283 of the Kansas statute, the International Textbook Company was doing business in the latter State at the time the contract in question was made, and was therefore within the terms of that section.

2. But this view as to the meaning of the Kansas statute does not necessarily lead to an affirmance of the judgment below if, as the plaintiff contends, the business in which it is regularly engaged is interstate in its nature, and if the statute,

by its necessary operation, materially or directly burdens that business.

It is true that the business in which the International Textbook Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and, practically, continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode—looking at the contracts between the Textbook Company and its scholars—involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—"a new species of commerce," to use the words of this court in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9. In the great case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, this court, speaking by Chief Justice Marshall, said, "Commerce, undoubtedly, is traffic, but it is something more; it is *intercourse*." Referring to the constitutional power of Congress to regulate commerce among the States and with foreign countries, this court said in the *Pensacola case*, just cited, that "it is not only the right but the duty of Congress to see to it that *intercourse* among the States and *the transmission*

of intelligence are not obstructed or unnecessarily encumbered by state legislation." This principle has never been modified by any subsequent decision of this court.

The same thought was expressed in *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356, where the court said: "Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only *ideas, wishes, orders,* and *intelligence.*" It was said in the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, 156 Fed. Rep. 1, 17, that "all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, *or information,* is a transaction of interstate commerce." If intercourse between persons in different States by means of telegraphic messages conveying intelligence or information is commerce among the States, which no State may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, especially where, as here, such intercourse and communication really relates to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case we shall therefore assume that the business of the Textbook Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature.

3. We must next inquire whether the statute of Kansas, if applied to the International Textbook Company, would directly burden its right by means of correspondence through the mails and by its agents, to secure written agreements with

persons in other States, whereby such persons, for a valuable consideration, contract to pay a given amount for scholarships in its Correspondence Schools, and to have sent to them, as found necessary, from time to time, books, papers, apparatus and information, needed in the prosecution, in their respective States, of the particular study which the scholar has elected to pursue under the guidance of those who conduct such schools at Scranton? Let us see what effect the statute by its necessary operation must have on the conduct of the company's business.

In the first place, it is made a condition precedent to the authority of a corporation of another State, except banking, insurance and railroad corporations, to do business in Kansas, that it shall prepare, deliver *and file with the Secretary of State* a detailed "Statement," showing the amount of the authorized, paid-up, par and market value of, its capital stock, its assets and liabilities, a list of its stockholders, with their respective post-office addresses and the shares held and paid for by each, and the names and post-office addresses of the officers, trustees, or directors and managers.

In the next place, the statute denies to the corporation doing business in Kansas the right to maintain an action in a Kansas court, *unless it shall first obtain* a certificate of the Secretary of State to the effect that the Statement, required by § 1283, *has been properly made.*

Was it competent for the State to prescribe, as a condition of the right of the Textbook Company to do interstate business in Kansas, such as was transacted with Pigg, that it should prepare, deliver, and file with the Secretary of State the Statement mentioned in § 1283? The above question must be answered in the negative upon the authority of former adjudications by this court. A case in point is *Crutcher* v. *Kentucky*, 141 U. S. 47, 56, 57, often referred to and never qualified by any subsequent decision. That case arose under a statute of Kentucky regulating agencies of foreign express companies. The statute required as a condition of the right

of the agent of an express company, not incorporated by the laws of Kentucky, to do business in that Commonwealth, to take out a license from the State Auditor, and to make and file in the Auditor's office a statement showing that the company had an actual capital of a given amount, either in cash or in safe investments, exclusive of costs. These requirements were held by this court to be in violation of the Constitution of the United States in their application to foreign corporations engaged in interstate commerce. The court said: "If the subject was one which appertained to the jurisdiction of the State legislature, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the National and not the State legislature. Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety. 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." Again, in the same case: "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." Further, in the same case: "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." To the same general effect are many other cases. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Leloup* v. *Mobile*, 127 U. S. 640; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Lyng* v. *Michigan*, 135 U. S. 166; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1. It is true that the statute does not, in terms, require the corporation of another State engaged in interstate commerce to take

out what is technically "a license" to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers and files a "Statement" of the kind mentioned in § 1283. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a *condition* upon a corporation of another State seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce. It follows that the particular clause of § 1283 requiring that "Statement" is illegal and void.

In this connection it is to be observed that by the statute the doors of Kansas courts are closed against the Textbook Company, unless it *first* obtains from the Secretary of State a certificate showing that the "Statement" mentioned in § 1283 has been properly made. In other words, although the Textbook Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do, namely, make, deliver and file with the Secretary of State the Statement required by § 1283. If the State could, under any circumstances, legally forbid its courts from taking jurisdiction of a suit brought by a corporation of another State, engaged in interstate business, upon a valid contract arising out of such business and made with it by a citizen of Kansas, it could not impose on the company, as *a condition of its authority to carry on its interstate business in Kansas*, that it shall make, deliver and file that Statement with the Secretary of State and obtain his certificate that it had been properly made. This court held in *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 148, that a State may, subject to the restrictions of the Federal Constitution, "determine the limits of the jurisdiction of its courts, and the character of the

controversies which shall be heard in them." But it also said in the same case: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution." How far a corporation of one State is entitled to claim in another State, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the Statement mentioned in § 1283 of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and, therefore, is in violation of its constitutional rights. It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a Statement setting forth certain facts which the State, confessedly, could not control by legislation. It results that the provision as to the Statement mentioned in § 1283 must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of *the same section* which provides that the obtaining of the certificate of the Secretary of State that such Statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas. Section 1283, looking at the object for which it was enacted, must be regarded as an entirety. These

parts of the statute are so connected with and dependent upon each other that the clause relating to actions brought in the courts of Kansas cannot be separated from the prior clause in the *same section* referring to the Statement to be filed with the Secretary of State, and the former left in force after the latter is stricken down as invalid. As the clause about suits in the courts of Kansas *expressly refers* to the prior clauses *in the same section* prescribing the Statement to be filed with the Secretary of State, the clause relating to suits would be meaningless without reference to the latter. We cannot suppose, from the words of the statute, that the legislature would have adopted the regulation about actions in the state courts, except for the purpose of enforcing the prior clause in the same section relating to the Statement to be filed with the Secretary of State. The several parts of the section are not capable of separation if effect be given to the legislative intent. It is well settled that if a statute is in part unconstitutional the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intent of the legislature. In *Allen* v. *Louisiana*, 103 U. S. 80, 84, this court referred with approval to what Chief Justice Shaw said on this point in *Warren* v. *Mayor &c.*, 2 Gray, 84. Referring to the rule obtaining in cases of statutes in part constitutional and in part unconstitutional, that eminent jurist said: "But, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." See also *Poindexter* v. *Greenhow*, 114 U. S. 270; *Spraigue* v. *Thompson*, 118 U. S. 90; *Huntington* v. *Worthen*, 120 U. S. 97.

It results that as the part of § 1283, which relates to the Statement to be filed with the Secretary is unconstitutional, and as the clause in the same section, relating to suits in the state court, is so dependent upon and connected with that part as to be meaningless when standing alone, the section must be held inoperative in all its parts and as not being in the way of the enforcement in any state court of competent jurisdiction of the plaintiff's right to a judgment against the defendant for the amount conceded to be due from him to the Textbook Company under his contract. The judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr Justice Moody heard the argument of this case, participated in its decision in conference, and approves the reversal of the judgment upon the grounds stated in this opinion.

Reversed.

The Chief Justice and Mr. Justice McKenna dissent.

SOUTHWESTERN OIL COMPANY *v.* STATE OF TEXAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 119. Argued March 2, 1910.—Decided April 4, 1910.

This court will not consider whether a state statute is unconstitutional under provisions of the Constitution other than those set up in the state court even if those provisions be referred to in the assignment of error.

On writ of error this court is not concerned with the question of whether the statute attacked as unconstitutional under the Fourteenth Amendment violates the state constitution if the state courts have held that it does not do so.

Whether the severity of penalties for non-compliance with a state statute renders it unconstitutional under the Fourteenth Amendment will not be considered in an action in which the State does not ask for any penalties.

The Fourteenth Amendment was not intended to cripple the taxing power of the States or to impose upon them any iron rule of taxation.

This court will not speculate as to the motive of a State in adopting taxing laws, but assumes—the statute neither upon its face nor by necessary operation suggesting a contrary assumption—that it was adopted in good faith.

Except as restrained by its own or the Federal Constitution, a State may prescribe any system of taxation it deems best; and it may, without violating the Fourteenth Amendment, classify occupations, imposing a tax on some and not on others, so long as it treats equally all in the same class.

An occupation tax on all wholesale dealers in certain specified articles does not on its face deprive wholesale dealers in those articles of their property without due process of law or deny them the equal protection of the law because a similar tax is not imposed on wholesale dealers in other articles, and so held as to the Kennedy Act of Texas of 1905 levying an occupation tax on wholesale dealers in coal and mineral oils.

A Federal court cannot interfere with the enforcement of a state statute merely because it disapproves of the terms of the act, questions the wisdom of its enactment, or is not sure as to the precise reasons inducing the State to enact it.

100 Texas, 647, affirmed.

THE facts, which involve the constitutionality of certain provisions of the Kennedy Act of Texas of 1905 for taxing certain classes of business, are stated in the opinion.

Mr. George C. Greer, with whom *Mr. F. C. Proctor* and *Mr. D. E. Greer* were on the brief, for plaintiff in error.

Mr. James D. Walthall, with whom *Mr. R. V. Davidson*, Attorney General of the State of Texas, was on the brief, for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the State of Texas in one of its own courts against the Southwestern Oil Company, a corporation of that State, to recover the amount of certain taxes alleged to be due under what is known as the Kennedy act, Chapter 148, General Laws of Texas, 1905, p. 358, providing

for the levy and collection of a tax upon individuals, firms, associations or other persons, owning, managing, operating or controlling for profit within the State certain specified kinds of business, including *wholesale* dealers in coal oil, etc., and prescribing penalties for violations of the act. The State recovered judgment for a part of that amount. Upon appeal to the Court of Civil Appeals the judgment was affirmed, and the action of the latter court was afterwards affirmed by the Supreme Court of Texas.

Upon this writ of error the Southwestern Oil Company contends here, as it contended in the state courts, that the statute under which the State proceeded was in violation of the Constitution of the United States.

The statute in question (§ 9) provides: "Each and every person, association of persons or corporation created by the laws of this or any other State or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents in this State, in the *wholesale* business of coal oil, naphtha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent upon their gross receipts from any and all sales in this State of any of said articles in section 9 of this act hereinabove mentioned, and an annual tax of two per cent of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any manner other than by sale in this State; and it is hereby expressly provided that delivery to or possession by any person, association of persons or corporation in this State of any of the articles hereinabove mentioned in section 9 of this act, from whatever source the same may have been received, shall for the purpose of this act be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will and shall subject the same to the tax herein provided for. Said tax herein provided for shall be paid to the State Treasurer quarterly, and every such person, agent, association of per-

sons, or corporation so owning, controlling or managing such business shall, on or before the first day of April, and quarterly thereafter, report to the Comptroller under oath of the president, treasurer, superintendent or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this State. Should any person, association of persons or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay said taxes for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars. Each and every day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officers or agents so failing, shall forfeit and pay to the State the sum of twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for in this article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis County, and service may be had upon any officer or agent of such company or corporation in the State, and such service shall in all respects be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law."

The defendant insists that the statute is inconsistent with the Fourteenth Amendment of the Constitution of the United States, in the following particulars: That it arbitrarily selects and levies upon the *wholesale* business in coal oil, naphtha, benzine or other mineral oils refined from petroleum, and any and all mineral oils, a tax of from fifty to one hundred times

greater than is levied by the State upon wholesale business in other articles; that it denies to the defendant the equal protection of the laws, in that the failure of the wholesale dealer to pay the required tax for thirty days is made a misdemeanor and subjects such dealer upon conviction to a fine of not less than fifty nor more than one hundred dollars, each day after the expiration of the thirty days being deemed a separate offense, and, in addition, subjects him to a forfeiture of $25 for each day's delay in making the report required and paying the taxes imposed, while the only punishment prescribed against a wholesale dealer in other articles was a fine in any sum not less than the taxes due, and not more than double that sum and the cost of prosecution, the taxpayer in such case having the right to a dismissal of the prosecution on the payment of the tax and costs of prosecution and procuring the license to pursue or follow the occupation for the pursuing of which, without license, the prosecution was instituted; no prosecution to be commenced against any person after the procuring of said license, if the license procured covers the time actually followed in said occupation or calling. Penal Code, Art. 112.

The transcript contains three principal assignments of error, one of which is that the state court should have held § 9 of the statute to be unconstitutional as laying a tax or burden on interstate commerce. It may be observed that no such defense was made by the company in its answer, and we need not stop to consider the question whether such a defense would have merit. Besides, the certificate made by the Supreme Court of Texas, at the request of the Oil Company, shows that the alleged invalidity of the statute was based entirely on the Fourteenth Amendment. Again, no point under the commerce clause is urged in the brief of the company. In this court it contends only that § 9 of the statute contravenes the Fourteenth Amendment. In our consideration of that proposition we assume, in conformity with the decision of the state court, that the statute is not in vio-

lation of any provision of the constitution or statute of Texas. That is a local question with which this court is not concerned on this writ of error. We are only concerned to inquire whether the statute is inconsistent with the Fourteenth Amendment, either as depriving the taxpayer of property without due process of law or as denying the equal protection of the laws.

Looking at the clause of the Amendment prohibiting the deprivation of property without due process of law, it is to be remembered that the provision to that effect appeared in most of the state constitutions long before the Amendment was adopted, and that principle was accepted everywhere as vital in the American systems of government. But the amendment, although negative in its words, had the effect to incorporate into the fundamental law of each State a rule theretofore prescribed by the Constitution of the United States for the General Government and its agencies. So that prior to the adoption of the Fourteenth Amendment the States were controlled, in imposing and collecting taxes, entirely by their own fundamental law, and if they departed from due process of law in matters involving the deprivation of property the taxpayer injuriously affected by its action could not, *for that reason*, prior to the Amendment, invoke for his or its protection any provision of the Constitution of the United States. But upon the adoption of the Fourteenth Amendment—whatever their own constitutions may then, or have subsequently, declared—the States became bound, as was the United States by the Fifth Amendment, not to deprive any person of property without due process of law. Still it was never contemplated, when the Amendment was adopted, to restrain or cripple the taxing power of the States, whatever the methods they devised for the purposes of taxation, unless those methods, by their necessary operation, were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws in respect of rights of property.

Can it be predicated of the statute of Texas that its provisions for the imposition and collection of taxes is not conformable to due process of law? We think not. The tax in question is an occupation tax only. The statute has been so construed by the state court, and the counsel for the Oil Company accept that construction as the law that should be applied in this case. The tax was imposed by the legislature, charged with the duty of providing the means necessary for the support of the state government. That branch of the state government alone could declare what taxes should be imposed and upon whom or upon what kinds of business imposed. If the State seeks, directly by civil suit, or indirectly by criminal prosecution in one of its courts, to enforce the provisions of the statute, the way is open for the taxpayer, in his defense, to raise the question of the constitutional validity either of the statute as a whole, or of any method prescribed in it for the collection of the tax. No element of due process of law seems to be wanting unless it be, as contended by the Oil Company, that the penalties prescribed for failing to make the "reports" required by the statute are so severe and exacting as to make it unsafe for the taxpayer to question the validity of such penalties and thereby interfere with or suspend the collection of the taxes by insisting that they have been imposed in disregard of due process of law. But this point, as to the severity and exacting character of the penalties, need not be now considered, because no penalties are claimed by the State in this action and no judgment therefor was rendered. Besides, the provision as to penalties is not so necessarily connected with the other parts of the statute as to vitiate the entire act, even if that provision should be held to be void. The right of the State, by a civil suit, to recover the taxes imposed is wholly independent of its right, by suit or prosecution, to recover the prescribed penalties. If the provisions as to penalties should be stricken down, there will still be left a complete act providing for the collection by civil suit of the taxes due the

State. The rule is well settled that if one part of a statute is valid and another invalid the former may be enforced, if it be not so connected with or dependent on the other as to make it clear that the legislature would not have passed that part without the part that may be deemed invalid.

But it is contended that the statute contravenes the Fourteenth Amendment, in that it denies to the Oil Company the equal protection of the laws. This position is based mainly on the ground that the statute by imposing a tax on *wholesale* dealers in coal oil, naphtha, benzine, mineral oils refined from petroleum, and all other mineral oils, while omitting to put any such tax whatever on wholesale dealers in other articles of merchandise—such, for instance, as sugar, bacon, coal and iron—so discriminates against wholesale dealers in the several articles specified in § 9 as to deny them the equal protection of the laws. This view gives to the Amendment a scope that could not have been contemplated at the time of its adoption. The tax in question is conceded to be an occupation tax simply. It was imposed under the authority of the state constitution, providing that the legislature may "impose occupation taxes, both upon natural persons and occupations other than municipal, doing any business in this State, . . . except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax." It is not questioned that the State may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights. The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the State, in its discretion, to classify occupations for purposes of taxation. The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best by it for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment.

A leading case on the general subject is *Bell's Gap Rd. Co.* v. *Pennsylvania*, 134 U. S. 232, 237. In that case a question arose as to whether a statute of Pennsylvania, subjecting bonds and other securities issued by corporations, to a higher rate of taxation than was imposed on other moneyed securities, was a denial of the equal protection of the laws to corporations. This court held that there was no discrimination which the State was not competent to make, saying: "All corporate securities are subject to the same regulations. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usages, are within the discretion of the state legislature, or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions

and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

In *Home Ins. Co.* v. *New York*, 134 U. S. 594, involving the constitutional validity of a law taxing corporate franchises and business, the court held that the statute was not a denial of the equal protection of laws. It said that the Amendment "does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the Amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another *of the same class*."

So, in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562: "A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or

calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

There are many other cases in which the court considered the meaning and scope of the constitutional guaranty of the equal protection of the laws. We will refer to a few of them.

In *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, the court sustained, as not inconsistent with the equal protection clause of the Fourteenth Amendment, a Kentucky statute providing for the assessment of railroad property for purposes of taxation in a mode different from that prescribed as to ordinary real estate, or as to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. It said that "the rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents *of each class*, so that the law shall operate equally and uniformly upon all persons *in similar circumstances*. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained." In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294, which involved the constitutionality of an inheritance tax law, the court recognized the power of the State to "distinguish, select and classify objects of legislation," by laws which did not violate the settled usages and established practices of our Government. In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, a state enactment, imposing a license tax on the business of refining sugar and molasses was held not

to be a denial of the equal protection of the laws, because of the exemption from such tax of planters and farmers who ground and refined their own sugar and molasses. In *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, a statute requiring a license to operate a warehouse for the receipt of grain, located upon the right of way of a railroad, but which did not require a license as to a similar warehouse not located on any right of way, was not a denial of the equal protection of the laws to the first-named class. In *Cook* v. *Marshall Co.*, 196 U. S. 268, which involved the validity of a cigarette tax law that made a distinction between jobbers and wholesale dealers in cigarettes, the court said: "There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. They are two entirely distinct occupations. One sells at retail, and the other at wholesale, one to the public generally, and the other to a particular class; one within the State, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned." In *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, a state law, imposing a license tax on meat packing houses, did not deny the equal protection of the laws to persons or corporations engaged in such business, because a like tax was not imposed on persons engaged in the business of selling the products of such houses, or on those engaged in packing articles of food other than meat.

In our judgment, the objection that within the true meaning of the Fourteenth Amendment, the statute of Texas has the effect to deny to the Oil Company the equal protection

of the laws does not rest upon any solid basis. The statute makes no distinction among such wholesale dealers as handle *the particular articles specified in* § 9. The State had the right to classify such dealers separately from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents *of each of those separate classes* on the same plane of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a court of law. And it cannot be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the State to adopt the classification of which the Oil Company complains, we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the State was to encourage retail dealing in the particular articles mentioned in § 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground. We may repeat what was said in *Delaware Railroad Tax Cases*, 18 Wall. 206, 231, that "it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." But we will not speculate as to the motives of the State, and will assume—the statute, either upon its face or by its necessary operation, not suggesting a contrary assumption—that the State has in good faith sought, by its legislation, to protect or promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by its own constitution or by the Constitution of the United States, the State of Texas, by its Legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that, so far as the

power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State, that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law or to deny him the equal protection of the laws; and that the Federal court cannot interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the State to enact it.

For the reasons herein stated, the judgment is

Affirmed.

UNITY BANKING AND SAVING COMPANY *v.* BETTMAN, TRUSTEE OF HOLZMAN & CO., BANKRUPTS.

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

No. 126. Argued March 4, 7, 1910.—Decided April 4, 1910.

As against the true owner, a right of property cannot be acquired by means of a forged written instrument relating to such property, except when the owner has by laches or gross or culpable negligence induced another who proceeds with reasonable care to act in belief that the instrument was genuine or would be so recognized by the owner.

Where the owner of property which passes only by written transfer has left it with another who has wilfully forged the name of such owner to a transfer of the property, the person taking it acquires no right thereto merely because the property was left with party committing the forgery.

Quære, how far a broker having lawful possession of stock certificates belonging to a customer, the legal title to which has not been transferred to him, may retain the same as security for any debt balance of such customer.

THE only question to be determined in this case relates to the ownership of fifty shares of preferred stock in the Philip Carey Manufacturing Company, a corporation of Ohio.

On or about May 13th, 1905, Richard Fritz, the owner of such shares, placed the certificate for them in the hands of a member of the partnership of Holzman & Co., brokers, with or through whom Fritz had some dealings. The deposit of the stock with that firm was upon an express agreement that it was to be held by them only to show Fritz's financial responsibility, and was not to pass out of their possession. There was no change in the terms or conditions of that contract. The certificate was in the name of Fritz Brothers, and was thus indorsed: "For value received, I, the undersigned, hereby sell and transfer to Richard Fritz fifty shares of stock within mentioned and described and hereby appoint true and lawful attorney irrevocable, with power and [of] substitution to transfer said stock on the books of the company. Witness hand and seal this 5th day of January 1905. Fritz Bros. per Otto H. Fritz. Witness Max Winkler."

On May 5th, 1905, without the knowledge or consent of Fritz, this certificate was pledged by Holzman & Co. with the Unity Banking and Saving Company as a substituted security for a note, dated March 21st, 1905, for $10,000, which that firm had executed to the bank, other security of substantially the same value being withdrawn at the time of the substitution. That transaction had no connection with any dealings by Holzman & Co. for or on behalf of Fritz.

When the pledge to the bank was made there was pinned to the certificate a blank power of attorney purporting to have been signed May 13th, 1905, by Richard Fritz in the presence of Ross Holzman, the active member of the firm of

Holzman & Co. None of the blanks in the power of attorney were then filled out, and the only writing on the paper included the date, the name of Richard Fritz in the blank for the signature, and Ross Holzman in the blank for the attestation.

Upon the petition of certain creditors of Holzman & Co., that partnership and the individuals composing it were on July 1st, 1905, adjudicated bankrupts by the District Court of the United States for the Southern District of Ohio, the petition charging that the act of bankruptcy was committed May 25th, 1905. Boyden was the first trustee in the bankruptcy case. He subsequently resigned and was succeeded by Bettman. The case was sent to a Referee in Bankruptcy to take such further proceedings as might be necessary.

Richard Fritz filed in the bankruptcy proceeding a claim, supported by affidavit, that he owned the certificate of stock placed with Holzman & Co., and which, as above stated, was afterwards pledged by that firm, without the authority or knowledge of Fritz, with the Unity Banking and Saving Company. He neither signed, nor authorized to be signed for him, the blank power of attorney of May 13th, 1905, and his name to that paper was a forgery. It does not appear who committed the forgery. But at the time of the hearing of the case Ross Holzman was beyond the jurisdiction of the court and in parts unknown. The Referee so stated.

The relief sought by Fritz was, among other things, an order requiring the delivery to him of the above stock in the Philip Carey Manufacturing Company, free from the claims of all the parties.

At the time of the hearing below the certificate for the stock had come under the control of the court. The Banking and Saving Company asserted its right to the possession of the stock and to retain the certificate therefor, with authority to apply the proceeds of the sale of the stock on the loan for which it had been pledged to the bank. The trustee asked

the determination of the controversy between Richard Fritz and the Manufacturing Company and for the protection of the interests represented by him as trustee. He contended that if Fritz did not sign the power in question, he authorized it to be signed for him.

The cause was sent to a Referee in Bankruptcy, who found that Richard Fritz had never signed the above power of attorney, nor authorized any one to sign it for him; that he was the owner of the fifty shares of stock represented by the certificate; and that he was entitled to the possession of them, free of all liens and interests, either by the Unity Banking and Saving Company or of the trustee in bankruptcy. The Referee thus stated his conclusion of law from the facts found by him: "Where F deposits with a broker a certificate of stock belonging to F and in his name, without any indorsement or power to execute or transfer of said stock, upon an agreement that said stock is to be held by said broker as an evidence of F's financial responsibility only and is not to leave the broker's possession, and the broker pledges said certificate to a bank as security upon a note of the broker for money loaned by the bank to the broker for general use of the broker, the bank holds said certificate, subject to all the conditions of the original deposit by F with the broker, and F is not estopped to claim title to said certificate as against the bank by the mere placing of said certificate in the hands of the broker, or the further fact that in the course of dealings between F and the broker large balances have at various times been owed by F to the broker when it appears that no demand for the payment of said balances was made upon F or notice served upon him changing the conditions of the deposit of said stock and further, that at the conclusion of the dealings between F and the broker, F is a creditor and not a debtor of said broker."

This order, upon being brought before the court in bankruptcy for review, was affirmed. The case was then carried by appeal to the Circuit Court of Appeals, which affirmed the

decree of the District Court. Only the Unity Bank and Saving Company appealed to this court.

Mr. Constant Southworth, with whom *Mr. Louis J. Dolle* was on the brief, for appellant:

Fritz was engaged in a gambling transaction with the bankrupts. He has no standing in this court of equity to claim the Carey certificate.

Fritz and the bankrupts are charged with knowledge that their dealings were illegal. See *Re A. B. Baxter & Co.,* 152 Fed. Rep. 137; *Wood* v. *Hubbell,* 10 N. Y. 479; *Irwin* v. *Williar,* 110 U. S. 499, 511; *Flagg* v. *Baldwin,* 38 N. J. Eq. 219, 231; *Lester* v. *Buel,* 49 Ohio St. 240, 252; *Barnard* v. *Backhaus,* 52 Wisconsin, 593. Hence Fritz has no standing in this court of equity. *Kahn* v. *Walton,* 46 Ohio St. 195; *Higgins* v. *McCrea,* 116 U. S. 671; *Loevy* v. *Kansas City,* 168 Fed. Rep. 524; *Marden* v. *Phillips,* 4 Am. Bk. Rep. 566; *St. Louis R. R. Co.* v. *Terre Haute R. R.,* 145 U. S. 393, 407; *Thomas* v. *City of Richmond,* 12 Wall. 349; *Hanauer* v. *Doane,* 12 Wall. 349.

The Unity Bank is in a far better position than the bankrupts. If the bankrupts could have interposed the defense of illegality, much more can the Unity Bank, which is an innocent purchaser for value. *Baxter* v. *Deneen,* 98 Maryland, 181; *Plank* v. *Jackson,* 128 Indiana, 424; and see *Cont'l Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227.

As against an innocent purchaser for value such as the Unity Bank, Fritz has no standing in this court of equity to recover the Carey certificate, because his gambling partners abused his confidence. See Ohio statutes as to gaming, § 6934*a*–1; § 1; § 6934*a*–2; § 6934*a*–4; § 4.

The Ohio statutes as to losses at gaming are in the nature of penal statutes, *Paul* v. *Groene,* 4 O. L. R. 632; and of course they will not be recognized or enforced in a Federal court. *Perkins* v. *B. & A. R. R. Co.,* 90 Fed. Rep. 321. The local law, including the Ohio cases, controls. *Security Warehousing Co.* v. *Hand,* 206 U. S. 415.

The fact of the illegality of a contract may be raised at any time in a legal proceeding; and the court may do so of its own motion in the absence of objection by the parties. *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *In re Wilde's Sons*, 144 Fed. Rep. 972; Loveland's Bankruptcy, 3d ed., 143.

The answer of the Unity Bank is evidence and proves that the disputed signature is genuine and adopted by Fritz.

Bankruptcy proceedings are governed by the rules of equity. *Re McIntire*, 142 Fed. Rep. 593; *Bardes* v. *Bank*, 178 U. S. 524; *Dodge* v. *Nortin*, 133 Fed. Rep. 363; *Nashville Ry. Co.* v. *Bum*, 168 Fed. Rep. 862; *Shook* v. *Dozier*, 168 Fed. Rep. 867; *Scott* v. *McNeely*, 140 U. S. 106; *Elliott* v. *Toeppner*, 187 U. S. 327; General Orders in Bankruptcy, No. 37; *Schwarts* v. *Siegel*, 117 Fed. Rep. 13, 16; *In re Rochford*, 124 Fed. Rep. 182; *In re Cooper Bros.*, 159 Fed. Rep. 956; *Goldman* v. *Smith*, 93 Fed. Rep. 182; *Dokken* v. *Page*, 147 Fed. Rep. 438; *Barton* v. *Barbour*, 140 U. S. 126; *Rouse* v. *Hornsby*, 161 U. S. 588; *Mercantile Trust Co.* v. *Pitts. & W. Ry. Co.*, 115 Fed. Rep. 475; Loveland's Bankruptcy, 3d ed., pp. 34, 88, 458, 459.

Marshalling assets is essentially equitable relief. 2 Pomeroy's Equitable Remedies, § 865 (6 Pomeroy's Eq. Jur., § 865).

The circumstantial evidence in the case shows conclusively that the power of attorney was Fritz's either by actual execution or by adoption. The referee wrongfully placed the burden of proof on the Unity Bank, which materially prejudiced its rights. *McNutt & Ross* v. *Kaufman*, 26 Ohio St. 127; *List & Sons Co.* v. *Chase*, 80 Ohio St. 42.

Where a party like Fritz attempts to make his case by proving the commission of crime, as forgery, in a civil case, his testimony must be clear and convincing. *United States* v. *Am. Bell Tel. Co.*, 167 U. S. 224; *Lexington Ins. Co.* v. *Paver*, 16 Ohio, 324, 332; approved in *Strader* v. *Mullane*, 17 Ohio St. 624; *Still* v. *Wilson*, Wright, 505; *Sprague* v. *Dodge*, 48 Illinois, 142; *Lalone* v. *United States*, 164 U. S. 255; *Conner* v.

Groh, 90 Maryland, 674; *Kansas M. O. M. Ins. Co.* v. *Rammelsberg*, 58 Kansas, 531.

The bankrupts had the right to rehypothecate the Carey stock to raise money to carry out Fritz's orders. The Unity Bank, therefore, acquired a valid lien to the extent of its advance. *Lawrence* v. *Maxwell*, 58 Barb. (N. Y.) 511; 53 N. Y. 19; *Whitlock* v. *Seaboard National Bank*, 29 Misc. (N. Y.) 84; and see also *Martin* v. *Megargee*, 212 Pa. St. 558; *Horton* v. *Morgan*, 19 N. Y. 170; *Caswell* v. *Putnam*, 120 N. Y. 152; *Mays* v. *Knowlton*, 134 N. Y. 250; *Berlin* v. *Eddy*, 33 Missouri, 426; *Price* v. *Gover*, 40 Maryland, 103.

The rehypothecation of the Carey certificate to the Unity Bank gave it in equity all the rights of the bankrupts. *Talty* v. *Freedman's Savings & Trust Co.*, 93 U. S. 321; *Belden* v. *Perkins*, 78 Illinois, 449; and see also *Donald* v. *Suckling*, L. R., 1 Queen's Bench, 585; *Reardon* v. *Patterson*, 19 Montana, 231; *National Cash Register Co.* v. *Cerrone*, 76 Ohio St. 12.

It is also held that the assignment of the collateral carried with it the debts secured. *Lahmers* v. *Schmidt*, 35 Minnesota, 434; *Dintruff* v. *Crittenden*, 1 Thomp. & C. (N. Y.) 143; *Hawkins* v. *Oswald*, 2 Woodw. Dec. (Pa.) 345.

It makes no difference whether or not Fritz knew of the equitable assignment to the Unity Bank of his debt, or that the equitable assignment was of part only of his debt to the bank. *Knickerbocker Trust Co.* v. *Coyle*, 139 Fed. Rep. 792; *Exchange Bank* v. *McLoon*, 73 Maine, 498, 505; Jones on "Liens," 2d ed., § 43. Fritz's debt to the bankrupts is still unpaid. Fritz was negligent and must bear any loss that may occur. *First National Bank of Chicago* v. *Baird*, 141 Fed. Rep. 862; *Brown* v. *Blydenburg*, 7 N. Y. 141, approved in *Kenochan* v. *Dunham*, 48 Ohio St. 1, 24; *Syracuse Savings Bank* v. *Merrick*, 182 N. Y. 387; *Hoffmaster* v. *Black*, 78 Ohio St. 1; 4 Cyc. 85, note 13.

Even though Fritz could recover the Carey stock from the bankrupts, he cannot recover it from an innocent transferee,

such as the Unity Bank. *Fenno* v. *Sare*, 3 Alabama, 458; *Willis* v. *Hockaday*, 1 Spear (So. Car. Law), 379; *Chiles* v. *Coleman*, 2 A. K. Marshall (Ky.), 296 (687); *Neuremberger* v. *Lehenhauer*, 23 Ky. L. Rep. 1753; *Greathouse* v. *Throckmorton*, 7 J. J. Marshall (30 Ky.), 17, 28; *Harrod* v. *Black*, 1 Duv. (62 Ky.) 180; *Braswell* v. *Braswell*, 109 Kentucky, 15, 17; *Smith* v. *Kamerer*, 152 Pa. St. 98; *Martinez* v. *Lindsey & Gay*, 91 Alabama, 334; *Parsons* v. *Joseph*, 92 Alabama, 403; *Maue* v. *Krell Piano Co.*, 7 O. L. R. 539; *Lawler* v. *Kell*, 4 Ohio Nisi Prius, 218; *Oliver* v. *Cincinnati, C. & W. Tpk. Co.*, Hosea, 457, affirmed. And see *Combes* v. *Chandler et al.*, 33 Ohio St. 178.

Mr. Theodore Horstman for appellee Fritz.

Mr. Justice Harlan, after stating the case as above, delivered the opinion of the court.

Briefly outlined, the case as disclosed by the above statement is this: The certificate of stock in the Carey Manufacturing Company was placed in the possession of Holzman & Co. under an express agreement that it should not go out of their possession, but be held simply for the purpose of showing Fritz's financial responsibility; that Holzman & Co. had no authority to pledge the stock with the Unity Banking and Saving Company as security for the payment of their individual note for $10,000 to that institution; that the pledging of the stock with the bank by Holzman & Co. was without Fritz's knowledge; that his signature to the blank power of attorney was unauthorized by him and was a forgery; that Fritz did not, by anything said, done or omitted by him, lead the bank to believe that he had executed such power of attorney, or had authorized any one to do so for him; and that he never, in any way, ratified the forgery of his name or approved the pledging of the stock to the Unity Banking and Saving Company for the individual debt of Holzman & Co.

In view of these facts—which the Referee as well as the District and Circuit Courts of Appeals correctly held to have been established by the evidence—it would seem unnecessary to cite authorities to show that, as between the bank and Fritz, the bank did not acquire any interest, legal or equitable, in the stock represented by the certificate placed in the possession of Holzman & Co. under the circumstances stated. The bank no doubt relied upon the integrity of that firm, and acted in the belief that Fritz had in fact signed the blank power of attorney or authorized it be signed for him. But that belief was not, according to the evidence, superinduced by anything said, done or omitted by Fritz. He was not chargeable with laches or negligence. The bank having elected to rely upon Holzman & Co., must stand the consequences. It cannot say that it was misled by Fritz to its prejudice. It could not, therefore, as between itself and Fritz, take anything in virtue of the forgery. As against the true owner, a right of property cannot be acquired by means of a forged written instrument relating to such property. This is the general rule. An exception to the rule arises where the owner by laches, or by culpable, gross negligence, or by remaining silent when he should speak, has induced another, proceeding with reasonable caution, to act with reference to the property, in the belief that the instrument was genuine, or would be so recognized by the owner. In such cases the owner would be equitably estopped to rely upon the fact of forgery, as against the person who was misled by his conduct. There are no facts in this case from which could arise an exception to the general rule.

Nor, in view of the facts, need we follow the example of counsel and enter upon an examination of the cases bearing on the general inquiry as to the circumstances under which a broker who, by the act of the owner, comes into the lawful possession of a stock certificate—but, without the legal title having been transferred to him—may retain the certificate as security for any balance ascertained upon settlement due

him on account of dealings for or on behalf of such customer. We say this, because it appears, and it is so found, that at the close of the business transacted by Holzman & Co. for Fritz, the latter was a creditor, not a debtor, of that firm.

In any aspect in which the case can be properly viewed, and for the reasons stated, the judgment sustaining Fritz's claim to the stock and certificate in question must be

Affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 111. Argued January 26, 27, 1910.—Decided April 4, 1910.

Where the constitutional defenses asserted in the answer, and embraced in the instructions asked and refused, in an action for penalties for violating an order of a state commission are not confined to the reasonableness of the order as such, but also challenge the power of the State to inflict the penalty at all under the circumstances disclosed by the answer, the judgment does not rest on grounds of local law alone, but a Federal right has been set up and denied which gives this court jurisdiction to review the judgment under § 709, Rev. Stat.

A state statute which compels a railroad to distribute cars for shipments in a manner that subjects it to payment of heavy penalties in connection with its interstate business imposes a burden on its interstate business, and is unconstitutional under the commerce clause of the Constitution; and so held in regard to the Arkansas act and order of the commission in regard to distribution of cars for shipment of freight.

Whether or not the rules of an association of railroads in regard to exchange of cars are efficient to secure just dealings as to cars moved in interstate commerce is a matter within Federal control, and it is beyond the power of a state court to determine that they are inefficient and to compel a member of the association to violate such rules.

85 Arkansas, 311, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Constitution of the United States of a regulation of the Railroad Commission of Arkansas as to delivery of freight cars, are stated in the opinion.

Mr. Roy F. Britton, with whom *Mr. Samuel H. West, Mr. Frank G. Bridges, Mr. William T. Woolbridge* and *Mr. Nicholas J. Gantt, Jr.,* were on the brief, for plaintiff in error:

Order No. 305 of the Railroad Commission of Arkansas, or §§ 6803 and 6804 of Kirby's Digest, as construed by the Supreme Court of Arkansas, being the necessary basis for this suit, and being, by their terms and as so construed, a burden on interstate commerce, there is a Federal question involved, and this court has jurisdiction. *Arrowsmith* v. *Harmoning,* 118 U. S. 194; *Leathe* v. *Thomas,* 207 U. S. 93; *Houston & T. C. Rd. Co.* v. *Mayes,* 201 U. S. 321; *Gibbons* v. *Ogden,* 9 Wheat. 1; *United States* v. *E. C. Knight Co.,* 156 U. S. 1; *Wabash &c. Ry. Co.* v. *Illinois,* 118 U. S. 557; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *Johnson* v. *So. Pac. Co.,* 196 U. S. 1.

Order No. 305 of the Railroad Commission of Arkansas, and §§ 6803 and 6804 of Kirby's Digest, as construed by the Supreme Court of Arkansas in this suit, are void as regulations of interstate commerce.

A regulation of the instrumentalities of interstate commerce is a regulation of that commerce, and is repugnant to the commerce clause of the United States Constitution. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *United States* v. *E. C. Knight Co.,* 156 U. S. 1; *Johnson* v. *Southern Pac. Co.,* 196 U. S. 1; *Cooley* v. *Board of Wardens,* 12 How. 299; *Hall* v. *De Cuir,* 95 U. S. 485; *Covington Bridge Co.* v. *Kentucky,* 154 U. S. 204; *Louisville Rd. Co.* v. *Stock Yards Co.,* 212 U. S. 132; *Miss. R. R. Com.* v. *Illinois Cent. R.,* 203 U. S. 335; *McLean* v. *Denver &c. R. Co.,* 203 U. S. 38; *Adams Express Co.* v. *Kentucky,* 214 U. S. 218; *Rhodes* v. *Iowa,* 170 U. S. 412; *Central Stock Yards Co.* v. *Louisville & N. R. Co.,* 118 Fed. Rep. 113; *Smith* v. *Alabama,* 124 U. S. 465; *Nashville, C. & St. L. R. Co.*

v. *Alabama*, 128 U. S. 196; *Hennington* v. *Georgia*, 163 U. S. 299; *New York &c. R. Co.* v. *New York*, 165 U. S. 628.

The order of the Railroad Commission and the statutes of Arkansas, as applied to the facts in this case, impose a direct burden on interstate commerce. *Houston & T. C. Rd. Co.* v. *Mayes*, 201 U. S. 321; *McNeil* v. *Southern Ry. Co.*, 202 U. S. 543; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557; *Southern Ry. Co.* v. *Commonwealth*, 107 Virginia, 771; *S. C.*, 60 S. E. Rep. 70; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Voight* v. *Wright*, 141 U. S. 62.

The order and statutes are void because Congress has legislated with respect to their subject-matter in the act to regulate commerce, approved February 4, 1887, and amendments thereto. U. S. Comp. Stat., 1901, pp. 3155, 3172; *Pennsylvania Rd. Co.* v. *Hughes*, 191 U. S. 477; *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98.

Order 305 and the statutes of Arkansas are void, because they are unreasonable, and their enforcement constitutes a taking of property without due process of law. They are, therefore, in conflict with § 1 of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Houston & T. C. R. Co.* v. *Mayes*, 201 U. S. 321; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Covington Turnpike Road* v. *Sandford*, 164 U. S. 578; *L. S. & M. S. R. Co.* v. *Smith*, 173 U. S. 684; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Henderson* v. *Mayor*, 92 U. S. 259; *Chicago &c. R. Co.* v. *Minnesota*, 134 U. S. 418; *Lawton* v. *Steele*, 152 U. S. 133; *St. L. & S. F. Co.* v. *Gill*, 156 U. S. 649; *Lochner* v. *New York*, 198 U. S. 45.

Mr. Hal Norwood, Attorney General of the State of Arkansas, and *Mr. F. E. Brown*, for the defendant in error, submitted:

For the statute law of Arkansas concerning furnishing of cars and undenied allegations of complaint filed thereunder, see act of March 11, 1899, Acts 82–99; Kirby's Dig., Ark., §§ 6787, 6286.

For the law of Arkansas concerning cars, as construed by the Supreme Court of Arkansas, which recognizes and establishes the common-law excuses for failure to furnish sufficient shipping facilities, see *St. Louis Southwestern Ry. Co.* v. *Gin Company*, 77 Arkansas, 362; *St. Louis Southwestern Ry. Co.* v. *Leder*, 79 Arkansas, 59; *St. Louis, I. M. & So. Ry. Co.* v. *Cooperage Company*, 81 Arkansas, 373; and the case below, *Oliver* v. *Chicago, R. I. & P. Ry. Co.*, 89 Arkansas, 467, express no opinion as to interstate shipments.

In this case the validity of order No. 305 of the Railroad Commission is immaterial. This suit is based upon failure to furnish cars as required by law.

On this theory, too, the instructions to the jury presented the law and not the order of the Railroad Commission, and declared the duty of carriers to furnish cars "without undue and unreasonable delay" (not in five days as in the Commission Order 305) and declared such duty in the language of the Supreme Court declaring the common-law duty to furnish cars and not in the language of Order 305.

Accordingly, the Supreme Court of Arkansas sustained this suit as one instituted for a violation of statute (not for a violation of rule of Railroad Commission), the language of the opinion of the lower court on this point being as follows: "Order 305 is not unreasonable on the ground that it contains no exception whatever, but requires the cars ordered to be furnished within five days in all cases and under all circumstances. But the order should be construed, if reasonably possible, to uphold its validity; and the Supreme Court of Arkansas has not construed this order as creating an absolute duty to furnish cars, but on the contrary, has in effect said, that the duty of a railroad company to furnish cars is no broader than the common-law duty, whether the railroad be notified to furnish cars under the statute or the rule of the Railroad Commission."

There is no Federal question involved. The statutes and decisions of the Arkansas Supreme Court do not seek to make

the duty of railroads to furnish cars an absolute one and the Arkansas law is simply declaratory of the common law. The cars not furnished in this case were ordered for shipments within the State of Arkansas—intrastate business.

The law of Arkansas which is simply declaratory of the common law requiring railroads to furnish cars, subject to reasonable excuses, is not a burden on interstate commerce. As to *Houston & Tex. Cen. Ry.* v. *Mayes*, 201 U. S. 321, see Calvert on Reg. of Commerce, p. 5, preface 160, 96 and 77.

Referring to interstate shipments, plaintiff in error suggests in its brief, page 31 of the Interstate Commerce Act of 1877, requiring railroads to furnish cars, thereby covering the same subject-matter as the state legislation, has been construed in 10 I. C. C. Rep. 636; 2 I. C. C. Rep. 116; 109 Fed. Rep. 831, as making no requirement concerning furnishing of cars, except to prevent discrimination.

Even if the Interstate Commerce Act of 1887 had applied to furnishing of cars beyond discrimination, and even if the law in this case were being tested with reference to interstate shipments, the state law declaratory of the common law would be in aid of interstate commerce, Federal policy and Federal statute, and not inconsistent therewith.

MR. JUSTICE WHITE delivered the opinion of the court.

Prior to October, 1905, the Railroad Commission of Arkansas promulgated a rule by which, within five days after written application by a shipper, it was made the duty of a railway company, under the conditions prescribed in the rule, to deliver freight cars to such shipper for the purpose of enabling him to load freight. The rule in question, known as Order No. 305, is in the margin.[1]

[1] It is ordered by the commission that its rules be so amended that when a shipper makes written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight,

Complaint was made by Philip Reinsch before the commission, charging the St. Louis Southwestern Railway Company with having violated this rule, in that it was fifty-one freight cars short in complying with written applications made at various times in October, November and December, 1905, and January, 1906, for the delivery at a station called Stutt-

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and its final destination, the railroad company shall furnish same within five days from 7 o'clock a. m. the day following such application. Provided, that when a shipper orders a car or cars and does not use the same, he shall pay demurrage for such time as he holds the car or cars, at the rate of $1.00 per car per day, dating from 7 o'clock a. m. after the car or cars are placed.

Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than five days' notice thereof, computing from 7 o'clock a. m. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

When freight in carloads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of lading therefor, and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than fifty miles per day of twenty-four hours, computing from 7 o'clock a. m. the second day following receipt of shipment. Provided, that in computing the time of freight in transit there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or rehandling freight is involved.

The period during which the movement of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this rule, and counted as additional free time.

The commission reserves the right on its own motion to suspend the operation of these rules, or any one or more of them, in whole or in part, whenever it shall appear that justice demands such action, and the commission will, upon complaint, hear and act upon applications for a like suspension.

Nothing in these rules shall apply to shipment of live stock and perishable freight where the rules of this commission or the laws of the State require the more prompt furnishing of cars or movement of freight than provided for by these rules.

gart, of a much larger number of freight cars. The commission found that the railway company was short in the delivery of cars as alleged, and that its failures in that respect not only violated Order No. 305, previously referred to, but also § 10 of an act of March 11, 1899, embodied in Kirby's Digest as § 6803. It also declared that by these violations of the statute and rule of the commission the railway company had become subject to penalties in favor of the State of Arkansas, as provided in § 18 of the act of 1899, being § 6813 of Kirby's Digest, which penalties were to be enforced as therein provided. Conformably to the section in question the prosecuting attorney for the proper county commenced this action in the name of the State against the railway company to recover penalties to the amount of $1,950. Rule No. 305 of the commission was recited, the proceedings before the commission were detailed, and the order made by the commission finding the defaults on the part of the railway company was set out, and upon these considerations the prayer for the statutory penalty was based.

A demurrer having been overruled, an answer was filed on behalf of the railway company. By that answer it was alleged that the company was engaged in the transportation of interstate shipments of freight over its line of railroad in the States of Arkansas, Illinois, Louisiana and Missouri, and that its equipment of freight cars for the transaction of its business, both interstate and state, was ample. That, anticipating the possible increase of business, both interstate and state, and as a precautionary measure, the company had, prior to the autumn of 1905, endeavored to contract for the construction of a large number of additional freight cars, but failed to do so, because the car manufacturers had such a press of work that they were unable to take the order. That thereupon, in an effort to provide for every future contingency, the corporation had at a very large expense commenced the construction of a plant of large capacity to enable it to manufacture its own cars and was pressing the same to completion in the

shortest possible time. It was alleged that at the time of the alleged defaults there was an extraordinary demand for cars, both for the movement of interstate and local traffic, and when, as the result of this condition, the shortage developed the company had equally distributed its cars to the shippers along its line, giving no preference to interstate over local shippers or to local over those desiring cars for interstate shipments. It was alleged that it would have been impossible for the company to comply with rule No. 305 without discriminating against its interstate commerce shippers, and therefore obedience to the rule would have resulted in a direct burden upon interstate commerce. Referring to the interstate commerce business of the company, which it was alleged moved over its own line through the States of Arkansas, Illinois, Louisiana and Missouri, and thence by connecting roads throughout the United States and Canada, it was charged the burden imposed upon the company to deliver cars to local shippers without reference to the effect and operation of such delivery upon the interstate commerce business of the company would be a direct burden upon interstate commerce, and therefore repugnant to the Constitution of the United States, and that the same result would flow from enforcing the command of the commission as embodied in its rule No. 305. The rule, moreover, was especially assailed as being repugnant not only to the commerce clause, but to the Fourteenth Amendment, both because of the inherent nature of the duty which the rule sought to impose, and also because of the unreasonable conditions which were expressed therein.

There was a trial to a jury. Without going into detail it suffices to say that specific instructions were asked, in reiterated form, by the defendant company concerning its asserted defenses under the Constitution of the United States; that is, the repugnancy to the Constitution of the rule of the commission and of the statute imposing penalties upon it for its failure to furnish cars. After verdict against the company for $1,350 and judgment thereon, the cause was taken to the

Supreme Court of the State of Arkansas, and from the action of that court in affirming the judgment (85 Arkansas, 311) this writ of error is prosecuted.

The question for decision will be simplified by analyzing the action of the court below—that is, by stating the facts which it deemed were established, and by precisely fixing the issues and principles governing the same which the court stated and applied. Clearing the way to consider the proposition which it conceived the case involved in its fundamental aspect, the Supreme Court of Arkansas at once disposed of the contention that the commission was without power to adopt rule No. 305 by the statement that the power to do so was expressly conferred by statutes of the State. The court did not pass on the contentions concerning the alleged conflict between the rule and the Constitution of the United States, because it was expressly declared that it was not at all necessary to do so. This was based upon the conclusion that the duty to furnish the cars which had been demanded arose from statutory provisions (Kirby's Digest, §§ 6803–6804), which were but expressive of the common law, and that the liability for the penalty which was imposed by the judgment below equally resulted, considering the default as alone arising from violations of the statutory duty.

The statutory duty to supply cars on application having been thus ascertained and the failure of the company to furnish after demand not being disputed, the court was brought to consider what it declared to be the only question in the case, that is, "Whether the undisputed evidence introduced by appellant presented a sufficient excuse for the failure to furnish the cars." In so far as adequate excuse could arise from the complete discharge by the company of the duty to equip its road with a sufficient number of cars, it was recognized that the proof was ample, indeed the court said:

"In fact, the appellant was shown to have a larger car equipment than the average freight carrying road, and the failure to furnish cars was wholly due to an inability to regain

its cars which were sent to other roads carrying freight from its own line."

Coming then to state the facts concerning the cause which the court expressly found was wholly responsible for the failure to deliver all the cars asked for, it was pointed out:

"The appellant is an originating line, originating about 70 per cent of its traffic and receiving about 30 per cent. To illustrate its situation, during the month of November, 1905, it had in revenue service 9,517 cars, of which it averaged daily 3,982 in use on its own lines, 5,525 off its line, and 2,519 foreign cars in use. In other words, a daily balance of exchange of 1,473 cars was against it, and its shortage in cars was only about 650 per day."

Directing attention to the fact that the preponderant originating business of the road led to a preponderance of interstate over domestic or local traffic, and that such interstate traffic would be greatly impeded, if not paralyzed, by breaking bulk at the state line and refusing to give continuous transportation, by not allowing its cars when loaded to move beyond its line to the roads of connecting carriers, the court was brought to consider whether, thus permitting the cars to move for the purpose of continuous interstate commerce traffic, was in and of itself a fault entailing legal responsibility under the statute for a refusal to deliver cars for local traffic when requested. In holding the negative of this proposition the court said:

"The evidence indisputably establishes that it is a benefit to the shipping public to interchange cars and not to refuse to send cars off the line. . . . It is unquestionably good for the public that the railroads of the United States have a system of interchange of cars, instead of each road hauling to its termini only, and thereby force reloading and reshipment. The inconvenience and expense of such a system would at once condemn it as failing to meet public requirements. It is unquestionably the policy of both State and Federal legislation to facilitate, if not require, an interchange

of cars. The most recent illustration of this policy is found in section 17, act April 19, 1907 (Acts 1907, p. 463). For one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England, and their fruits to the North, and their lumber and coal to the four quarters of the Union, without change from consignor to consignee."

Thus deciding that the mere delivery of cars for through transportation was not a factor in determining whether there was legal fault, the court came to consider whether there was anything in the arrangement by which the cars in question were permitted to go off the line, which in and of itself constituted fault and consequent responsibility for failure to furnish all the cars required in time of shortage. Reviewing the evidence on this subject it was found that the company was a member of an association known as the American Railway Association, which had adopted rules governing the interchange of cars from one road to another, with provisions for the return thereof and for compensation therefor, the association embracing and its rules governing ninety per cent of the railroads of the United States. Fixing thus the system which controlled the company in the interchange of its cars it was determined that the mere formation of an association for such purpose was not repugnant to the laws against combinations in restraint of trade, the court, after referring to various state decisions to that effect, saying:

"The result of these and other decisions, as summed up in an excellent text-book, is that these associations are lawful, and their rules and regulations, when reasonable, will be upheld. 2 Hutchinson on Carriers (3d ed.), § 861. Mr. Elliott says that such associations, formed for the purpose of making and enforcing reasonable regulations to facilitate business and secure the prompt loading, unloading, and return of cars, cannot be held illegal, upon the ground that the constituent companies by becoming members surrender their corporate

functions and control to the association. 4 Elliott on Railroads, § 1568."

Having thus sustained the right of the road to deliver its cars for the purpose of continuous transportation beyond its line in interstate commerce, and sanctioned the general method by which it was sought to regulate and control the transmission and return of such cars, that is, by membership in the American Railway Association, the nature and character of the rules of the association were considered. Without going into detail or following the statements of the court on the subject it suffices to say that, analyzing the rules of the association the court concluded that the regulations were inefficient in many respects, did not provide sufficient penalties to secure the prompt return of cars by roads which might receive the same, but on the contrary afforded a temptation in time of car shortage, inducing a road having the cars of another road to retain and use them, paying the penalty, as to do so would afford it an advantage. Pointing out that the general result of the operation of the rules of the American Railway Association for the interchange of cars had proven ineffective in the past, it was held that the company was at fault for delivering its cars to other roads for the movement of interstate commerce subject to the regulations of the American Railway Association, and therefore the penalty imposed in the judgment was rightly assessed.

As the penalty, which the court sustained, was enforced solely because of its conclusion as to the inefficiency of the rules and regulations of the American Railway Association, which governed ninety per cent of the railroads in the United States, the court was evidently not unmindful that the carrier before it was powerless of its own motion to change the rules thus generally prevailing, and therefore was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalties which the state statute pro-

vided for. We say this, since the court said (85 Arkansas, 322): "It may be better for the appellant to suffer these ills than to sail under a black flag, and refuse to send its cars beyond its line; that is not a question for the court. Until the appellant carrier shows reasonable rules and regulations for the interchange of cars, it cannot avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred." And the gravity of the ban on interstate commerce which it was thus recognized would result from the ruling made cannot be more vividly portrayed than by once again quoting the statement of the court on the subject, saying: "For one railroad company to be an Ishmaelite among its associates would be disastrous to its shippers." If the railroad company, compelled to be a law unto itself because of its inability to change by its own isolated will the rules of the American Railway Association, should prefer to subject itself to the penalties inflicted by the state statute rather than bring disaster to its shippers, the seriousness of the burden to which interstate commerce would be subjected cannot be better illustrated than by saying that by the provisions of the state statute, the penalty upon the carrier for each violation of the act or of the rules and regulations of the commission was not less than five hundred nor more than three thousand dollars.

When, by thus following the careful analysis made by the court below, the contentions which the case present are circumscribed and the issues to which all the controversies are reducible are accurately defined, we think no serious difficulty is involved in their solution. In the first place, it is suggested by the defendant in error that no Federal question arises for decision, and, therefore, the writ of error should be dismissed. This rests upon the theory that, as the court below put the rule of the commission, No. 305, out of view and declared in its statement of the case that no extraordinary or unusual rush of business on the line of the defendant com-

pany occasioned the car shortage, therefore no ground of Federal cognizance remained, as, in other respects, the action of the court below was, in effect, placed purely upon matters of local concern broad enough to sustain its judgment. The contention is plainly without merit. It is to be conceded that the ruling of the court as to the irrelevancy of the rule adopted by the commission eliminates from consideration so much of the answer and of the instructions asked by the company and refused, relating to the repugnancy of the order to the commerce clause of the Constitution, both on account of its inherent operation and because of unreasonable provisions, which, it was alleged, it contained. But the constitutional defenses which were asserted by the answer, and which were embraced in the instructions asked and refused, were not confined to the mere order as such, but plainly challenged the power of the State to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the answer. And the ruling of the court, that the asserted power arose from the statute instead of from the rule adopted by the commission, but changed the form without in any way minimizing or obscuring the completeness of the Federal defense which was made in the pleading and necessarily passed upon by the court below.

Coming to the merits, we think it needs but statement to demonstrate that the ruling of the court below involved necessarily the assertion of power in the State to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right. It is to be observed that there is no question here of a regulation of a State forbidding an unequal distribution of cars by a carrier for the benefit of interstate to the detriment of local commerce. This is the clear result of the finding below as to the proportion of the originating traffic of the road and the extent of

the cars retained and those permitted to go beyond the line of the road for the purposes of interstate commerce. If it be that the court below was right in its assumption that the rules of the American Railway Association, governing, as was conceded by the court, ninety per cent of the railroads and hence a vast proportion of the interstate commerce of the country, are inefficient to secure just dealing as to cars moved by the carriers engaged in interstate commerce, that fact affords no ground for conceding that such subject was within the final cognizance of the court below and could by it be made the basis of prohibiting interstate commerce or unlawfully burdening the right to carry it on. In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency we think was primarily vested in the body upon whom Congress has conferred authority in that regard.

The judgment of the Supreme Court of the State of Arkansas is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

MR. CHIEF JUSTICE FULLER dissents.

TODD *v.* ROMEU.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 408. Submitted January 10, 1910.—Decided April 4, 1910.

In Porto Rico a cautionary notice must be filed in accordance with the local law in order to render an innocent third party liable to dismembership of ownership by reason of purchase during pendency of a suit to set aside a simulated sale. *Romeu* v. *Todd*, 206 U. S. 358.

The right to file a cautionary notice in Porto Rico under the existing mortgage law is not absolute in all cases; in certain classes of cases

the right but depends on an express permissive order of the court, and one having knowledge of a suit to dismember title of his grantor in which such order is not a matter of right and no such order is applied for or granted is not bound because he had general knowledge of the pendency of the suit.

Quære, whether one buying property in Porto Rico with actual knowledge of pendency of a suit to dismember title for fraud in which the law gives an absolute right to a cautionary notice without the prerequisite of judicial permission would be liable for the ultimate result of the suit even if no cautionary notice were registered.

THE facts are stated in the opinion.

Mr. N. B. K. Pettingill for appellant:

There is but one question before the court on this appeal, and that is: What is the law of Porto Rico as to the effect of bringing home to an intending purchaser of real estate knowledge or notice of a defect in the title to, or of a lien upon, such real estate in favor of some person other than the vendor, where such knowledge or notice is not required from the registry of property, such defect or lien not being recorded? Or, to state it in another way: Is an intending purchaser of real estate in Porto Rico permitted by the law to ignore knowledge actually possessed or acquired by him, otherwise than from the registry, before completing his purchase, that the title to, or lien upon, such property in fact exists in favor of a person other than the proposed vendor?

The articles of mortgage (or recording) law, which are material to this inquiry, and which may be referred to in some of the cases hereinafter cited, are as translated in the War Department edition of 1899: Arts. 2, 23, 25, 27, 33–36, 42, 69, 99; and see *Valdes* v. *Valle,* 1 Dec. de P. R.; and see also §§ 612–615, 1258–1265 of the Civil Code of 1902 having more or less correlation with the articles of the mortgage law, especially § 34, with which the present controversy, however, has directly to do especially with reference to the phrase "third persons" as used therein. See 58 Juris. Civil de España, 460; vol. 102, p. 390.

From all these cases we submit it conclusively appears that the answer to the questions propounded at the opening of this discussion must be in the negative, and that any proper and sufficient proof of notice, which would be sufficient to destroy the good faith of an intending purchaser and make it equitable that he be charged with the claim or lien of a person other than his vendor, will under the Spanish law, and the mortgage law, result in his being so charged.

We leave those cases and the conclusion to be drawn from them to the consideration of the court without further discussion.

It may also be shown, although not material, we believe, in this case that in the jurisdictions of those States of the Union which have derived their systems of jurisprudence from the Civil Law, the same rule prevails, as to which, see the following cases: *Sampson* v. *Ohleyer*, 22 California, 200, 211; *Sharp* v. *Lumley*, 34 California, 611, 615; *Wise* v. *Griffith*, 78 California, 152; *Christie* v. *Sherwood*, 113 California, 530; *Hibernia Soc.* v. *Lewis*, 117 California, 577; *Splane* v. *Mitcheltree*, 2 La. Ann. 265; *Bach* v. *Abbott*, 6 La. Ann. 809; *Swan* v. *Moore*, 14 La. Ann. 833; *Brian* v. *Bonvillain*, 52 La. Ann. 1794, 1806.

In Louisiana the rule seems to be different as to the effect of notice of unrecorded mortgages, or of those not reinscribed as required by law; but that is clearly the result of an unusual statutory provision, and does not affect the application of the ordinary rule otherwise. *Ridings* v. *Johnson*, 128 U. S. 212; *Lacassagne* v. *Chapius*, 144 U. S. 119.

There was no appearance or brief filed for appellee.

Mr. Justice White delivered the opinion of the court.

Todd, a judgment creditor of Pedro and Juan Agostini, sued Anna Merle to subject property registered in her name to the payment of the judgment, on the ground that she was a mere interposed person, resulting from simulated conveyances to

her made by the Agostinis. To enforce a decree in his favor Todd advertised the property for sale. Romeu, alleging himself to be an innocent third person, who had bought the property pending the suit, filed a bill to enjoin. A demurrer on behalf of Todd having been sustained, and a final decree entered against Romeu, he brought the cause to this court. The judgment was reversed and the case remanded. *Romeu* v. *Todd*, 206 U. S. 358.

In virtue of leave given him by the court below, Todd answered, and alleged that Romeu was not an innocent third person, because he had bought with notice of the pendency of the suit. A demurrer on the ground that this answer stated no defense was sustained, and a final decree was rendered enjoining Todd from proceeding against the property. This appeal is prosecuted by Todd, and the question for decision is thus stated in the brief filed on his behalf: "What is the law of Porto Rico as to the effect of bringing home to an intending purchaser of real estate knowledge or notice of a defect in the title to, or of a lien upon, such real estate in favor of some person other than the vendor, where such knowledge or notice is not required (acquired?) from the Registry of property, such defect or lien not being recorded?" Under the assumption that the pending suit, by operation of law, dismembered the ownership of Merle in the property to which the suit related, pending the same, or operated, from the fact of its pendency, to create a lien upon the property, decisions of the Supreme Courts, both of Porto Rico and of Spain, are referred to as establishing that one who acquires a right in or to property with knowledge of a defective title or of an existing lien is not a third party, and therefore is not entitled to rights which depend for their existence upon that relation. Conceding, for the sake of the argument, that the decisions relied on announce the principle which is attributed to them, we think they are here inapposite. We say this because their applicability depends upon the erroneous assumption upon which the entire argument necessarily proceeds, that is to say, upon the theory

that by operation of law the effect of the pending suit against Merle was either to create a defect in the title of the property standing in her name, or to engender a lien on the same.

When the case was previously here we held: (*a*) That, differing from the ancient Spanish law, the modern Spanish law did not deprive an owner of property of the right, because a suit was brought against him concerning the same, to dispose of the property *pendente lite*. Pp. 363, 364. But while this was the case, the modern law, in order to prevent this right from depriving suitors of the ultimate benefit to result from the successful prosecution of suits, and to protect the public, provided for a system of cautionary notices, by means of which suitors in the cases provided for could put upon the public record a notice concerning the pendency of their suits, thus protecting those who dealt with property upon the faith of the recorded title, leaving the owner the power to dispose of his property pending a suit, and at the same time saving to those who sued the enjoyment of their ultimate rights if they recorded a cautionary notice. (*b*) As these requirements of the local law were incompatible and in conflict with the doctrine of *lis pendens* prevailing in the courts of the United States, it was held that that doctrine did not obtain in Porto Rico, because the legislation of Congress concerning that island contemplated the fostering and not the overthrow of the local laws, especially those governing the title to real estate. P. 364. (*c*) Applying these rulings, it was decided that as Todd had not availed of the privilege of the local law by applying for and recording a cautionary notice, the court below had erroneously decided that the property in the hands of Romeu, an innocent third person, who had bought from Merle on the faith of the record title, was liable to Todd as the result of the decree ultimately rendered in his favor.

It thus becomes apparent that the assumption as to dismemberment of ownership and consequent defective title, or a lien on the property arising solely by the pendency of the Todd suit upon which the case before us primarily depends, is

without foundation, and was expressly decided to be so by our previous ruling. The case then, if it has any foundation at all, can only rest upon the hypothesis that, as by the pendency of the suit, the law gave the right to obtain a cautionary notice and put the same upon the public records, so that if the suit ultimated in favor of the complainant the person buying the property or dealing concerning the same pending the suit would do so subject to rights finally established in favor of the complainant, therefore the knowledge of the suit and of the rights arising from it as a result of the privilege of registering a cautionary notice deprived the person having such knowledge of the attitude of an innocent third party, and subjected the property in his hands to a responsibility for the result of the suit to the extent which would have been the case had the notice been recorded. But this also depends upon an erroneous assumption as to the operation and effect of the local law as to cautionary notice. In that law, as expressly held in the previous opinion, the provision as to cautionary notices which was applicable to the suit of *Todd* v. *Merle* was embraced in the mortgage law, and was as follows (article 42, p. 365): "Cautionary notices of their respective interests in the corresponding public registries may be demanded by: 1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right." This provision is followed by nine other paragraphs, specifying particular cases in which a cautionary notice is authorized, none, however, of these paragraphs having any relation to the case in hand. But the right to have a cautionary notice and to record it in order to cause the pendency of the suit to be operative against property involved in the suit, against persons buying, pending the suit, on the faith of the registered title was not an absolute one arising in and by the effect of the pendency of the suit, but was contingent; that is to say, could only arise as the result of an application made to the court to grant the cautionary notice and by a judgment of the court awarding the same. This

clearly follows from a subsequent provision of the mortgage law, saying (art. 43):

"In the case of No. 1 of the preceding article no cautionary notice may be made unless it is so ordered by a judicial decree issued at the instance of a person having a right thereto and by virtue of a document sufficient in the opinion of the judge."

In other words, the right in the case specified to the cautionary notice was not absolute, but relative. That is to say, the law, considering the right of an owner to dispose of his property and the injustice which would arise from limiting such right in every case merely because a suit was brought against him concerning the property, gives the right to the cautionary notice in such case, not merely because of the commencement of the suit, but makes it should depend upon an express order of the court granting the cautionary notice. As, therefore, the right to a cautionary notice did not arise in and by virtue of the pendency of the suit and could only have come from a judicial decree which was never applied for and never rendered, it must follow that the assumption that there was an existing dismemberment of ownership or lien arising from the conception that there was the absolute right to the cautionary notice has no foundation upon which to rest. It results that the contention reduces itself to this, that Romeu, the purchaser, who bought the property on the faith of the recorded title and in the absence of a cautionary notice, was bound because he had knowledge of the suit, although by operation of law the suit had no effect whatever upon the right of the owner to dispose of the property during its pendency, since the steps which the law provided as necessary to limit the right of the owner had not been taken. Thus to bring the proposition relied upon to establish that error was committed by the court below to its ultimate conclusion is to demonstrate its want of merit.

Of course, our ruling is confined to the case before us, and we do not, therefore, intimate an opinion as to whether the

doctrine that notice is equivalent to registry is or not compatible with the public policy manifested by the requirements of the mortgage law prevailing in Porto Rico. And upon the hypothesis that the doctrine that notice is equivalent to registry is not incompatible with the requirements of the mortgage law, we must not be understood as deciding that one who bought where no cautionary notice had been registered, but with knowledge of a pending suit from which, owing to its character, the law gave an absolute right, without the prerequisite of judicial action to the cautionary notice, would not be liable to the extent of the property acquired *pendente lite* for the ultimate results of the suit. See, among others, paragraph 2 of article 42 of the mortgage law in connection with the second paragraph of article 43 of the same law.

Affirmed.

DAVIS *v.* CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

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

No. 123. Argued March 3, 4, 1910.—Decided April 4, 1910.

Even though the certificate is not in proper form this court can review the judgment of the Circuit Court under § 5 of the act of 1891 if the record shows clearly that the only matter tried and decided in that court was one of jurisdiction.

The fact that a writ of error was sued out from the Circuit Court of Appeals to the Circuit Court and dismissed is not a bar to the jurisdiction of this court to review the judgment of the Circuit Court on the question of its jurisdiction as a Federal court.

A court cannot without personal service acquire jurisdiction over the person, and it is open to one not served, but whose property is attached, to appear specially to contest the control of the court over such property; and in this case the appearance of the defendant for that purpose was special and not general.

Neither the enactment of § 5258, Rev. Stat., nor of the Interstate Commerce Law by Congress abrogated the attachment laws of the States.

Although different views have been taken in several States as to the immunity from seizure and garnishment under attachment of cars engaged in interstate commerce and credits due for interstate transportation, this court holds that it was within the jurisdiction of the state court to seize and hold the cars and credits seized and garnisheed in this case, notwithstanding their connection with interstate commerce.

THE facts, which involve the liability to attachment of cars used in interstate commerce, are stated in the opinion.

Mr. Wilbur Owen, with whom *Mr. Elbert H. Hubbard* was on the brief, for plaintiff in error:

The cars and funds were subject to attachment and garnishment. The rolling stock of railway corporations is personal property, over which they have the power of alienation, and is subject to seizure, when not in actual use, by attachment or execution, or other valid process, the same as other personal property. *Boston C. M. Ry. Co.* v. *Gilmore*, 37 N. H. 410; *Coe* v. *Col. Piq. & I. R. R. Co.*, 10 Ohio St. 372; *Louisville & New Albany Ry. Co.* v. *Boney*, 117 Indiana, 501; *Buffalo Coal Co.* v. *Rochester & S. L. Ry. Co.*, 8th Weekly Notes Cases, 126 (Penn.); *Williamson* v. *N. J. S. R. Co.*, 29 N. J. Eq. 311; *Randall* v. *Elwell*, 52 N. Y. 521; *Potter* v. *Hall*, 20 Massachusetts, 368; *Hall* v. *Carey*, 140 Massachusetts, 131; *Johnson* v. *Southern Pacific*, 196 U. S. 1; Elliott on Railroads, vol. 2, p. 587; Drake on Attachment, 7th ed., § 252*A*; 4 Cyc. Law & Procedure, p. 557; *The "Winnebago"* v. *DeLaney*, 205 U. S. 354; *Johnson* v. *Chi. & Pac. Elevator Co.*, 119 U. S. 388; *The Robert Dollar*, 115 Fed. Rep. 218; *Ex parte McNeil*, 13 Wall. 236; *Menich* v. *Tehuantepec Co.*, 16 La. Ann. 46; *Sibley* v. *Ferris*, 22 La. Ann. 163; *Haberle* v. *Barringer*, 29 La. Ann. 410; *Sherlock* v. *Alling*, 93 U. S. 99.

Notwithstanding that Congress has passed laws inflicting severe penalties upon anyone who interferes with the transportation of mail, a boat owned by a mail contractor may be

attached if the mail be not on the boat at the time. *Parker* v. *Porter,* 6 La. Ann. 169; 4 Cyc. L., p. 569; Waples on Attachment, § 723; *Briggs* v. *Strange,* 17 Massachusetts, 405.

The fact that chattels were when seized upon attachment, execution or replevin, subjects of interstate commerce or were in transit from one State to another, has never been regarded as preventing their actual seizure if within the jurisdiction of the court issuing the process, and they can even be held by garnishment of the carrier if not too late to arrest the shipment. *Morrell* v. *Buckley,* 20 N. J. L. 667; *Santa Fe Ry. Co.* v. *Bossut,* 19 Am. & Eng. Ry. Cases, 683; 5 Am. & Eng. Ency. of Law, p. 239; Waples on Attachment, 2d ed., § 449; Moore on Carriers, pp. 34, 229, 232; *Adams* v. *Scott,* 104 Massachusetts, 164; *Landa* v. *Holck,* 129 Missouri, 663; *The Robert Dollar,* 115 Fed. Rep. 218, 222.

The cars in question when attached were not engaged in interstate commerce. They were, with one exception, standing "empty and idle" upon the tracks of the garnishees: they had reached their destination and had been unloaded. *Nor. & West. R. R. Co.* v. *Commonwealth,* 93 Virginia, 749. The record fails to establish any contractual relations between the principal defendant and the garnishees.

Even if the garnishees had the right of reloading the cars, it is not claimed that there was any intention on their part to exercise that right. *Rausch* v. *Moore,* 48 Iowa, 611.

No rule of law or statute requires any railway company to receive shipments from connecting lines and transfer them in the same cars in which they are tendered; nor are railway companies bound to allow their cars to go beyond their own terminals, and in practice railway companies often refuse to transport freight in any but their own cars, or to allow their cars to be used beyond their own terminals. Rev. Stat., § 5228, authorizing through shipments is permissive only and imposes no affirmative duties upon railway companies. 6 Am. & Eng. Ency. of Law, p. 609; *Kentucky Bridge Co.* v. *Louisville,* 37 Fed. Rep. 567; Moore on Carriers, 453, 454.

In order that a state law, or the action of state authorities under such law should be construed a "regulation of commerce between States," the operation of such law, or the action of such state authorities must be a direct interference or regulation, and directly and substantially hurtful to such commerce, not a mere incidental or casual interruption or regulation, or remotely hurtful. *Sherlock* v. *Alling*, 93 U. S. 99; *L. & N. Ry. Co.* v. *Kentucky*, 183 U. S. 503; *N. Y., L. E. & W. R. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *L. & N. Ry. Co.* v. *Kentucky*, 161 U. S. 677; *Nashville Ry. Co.* v. *Alabama*, 128 U. S. 96; *Wall* v. *Nor. & West. Ry. Co.*, 44 S. E. Rep. (W. Va.) 294; *Conery* v. *Q. O. & K. Ry. Co.*, 99 N. W. Rep. (Minn.) 365, are not similar in their facts to the case at bar.

Debts due a principal defendant from a garnishee are subject to garnishment wherever the garnishee could as in this case be sued by the defendant. See §§ 3497, 3529 of the Code of Iowa.

There is no inhibition in the laws of Iowa preventing suits by a non-resident plaintiff in the courts of Iowa. Nor is it material that the debt was not made payable in the State where the attachment proceedings were instituted or that the garnishee's contract with the defendant is to pay the money in another State or country than that in which the attachment is pending. 14 Am. & Eng. Ency. of Law, pp. 804, 816; *Harvey* v. *G. N. Ry. Co.*, 50 Minnesota, 405; Drake on Attachment, 7th ed., § 597; *Mooney* v. *Buford*, 72 Fed. Rep. (C. C. A.) 32; *Mooney* v. *U. P. R. R. Co.*, 60 Iowa, 346; *German Bank* v. *Ins. Co.*, 83 Iowa, 491; *National Fire Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468; *Blake* v. *Williams*, 6 Pick. 286; Minor on Conflict of Laws, § 125; *Wyeth Hdw. Co.* v. *Lang*, 127 Missouri, 242; *Cross* v. *Brown*, 19 R. I. 220; *Harris* v. *Balk*, 198 U. S. 215; *Newfielder* v. *Ger.-Am. Ins. Co.*, 6 Washington, 336; *M. & O. R. R. Co.* v. *Barnhill*, 90 Tennessee, 349; *Smith* v. *Tabor*, 16 Tex. Civil Appeals, 154; *Pomeroy* v. *Rand*, 157 Illinois, 176; *Cousins* v. *Lovejoy*, 83 Maine, 467; *Fithian* v. *Ry. Co.*, 31 Pa.

St. 114; *Barr* v. *King*, 96 Pa. St. 485; *Blake* v. *Huntington*, 129 Massachusetts, 444; *Cahoon* v. *Morgan*, 38 Vermont, 236; *Towle* v. *Wilder*, 51 Vermont, 622; *Mashussuck Felt Mill* v. *Blanding*, 17 R. I. 297.

These garnished funds are not shown to be receipts for carriage of interstate commerce, and even if so they would not be immune from garnishment. The garnishment of these funds would in no sense be a "regulation of commerce between the states."

The statutes of Iowa inhibit special appearances. § 3541 of the Code of Iowa; *Bank* v. *Vann*, 12 Iowa, 523; *Rahn* v. *Greer*, 37 Iowa, 627; *Lesure Lumber Co.* v. *Ins. Co.*, 101 Iowa, 514; *Moffitt* v. *Chicago Chronicle Co.*, 107 Iowa, 412; *Blondel* v. *Ohlman*, 109 N. W. Rep. (Ia.) 806; *Sam* v. *Hochstadler*, 76 Texas, 162; *Lucas* v. *Patton*, 107 S. W. Rep. (Tex.) 1143.

This section of the Iowa Code is binding upon Federal courts held within that State, § 914, Rev. Stat.; *Amy* v. *Watertown*, 130 U. S. 304; but even if not it generally would be binding in this case as it was removed from the state court. The appearance made by the defendant in error, and the matters contained in its motion and affidavit, filed under such appearance, cannot be regarded as a special, but constituted a general appearance.

A special appearance is never allowable except for the single purpose of objecting to the jurisdiction of the court over the person of the defendant. 3 Cyc. L., pp. 502, 511, 527; 2 Ency. of Pl. & Pr. 620, 621, 625; *Elliott* v. *Lawhead*, 43 Ohio St. 171; *Fitzgerald Const. Co.* v. *Fitzgerald*, 137 U. S. 98; *Welch* v. *Ayers*, 61 N. W. Rep. (Neb.) 635; *Abbott* v. *Semple*, 25 Illinois, 91; *State* v. *Buck*, 15 So. Rep. (La.) 531; *Mahr* v. *U. P. R. Co.*, 140 Fed. Rep. 921; *Perrine* v. *Knights Templars*, 101 N. W. Rep. (Neb.) 101; *S. C.*, 98 N. W. Rep. 481; *Dudley* v. *White*, 44 Florida, 264; *Ray* v. *Trice*, 48 Florida, 297; *Reed* v. *Chilson*, 142 N. Y. 152; *Lowe* v. *Stringham*, 14 Wisconsin, 222; *Rogers* v. *McCord, &c.*, 91 Pac. Rep. (Okl.) 864; *Wabash Western Ry.* v. *Brow*, 164 U. S. 271.

An appearance to a writ of attachment is a general appearance, especially when coupled with objections requiring evidence to sustain, or objections to the jurisdiction *in rem*, or it moves to quash for matters not going to irregularity in process or service thereof, and is sought to be sustained by matters dehors the record. Waples on Attachment, 2d ed., § 702, 658; *Wood* v. *Young*, 38 Iowa, 102; *Whiting* v. *Budd*, 5 Missouri, 443; *Evans* v. *King*, 7 Missouri, 411; *Withers* v. *Rogers*, 24 Missouri, 340; *Greenwell* v. *Greenwell*, 26 Kansas, 530; *Gorham* v. *Tanquery*, 58 Kansas, 233; *Burnham* v. *Lewis*, 65 Kansas, 481; *Frazier* v. *Douglas*, 48 Pac. Rep. 36; *Nicholas & Shepard Co.* v. *Baker*, 13 Oklahoma, 1; *Ray* v. *Mercantile Co.*, 26 Pac. Rep. 996; *Duncan* v. *Wycliffe*, 4 Met. (Ky.) 118; *Raymond* v. *Nix*, 49 Pac. Rep. 1110; *Gann* v. *Beasly*, 59 N. W. Rep. 714; *Cooper* v. *Reynolds*, 10 Wall. 308.

Although the defendant in error did not ask for a dismissal of the action in its written motion filed under its alleged special appearance, the record discloses that on June 6, a second judgment was rendered on motion of the defendant, quashing the service of notice on the defendant, dismissing plaintiff's cause of action and rendering judgment in its favor and against the plaintiff for $129.70.

This was error and is a general appearance. *Teater* v. *King*, 35 Washington, 138; *Welch* v. *Ayers et al.*, 61 N. W. Rep. 371; *Bucklin* v. *Strickler*, 32 Nebraska, 602; *Everett* v. *Wilson* 83 Pac. Rep. 211.

Mr. W. H. Farnsworth, with whom *Mr. Frank L. Littleton* was on the brief, for defendant in error:

The cars attached were engaged in interstate commerce and under control of Congress, notwithstanding some of the cars were empty and awaiting their return to their owner in completion of an interstate journey. *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *Connery* v. *Railway Co.*, 92 Minnesota, 20; *Shore & Bros.* v. *B. & O. R. R. Co.*, 76 S. C. 472.

There is a distinction between merchandise which may or

may not become articles of interstate commerce, and cars or other instruments which are used in moving interstate commodities, which may have stopped temporarily on their journey. *Johnson* v. *S. P. Co.*, 196 U. S. 20.

The state laws cannot be permitted to impede or impair interstate traffic, or the usefulness of the facilities for such traffic. *I. C. R. Co.* v. *Illinois*, 164 U. S. 142; *Bowman* v. *Chicago*, 125 U. S. 465; *Ry. Co.* v. *Richmond*, 19 Wall. 584; *C. & N. W. Ry. Co.* v. *Forest*, 95 Wisconsin, 80; *Michigan, C. R. Co.* v. *C. & M. L. S. R. Co.*, 1 Ill. App. 399; *Connery* v. *R. Co.*, 92 Minnesota, 20; *Shore & Bros.* v. *B. & O. R. R. Co.*, 76 S. C. 472; *Seibels* v. *Northern Cent. Ry. Co.*, 61 S. E. Rep. 435; *Wall* v. *Ry. Co.*, 64 L. R. A. (W. Va.) 501.

The method of service of the writs of attachment was irregular and illegal, and conferred no rights upon the plaintiff. The cars sought to be reached were susceptible of manual delivery, and to create any lien or give effect to the proceedings the officer must take manual custody of the property. § 3898, Iowa Code. Also see 1 Shinn on Attach. & Garn., 1st ed., 391; *Culver* v. *Rumsey*, 6 Ill. App. 598; *R. R. Co.* v. *Pennock*, 51 Pa. St. 244; Drake on Attachments, 7th ed., § 246; *Crawford* v. *Newell*, 23 Iowa, 453; *Hibbard* v. *Zenor*, 75 Iowa, 471; *Hall* v. *Craney*, 140 Massachusetts, 131; *Boston R. R. Co.* v. *Gilmore*, 37 N. H. 410.

The statute of Iowa permitting attachments and garnishments, and the sale of property thereunder, is not of itself broad enough to authorize the attachment and sale of railway property necessary in the discharge of its public duties. *Michigan C. R. Co.* v. *C. & M. L. S. R. Co.*, 1 Ill. App. 399; *Connery* v. *R. Co.*, 92 Minnesota, 20; *Shore & Bro.* v. *B. & O. R. R. Co.*, 76 S. C. 472; *Seibels* v. *Northern Cent. Ry. Co.*, 61 S. E. Rep. (S. C.) 435; *Wall* v. *Railway Co.*, 64 L. R. A. (W. Va.) 501; *Railway Co.* v. *Forest*, 95 Wisconsin, 80, *supra*.

Under the common law no such rights exist, and where the right is claimed under a statute, the statute must be

specific in its provisions with reference to the attachment, seizure and sale of railway property. *Railway Co.* v. *Forest*, 95 Wisconsin, 80; *Commissioners* v. *Tommey*, 115 U. S. 122; *Wall* v. *Railway Co.*, 64 L. R. A. 506.

Even if ordinarily garnishment proceedings would confer rights and create a lien in favor of the plaintiff, jurisdiction could not be thus obtained in this case, because under contracts with the defendant the garnishees had the sole right to possession and use of the cars until returned to the defendant in the usual course of operation. Drake on Attachment, 3d ed., 462; *Wall* v. *Ry. Co.*, 52 W. Va. 485; *Michigan C. R. R. Co.* v. *C. & M. L. S. R. Co.*, 1 Ill. App. 399; *Connery* v. *Ry. Co.*, 92 Minnesota, 20; *Johnson* v. *Union Pacific Ry. Co.*, 145 Fed. Rep. 249; *Johnson* v. *Union Pacific Ry. Co.*, 69 Atl. Rep. 288; *Seibels* v. *Northern Cent. Ry. Co.*, 61 S. E. Rep. 435.

The Interstate Commerce Act enjoining upon railway common carriers the duty of providing and establishing through routes, and the railway act of Congress authorizing and empowering steam railroads to provide and furnish connections and through transportation, create a distinction between water craft engaged in interstate commerce and railway companies so engaged as to the right of foreign attachment. *The St. Louis*, 48 Fed. Rep. 312; *Union Pac. Ry. Co.* v. *Chicago Ry. Co.*, 163 U. S. 564.

The garnishees were indebted to the defendant only for their proportionate share of earnings on account of interstate shipments, and to allow garnishment of the same would burden and impede interstate commerce to the same effect as the actual seizure and attachment of the carrier's cars.

As to the law in regard to garnishment, see Drake on Attachment, 3d ed., § 474; Shinn on Attachment, 2d ed., §§ 490, 491, 494; *Railroad Co.* v. *Maggard*, 39 Pac. Rep. 985. See, also, *Central Trust Co.* v. *Ry. Co.*, 68 Fed. Rep. 685; *Aye* v. *Lidscomb*, 21 Pick. 263; *Gold* v. *Ry. Co.*, 1 Gray, 424; *Singer* v. *Fleming*, 39 Nebraska, 679–686; *Drake* v. *Ry. Co.*, 89 Michi-

gan, 168; *Railway Co.* v. *Smith*, 19 L. R. A. (Miss.) 597; *McSham* v. *Knox*, 114 N. W. Rep. (Minn.) 955.

Special appearances are allowable under the state practice of Iowa where the objection is that service was unauthorized. *Wilson* v. *Stripe*, 4 G. G. Rep. (Ia.) 551; *Hastings* v. *Phœnix*, 79 Iowa, 394; *Crox* v. *Allen*, 91 Iowa, 462; *Chittenden* v. *Hobbs*, 9 Iowa, 417; *Murray* v. *Wilcox*, 122 Iowa, 188; *Cibula* v. *Pitts Co.*, 48 Iowa, 528.

Mr. Justice McKenna delivered the opinion of the court.

This case presents a question of jurisdiction arising from the levy in attachment proceedings on freight cars alleged to have been engaged, when attached, in interstate commerce. The case is here on certificate.

Plaintiff in error, as executor of the estate of Frank E. Jandt, brought an action against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for causing the death of Jandt, a statute of Illinois giving such an action to the personal representative of a person whose death has been caused by "wrongful act, neglect or default." The cause of action arose in Illinois. The action was brought, however, in the District Court of Woodbury County, State of Iowa, and under the laws of the latter State writs of attachment and garnishment were issued and levied upon certain cars of the C. C. C. & St. L. Ry. Co., in the possession of the other defendants in error, referred to hereafter as the garnishee companies. Notice of garnishment was duly served on the garnishee companies, and each of them filed answers. Plaintiff in the action, and we will so refer to him, controverted by proper pleadings the answers, and demanded that evidence be taken on the issues joined.

The original notice was served on the C. C. C. & St. L. Ry. Co., at its principal place of business in the State of Ohio; also notice of attachment and garnishment. It filed a petition for removal of the action to the Circuit Court of the United States for the Northern District of Iowa, Western Division. Its peti-

tion alleged that it was a corporation duly formed and organized under the laws of Indiana, and that the plaintiff was a citizen of Iowa. The petition was granted and the case duly removed to the Circuit Court of the United States. On the second of October, 1905, the C. C. C. & St. L. Ry. Co., filed a motion, which was denominated a motion to quash and set aside service, in which it stated that it appeared specially for the purpose of the motion only, "to quash and set aside the service of attachment and garnishment attempted to be made in the cause by plaintiff against the defendant's property." The motion was supported by an affidavit. The affidavit stated that the company was incorporated under the laws of Indiana and Ohio, and conducted and operated lines of railway in those States and in Illinois, with its principal place of business in Cincinnati, Ohio; that it was not incorporated in Iowa, and had no agent or agency of any character in that State; that it was a common carrier of freight and passengers, and in the carrying on of such business it owned and operated cars for the transportation of freight and merchandise through the various States; that in the conduct of such business it had arrangements, contracts and agreements with various connecting railroad companies doing business as common carriers, including all of the railway companies attached and garnisheed in the action by plaintiff, under which those companies accepted from it, at points on its line of road, its cars loaded with goods and merchandise destined for various points on their respective lines, to be transported through the various States to destinations, constituting interstate shipments of commerce. It was stated that it was provided in the agreement that such connecting carriers should have the right to reload the cars received by them, and so use the same in returning them to the place where received, and that in all cases the cars of the company were to be returned to it in the usual and ordinary course of transit as soon as the nature and character of the business would permit. It was further stated that under the laws

of Congress the company was bound to furnish cars so loaded to be transported continuously from one State to another without being unloaded, and that under the same laws connecting carriers were bound to receive the same and transport them from one State to another. That in pursuance of the agreements and laws of Congress the cars attached were delivered by the C. C. C. & St. L. Ry. Co. to the other companies, and so received by them; that the cars were part of the company's rolling stock, and were necessary to enable it to perform its duties as a common carrier; that by reason of the commerce clause of the national Constitution and of the Interstate Commerce Act the cars could not be levied upon; that the company had not been served personally or by publication, and had not appeared in the action to any writ issued in the cause. It was further stated that none of the garnishee companies was indebted to the company, and that any accounts which might be due from the garnisheed companies were only by reason of the contracts and agreements for the use of the cars, as heretofore stated, under which the permits for the use of the cars were arranged between the companies "by wheelage or mileage of such cars, and were constantly and hourly changed from bills due one company to bills due the other company, which bills were satisfied and settled by such exchange of service and use of each other's cars. And such agreements and contracts are to be discharged, satisfied and settled only in the city of Chicago and State of Illinois, where the same are made, and such accounts, or debts, if any, in favor of this defendant, have no situs in the State of Iowa." The affidavit was supplemented by two others.

Plaintiff filed a "resistance" to the motion to quash and to the motion of the garnishee companies, and alleged that a special appearance was "unwarranted and unauthorized by law," and that as the purpose sought by the motion of the defendant company could only be had by a general appearance the special appearance should be construed to be such and subject the "person of the defendant as well as the prop-

erty actually attached, and the property and money of the defendant sought to be reached by garnishment proceedings to the jurisdiction of the court." The ground of this conclusion was stated, with some repetition, to be that the special appearance was not for the purpose of raising any question of lack of notice, or notice of defect or irregularity of process, but to contest the right to attach property by evidence outside the record of the case, and required the court to pass upon the merits of the attachment. Plaintiff denied that the property attached was engaged in interstate commerce or in the transportation of interstate commerce at the time they were attached, that they were not in use at the time they were attached, but were standing empty upon the tracks of the railway companies in whose possession they were found, and denied the existence of the agreements and arrangements between the C. C. C. & St. L. Ry. Co. and the other companies in regard to the cars and that no contractual rules existed between them, that the cars were not necessary either to that company or to the other companies to enable them to perform their duties as common carriers, and alleged that they were subject to attachment as other personal property. It was stated that the garnishee companies had no interest in the attached cars, and none of them had served notice of interest or ownership on the plaintiff nor on the sheriff.

The answers of five of the garnishee companies denied indebtedness to the C. C. C. & St. L. Ry. Co., averred the existence of agreements as to the cars substantially as set out by that defendant, also their duties as common carriers under the acts of Congress, and that the cars were in their possession in pursuance of the agreements with the defendant, and were to be returned empty or loaded in the usual and customary course of business. The other companies also denied indebtedness to the C. C. C. & St. L. Ry. Co., and in effect set up the defense that the cars were in interstate commerce business.

On the twenty-second of May, 1906, the court sustained the motion to quash the judgment and discharge the gar-

nishees thereunder. On June 6 "the court" (we quote from the record) "rendered further judgment, dismissing the said cause of action as to said principal defendant, on the ground that the court had no jurisdiction of the defendant or the attached property of the defendant, and taxed the costs in the case to the plaintiff."

The time for the allowance and filing of the bill of exceptions was extended to October 28, 1906, and on the twenty-eighth of September it was allowed, the order reciting as the date "being one of the regular days of the May A. D. 1906 term of said court." The bill of exceptions also recited that it was submitted to the court, with a prayer that it "be signed and certified by the judge, and approved by him and made a part of the record in said cause, preparatory to the prosecution of a writ of error from the said Circuit Court of the United States to the Supreme Court of the United States." It concludes as follows:

"And the court having examined said transcript of the record, papers and proceedings, hereby certifies that the same contains the entire record in said cause, including the plaintiff's petition, the answers of the garnishees, the defendant's motion to quash and set aside service and the plaintiff's resistance thereto, and all of the proceedings had thereunder in reference thereto, including the opinion, orders and judgment of the court thereon, and the exceptions of the plaintiff thereto, and all of the record submitted to the court upon which the judgment herein was rendered.

"On consideration whereof the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $500, which shall operate as a supersedeas bond.

"And in this case, I, the undersigned, judge of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, further hereby certify that in sustaining the motion to quash the attachment and discharging the garnishees, and in dismissing the action as to the principal defendant, and taxing the costs to the plaintiff, the sole ques-

tion considered and determined by the court was that the court had no jurisdiction over the person of the defendant or of the property involved, and that the appearance of the principal defendant as shown by the record was a special and not a general appearance, and that the same did not subject said principal defendant and its property to the jurisdiction of the court.

"This certificate is made conformable to the act of Congress of March 3, 1891, chapter 317, and the opinion filed herein is made a part of the record, and will be certified and sent up as part of the proceeding, together with this certificate."

For the opinion of the court, see 146 Fed. Rep. 403.

A writ of error was sued out from the Circuit Court of Appeals, according to the admission of counsel, though there is nothing in the record to show it, which writ was dismissed. 156 Fed. Rep. 775.

A motion is made to dismiss the writ of error, and in support of the motion it is urged (1) that the certificate as to jurisdiction was not granted during the term at which the judgment was rendered; (2) that the writ of error was not perfected in time as required by law, in that the writ and certificate were allowed on the twenty-eighth of September, 1906, and were not prosecuted in this court until April, 1908; (3) that the certificate is not sufficient in law nor proper in form, in that it does not state any facts or propositions of law upon which the question of the court's lack of jurisdiction rested; (4) that the jurisdiction of the court as a Federal court was not put in issue; (5) that the case having been taken to the Circuit Court of Appeals and there decided that the writ of error should be to that court and not to the Circuit Court, the latter court, it is urged, having lost jurisdiction of the case; (6) there is no certificate of a jurisdictional question in the order allowing the writ of error.

The first and second grounds in support of the motion to dismiss are based upon a misapprehension of the record. The

term at which the judgment was rendered had not expired when the certificate of jurisdiction was made, and the writ of error was allowed on the eighteenth of March, 1908, not on September 28, 1906, as contended by defendants in error.

The grounds of the motion based on the form or sufficiency of the certificate are not tenable. Even if we should admit, which we do not, that the certificate is not, as it is contended, in proper form, the record shows clearly that the only matter tried and decided in the Circuit Court was one of jurisdiction. This is sufficient. *United States* v. *Larkin*, 208 U. S. 333, 339.

The other grounds urged to support the motion to dismiss all depend upon the proposition whether the question of the jurisdiction of the Circuit Court as a Federal court was presented. If so, the writ of error from the Circuit Court of Appeals is no bar to the present writ of error. *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; *United States* v. *Larkin, supra.* And if so, the way is clear to a decision of the question on the merits.

As we have shown, the Circuit Court decided that it had no jurisdiction over either the person or the property of the principal defendant, the C. C. C. & St. L. Ry. Co. The first, non-jurisdiction over the person, depending, as the court considered, upon the second, non-jurisdiction over the property, as we understand the opinion. And this view of it the Circuit Court of Appeals took.

The latter court stated the questions to be, "Was the defendant's appearance to contest the validity of the judgments and garnishments a general one? Were the cars and credits of the defendant subject to judgment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for the want of jurisdiction. In respect to the essential character of these questions, they are not distinguishable from

one of the legality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of the trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed 'jurisdiction.' It is none the less a jurisdictional matter in the case of judgment and garnishment of the property of a non-resident because the power of the court to proceed to trial depends in the absence of the defendant upon the lawful seizure of his property. The question of jurisdiction was decided in favor of the defendant, and the decision disposed of the case." For these propositions the court cited *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 428; *United States* v. *Jahn*, 155 U. S. 109; *St. Louis Cotton Compress Co.* v. *American Cotton Co.*, 125 Fed. Rep. 196; and, as we have seen, dismissed the case on the ground that this court alone had the power to review the decision of the Circuit Court. We concur in the views of the Circuit Court of Appeals, for which also may be cited *Kendall* v. *American Automatic Loom Co.*, 198 U. S. 477. The motion to dismiss is denied.

The ruling of the Circuit Court dismissing the action is attacked upon the grounds, (1) that the appearance of the C. C. C. & St. L. Ry. Co. was a general appearance, and, being so, the railway company submitted itself to the jurisdiction of the court, "regardless of the seizure of the attached property;" (2) that the property was subject to attachment.

1. It is not controverted that, if the property was subject to attachment, the procedure prescribed by the laws of Iowa was duly observed and hence, it is contended, that the property having been seized under the jurisdiction of the court under valid regular process, the motion to quash the attachment was based on matters *dehors* the record, going to the jurisdiction of the court over the subject-matter of the action, and the court had jurisdiction over the person of the railway company. "A special appearance," it is contended, "can never serve a

dual or triple purpose, but is only allowed for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant."

The ruling of the Circuit Court, we think, was broader than plaintiff conceives it to have been. It appears from the record that the C. C. C. & St. L. Ry. Co. was a corporation of Indiana and Ohio, and that certain of its freight cars were attached in Iowa in the hands of the garnishee companies, and that there were certain credits due to it from some of the latter companies, on account of interstate commerce freight. In other words, it fairly appears upon the face of the complaint in the action and the attachment papers that the cars had been sent into the State in the transportation of interstate commerce. It is true, it was also contended, that an issue was presented by the affidavits upon the motion to quash as to what contractual arrangements existed between the company and the other companies as to the right of the latter companies to reload the cars and so return them, but there was no dispute that it was their duty to receive them. Besides, the bill of exceptions contains the following: "No evidence is submitted by the plaintiff in opposition to the motion of defendant to quash the attachment, or in support of its pleading controverting the answer of the several garnishees, and the matters are submitted upon the record, including such motion and admission of the pleadings."

The question, therefore, was submitted to the court whether the cars, under the circumstances, were engaged in interstate commerce when they were attached, and the court considered it to be immaterial that the cars had not started on a return trip, saying that: "The cars of defendant when brought into the State of Iowa to complete an interstate shipment of property were being used in interstate commerce, and were being so used while waiting, at least, a reasonable time to be loaded for the return trip."

The court further decided that debts, if any, which were due from the garnishee companies to the C. C. C. & St. L. Ry. Co. for its share of the price of carriage were "as much a part of

interstate commerce, as defined by the Supreme Court, as the actual carriage of their property."

2. The next contention of plaintiff is that the appearance of the C. C. C. & St. L. Ry. Co. was a general appearance and submitted its person to the jurisdiction of the court. In other words, it is contended that the person over whom personal jurisdiction has not been obtained cannot appear specially to set aside the attachment of his property, which we must assume in order to completely exhibit the contention, is valid. We cannot concur in the contention. It is supported, it is true, by some cases, but it is opposed by more. Drake on Attachments, § 112, and cases cited. The stronger reasoning we think too is against the contention. A court without personal service can acquire no jurisdiction over the person, and when it attempts to assert jurisdiction over property it should be open to the defendant to specially appear to contest its control over such property; in other words to contest the ground of its jurisdiction. *Harkness* v. *Hyde*, 98 U. S. 476; *Railway Co.* v. *Denton*, 146 U. S. 206; *Goldey* v. *Morning News*, 156 U. S. 518, 523; *Railway Co.* v. *Brow*, 164 U. S. 271, 278.

The appearance of the C. C. C. & St. L. Ry. Co. was not to object to the subject-matter of the action, as it is contended by plaintiff. The subject-matter of the action is a demand for damages, which can only be prosecuted to efficient judgment and be satisfied out of the property attached. *Clark* v. *Wells*, 203 U. S. 164. The jurisdiction of the court, therefore, depended upon the attachment, and the appearance to set that aside was an appearance to object to the jurisdiction. In other words, the defendant was only in court through its property, and it appeared specially to show that it was improperly in court.

These contentions being disposed of, we are brought to the question whether the cars were "immune from judicial process" because engaged in interstate commerce. The question has come up in several of the state courts and different views have been taken. The question has been answered in the

affirmative in *Michigan C. R. Co.* v. *C. & M. L. S. R. Co.*, 1 Ill. App. 399; *Connery* v. *R. R. Co.*, 92 Minnesota, 20; *Shore & Bro.* v. *B. & O.*, 76 S. C. 472; *Seibels* v. *Northern Central Ry. Co.*, 61 S. E. Rep. 435; *Railway Co.* v. *Forest*, 95 Wisconsin, 80; *Wall* v. *N. & W. R. R. Co.*, 52 W. Va. 485. A negative answer has been pronounced in the following cases: *De Rochemont* v. *N. Y. C. & N. R. R. Co.*, 71 Atl. Rep. (N. Y.) 868; *Southern Flour & Grain Co.* v. *N. P. Ry. Co.*, 127 Georgia, 626; *Southern Ry. Co.* v. *Brown*, 62 S. E. Rep. (Ga.) 177; *Cavanaugh Bros.* v. *Chicago, R. I. & P. Ry.*, 72 Atl. Rep. 694; See also *Humphreys* v. *Hopkins*, 81 California, 551. *Boss* v. *Chicago, R. I. & P. Ry.*, 72 Atl. Rep. 694, may be assigned to the list of cases giving a negative answer. In that case there was an attachment of credits or funds representing the sending carrier's part of transportation charges on interstate freight. The attachment was sustained. In *Wall* v. *N. & W. R. R. Co.* the levy was upon cars which were unloading. In the case in 1 Ill. App. the condition or situation of the cars does not clearly appear. In the other cases the cars were not in use when attached. In most of the cases there is a full and able discussion of the principles involved. In *Humphreys* v. *Hopkins* it was taken for granted that the cars were subject to process, the case going off on another point.

The answer to the question is, therefore, certainly not obvious, and counsel, realizing it, have pressed many considerations on our attention. Their arguments result in certain contentions. The plaintiff's contention is, that even though the cars in question had been or were to be used in interstate commerce, their attachment was not a regulation of such commerce, and that they were as legally subject to attachment as the property of any other non-resident. The contention of the defendants is an exact antithesis of that of plaintiff. It is that the state laws cannot be permitted to impede or impair interstate traffic or the usefulness of the facilities for such traffic. And, further, that the provisions of the Interstate Commerce Act, providing for the establishment of through

routes, and § 5258 of the Revised Statutes, providing for the connection of railroads, exempt the cars from attachment.

In our discussion we may address ourselves to the contention of defendants. They do not contend that the laws of the State have the purpose to interfere with the interstate commerce, or are directly contrary to the acts of Congress. They do contend, however, that "to permit the instrumentalities used in the interchange of traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibition of the acts of Congress." In other words, that the acts of Congress constitute a declaration of exemption of railroad property from attachment, and, of course, from execution as well, by reason of their provisions for continuity of transportation.

This can only result if there is incompatibility between the obligations a railroad may have to its creditors and the obligations which it may have to the public, either from the nature of its service or under the acts of Congress. Obligations it surely will have to creditors, inevitable even in providing equipment for its duties—inevitable in its performance of them. It would seem, therefore, that the contentions of the defendants are but deductions from the broader proposition that all of the property of the railroad company is put apart in a kind of civil sanctuary. And one case (*Wall* v. *Railroad Company, supra*) seems to give this extent to the exemption. Indeed, the decision in the case at bar seems to do so, the court holding, as we have seen, that the C. C. C. & St. L. Ry. Co.'s share of the compensation for carriage was as much a part of interstate commerce as the actual carriage of property. A still broader proposition under the contention might be urged. If the property have such character that all obligations of the company must yield to the public use or to the obligations imposed by Congress, the railroad company itself, it might be contended, cannot burden its property and that its property is taken from it as an asset of credit, the means, it may be, of performing the very duties enjoined upon it, and the anomaly

will be presented of the duties it is to perform becoming an obstacle to acquiring the means of performing them. Indeed, the further consequence might be said to follow that the rolling stock of a railroad is exempt from taxation, at least so far as taxation might be attempted to be enforced against the rolling stock. We realize that a proposition may be generally applicable and yet involve embarrassment when pushed to a logical extreme. If this be so of the contentions of defendant, it may be so of the counter contentions which would subject the cars of a railroad company to attachment process, however engaged or wherever situate.

It is very certain that when Congress enacted the Interstate Commerce Law it did not intend to abrogate the attachment laws of the States. It is very certain that there is no conscious purpose in the laws of the States to regulate, directly or indirectly, interstate commerce. We may put out of the case, therefore, as an element an attempt of the State to exercise control over interstate commerce in excess of its power. Indeed, the questions in this case might arise upon process issued out of the Circuit Court of the United States under the Federal statutes. For, by §§ 915 and 916 of the Revised Statutes, remedies "by attachment or other process," before judgment, and "by execution or otherwise," after judgment, are given litigants in common law causes in the Circuit and District Courts of the United States.

The questions in the case, therefore, depend for their solution upon the interpretation of Federal laws. May the laws of the States for the enforcement of debts (laws which we need not stop to vindicate as necessary foundations of credit and because they give support to commerce, state and interstate), and the Federal laws which permit or enjoin continuity of transportation, so far incompatible that the provisions of the latter must be construed as displacing the former? We do not think so. Section 5258 of the Revised Statutes is permissive, not imperative. It removed the "trammels interposed by State enactments or by existing laws of Congress" to the

powers of railroad companies to make continuous lines of transportation. *Railroad Co.* v. *Richmond*, 19 Wall. 584, 589. The Interstate Commerce Act, however, has a different character. It restricts the powers of the railroads. It regulates interstate railroads and makes it unlawful for them, by any "means or devices," to prevent "the carriage of freight from being continuous from the place of shipment to the place of destination." [1]

The Interstate Commerce Law therefore is directed against the acts of railroad companies which may prevent continuity of transportation. Section 5258 of the Revised Statutes was directed against the trammels of state enactments then existing or which might be attempted. In neither can there be discerned a purpose to relieve the railroads from any obligations to their creditors or take from their creditors any remedial process provided by the laws of the State, and, as we have seen, provided by Federal law as well. May it be said that such result follows from the use of property in the public service? A number of cases may be cited against such contention. We have already pointed out what might be contended as its possible if not probable consequences. In a recent case in this court a lien imposed under the law of Michigan upon a vessel to be used in domestic and foreign trade was sustained. To the contention that the enforcement of the lien while the vessel was engaged in interstate commerce was unlawful and

[1] SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act.

void in view of the exclusive control of Congress over the subject, we answered: "But it must be remembered that concerning contracts not maritime in their nature, the State has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character. The laws of the States enforcing attachment and execution in cases cognizable in state courts have been sustained and upheld. *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388. The State may pass laws enforcing the rights of a citizen which affect interstate commerce, but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress. *Sherlock et al.* v. *Alling*, 93 U. S. 99, 103; *Kidd* v. *Pearson*, 128 U. S. 1, 23; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477." *The Winnebago*, 205 U. S. 354, 362.

The interference with interstate commerce by the enforcement of the attachment laws of a State must not be exaggerated. It can only be occasional and temporary. The obligations of a railroad company are tolerably certain, and provisions for them can be easily made. Their sudden assertion can be almost instantly met; at any rate, after short delay and without much, if any, embarrassment to the continuity of transportation. However, the pending case does not call for a very comprehensive decision on the subject. We only decide that the cars situated as this record tends to show that they were when attached, and the amounts due from the garnishee companies to the C. C. C. & St. L. Ry. Co., were not exempt from process under the state laws, and that the court had, therefore, jurisdiction of them and through them of the C. C. C. & St. L. Ry. Co.

Judgment reversed and the cause remanded with directions to proceed in accordance with this opinion.

MR. JUSTICE HOLMES took no part in the decision.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 133. Argued March 9, 10, 1910.—Decided April 4, 1910.

The acts of May 15, 1856, c. 28, 11 Stat. 9; March 3, 1857, c. 99, 11 Stat. 195, and § 13 of the act of July 12, 1876, c. 179, 19 Stat. 78, providing that mails should be transported over railroads constructed in whole or in part by aid of land grants at eighty per cent of the authorized price, apply to such transportation by companies which carry the mail over a leased line which was partly constructed by such aid, although the transporting company itself received no land grant aid from the Government.

A court does not overlook contentions advanced which are necessarily untrue if the proposition upon which its decision rests is true. The statement of such proposition answers opposing contentions.

The reduction in mail service which the Government exacts in return for land grants for building railroads attaches to all tracks including those subsequently built, and to all companies operating thereover.

43 C. Cl. 595, affirmed; 41 C. Cl. 518, approved.

THE facts, which involve the amount of compensation due for transportation of mail by a railroad company over a railroad constructed in part by grant of land from the Government, are stated in the opinion.

Mr. Samuel A. Putman, with whom *Mr. Charles W. Bunn* was on the brief, for appellant.

Mr. John Q. Thompson, Assistant Attorney General, with whom *Mr. Philip M. Ashford* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in this case is the legality of certain deductions made by the Postmaster General from the amount

which, it is contended, is due appellant for carrying the mails between Minneapolis, Minnesota, and Sioux City, Iowa, over postal route No. 121,045. The appellant sought to recover the sum of forty thousand dollars ($40,000). The Court of Claims gave judgment for only thirty-three hundred and eighty-nine dollars and fifty-three cents ($3,389.53), rejecting the balance of the claim on the authority of *Astoria & Columbia River Railway Company* v. *United States*, 41 Ct. Cl. 284.

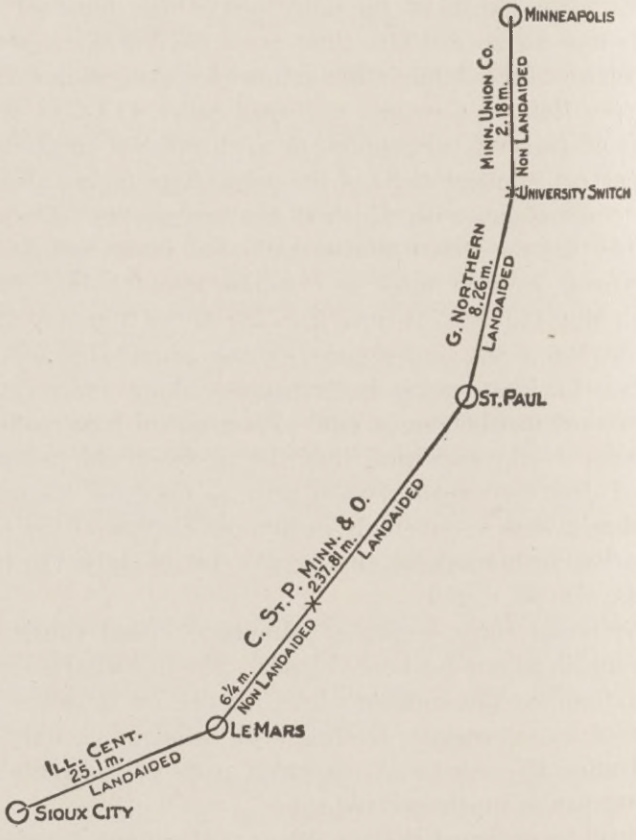
The controversy turns upon the application of certain acts of Congress, granting parts of the public domain to appellant and to companies with which it has agreements. The acts provide that the United States mails shall be transported on such roads at such rates as Congress may by law direct. Act of May 15, 1856, 11 Stat. 9, c. 28; Act of March 3, 1857, 11 Stat. 195, c. 99. Subsequently it was provided as follows:

"SEC. 13. That railroad companies, whose railroad was constructed in whole or in part by a grant of land made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act." Act of July 12, 1876, 19 Stat. 78, 82, c. 179.

The postal route begins at Minneapolis and consists of land-aided and non-land-aided roads. The following diagram, taken from the Government's brief, though not drawn to any scale of measurement, exhibits with enough accuracy for illustration the aided and non-aided parts of the route and the companies which received aid.

It will be observed that appellant is the direct beneficiary of the road from St. Paul south 237.81 miles to a point north from a place marked as Le Mars. It used the other parts of the route under the contracts with the other companies, and it is found that from some time prior to October 1, 1900, appellant used the tracks of such other companies to "form a continuous route for the operation of its mail trains, made up of its own rolling stock and controlled and operated by its

own servants, between Minneapolis and Sioux City, except that within the last-named city it did not use the station of the Illinois Central Company, but had a station of its own." It is also



found that appellant operated its trains over the tracks of the Great Northern Company under a contract in writing with the predecessor of the latter company, the St. Paul, Minneapolis and Manitoba Railway Company, and operated its trains over the Illinois Central Company under a contract with the predecessor of that company, the Iowa Falls and Sioux City Railroad Company. By the first contract appellant is given "the

right and privilege to run such of its locomotives, engines, car and trains, handled by its own employés, as shall be reasonably necessary for the efficient and full transaction of its business to and from the city of Minneapolis, and all points on the second party's road, east of St. Paul over the *main track* of the first party as now constructed." It was provided that the amount of the monthly rental should be a sum of money equal to one-twelfth part of the annual interest at the rate of six and one-half per cent per annum on one-half the value of the property of the first party, which the second party is entitled to use under the contract. And in addition such proportion of cost of maintaining and repairing the properties, "as the number of wheels per mile" appellant should "run over the said property or any part thereof, bears to the whole number of wheels per mile run over the same." It was provided that the earnings of all local business done by appellant over the railroad should belong to the party of the first part, but the appellant was not obliged to do such business. The contract was to continue twenty-five years.

The contract of the appellant with the Iowa Falls and Sioux City Railway Company may be said, as far as the question in the case is concerned, to be substantially the same. Its provision as to the use of tracks is more comprehensive. It permits also appellant to do local business, sixty per cent of the gross receipts of which, however, are to be paid to the Iowa Falls Company. There is a provision for maintenance and repairs, based on car mileage. The rental stipulated is $450 per mile for the use of each mile of main track.

It is found that appellant had no part in the construction of the tracks of the Great Northern Company or of the Illinois Central Company, and received no benefit on account of their construction by grants of land or otherwise; that ever since the construction of the tracks the respective companies owning them have operated trains and transported United States mails over them, and that the use of the tracks by those companies does not appear to have been limited by appellants

using them; that the tracks of the Great Northern Company between University Switch and St. Paul are a portion of postal route No. 141,004 between St. Paul and Fargo, North Dakota, and those belonging to the Illinois Central between Le Mars and Sioux City are a portion of postal route No. 143,021 between Dubuque and Sioux City, Iowa. That prior to October 1, 1900, the Postmaster General designated the line of railroad between Minneapolis and Sioux City as postal route No. 141,025, and has maintained it ever since, and that between that date and September 30, 1906, appellant has carried mails over such route, but the Postmaster General has allowed for the whole of the route only eighty per cent of the compensation allowed and fixed by law for similar service for non-land-granted roads. A table of reductions is given, showing the deductions for the periods mentioned, amounting in all to $33,301.17.

The contentions of the parties are foreshadowed by the facts which we have recited. It may be conceded, appellant says, that the grants of land to the companies to which they were made "completed contracts between them and the United States," and it may be further conceded, it is said, "that by these contracts privity was established between the United States and these various railroad companies." But succession to the obligation of the contract is denied because appellant "has not succeeded to the title or any part of the title of these respective roads, nor has it in any way directly or indirectly received any benefit from the respective grants or done any other thing which creates privity of contract between it and the United States or which makes it, in the language of the thirteenth section of the act of 1876, a railroad company 'whose railroad was constructed in whole or in part by a grant of land,' " etc.

This distinction is earnestly insisted on and is made the foundation of the argument of the appellant. It makes irrelevant, it is urged, the consideration of the obligations of the other companies, and by overlooking it the Court of

Claims fell into error in *Astoria & Columbia River Ry. Co.* v. *United States*, *supra*, and continued the error in its judgment in the case at bar. But did the Court of Claims overlook it? It was urged in *Astoria & Columbia River Ry. Co.* v. *United States*, as it is urged in this, to justify the distinction that the "owning and aided companies," to adopt counsel's designation, are and always have been "ready to perform all the service due them under the terms of their contract with the United States," and it seems to us that the Court of Claims did not misunderstand or overlook the contention. A court does not overlook a contention because it rests its decision upon a proposition which, if true, the contention is not true. To bring forward a proposition upon which the question to be proved depends answers necessarily opposing propositions. And this is what the Court of Claims did. It decided that the power reserved to Congress was over the property, not alone over the companies who owned it and extended to every use of it, whether by the owning companies or any company who received a right from them. That proposition, if true, necessarily determined the judgment against the Astoria and Columbia River Railway Company in the cited case. It is opposed to the proposition decided in that case by the Circuit Court of the United States for the District of Oregon, and which is relied upon by appellant in this case. That case was brought by the United States to enjoin the Astoria and Columbia River Railway Company from charging for the transportation of army supplies from Portland, carried by that company over the tracks of the Northern Pacific Railroad Company, which it used under a contract with the latter company. The suit was based on the fact that the Northern Pacific was a land-aided road. The injunction was refused. The court sustained the contention which was made (and which was repeated in the Court of Claims and is repeated here), that the power reserved to Congress attached in effect to the company, not to the property. The Circuit Court said: "The defendant's use of the Northern Pacific Railroad track

between Portland and Goble does not affect the transportation due from the latter company to the plaintiff. It is still open to the latter to have its freight carried over every part of the railroad of the land grant company at fifty per cent of the regular rate. This is the extent of its right. And this right, as already appears, has not been affected by the use of a part of that company's track by the defendant company. It is a matter of no consequence to the plaintiff [United States] how many railroads use this particular track of the Northern Pacific Company, nor what their traffic rates are, so long as the latter company continues to afford all the facilities for transportation over every part of its road required by the plaintiff." *United States* v. *Astoria & C. R. R. Co.*, 131 Fed. Rep. 1006.

The order denying application for injunction was pleaded in the Court of Claims, as it appears from the opinion of the court, as *res judicata* of the "subject-matter" there involved, and therefore the full breadth of the contentions of the railroad company in the Circuit Court and of the decision of that court was considered by the Court of Claims, and all of the elements of decision and all the distinctions which depended upon them the court must have taken into account in rendering its decision.

We are brought then to the question whether the decision of the court was right. Certain concessions are made by appellant at the outset of the argument. It is conceded that the acceptance of the land grants by the "owned and aided companies" completed a contract between them and the United States, and that privity was established between them and the United States. That is privity (we use the word, as we presume that counsel does, in the sense of party for the United States, and the companies are parties, not successors, to rights or obligations) of contract, a personal obligation, that is, not an obligation which attached to the property and covered every use of it. This is necessarily what appellant means, though it is confused in discussion.

Appellant quotes the statute to show that the obligation is on the *companies*, not on the *roads*, as follows: "That railroad companies whose railroad was constructed . . . by grant of land . . . shall receive only eighty per centum of the compensation authorized by this act."

And further, it points out, as we have seen, that it has not succeeded "to the title or any part of the title" of the roads, nor "directly or indirectly receives any benefit from the respective grants." And, finally, it urges that if appellant "is a mere licensee, owing no contractual duty as a corporate individual to the Government, owning no railroad property which is pledged to the Government as security for the performance of any duty, and operating its trains on the joint track in such manner as to interfere in no wise with its licensor in the transaction of its business and the performance of its contractual duty to the Government, it is difficult to understand how appellant can be held to fall within the terms of the thirteenth section of the act of 1876, or why it does not stand upon the same footing as any other company without privity with the United States."

This is stating by periphrase the simple proposition that there is a contract only between the United States and each of the aided companies, in which such company "has bound itself" [we quote from appellant's brief] "to operate trains for the transportation of the Government business." And "whenever" appellant says "one of these companies shall fail to perform its duty, whatever relief the United States may be entitled to must be sought by appropriate proceedings directed against the delinquent company." Appellant joins to this as a concession that the "railroad property" of an aided company "is pledged to secure the performance" of its obligation. In what way is not pointed out, or how the security can be availed of.

The opposite contention to that of appellant is, therefore, what it was decided to be by the Court of Claims, that the obligation is upon the property of an aided company, and

attaches to all of the uses of the property, whether by the "owned and aided companies" or any other company. We concur with the decision of the Court of Claims, and we think further discussion is not necessary, except to notice some of the reasons urged against the decision.

We have noticed and commented on one concession of appellant. Another is made, which we quote with its qualifications, as follows: "We do not contend that a land-aided road can be sold, either in whole or in part, so as to avoid its obligations to the government. To this extent we concede that the obligation runs with the railroad aided by land grant, but the act does not say that companies permitted simply to run trains on the road shall suffer reductions. They receive no aid from the grant, and are neither within the terms or the reason of the statute." Of course, the statute did not deal with other companies or with deductions. It would be very strange if it had. It either imposed a service on the companies or on the road as well. If on the companies alone, there would necessarily be exclusion of all others. If on the roads as well, it would comprehend all that used them. If a difference in degree of use or a participation in the use by other companies than the aided ones, had been intended it would have been expressed. The concession as to the effect of the sale or lease of the road is fatal. As we have already said, the obligation is either upon the aided companies, to be enforced by remedies against them, or it is on the property as well, and if on the property, necessarily on it by whatever company or person it is used.

It is further contended in the brief filed for the Great Northern that the condition of earning its grant was the building of a single track and it or its grantors, it is said, has provided several. It has therefore, it is further said, "a surplus of track capacity and, by contract, permits the Omaha [appellant] and other companies to run their trains over its tracks." To this it is only necessary to reply that the service that the Government reserved was coextensive with

the road as constituted under the grant and attached to as many tracks as should be used.

Again, it is urged that if the Omaha Company had built its own road there would be no assertion of a right to deduct from its mail pay, and that it is to run over the Great Northern, the latter not being made thereby less useful or efficient, is for its purpose equivalent to building its own road. An answer to this is contained in what we have said. We may add, however, that the appellant no doubt considered the advantages and disadvantages of the alternative presented before making its selection, but it could not have supposed, nor can we admit, that it could lessen rights in property because it could acquire like property for itself.

Union Pacific v. *Chicago &c. Ry. Co.*, 163 U. S. 564, and *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, are cited as authorities against our conclusion. We content ourselves by saying that they have not that effect. On *United States* v. *Astoria Company*, 131 Fed. Rep. 1006, we have commented.

Judgment affirmed.

BOSTON CHAMBER OF COMMERCE *v.* CITY OF BOSTON.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 99. Argued March 2, 3, 1910.—Decided April 4, 1910.

This court accepts the construction of a state statute as to condemnation of land given to it by the state court.

While in condemnation proceedings the mere mode of occupation does not limit the right of an owner's recovery, the Fourteenth Amendment does not require a disregard of the mode of ownership, or require land to be valued as an unencumbered whole when not so held.

Where one person owns the land condemned subject to servitudes to

others, the parties in interest are not entitled to have damages estimated as if the land were the sole property of one owner, nor are they deprived of their property without due process of law within the meaning of the Fourteenth Amendment because each is awarded the value of his respective interest in the property.

195 Massachusetts, 338, affirmed.

THE facts are stated in the opinion.

Mr. Charles A. Williams and *Mr. Charles S. Hamlin* for plaintiff in error:

The market value of the "locus," the land taken for this street at the time of the taking, was $60,000.

Consequently, the owners in fee simple of the land unencumbered were entitled to recover in this proceeding $60,000. *Boom Company* v. *Patterson*, 98 U. S. 403.

In determining the damages sustained by an owner of land taken by eminent domain, the use which the landowner at the time of taking happens to be making of his land is not the only thing to be considered. The use which the owner of the land taken is making of the land at the time of the taking is absolutely and wholly immaterial. *Maynard* v. *Northampton*, 157 Massachusetts, 218, 219; *Eastern R. R.* v. *Boston & Maine R. R.*, 111 Massachusetts, 125, 132; and see also *Providence &c. R. R.* v. *Worcester*, 155 Massachusetts, 35; *Conness* v. *Commonwealth*, 184 Massachusetts, 541; *Fales* v. *Easthampton*, 162 Massachusetts, 422, 425.

The right of the petitioners to recover the fair market value of the land is not lost because of the fact that there is more than one owner, nor by reason of the fact that the entire title is held by different owners who own different interests, nor because of the fact that at the time of the taking the petitioners were making a use of the land similar in kind to the use which the city intended by its taking, to make of it.

And this although neither without the coöperation of the other could convey a clear title to the whole estate. *Edmands* v. *Boston*, 108 Massachusetts, 535.

The statute was not intended to be used so as to prevent

the recovery of full damages, *i. e.*, the fair market of the land taken. It was only intended to prevent the recovery of more than the fair market value.

The taking of land for a highway and subjecting it to that use in perpetuity, to the exclusion of all other uses, gives the owner of the land taken, the right to recover the fair market value of the land taken, even though technically an easement and not the fee is taken. If what is taken is practically co-extensive with the fee, and if the taking deprives the owner of the beneficial interest in the land, then it makes no difference in the quantum of the damage which he has sustained whether you call the taking a taking of an easement or a taking of the fee. *Lawrence* v. *Boston*, 119 Massachusetts, 126; *Edmands* v. *Boston*, 108 Massachusetts, 535; *Chase* v. *Worcester*, 108 Massachusetts, 60, 67; *Parks* v. *Boston*, 15 Pick. 198; *Newton* v. *Perry*, 163 Massachusetts, 319; *New Eng. Tel. & Tel. Co.* v. *Boston Terminal Co.*, 182 Massachusetts, 397, 399; *Sears* v. *Crocker*, 184 Massachusetts, 586.

The decision of the state court overlooks the vital fact that the petitioners by their agreement with reference to this land did not part with the right to sell the land to be used for any of the purposes for which it was adapted, while the taking by the city did deprive them of this right. *Blaney* v. *Salem*, 160 Massachusetts, 303.

In Massachusetts, easements in gross may be reserved in a deed poll, and may be separately sold and conveyed. *Goodrich* v. *Burbank*, 12 Allen, 459, 461; *Whittenton Mfg. Co.* v. *Staples*, 164 Massachusetts, 319, 328; *White* v. *Crawford*, 10 Massachusetts, 183; and see also *Matter of the Opening of Eleventh Avenue*, 81 N. Y. 436; *S. C.*, 27 App. Div. (N. Y.) 265; *Winthrop* v. *Welling*, 2 App. Div. (N. Y.) 229; *Re Canal Place*, 101 N. Y. Supp. 397; see also 115 App. Div. 458; and 191 N. Y. 525; *Re Jerome Avenue*, 105 N. Y. Supp. 319.

Mr. Thomas M. Babson for defendant in error:

Damages, when property is taken, are to be assessed as of

the time of taking. *Parks* v. *Boston*, 15 Pick. 198; *Cobb* v. *Boston*, 109 Massachusetts, 438; *Pitkin* v. *Springfield*, 112 Massachusetts, 509; *Burt* v. *Merchants' Ins. Co.*, 115 Massachusetts, 1; *Bates* v. *Boston El. Ry.*, 187 Massachusetts, 328.

The construction of the statute by the state court gave the plaintiffs in error just compensation measured by the loss caused them. The decision entitled them to receive the value of what they have been deprived. To have awarded more would have been unjust to the public. At the time of the taking of the easement of public travel the land taken was already subject to rights of way and to rights of light and air not only to the Wharf and Dock Corporation but to its assigns, and the owner of the land so taken may be limited in his recovery to nominal damages. *Bartlett* v. *Bangor*, 67 Maine, 460; *Walker* v. *Manchester*, 58 N. H. 438; *Wilkins* v. *Same*, 74 N. H. 275; *In re Ethel Street*, 24 N. Y. Supp. 689; *Olean* v. *Steyner*, 135 N. Y. 341; *In re Adams*, 141 N. Y. 297; *Washburn* v. *Common Council*, 128 App. Div. (N. Y.) 44, 49; *Gamble* v. *Philadelphia*, 162 Pa. St. 413; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226.

Servitudes which diminish the value of land are a legitimate ground for a reduction of damages. *Tobey* v. *Taunton*, 199 Massachusetts, 411; *Crowell* v. *Beverly*, 134 Massachusetts, 98. See also *Allen* v. *Boston*, 137 Massachusetts, 319; *New England Tel. & Tel. Co.* v. *Boston Terminal Co.*, 182 Massachusetts, 400.

The filing of a stipulation signed by the plaintiffs in error could not make the property taken unencumbered building land, and as such the property of a single owner in fee, when at the time of the taking it was not. To so construe the statute would have been to deprive the public of property without due process of law rather than the plaintiffs in error. Thus the United States will follow the construction of a state statute given it by the highest court of the State. *Maiorano* v. *B. & O. R. R. Co.*, 213 U. S. 268; *Smiley* v. *Kansas*, 196 U. S. 447, 455; *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348, 353; *Covington* v. *Kentucky*, 173 U. S. 231.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for the assessment of damages caused by the laying out of a public street over 2955 square feet of land at the apex of a triangle between India Street and Central Wharf Street in Boston, the latter being a private way between Milk Street and Atlantic Avenue, laid out by the same order as part of the same street. The Chamber of Commerce had a building at the base of the triangle and owned the fee of the land taken. The Central Wharf and Wet Dock Corporation, which owned other land abutting on the new street, had an easement of way, light and air over the land in question, and the Boston Five Cents Savings Bank held a mortgage on the same, subject to the easement. These three were the only parties having any interests in the land. They filed an agreement in the case that the damages might be assessed in a lump sum, the city of Boston refusing to assent, and they contended that it was their right, as matter of law, under the Massachusetts statute, R. L. c. 48, p. 495, §§ 20, 21, 22, and the Fourteenth Amendment, to recover the full value of the land taken, considered as an unrestricted fee. The city on the other hand offered to show that the restriction being of great value to the Central Wharf and Wet Dock Corporation, the damage to the market value of the estate of the Chamber of Commerce was little or nothing, and contended that the damages must be assessed according to the condition of the title at the date of the order laying out the street. It contended that the jury could consider the improbability of the easement being released as it might affect the mind of a possible purchaser of the servient estate, and that the dominant owner could recover nothing, as it lost nothing by the superposition of a public easement upon its own. The parties agreed that if the petitioners were right, the damages should be assessed at $60,000, without interest, but if the city was right they should be $5,000. The judge before whom the case was tried ruled in favor of the city, and this ruling was sustained by the Supreme

Judicial Court, upon report. 195 Massachusetts, 338. A judgment was entered in the court where the record remained, and then the case was brought here.

We assume in favor of the petitioners, the plaintiffs in error, that their only remedy was under the statute; and we give them the benefit of the doubt in interpreting the decision of the court, so far as to take it to mean that the statutes of Massachusetts authorize the taking of land held as this was with no other compensation than according to the principle laid down. In short, we assume in their favor that the constitutional question is open, and that the case properly is not to be dismissed. But we are of opinion that upon the only possible question before us here the decision was right.

Of course we accept the construction given to the Massachusetts statute by the state court. *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272. The only question to be considered is whether when a man's land is taken he is entitled by the Fourteenth Amendment to recover more than the value of it as it stood at the time. For it is to be observed that the petitioners did not merely contend that they were entitled to have the jury consider the chance of getting a release, for whatever it might add to the market value of the land, as the city merely contended that the jury should consider the chance of not getting one. The petitioners contended that they had a right, as matter of law under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate—in other words, that the servitude must have been maintained in the interest of lands not before the court—but still, according to the contention, by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.

The statement of the contention seems to us to be enough.

It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 435. But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement. See *Bartlett* v. *Bangor*, 67 Maine, 460, 468. *Walker* v. *Manchester*, 58 N. H. 438, 441. *Gamble* v. *Philadelphia*, 162 Pa. St. 413. *Matter of Adams*, 141 N. Y. 297. *Olean* v. *Steyner*, 135 N. Y. 341, 346. *Crowell* v. *Beverly*, 134 Massachusetts, 98. There is some subordinate criticism under the alternative agreement giving them only $5,000. It is noticed that this was conditioned upon the petitioners not being entitled as just stated, and upon the admissibility of the evidence offered by the city, and upon the substantial correctness of the requests for rulings; and it is said that the evidence was not admissible. It seems to us that the worst objection to it was that it was offered to prove the obvious. But taking the agreement fairly we think it meant only to contrast broadly the position of the two sides, and made the result depend upon which was right.

Judgment affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* STATE OF NEBRASKA.

SAME *v.* SAME EX REL. FARMERS' ELEVATOR COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Nos. 127, 128. Argued March 7, 1910.—Decided April 4, 1910.

There are constitutional limits to what can be required of the owners of railroads under the police power.

Requiring the expenditure of money takes property whatever may be the ultimate return for the outlay.

It is beyond the police power of a State to compel a railroad company to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit. It amounts to deprivation of property without due process of law; and so held as to the applications for such switches made by elevator companies in these cases under the statute of Nebraska requiring such switch connections.

Quære whether even if a statute requiring railroad companies to make such switch connections at their own expense be construed as confined to such demands as are reasonable, it does not deprive the railroad company of its property without due process of law if it does not allow the company a hearing as to the reasonableness of the demand prior to compliance therewith, where, as in this case, failure to comply involves heavy and continuing penalties.

81 Nebraska, 15, reversed.

THE facts, which involve the constitutionality of a statute of the State of Nebraska requiring railroad companies to make switch connections with grain elevators under certain conditions, are stated in the opinion.

Mr. Balie P. Waggener, with whom *Mr. James W. Orr* was on the brief, for plaintiff in error:

The Nebraska statute in terms, and as construed by the state court, operated to take the property of the railway company for a private use, without its consent, and without com-

pensation, in violation of the Fourteenth Amendment. *C., M. & St. P. R. R.* v. *Minnesota,* 134 U. S. 418; *Hartford Ins. Co.* v. *Railroad Co.,* 175 U. S. 99; see *Ex parte Young,* 209 U. S. 148.

If the validity of this law is sustained, the control and management of railroad property will be turned over to every farmer who wants or imagines he wants side tracks to elevators.

The alternative arrangement of the section of the act in controversy was evidently made for the purpose of avoiding *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403, but it entirely fails so to do.

There is no question of rates to be made nor facilities to be furnished by the railroad company for the transportation of passengers or freight connected with the questions presented in this case. It is not a question of additional or better or different railroad facilities. It is not intended that the railroad company should have any control over this elevator to aid in or facilitate the movement of freight. It is to be purely a private concern, operated by private persons for private gain, and in no manner connected with the public or the railroad company. As to this see *Mann* v. *Pere Marquette R. Co.,* 135 Michigan, 210, 219.

In no event can property be taken, except for public use, nor then without just compensation. *C., K. & N. R. R. Co.* v. *Hazels,* 26 Nebraska, 354; *Gottschalk* v. *C., B. & Q. R. Co.,* 14 Nebraska, 550, 559.

The taking of private property does not necessarily mean the taking of real estate, but applies as well to the taking of personal property as of real property, and where, as in the case at bar, the railway company is not only required to part with the possession of certain portions of its real estate, but also with its money, for the purpose of constructing and operating a railroad the taking of the money is as much inhibited by the Constitution as would be the physical taking of a portion of its right of way, or its real estate. *Welton* v.

Dickson, 38 Nebraska, 767; *Mich. Cent. R. R. Co.* v. *Collector*, 100 U. S. 595; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 324; *Atlantic &c. Tel. Co.* v. *Chicago &c. R. R. Co.*, 6 Bissell (U. S.), 158.

The proposed taking of the right of way and moneys of the defendant company is for a private and not a public use. *Re Manderson*, 51 Fed. Rep. 503. *In re Montgomery*, 48 Fed. Rep. 896; and see *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 233, 241.

The statute, as construed by the Supreme Court of Nebraska, is void, within *L. & N. R. R. Co.* v. *Stock Yards*, 212 U. S. 132. It is arbitrary and unreasonable—denies to the railroad company the equal protection of the law; deprives it of its property, for private use, without compensation and without due process of law. *Interstate Comm. Comm.* v. *Railroad Co.*, 209 U. S. 118. The statute gives the company no discretion or voice whatever in the premises. It can appeal to no tribunal for relief. The fact that the company gives elevator switches to some does not give to every person the right to demand a switch of the railway company. The statute vests in the applicant the power to be the sole judge as to necessity and in that respect is arbitrary and illegal. *Nor. Pac. R. R.* v. *Dustin*, 142 U. S. 492; *Railroad Co.* v. *Minnesota*, 193 U. S. 53; and see *Atlantic Coast Line* v. *N. C. Com.*, 206 U. S. 20.

The power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation. *Reagan* v. *Farmers' &c. Co.*, 154 U. S. 399; *Railroad Commission Cases*, 116 U. S. 331, and see also *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Every person in Nebraska, except a railway company, may exercise some discretion in the management of his business. Under this statute, the railway company has no discretion. See *Hartford Ins. Co.* v. *Chicago Ry.*, 175 U. S. 91; *Dodge* v. *Mission Township*, 107 Fed. Rep. 827; *McKinster* v. *Sager*, 163 Indiana, 671; *Loan Assn.* v. *Topeka*, 20 Wall. 655.

Not only must the purpose be public for which the land is taken, but the State must have a voice in the manner in which the public may use it. *Board of Health* v. *Van Hoesen*, 87 Michigan, 533; *In re Burns*, 155 N. Y. 23–49; *Wisconsin Keely Co.* v. *Milwaukee Co.*, 95 Wisconsin, 153; *Davidson* v. *New Orleans*, 96 U. S. 97–102; *Loan Assn.* v. *Topeka*, 20 Wall. 655.

In operation and effect the statute is a delegation of the right and power of eminent domain, for a private purpose, and, without notice or hearing, permits and authorizes any "person or association" to take and appropriate the private property of the railroad company, without its consent, and without compensation.

This statute of Nebraska is an arbitrary and capricious exercise of power, and denies "the equal protection of the laws." *In re Eureka Warehouse*, 96 N. Y. 42–48; *Weidenfeld* v. *Sugar &c. Co.*, 48 Fed. Rep. 615; *Gaylord* v. *Chicago &c.*, 204 Illinois, 576; *Jordan* v. *Woodward*, 40 Maine, 317.

The statute, on its face, is class legislation, in this: That its operation as to elevators "hereafter" constructed is restricted to those having a capacity of fifteen thousand bushels. *State* v. *Haun*, 61 Kansas, 146; *Cotting* v. *Godard*, 183 U. S. 79; *Leeper* v. *Texas*, 139 U. S. 462.

Upon the conceded facts, the state court was without jurisdiction in the premises, and its order and judgment in violation of the Constitution and laws of the United States.

The statute is in direct conflict with the act of Congress. The one is arbitrary; makes no provision for notice, reasonableness or compensation. The other provides for a hearing and compensation. The one is extreme and populistic in all of its terms; the other is wise, reasonable and just. Congress has also provided the remedy for violation of the commission's orders, and designated the tribunal for its enforcement. *In re Railway Co.* v. *Interstate Comm. Comm.*, 162 U. S. 940; *Armour* v. *United States*, 209 U. S. 78; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Co.*, 204 U. S. 430, 452; *Wilson* v. *The Blackbird*, 2 Pet. 250.

The statute as construed by the state court, is an attempted regulation of the conduct of a carrier, subject to the provisions of the act of Congress, and of the instrumentalities and facilities of that carrier used and necessary to be used in interstate commerce. *Welton* v. *The State*, 91 U. S. 280; *Railroad Co.* v. *Husen*, 95 U. S. 469; *Hall* v. *DeCuir*, 95 U. S. 489; *Lake Co.* v. *Railroad Co.*, 130 U. S. 670; *Railway Co.* v. *Interstate Comm. Comm.*, 162 U. S. 211; *Copp* v. *Railroad Co.*, 43 La. Ann. 511; *Dudley* v. *Mayhew*, 3 N. Y. 9; *The Moses Taylor*, 4 Wall. 411; *Gulf, Col. &c. Ry. Co.* v. *Hefley*, 158 U. S. 99; *Railroad Co.* v. *Haber*, 169 U. S. 613–636.

Mr. R. C. James, *Mr. William P. Thompson* and *Mr. Norris Brown*, with whom *Mr. C. Gillespie* was on the brief, for defendants in error.

Mr. William P. Thompson for defendant in error in No. 127; *Mr. R. C. James* and *Mr. Norris Brown*, with whom *Mr. C. Gillespie* was on the brief, for defendant in error in No. 128:

The statute does not operate to take the property of the railway company within the meaning of the Constitution without its consent and without compensation, and is not in violation of the Fourteenth Amendment. *Wis. &c. R. R.* v. *Jacobson*, 179 U. S. 296; *Olcott* v. *Supervisors*, 16 Wall. 678, 684; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 569, 570; *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285, 301.

The statute is valid by whatever test applied. Obviously, it is within the provisions of the state constitution. The act is a clear exercise of the police power enjoyed by every sovereignty on which rests the burden to care for the public health, safety and convenience. A common carrier doing an interstate as well as intrastate business is not above the reach of local police authority.

Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent

domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of the defendant in error. *Mayor &c.* v. *Northwestern Ry.*, 109 Massachusetts, 112; *People* v. *Railroad Co.*, 58 N. Y. 152, 163; *People* v. *Boston R. R. Co.*, 70 N. Y. 569; *People* v. *Railroad Co.*, 104 N. Y. 58, 67.

In the exercise of its police power the State may legislate for the public convenience as well as for the public health, morals or safety. The side track in question is for the convenience of the public in loading its grain into the cars of the railroad company. It is a public inconvenience, expensive in time as well as money, to haul the grain in wagons from the elevator to the car.

Public convenience justifies statutes requiring interstate carriers to stop at stations long enough to allow passengers to get on and off the trains. *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285, 300. See also *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Caldwell* v. *Am. Bridge Co.*, 113 U. S. 205, 208; *Huse* v. *Glover*, 119 U. S. 543; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650, 662, and *Richmond & Allegheny R. R.* v. *Patterson Tobacco Co.*, 169 U. S. 311, 315.

In compelling the common carrier to deal fairly and without discrimination with its patrons and the public the statute is merely declaratory of the common law. It is a reasonable provision and places no irksome or unnecessary burden on the railroad, whose business is with the grain-shipping public at the elevator, just as it is with the passenger public at the depot.

The constitutional provision against taking property without compensation was not intended to deny the State the proper exercise of its police powers. *C., B. & Q. Ry. Co.* v. *Drainage Comm.*, 200 U. S. 562.

Upon the conceded facts, the State had full jurisdiction in the premises and the Federal Interstate Commerce Commission under the terms of the Hepburn Act is without jurisdic-

tion over the subject-matter involved in the case at bar. *Lake Shore Ry. Co.* v. *Ohio,* 173 U. S. 285.

The Federal tribunal has jurisdiction only of such matters as directly involve interstate commerce.

Mr. William T. Thompson, Attorney General of the State of Nebraska, and *Mr. Grant G. Martin* for defendant in error, the State of Nebraska, submitted:

Each State has the inherent power to regulate all commerce within its limits of purely an internal character. *Gibbons* v. *Ogden,* 9 Wheat. 194.

The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government. *Sands* v. *Manistee R. Imp. Co.,* 123 U. S. 288. See also *Wabash, St. L. & P. Ry. Co.* v. *Illinois,* 118 U. S. 557; *The Daniel Ball,* 10 Wall. 557.

The exclusive power to regulate interstate commerce belongs to Congress, but the jurisdiction of the State over its commerce of a purely domestic character is equally exclusive. Regulations such as are in this statute are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States. *Stone* v. *Farmers' L. & T. Co.,* 116 U. S. 307, 333, 334; *Smith* v. *Alabama,* 124 U. S. 465, 481, 482; *Hennington* v. *Georgia,* 163 U. S. 299, 308, 317; *N. Y., New Haven & H. R. R.* v. *New York,* 165 U. S. 628, 632; *Gladson* v. *Minnesota,* 166 U. S. 430.

One engaging in interstate commerce does not thereby submit all his business to the regulating power of Congress. *Employers' Liability Cases,* 207 U. S. 463. The Interstate Commerce Act is limited to the regulation of the business of

interstate commerce. The Hepburn law did not become operative until after this cause of action had accrued.

This act is not special or class legislation. That the classification limiting the applicability of the law to elevators having 15,000 bushels capacity is greatly to the advantage of the railway company. Such a class is reasonable, and general in its terms. It operates on all alike, is restricted to no locality and operates squarely upon all the groups of objects. It is not special law. *Hunzinger* v. *State*, 39 Nebraska, 653. See also *State* v. *Berka*, 20 Nebraska, 375; *State* v. *Graham*, 16 Nebraska, 64; *McClay* v. *City of Lincoln*, 32 Nebraska, 412; *Van Horn* v. *State*, 46 Nebraska, 62; *State* v. *Robinson*, 35 Nebraska, 401; *Livingston Bldg. & L. Assn.* v. *Drummond*, 49 Nebraska, 200.

The act does not seek to take or damage property without just compensation or due process of law. It is designed to be a facility which will enable the railway company to better serve its patrons and more expeditiously perform its own work. This side track must ever remain a part of the railroad and hence a part of the public highway of the State. See *Roby* v. *Farmers' Grain Co.*, 107 N. W. Rep. 766; *Rock Creek Township* v. *Strong*, 96 U. S. 271; *Black* v. *Philadelphia & R. R. Co.*, 58 Pa. St. 249. *Missouri Pacific Ry.* v. *State*, 164 U. S. 404, is not in point for the reason that the statute under consideration in that case expressly provided that the railroad company should give a site on its right of way to the elevator company on which to build an elevator.

The police powers of the State include questions of public welfare and convenience as well as questions of public health and morals. *Lawton* v. *Steele*, 152 U. S. 133; *Munn* v. *Illinois*, 94 U. S. 113; *Minneapolis & St. L. R. Co.* v. *Herrick*, 127 U. S. 210; *Chicago, B. & Q. R. Co.* v. *Cutts*, 94 U. S. 155; *Pike* v. *Chicago & N. W. R. Co.*, 94 U. S. 164; *Wisconsin M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287; *Atlantic Coast Line R. Co.* v. *Florida*, 203 U. S. 256; *Atlantic Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 19. A railroad company, as an interstate

carrier, may be compelled by state authority to furnish necessary facilities and convenience to accommodate the public within the State even though it suffer loss thereby. *Atlantic Coast Line R. R. Co.* v. *Nor. Car. Corp. Comm.*, 206 U. S. 26. In this case, however, the railroad company will suffer no loss by affording this facility.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are two suits arising under a Nebraska statute. The first is brought by the State to recover a fine of five hundred dollars imposed by the law for failure to obey its command; the second is brought at the relation of the party concerned to compel obedience to the same command by mandamus. The statute in question provides that "every railroad company or corporation operating a railroad in the State of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made, shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity

of not less than fifteen thousand bushels." Then follows a section making railroads liable for damages in case of wilful violation of the act, (which contains other provisions beside the above), and imposes the above-mentioned fine for each offense. Session Laws of 1905, c. 105, §§ 1, 6. 2 Cobbey's Supplement, § 10007, p. 410.

Under this act the Manley Coöperative Grain Association, a corporation, applied in writing for a site for an elevator on the right of way of the plaintiff in error, in Manley, Nebraska, but the application was refused. Then notice was sent that the corporation intended to build near the end of a side track at the railroad station at Manley and would expect an extension of the side track. The railroad company replied that it would give no trackage privilege. The elevator was built and a demand was made for a side track, repeating a previous offer to bear a fair share of the expense of the extension. This also was refused, and thereupon the first mentioned suit was brought for the penalty imposed by the act. The other suit is a petition for mandamus at the relation of the Farmers' Elevator Company of Strausville, Nebraska, another elevator corporation, and the facts are so like the foregoing that they do not need special statement. In both cases the railroad company set up that the statute was an attempt to regulate commerce among the States and also was void under the Fourteenth Amendment. After trials the fine was imposed and the peremptory writ of mandamus was ordered, and both judgments were affirmed by the Supreme Court of the State. 81 Nebraska, 15; 115 N. W. Rep. 757.

It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases, the initial cost is said to be $450 in one and $1732 in the other; and to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay. *Woodward* v. *Central Vermont Railway Co.*, 180 Massachusetts, 599,

602, 603. Moreover a part of the company's roadbed is appropriated mainly to a special use, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator. Now it is true that railroads can be required to fulfil the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. *Missouri Pacific Railway Co.* v. *Kansas*, 216 U. S. 262. It also is true that the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away.

Thus it is at least open to question whether a railroad company could be required to deliver cattle at another than its own stock yard at the end of the transit, or cars elsewhere than at its own terminus, without extra charge, if it furnished reasonable accommodations. *Louisville & Nashville R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, 144. *Central Stock Yards Co.* v. *Louisville & Nashville R. R. Co.*, 192 U. S. 568, 570. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128. So far as we see a grain elevator stands in no stronger position than a stock yard. If, as intimated, the elevators with which the Missouri Pacific connects charge too much and wrong the farmers, there may be other remedies; but manifestly the apprehension expressed by the Supreme Court of Nebraska, that the company, unless checked, will have power to establish a monopoly, is not to be met merely by building another elevator—the physical limits of that kind of competition are too easily reached. But if we assume that circumstances might make it reasonable to compel a railroad to deliver and receive

grain elsewhere than at its own elevators, or those that it had made its own by contract, the circumstances must be exceptional when it would be constitutional to throw the extra charge of reduplicating already physically adequate accommodations upon the road.

This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs and, possibly, without regard to place. It is true that in the first of the present cases the Supreme Court of Nebraska discussed the circumstances and expressed the opinion that the demand was reasonable and that building the side track would not cast an undue burden upon the road; and, in the second, it somewhat less definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed as, by implication, confining their requirements to reasonable demands. On the face of it the statute seems to require the railroad to pay for side tracks, whether reasonable or not—or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power.

But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason. And, moreover, even on this strained construction, they refrain from paying at the peril of a fine, if they turn out wrong in their guess that in the particular case the court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the

act. Sometimes when summary action is necessary the property owner's rights are preserved by leaving all questions open in a subsequent suit. *North American Storage Co.* v. *Chicago*, 211 U. S. 306. But in such cases the risk is thrown on the destroyer of property. In this case there is no emergency, yet at the best the owner of the property, if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least five hundred dollars for its offense in awaiting the result of a hearing. See *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418. An earlier statute authorizing the State Board of Transportation after hearing to require the railroad to permit the erection of an elevator upon its roadbed already has been held bad. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403. See also *Hartford Fire Ins. Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91, 99. We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing and compensation, which is said to have been passed in 1907. (See Laws of 1907, c. 89, p. 309.)

Judgments reversed.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissent.

SOUTHERN RAILWAY COMPANY *v.* MILLER.

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

No. 122. Argued March 3, 1910.—Decided April 4, 1910.

For the purposes of determining the removability of a cause, the case must be deemed to be such as the plaintiff has made it, in good faith, in his pleadings; and if a plaintiff in a suit for personal injuries joined with the foreign corporation one or more of its employés residents of plaintiff's State as defendants, and the state court holds that the joinder is not improper, the cause is not separable and cannot be removed into the Federal court. *Alabama & Great Southern R. R.* v. *Thompson*, 200 U. S. 206; *Railway Co.* v. *Bohon*, 200 U. S. 221.

After a case properly removable and moved into the Federal court has been voluntarily dismissed without action on the merits, the case is again at large and plaintiff may begin it again in any court of competent jurisdiction, including the state court from which the first case was removed into the Circuit Court.

59 S. E. Rep. 1115, affirmed.

THE facts are stated in the opinion.

Mr. John J. Strickland, with whom *Mr. Alfred P. Thom* was on the brief, for plaintiff in error:

As to the jurisdiction: Whether or not a case is made in the state court, for removal, is a Federal question. *Gordon* v. *Longest*, 16 Pet. 97; *B. & O. Ry. Co.* v. *Koontz*, 104 U. S. 5; *Goldey* v. *Morning News*, 156 U. S. 523; *B. C. R. & N. Ry.* v. *Dunn*, 122 U. S. 517; *Traction Co.* v. *Mining Co.*, 196 U. S. 245; *Kansas City R. R.* v. *Daugherty*, 138 U. S. 298; *Stone* v. *South Carolina*, 117 U. S. 430.

Though a case go to the state court of review a second time, the question will be passed on when carried to this court, if properly preserved. *Stanley* v. *Schwally*, 162 U. S. 255; *Re Blake*, 175 U. S. 118.

Whether or not the state court has jurisdiction to try a

case once removed into the Circuit Court of the United States and again sued in the state court, is a Federal question. *Kern* v. *Huidekoper*, 103 U. S. 485; *National S. Co.* v. *Tugman*, 106 U. S. 118.

The fact that the party, after removal, has contested the case in the state court does not, after judgment against him, constitute a waiver as to jurisdiction. *Kern* v. *Huidekoper*, 103 U. S. 485; *National S. Co.* v. *Tugman*, 106 U. S. 118; *Goldey* v. *Morning News*, 156 U. S. 517.

The petition filed by plaintiff in the Court of Hall County, made a separable controversy on its face and was removable.

A joint action cannot be sustained against the master and the servant where the master is sought to be held liable solely for the acts of the servant without the concurrence of the master. *Warax* v. *Railroad Co.*, 72 Fed. Rep. 637; *Hakill* v. *Railroad Co.*, 72 Fed. Rep. 745; *Beuttel* v. *Railroad Co.*, 26 Fed. Rep. 50; *Ferguson* v. *Railroad Co.*, 63 Fed. Rep. 177; *Hartshorn* v. *Railroad Co.*, 77 Fed. Rep. 9; *Helms* v. *N. P. Ry.*, 105 Fed. Rep. 449; *Ala. So. Ry. Co.* v. *Thompson*, 200 U. S. 206; *Charman* v. *Railway Co.*, 105 Fed. Rep. 449; *Riser* v. *Railway Co.*, 116 Fed. Rep. 215.

The acts of negligence charged in plaintiff's petition, against defendants who were servants of the railway company, and the co-employés of plaintiff, were acts of nonfeasance, only, and for such acts the master only is liable to the injured party, the servants being in turn liable to the master. Blackstone, 430; 1 Am. & Eng. Ency. of Law, 2d ed., 1131; 20 Am. & Eng. Ency. of Law, 2d ed., 52; *Brice* v. *Southern Ry. Co.*, 125 Fed. Rep. 959; Code of Georgia, 1895, §§ 3029, 3817, 3915, 4940, 5872, 2321; *Kimbrough* v. *Boswell*, 119 Georgia, 203; *Reid* v. *Humber*, 49 Georgia, 208; *McCalla* v. *Shaw*, 72 Georgia, 458; *Hay* v. *Collins*, 118 Georgia, 248; *Cox* v. *Strickland*, 120 Georgia, 104; *Burch* v. *Caden Stone Co.*, 93 Fed. Rep. 181; *Shaffer* v. *Union Brick Co.*, 128 Fed. Rep. 97; *Campbell* v. *So. Ry. Co.*, 16 Am. Rep. 512; *Cent. of Georgia Ry.* v. *Brown*, 113 Georgia, 414; Pomroy on Code Remedies,

§ 307; *Cromwell* v. *County of Sac,* 94 U. S. 352; *So. Ry. Co.* v. *Grizzle,* 124 Georgia, 735.

The suit against the Southern Railway was based upon a statutory cause of action and the suit against the other defendants was based upon a common-law right, if any right. The two separate causes of action were blended in one count and thus made a separable controversy. *Helms* v. *N. P. Ry.,* 120 Fed. Rep. 389; *Lavelle* v. *Ry. Co.,* 40 Minnesota, 249; *Johnson* v. *Railroad Co.,* 43 Minnesota, 222; *Beuttel* v. *Railroad Co.,* 26 Fed. Rep. 50; *Ala. So. Ry. Co.* v. *Thompson,* 200 U. S. 206; *Gustafson* v. *Railway Co.,* 128 Fed. Rep. 85; *Atlantic Coast Line* v. *Bailey,* 151 Fed. Rep. 891; *Railroad Co.* v. *Stepp,* 151 Fed. Rep. 909; *N. E. R. R. Co.* v. *Conroy,* 175 U. S. 323; *James* v. *Kelley,* 107 Georgia, 452; *Railroad Co.* v. *Dixon,* 179 U. S. 131; *West & At. R. R. Co.* v. *Exposition Mills,* 83 Georgia, 441; *Charleston & W. C. Ry. Co.* v. *Miller,* 113 Georgia, 15; *Cavanaugh* v. *So. Ry. Co.,* 120 Georgia, 67; *McDormant* v. *Hannibal & St. Joseph R. R. Co.,* 87 Missouri, 286; *Addecker* v. *Schrubbee,* 45 Iowa, 315.

Eliminating from the petition all the paragraphs that refer to defendants other than the railroad company the petition still made on its face a case authorizing a recovery against the railway company and the same was therefore removable.

When the case was sued in Hall Superior Court, and removed into the Circuit Court, the cause of action as well as the case was removed and the plaintiff could not, by any act of his again bestow jurisdiction upon the state court. *Kern* v. *Huidekoper,* 103 U. S. 485; *Nat. S. Co.* v. *Tugman,* 106 U. S. 118; *Gordon* v. *Longest,* 16 Pet. 97; *Goldey* v. *Morning News,* 156 U. S. 523; *McIver* v. *F. C. & P. R. R.,* 110 Georgia, 223; *Webb* v. *Sou. Cotton Oil Co.,* 131 Georgia, 682.

Mr. Reuben R. Arnold, with whom *Mr. Reuben Arnold* was on the brief, for defendant in error:

The suit was a joint one and could not be removed. *Rail-*

way Co. v. *Dickson*, 179 U. S. 131; *Powers* v. *Railroad Co.*, 169 U. S. 92; *Railroad Co.* v. *Wangelin*, 132 U. S. 599.

If the plaintiff elects to bring a joint action, the defendant has no right to say that the action shall be severable. *Railroad Co.* v. *Ide*, 114 U. S. 52; and this is so even though the plaintiff has misconceived his cause of action and has no right to prosecute the same jointly. *Railroad Co.* v. *Thompson*, 200 U. S. 206; *Railway Co.* v. *Bohon*, 200 U. S. 221.

But this action is well brought jointly against the defendants. Georgia having a statute which makes a railroad responsible to one employé for the negligence of a fellow-servant, the negligent servant is liable to his fellow-servants for injuries inflicted by such negligent servant. See *Morrison* v. *Railroad Co.*, 74 Pac. Rep. (Wash.) 1064; *Howe* v. *Railroad Co.*, 30 Washington, 569; *Abel* v. *Railroad Co.*, 73 S. C. 173; *Warrax* v. *Railroad Co.*, 72 Fed. Rep. 637; *Railroad Co.* v. *Dickson*, 179 U. S. 131.

The point in the brief for plaintiffs in error that the acts of negligence charged against the employé defendants were acts of non-feasance merely, and that for such acts only the master is liable,—is untenable in negligence cases. *Railway Co.* v. *Grizzle*, 124 Georgia, 735; *Osborn* v. *Morgan*, 130 Massachusetts, 102; *Bell* v. *Josselyn*, 3 Gray, 309.

It was for the state court to decide whether it would permit persons to be joined who were guilty of misfeasance or nonfeasance. No Federal question is raised in this particular.

After dismissal in United States court, case can be brought over again in state court.

Upon the voluntary dismissal of a suit in the United States court, the jurisdiction of the United States court is ended; it no longer has control over the cause of action, as its control over the cause of action only lasted while the case was actually pending. When the case is dismissed the jurisdiction of the United States court is wholly divested and the plaintiff is just as free to bring his suit over again as he was when it was originally filed in the state court. See *Young* v. *Southern Bell*

Co., 55 S. E. Rep. 765; *Gassman* v. *Jarvis*, 100 Fed. Rep. 146; *Texas Cotton Products Co.* v. *Starnes*, 128 Fed. Rep. 183, affirmed, 133 Fed. Rep. 1022; *McIver* v. *Florida &c. Ry. Co.*, 110 Georgia, 223; *C., C. C. & St. L. R. R. Co.* v. *Reese*, 93 Ill. App. 467; *Cleveland, C. C. & St. L. R. R. Co.* v. *Lawler*, 94 Ill. App. 36; *Foley* v. *Cudahy Packing Co.*, 119 Iowa, 246; *Rodman* v. *Missouri P. R. Co.*, 65 Kansas, 645; *Swift & Co.* v. *Hoblawetz*, 10 Kan. App. 48; *Adams Exp. Co.* v. *Schofield*, 111 Kentucky, 832; *Stephenson* v. *Ill. C. R. Co.*, 117 Kentucky, 855; *DeWitt* v. *Chesapeake & O. R. Co.*, 25 Ky. L. Rep. 2019; *Nipp* v. *Chesapeake & O. R. Co.*, 25 Ky. L. Rep. 2335; *Dana & Co.* v. *Blackburn*, 28 Ky. L. Rep. 695; *Krueger* v. *Chicago & A. R. Co.*, 84 Mo. App. 358; *Fox* v. *Jacob Dold Packing Co.*, 96 Mo. App. 173; *Fleming* v. *Southern R. Co.*, 128 N. C. 80; *Hooper* v. *Atlanta, K. & N. R. Co.*, 106 Tennessee, 28; *Illinois Central R. Co.* v. *Bentz*, 108 Tennessee, 670; *Texas & P. R. Co.* v. *Maddox*, 26 Tex. Civ. App. 297. See also *Bush* v. *Kentucky*, 107 U. S. 110.

The cases cited by plaintiff in error only go to the extent of holding that when a defendant removes a case from a state court to a Federal court, so long as that case is pending in the Federal court, the jurisdiction of the state court is completely ousted. See *McIver* v. *Railroad Co.*, 110 Georgia, 223, distinguished.

The only case sustaining contentions of plaintiff in error, is *Railroad Co.* v. *Fulton*, 59 Ohio St. 575, which was based upon a mistaken interpretation of the case of *Cox* v. *Railroad Co.*, 68 Georgia, 446. See *McIver Case*, 110 Georgia, 223; and the *Young Case*, 55 S. E. Rep. 765; note to 7 L. R. A. (N. S.) 501.

Mr. Justice Day delivered the opinion of the court.

The defendant in error, plaintiff below, brought suit in the City Court of Hall County, Georgia, against the Southern Railway Company, a corporation of Virginia, and certain individual citizens of Georgia, to recover damages for personal in-

juries received by him while in the employ of the railroad company as an engineer. A recovery in the court of original jurisdiction was affirmed in the Court of Appeals of Georgia (59 S. E. Rep. 1115), and the case is brought here to review certain Federal questions presented by the record. These are, first, that the state court erred in refusing to remove the case to the United States Circuit Court upon the petition of the plaintiff in error; second, as it appeared that the case had once been removed to the Federal court and was dismissed by the plaintiff, the state court should have held that the right to further prosecute in that court was lost, and the jurisdiction completely and finally transferred to the Federal court.

In order to determine these questions it is necessary to state how the case arose. Originally this suit was brought against the Southern Railway Company alone, to recover damages for injuries charged to have been inflicted, because the train upon which the plaintiff was engineer was permitted to run from the main track through an open switch on to a siding where another train was standing, when, by reason of the rules and regulations of the company in the circumstances set forth, plaintiff's train had the right of way upon the track, and, because the switch was turned the wrong way, plaintiff's train was thrown into the siding upon which the other train was standing, and in order to avoid more serious injury plaintiff jumped from his engine, and was greatly injured.

The first suit, being against the Southern Railway Company alone, was removed to the United States Circuit Court, the transcript of record was duly filed, and the company answered. Thereafter the plaintiff voluntarily dismissed the case, and later began the present case against the Southern Railway Company for the same injury and joined Cox, Voil and Hurst as parties defendant. These parties were, respectively, the conductor of the train with which plaintiff's train collided, the engineer and front brakeman of said train. The negligence charged was that the brakeman negligently failed to turn the switch back to the main line after his train went into the sid-

ing; that Cox, the conductor, was in control and management of the train, and under the duty of seeing that the switch was turned to the main line; and that Voil, the engineer, after he got his engine into the siding with the exercise of ordinary care should have known that the switch was turned wrong, and yet failed to take any steps to report the situation or to have it remedied. It was further alleged that the individual defendants, in causing the switch to be unlocked and turned from the main line, were guilty of negligence, which was the negligence of the railroad company, inasmuch as they represented the company in the operation of the train which collided with the plaintiff's train. It is also alleged that the individual defendants should have flagged the plaintiff's train if for any reason the switch remained turned to the side track.

The petition for removal contained no charge that the attempt to join the defendants was for the purpose of fraudulently avoiding the jurisdiction of the United States court, or with a view to defeat a removal thereto. The case here presented is one in which the record discloses there was an attempt to join, in good faith, the railway company and the individual defendants as for a joint liability in tort.

Under the practice in Georgia the case went to the Court of Appeals of that State on the question of the right to remove the case to the Federal court. The decision of the Court of Appeals upon that question is reported in 1 Ga. App. 616; 57 S. E. Rep. 1020. In that case the court dealt with the right under the law of Georgia to join the individual defendants with the railroad company, and held that the objections to joinder were untenable, and that there was no separable controversy, either at common law or under the statutes of Georgia. In an opinion by the chief judge it was held that the acts of negligence charged against the individual defendants involved both acts of omission and commission, and were not merely matters of non-feasance, for which the agents would not be jointly liable with the principal. The court further held that the objection that the liability of the railroad company

was statutory and that of the other defendants at common law made no difference in the right to join the defendants, and that, under the statute law of Georgia, the acts of negligence set out in the declaration against the individual defendants may have amounted to criminal negligence, in which event both the railroad company and the individual defendants were jointly liable to the plaintiff under the law of the State. In view of the conclusions which the learned court reached it further held that the case was ruled by *Alabama & Great Southern R. R. Co.* v. *Thompson*, 200 U. S. 206. We agree with that conclusion. In that case it was held that, for the purposes of determining the removability of a cause the case must be deemed to be such as the plaintiff has made it in good faith in his pleadings. See also *Railway Co.* v. *Bohon*, 200 U. S. 221. There was no error in the refusal to remove the case.

A further objection is made that inasmuch as the suit was once removed from the state court to the Federal court and therein dismissed, there was no right to begin the case again in the state court. This argument is predicated upon the statement in a number of cases in this court, to the effect that where the petition for removal and bond has been filed the state court loses jurisdiction of the case, and subsequent proceedings therein are void and of no effect. But this is far from holding that a Federal court obtains jurisdiction of a suit thus removed in such wise that it can never again be brought in a state court, although there has been no judgment upon the merits in the Federal court, and the case has been dismissed therein without any other disposition than is involved in a voluntary dismissal with the consent of the court.

While it is true that a compliance with the act of Congress entitling the party to remove the case may operate to end the jurisdiction of the state court, notwithstanding it refuses to allow such removal, it by no means follows that the state court may not acquire jurisdiction in some proper way of the same cause of action after the case has been dismissed without final judgment in a Federal court. By complying with the removal

act the state court lost its jurisdiction, and upon the filing of the record in the Federal court that court acquired jurisdiction. It thereby had the authority to hear, determine and render a judgment in that case to the exclusion of every other court. But where the court permitted a dismissal of the action by the plaintiff it thereby lost the jurisdiction which it had thus acquired.

We know of no principle which would permit the Federal court under such circumstances, and after the dismissal of the suit, to continue its jurisdiction over the case in such wise that no other court could ever entertain it. After the voluntary dismissal in the Federal court the case was again at large, and the plaintiff was at liberty to begin it again in any court of competent jurisdiction.

We find no error in the judgment of the Court of Appeals of Georgia, and the same is affirmed.

Affirmed.

LOS ANGELES FARMING AND MILLING COMPANY *v.* CITY OF LOS ANGELES.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 137. Argued March 10, 11, 1910.—Decided April 4, 1910.

In this case both parties claim under Spanish or Mexican titles, confirmed by proceedings under the act of March 3, 1851, c. 41, 9 Stat. 631. The Federal rights alleged by plaintiff in error to have been violated by the decision of the state court, so far as concerns this act, relate to the extent of the right and ownership of the parties in the use of the Los Angeles River. Plaintiff in error contended that by its grant it became the owner of riparian rights without limitations by any right of the city of Los Angeles to use the water of the river, and that the city by failing to present its claim for the use of such water to the commission under the act of 1851 is foreclosed from now asserting them. The state court held that the city of Los Angeles had the exclusive right to the water of the Los Angeles

River from its source to the most southern part of the city. In dismissing a writ of error to review the judgment of the state court *held* that:

The act of 1851 was a confirmatory act and not one granting titles; that by its terms it did not originate titles nor make the patents to be issued in pursuance of decisions of the commission conclusive except upon the United States.

The extent of riparian rights belonging to pueblos or persons receiving patents of the United States in pursuance of the decisions of the commission under the act of March 3, 1851, are matters of local or general law.

The decision of the state court in this case was put upon the effect of the old Spanish or Mexican law as to the rights of the original pueblo of Los Angeles succeeded to by the present city and such rights were merely confirmed and not originated by proceedings under acts of Congress; and therefore, as no rights existing under an authority of the United States were denied, this court has no jurisdiction to review the judgment under § 709, Rev. Stat.

Writ of error to review 152 California, 645, dismissed.

THE facts, which involve the title of the city of Los Angeles to the waters of the Los Angeles River and to the use thereof, are stated in the opinion.

Mr. R. M. Widney for plaintiff in error.

Mr. W. B. Mathews and *Mr. John F. Dillon*, with whom *Mr. Leslie R. Hewitt* and *Mr. John C. Thomson* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The city of Los Angeles brought suit in the Superior Court of the county of Los Angeles against the Los Angeles Farming and Milling Company, hereinafter called the Milling Company, to quiet the title of the city to the use of the waters of the Los Angeles River. The city of Los Angeles is situated on the Los Angeles River, a non-navigable stream rising in the San Fernando Valley and mountains adjacent, and flow-

ing from the north down to and through said city. The Milling Company is the owner of a large tract of land, about 10,000 acres, situated some ten miles up stream above said city on the same river. In its complaint the city of Los Angeles sets forth that it is the owner of the paramount right to take and use all of the water of said river from its sources to the southern boundary of the city, so far as it is necessary to furnish a supply for the use of the city and its inhabitants; that the plaintiff in error owns its lands subject to such paramount right of the city to the use of the water, and claims adversely to the city and its estate and interest in said water right.

The defendant answered, and, among other things, set up a denial of the alleged paramount rights of the city in the waters of the Los Angeles River, and alleged that it and its predecessors had been in the exclusive possession of said lands for more than fifty years under claim of title, using the waters of the river riparian or appurtenant to its estate; that the value of the premises was over $500,000; that its lands were some ten miles above the city, on the river; that the title to the lands and waters in controversy were first owned by the crown of Spain, thence passing to the Republic of Mexico, which republic, on June 17, 1846, granted to the predecessors of the Milling Company certain lands, which included the lands in controversy; that by the treaty between the Republic of Mexico and the United States the sovereign rights and titles of said Republic of Mexico in said property passed to and vested in the United States; that California, upon its admission to the Union, was prohibited from passing any laws disposing of the public lands of the United States, or from doing any acts whereby the title of the United States in the public lands within its limits should be impaired or questioned; that the laws of the United States were extended over California, September 29, 1850; that the Congress of the United States passed an act, approved March 3, 1851, providing for the ascertainment and settlement of the land

claims derived from Spain or Mexico in the State of California, and created a board of land commissioners for that purpose; that all lands, the claim to which was rejected, or had not been presented, to said board should be held and considered as part of the public domain of the United States; that claims of towns or cities should be presented under said act; that a grant to cities or towns existing July 7, 1846, should be presumed; that the decrees and patents issued by the tribunals under said act should be conclusive between the United States and the claimant; that the claims of the predecessors in interest of the Milling Company to its lands was duly presented to the board of land commissioners, and confirmed on January 8, 1873, and the patent of the United States was issued to them, and, it is alleged, that said patentee thereby became vested with the rights in fee simple to said lands and all the waters therein or riparian thereto. It is alleged that this patent is *res judicata* of the rights of the Milling Company; that under the act of March 3, 1851, the mayor and council of the city of Los Angeles presented to the said board of land commissioners a claim for sixteen square leagues of land, known as the pueblo of Los Angeles, and for the water rights of the said Los Angeles River, for the use of the pueblo; that said claim was adjudged and affirmed to be valid to the extent of four square leagues, and held invalid as to the remainder thereof, and that a patent was issued by the United States to the city of Los Angeles on August 9, 1866, for four square leagues of land. The Milling Company sets up that this confirmation and patent in favor of the city is *res judicata* for four square leagues, and claims that the city is barred from setting up or claiming any title, ownership or interest in or to the premises in controversy herein; that the sources and tributaries of the Los Angeles River are located on the public lands of the United States; that the legislature of California has passed certain acts, attempting to confer and grant to the city of Los Angeles paramount right to take and use all the waters of the Los Angeles River, which acts, it is con-

tended, are null and void under the act of Congress admitting the State of California into the Union, and, under Article XIV of the Constitution, preventing private property being taken for public use without just compensation therefor. The answer also sets up the statute of limitations.

The case was submitted to the court of original jurisdiction upon a stipulation of facts, which shows that the pueblo of Los Angeles was established in 1781 under the government of Spain, containing four square leagues of land, embracing the lands afterwards patented to the city under the act of Congress of March 3, 1851; that the settlers and inhabitants of the pueblo used the water from the river by means of ditches for domestic and irrigation purposes until the time of the acquisition of the State of California by the United States, the amount of irrigable land being then about fifteen hundred acres, and it is stipulated:

"Under the laws of the Kingdom of Spain, said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the complaint herein, to use all the water of the river, and such paramount right continued to exist under that government and under the Mexican government, until the acquisition of California by the United States."

It appears in the stipulation of facts that the pueblo of Los Angeles, in presenting its petition to the board of land commissioners, wherein it claimed the sixteen square leagues, presented as a part thereof a copy of an ordinance of the King of Spain, wherein he provides for the establishment of the town of Pitic in Sonora, and orders that the provisions relative thereto should be followed in the foundation of any new peublos in the jurisdiction of the commanding general of the internal provinces of the west, of which California constituted a part, and attached to that petition was a copy of the plan of the town of Pitic, which contained, among things, this provision:

"7th. The neighbors and natives shall likewise enjoy the

use of the woods, water and other benefits from the royal and vacant lands lying outside of the tract assigned to the new town jointly with the residents and natives of the immediate and adjoining towns; which favor and right shall continue until by his majesty the same shall be granted or alienated; in which case regulations will be made according to the provisions for concessions in favor of new possessors or proprietors."

But there is nothing in the statement of facts affecting the force of the stipulation that the pueblo of Los Angeles had the paramount water right, as above stated and as claimed in the complaint, until the acquisition of the State of California by the United States. It is further stipulated that no grant nor claim of the real property described in the complaint was presented for confirmation under the act of March 3, 1851, except in so far as the same may have been embraced in the claim of the mayor and common council of the city of Los Angeles presented and confirmed in the manner described, which resulted in the confirmation and patent for four square leagues of land and the rejection of the claim for the remaining portion of the premises described and claimed by the petitioners; that pursuant to that decree the United States issued a patent for the four square leagues of land; that the city of Los Angeles was incorporated on April 4, 1850, by act of the legislature of California, with boundaries including the four square leagues, and the act provided that the city should succeed to all the rights, claims and powers of the pueblo of Los Angeles in regard to property, and should be subject to all the liabilities incurred and obligations created by the ayuntamiento of said pueblo. The decision of the commissioners was affirmed by the District Court of the United States and a patent was issued on August 9, 1866, in accordance therewith, for four square leagues. Afterwards, on August 12, 1875, another patent was issued by the United States for the four square leagues of land, in which latter patent no mention was made of the fact that the land

for which confirmation was asked contained sixteen square leagues, or that the claim of the city was founded on the Mexican grant to the petitioners made on August 25, 1844, as was stated in the earlier patent. The patent of August 4, 1875, contained a certificate of the United States surveyor general for California, that notice of the plat and survey had been advertised in two newspapers, and that the plat was a correct copy of the original and had been approved August 4, 1875, by the Commissioner of the General Land Office.

As to the land claimed and owned by the Milling Company, it is stipulated that it was contained in the Rancho Ex-Mission de San Fernando, which embraced the lands of the Milling Company, and was an imperfect or inchoate grant made by the Mexican Government on June 14, 1846, and the claim thereto of the predecessors in interest to the Milling Company was presented to and confirmed by the board of land commissioners under the act of March 3, 1851, and the patent of the United States was issued therefor on January 8, 1873; that said patent includes 121,619 acres of land, through a part of which the Los Angeles River and its tributaries flow; that said rancho is riparian to said river, and that the patent states that the United States of America granted the land therein embraced, with the appurtenances, without making any reservation or exception of any rights to said river, its tributaries or waters therein; that the value of the premises in controversy is over $400,000; that neither the city nor any of its predecessors have contested the grant, survey or proceedings in connection with the confirmation of the claim of the predecessors in interest to the Milling Company to said rancho; that said rancho is situated on said river, some ten miles above the city of Los Angeles, and above any of the points of diversion of water by said city; that after the acquisition of California by the United States, the pueblo of Los Angeles continued to exist and be managed by the pueblo authorities, and the water of said river continued to be used for domestic and irrigation purposes by its inhabitants until

the incorporation of the city under the legislative act of April 4, 1850, and thereafter the use of water from said river for municipal, domestic and irrigation purposes continued until about 1901, since which time all of said water has been needed and used for domestic purposes in said city as enlarged from the patented area of 17,172 acres to 27,695 acres in 1898; that the surface stream of the river continues for a distance of several miles above the city, to points where it rises from beneath the surface of the ground, and, in seasons of heavy rainfall, it extends up to the mouths of the various canyons, from which surface streams, coming from public lands of the United States, and which are the sources and tributaries of the Los Angeles River, emerge and flow, until the approach of summer, when they sink into the sand at or near the mouths of such canyons; that all of the territory in which the surface stream of the Los Angeles River constantly flows, and all of the valleys through which the torrential surface stream of the river flows, in winter and spring, up to the mouths of said canyons, are embraced within Spanish and Mexican grants, confirmed and patented to parties, other than the city, under the act of March 3, 1851; that the city has sold to private parties all the lands embraced in its patent from the United States, including the lands riparian to the river, excepting certain lots, on which are erected public city buildings, also certain parks and the river bed, 200 feet more or less in width, inside the patent boundary; that the allegations of the complaint, describing the Los Angeles River, and showing that the underground stream thereof extends throughout the whole of the lands of the Milling Company, described in the complaint, are true.

Upon submission to the trial court a judgment was rendered in favor of the city, ordering and adjudging that the city was the owner in fee simple of the paramount right to take and use the water of the Los Angeles River from its source to the southern boundary of the city of Los Angeles, so far as may be reasonably necessary, from time to time, to

give an ample supply of water for the use of its inhabitants, and for all the municipal purposes and uses of the city, and the city was quieted in its title and right to the use of the water as aforesaid.

Upon appeal to the Supreme Court of California the judgment of the lower court was affirmed (152 California, 645), and the case is brought here by writ of error to that court.

A case can only be brought to this court from a supreme court of a State by writ of error under § 709 of the Revised Statutes of the United States, in order to determine Federal rights asserted under that section of the statutes which it is claimed have been denied by the decision and judgment of the supreme court of the State. It is therefore necessary to know just what is comprehended in the decision and judgment of that court. The Supreme Court of California, after reciting the proceedings and facts found in the court below, dealt with the contention of the plaintiff in error as to the proceedings under the act of March 3, 1851, which confirmed the title to the lands described, and held that in confirming the title to the lands and awarding patents therefor the riparian rights of the proprietors and patentees were left to be determined by the law of the country or State where the land is situated, and denied the contention of the Milling Company that the city had only title to the four square leagues of land awarded to it by the proceedings and patents under the act of March 3, 1851, with no ownership in the use of the water above the limits of the land granted, and denied the further contention that by the proceedings and patent to the Milling Company's predecessors they were adjudged the riparian owners with the use of the waters of the river running through the land as part and parcel of their estate. The court having reached this conclusion as to the effect of the act of March 3, 1851, held that the only question in the case was as to whether under the Spanish and Mexican law the old pueblo of Los Angeles and the city as its successor had,

as against the Milling Company, the prior and paramount ownership of so much of the water of the Los Angeles River as is necessary for its inhabitants, and for general municipal purposes, and held that this question was answered in the affirmative in the prior decisions of the California Supreme Court. *Lux* v. *Haggin*, 69 California, 265; *Vernon Company* v. *Los Angeles*, 106 California, 237; *Los Angeles* v. *Pomeroy*, 124 California, 597 (same case in this court, *sub. nom. Los Angeles* v. *Hooker*, 188 U. S. 314).

These decisions the court held to be determinative of the prior and paramount right of the pueblo and its successor under rights existing under the Spanish and Mexican laws, confirmed by the United States to the successors of the pueblo. The court declined to consider for what municipal purposes the water could be used as against a riparian owner, and held that the extent of the city's prior and paramount right was not involved in the case.

It is thus apparent that the Supreme Court of California put the decision of the case upon the effect of the old Spanish or Mexican law as to the rights of the pueblo succeeded to by the city, and confirmed by proceedings under the acts of Congress for the purpose of confirming such titles.

We come then to consider what Federal questions are really presented in this record, and whether, in reaching the decision which we have stated the Supreme Court of California directly, or necessarily, by reason of its decision, denied such rights asserted under § 709 of the Revised Statutes. We may at once put aside, as not presenting Federal questions of serious import, the assignments of error to the effect that the decision of the Supreme Court of California denied to the plaintiff in error due process of law or the equal protection of the laws secured by the Fourteenth Amendment of the Constitution of the United States. We may treat in like manner the assignments involving the construction by the Supreme Court of the state statutes, and rulings as to the admissibility of evidence. Nor do we find any denial of Federal right worthy

of consideration in the assertion that the statutes of California have undertaken to confer the water rights in controversy on the city of Los Angeles, and were given such effect, in violation of the Federal rights of the plaintiff in error. As we have seen, the rights of the city were not determined by the effect of those statutes, but upon the right and title secured by the Spanish or Mexican law, and the subsequent confirmation thereof under the statute of the United States.

As to the assignment of error that the effect of the judgment is to interfere with the disposition of the public lands by the United States.

The act of March 3, 1851 (chap. 41, 9 Stat. 631, 634, § 14), made provision for the presentation to the commission of the former right of pueblos and the issue of patents to them upon confirmation. And further, the same section provided that the existence of a city, town or village on July 7, 1846, being duly proved, should be *prima facie* evidence of a grant to such corporation.

This court, speaking by Mr. Justice Miller, tersely disposes of the nature of such old Mexican titles in *Adam* v. *Norris*, 103 U. S. 591, 593:

"But the United States in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the Government issued a patent it was in the nature of a quitclaim—an admission that the rightful ownership had never been in the United States, but had passed at the time of the cession to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The leading cases are *Beard* v. *Federy*, 3 Wall. 478; *Henshaw* v. *Bissel*, 18 Wall. 255; *Miller* v. *Dale*, 92 U. S. 473."

It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than a

quitclaim. *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339, 344.

The assignments covering other Federal questions which should be noticed embrace the contention that the rights of the Milling Company were secured under the treaty of Guadalupe Hidalgo between the United States and Spain, and under the act of Congress of March 3, 1851, for the confirmation of titles derived from the Spanish or Mexican governments. The contentions as to the supposed rights derived under that treaty and act have been before this court in a number of cases, in which it has been uniformly held that rights alleged to have arisen thereunder, in the manner claimed by the present plaintiff in error, are not rights of Federal origin which, when denied, lay the basis for the review and reversal of the judgment of the state court.

In *Townsend* v. *Greeley*, 5 Wall. 326, Mr. Justice Field, delivering the opinion of the court, held that the treaty of Guadalupe Hidalgo does not purport to divest the pueblo, existing at the site of the city of San Francisco, of any rights of property or to alter the character of interests it may have held in any lands under the former government; that the treaty provided for the protection of the inhabitants in their property, and that the same rights exist as to towns under the Mexican Government, and dealing with both the treaty and the act of Congress of March 3, 1851, Mr. Justice Field, again speaking for the court in *Beard* v. *Federy*, 3 Wall. 478, 491, etc., said:

"In the first place, the patent is a deed of the United States. As a deed its operation is that of a quitclaim, or rather a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners.

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did

not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation, to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner, and on such terms, as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunal, and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described."

In the later case of *Los Angeles* v. *Hooker*, 188 U. S. 314, practically the same contentions were made as in the case at bar concerning the effect of the act of 1851 and the treaty of Guadalupe Hidalgo. In that case the lands of the plaintiff in error were situated above the city of Los Angeles, and it was sought to appropriate them to the use of the city for the purpose of maintaining thereon the headworks of a system of water supply. In that case, as here, the city contended

that the rights of the plaintiffs in error were subject to the paramount rights of the city of Los Angeles to take water for the use of its inhabitants, for all the public and municipal purposes of the city. Plaintiffs in error denied this contention and set up their own rights as riparian owners of the lands, the confirmation of their rights by the board of land commissioners under the act of Congress of 1851, confirmed by the District Court for the Southern District of California, and patents duly issued in accordance therewith. The contention of the plaintiff in error was that the state court decided against its rights as riparian owners, and as to the ownership of the percolating waters described from patents of the United States as well as from Mexican grants, and under the treaty of Guadalupe Hidalgo. Delivering the opinion of the court, Mr. Chief Justice Fuller said:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and general public law, on which the decision of the state court was final. *San Francisco* v. *Scott*, 111 U. S. 768; *Powder Works* v. *Davis*, 151 U. S. 389. And the question of the existence of percolating water was merely a question of fact.

"The patents were in the nature of a quitclaim, and under the act of March 3, 1851, were 'conclusive between the United States and the said claimants only, and shall not affect the interest of third persons.' The validity of that act was not drawn in question in the state court, and as the right or title asserted by plaintiffs in error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error to the waters of the river was not against any title or right claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under, the Constitution. If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not involve the construction of the treaty, but the validity of the

title of Mexican and Spanish grants prior to the treaty. *New Orleans* v. *De Armas*, 9 Pet. 224; *Iowa* v. *Rood*, 187 U. S. 87; *Phillips* v. *Mound City Association*, 124 U. S. 605."

In *Powder Works* v. *Davis*, 151 U. S. 389, referred to by the Chief Justice in *Los Angeles* v. *Hooker*, it was held, referring to the previous case of *Phillips* v. *Mound City Assn.*, 124 U. S. 605, that the treaty of Guadalupe Hidalgo protected all existing property rights, but neither created nor defined the rights, and that a confirmation of such rights by a decree of the court did not determine rights which depended upon the Constitution, laws or treaties of the United States.

Similar questions came before this court in *Devine* v. *Los Angeles*, 202 U. S. 313. In that case 244 complainants, owners of lands situated in the county of Los Angeles and in the Ranchos San Rafel, Los Felis and Providencia, and whose title was alleged to have been confirmed pursuant to the treaty of Guadalupe Hidalgo by the board of land commissioners created under the act of Congress of 1851, and to whom patents had been issued by the United States, brought suit against the city of Los Angeles to quiet their title as against the claims of the city of Los Angeles to the paramount use of the water of the Los Angeles River. The bill is abstracted at length in the report of that case and it was alleged there, as here, that the rights asserted by the city and acts of the legislature and charters of the city were in violation of the Fourteenth Amendment of the Constitution, and that the city of Los Angeles should have presented its claims to the waters of the river to the board of land commissioners under the act of Congress of March 3, 1851, and that a decree should be granted declaring the acts of the legislature of California and the charters of the city of Los Angeles invalid in respect to conferring upon the city any rights in the waters of the Los Angeles River other than those which were ascertained and confirmed under the act of March 3, 1851.

An answer was filed by the city, fully setting up its rights and contentions, as the successor of the pueblo to the owner-

ship of the waters in the river and its tributaries, and admitting that it rested its claim to the Los Angeles River and the waters thereof, including the waters in the lands of the complainants, upon the treaty of Guadalupe Hidalgo, which protected the rights of pueblos as well as the rights of individuals, and in part upon the act of Congress of March 3, 1851, confirming the claims of pueblos and municipal corporations to lands granted by Spain and Mexico, and that the confirmation thereof had the effect of confirming the water rights contended for by the city; that said act did not require claims for property otherwise than for land to be presented for confirmation. The answer sets out a detailed history of the pueblo and city of Los Angeles, and certain prior adjudications which were claimed to conclude the plaintiff in the suit.

After the pleadings were filed the city of Los Angeles moved the court to dismiss the case on the ground that there was no Federal jurisdiction thereof; the motion was sustained, and the case brought to this court upon a certificate. This court held that there was no jurisdiction of the case in the Federal court, quoting in the opinion from the previous cases to the effect that the rights of the complainant depended upon the Spanish and Mexican grants confirmed by the board of land commissioners, (*Los Angeles* v. *Hooker*, 188 U. S. *supra*), and again held that the extent of the riparian rights of the plaintiffs alleged to be derived from the patents of the United States and confirmed Mexican grants, did not present a right, title, privilege or immunity arising under statutes or treaties of the United States. The court also cited *Chrystal Springs Land & Water Co.* v. *Los Angeles*, 177 U. S. 169, in which this court affirmed the ruling of the Circuit Court of the United States for the Southern District of California, holding that a controversy between parties claiming under Mexican grants, alleged to be confirmed and patented by the United States in accordance with the treaty of Guadalupe Hidalgo, was only a controversy as to what rights were thus granted and confirmed, and could not lay the basis for a suit as one arising un-

der the laws and treaties of the United States, and the decree of the Circuit Court dismissing the bill for want of jurisdiction was affirmed.

It is insisted that the Supreme Court of California, in holding that the term "land," as embraced in the act of March 3, 1851, did not include the riparian rights of the patentee of the land nor conclude the city from making claim of ownership of the water rights in controversy, and leaving to local law the determination of what riparian rights are embraced in the word "land," denied to the plaintiff in error the rights which had accrued to it because of the proceedings under the act of 1851 and the benefits of the limitations upon the rights conferred upon the city of Los Angeles by reason of the proceedings and determination of the commissioners. But as these alleged rights and limitations arise under the act of March 3, 1851, which this court has repeatedly held did not originate Federal rights or titles, but merely confirmed the old ones, we cannot review the judgment of the state court in this respect. In its opinion in the case at bar the Supreme Court of California said that in this respect it was following *Hardin* v. *Jordan,* 140 U. S. 371, and this court has frequently held that the extent of the right and title of a riparian owner under a patent is one of local law. See recent decision of *Whitaker* v. *McBride,* 197 U. S. 510, and cases therein cited.

And whatever the rule may be as to patents conveying title to the lands of the United States, it has been distinctly held in this court that neither the treaty of Guadalupe Hidalgo nor patents under the act of March 3, 1851, are original sources of private titles, but are merely confirmatory of rights already accrued under a former sovereignty.

Both parties claim under Spanish or Mexican titles, confirmed by proceedings under the act of March 3, 1851. The Federal rights alleged by the plaintiff in error to have been violated by the decision and judgment of the Supreme Court of California, so far as concerns this act, relate to the extent of the right and ownership in the use of the waters of the Los

Angeles River by the one or the other of the parties to this suit. The plaintiff in error, as we have seen, contends that by its grant it became the owner of riparian rights in such waters without limitation by any supposed right in the city of Los Angeles to use the water of the river, and that the city of Los Angeles, by failing to present the claim it now makes for the use of the waters of the river to the commissioners under the act of 1851, and by the effect of the judgment of the commissioners upon the petition presented by the city is forever adjudicated to have no such water rights in the river as the city now contends for and as were awarded to it by the decision and judgment of the Supreme Court of California.

The defect of these contentions from the standpoint of Federal jurisdiction is that this court has already determined, in the cases above cited, that the act of 1851 was a confirmatory act; that by its terms it did not undertake to originate titles or make the patents to be issued in pursuance of the decisions of the commission conclusive except upon the United States; and that the extent of the riparian rights belonging to pueblos or persons receiving such patents are matters of local or general law.

In this view the writ of error must be dismissed for want of jurisdiction.

WYNNE *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII.

No. 449. Argued February 28, March 1, 1910.—Decided April 4, 1910.

The words "out of the jurisdiction of any particular State" as used in § 5339, Rev. Stat., refer to the States of the Union and not to any separate particular community; and one committing the crimes referred to in that section in the harbor of Honolulu in the Territory of Hawaii is within the jurisdiction of the District Court of the

United States for that Territory. *United States* v. *Bevans*, 3 Wheat. 337, and *Talbot* v. *Silver Bow County*, 139 U. S. 438, distinguished.

While by § 5 of the Organic Act of the Territory of Hawaii of April 30, 1890, c. 339, 31 Stat. 141, the Constitution of the United States and laws not locally inapplicable were extended to Hawaii, and by § 6 of that act laws of Hawaii not repealed and not inconsistent with such Constitution and laws were left in force, nothing in the act operated to leave intact the jurisdiction of the territorial courts over crimes committed in the harbors of Hawaiian ports exclusively cognizable by the courts of the United States under § 5339, Rev. Stat.

A copy of the original certificate of enrollment of a vessel certified under seal by the deputy collector of customs of the port where issued which is in form as required by § 4155, Rev. Stat., held to be sufficient under the conditions of identification of the signature and seal and § 882, Rev. Stat., to prove the national character of the vessel upon which the crime was committed by one indicted and tried under § 5339, Rev. Stat.

THE facts are stated in the opinion.

Mr. Henry E. Davis, with whom *Mr. Frank E. Thompson* and *Mr. Charles F. Clemons* were on the brief, for plaintiff in error:

The trial court was without jurisdiction of any act alleged in the indictment, and of any act proved to have been committed.

If defendant is prosecuted for violation of § 5339, Rev. Stat., the justification for the indictment must be found, if at all, in the provisions of § 5 of the organic act for Hawaii, by which in a general way the laws of the United States are extended to the Hawaiian Islands, 31 Stat. 141, but the extension is limited by the provision continuing the laws of Hawaii not inconsistent with the Constitution or laws of the United States.

Among the statutes so preserved and continued in force are those relating to homicide and punishing murder. Organic act, § 6; Penal Laws, 1897, Hawaii, pp. 62–64; Rev. Laws, 1905, Hawaii, pp. 1074–1076.

The relations between the United States District Court for the District of Hawaii and other Federal courts on the one hand and the Hawaiian territorial courts on the other are similar to those between Federal and state courts. See *Equitable L. A. Co.* v. *Brown*, 187 U. S. 309; *Hawaii* v. *Carter*, 19 Hawaii, 198; *Hawaii* v. *Martin*, 19 Hawaii, 201; *Hawaii* v. *Keizo*, 17 Hawaii, 297; *Bierce* v. *Hutchins*, 18 Hawaii, 518. The Republic of Hawaii, before its annexation to the United States had a fully organized government. *Re Wilder S. S. Co.*, 183 U. S. 545; *Territory* v. *Martin*, 19 Hawaii, 201, 214.

There can be no reasonable doubt that Congress intended to leave the jurisdiction of the crime of murder, as of the crimes of manslaughter, rape, and assault and battery and other crimes which originated as common-law offenses, just where it had always been before annexation, *i. e.*, in the Hawaiian courts, whose existence was continued by §§ 81, 82, of the organic act, and see Rev. Laws, 1905, Hawaii, cc. 112, 113; Civil Laws, 1897, Hawaii, cc. 80, 81.

The word "State" should be construed in its broader meaning of, any separate political community, *Talbott* v. *Silver Bow County*, 139 U. S. 438, 444; *The Ullock*, 19 Fed. Rep. 297, 212; *Neill* v. *Wilson*, 14 Oregon, 410; *Geofroy* v. *Riggs*, 133 U. S. 258, unless there is something to require a narrow construction of the word State when used in our statutes, it should be given a broad and liberal meaning, in order to effect a reasonable construction, and to carry out the reason and spirit of the law.

The words "out of the jurisdiction of any particular State," were intended to provide a means of punishment where no such means were afforded. It was thereby intended to give jurisdiction to the Federal court in cases where the judicial bodies of the particular State (*i. e.*, political community, including Territory), were not invested with jurisdiction in the premises. See *United States* v. *Bevans*, 3 Wheat. 387, as to construction of effect of Art. III of the Constitution, and intent of Congress, in originally enacting the statute here involved

(Rev. Stat., § 5339), for punishment of murder committed "in a river, etc., out of the jurisdiction of any State," and holding that if there be common jurisdiction, the crime cannot be punished in the courts of the Union.

In *United States* v. *Bevans*, this court held the Federal court to have no jurisdiction even though the act charged was committed on board a ship of war of the United States, which was contended to be "a place within the sole and exclusive jurisdiction of the United States," under the terms of the statute in question, and was at all events clearly "out of the jurisdiction of any particular State." And see *Manchester* v. *Massachusetts*, 139 U. S. 240, applying the principle of the *Bevans case* nearly three-quarters of a century later. The act here charged in the indictment was committed within the body of the county, then the County of Oahu, now the City and County of Honolulu. *United States* v. *New Bedford Bridge Co.*, Fed. Cases, No. 15,867. Under the Hawaiian judicial system, as continued in force by the organic act, the territorial judiciary has the functions of state courts, while a separate Federal judiciary is created. 35 Stat. 838. This is quite different from the provisions which, for instance, were enacted in the case of the Territory of Washington, in which only one single judicial tribunal was created. See *The City of Panama*, 101 U. S. 461.

So, while the Republic of Hawaii ceded its territory, its public property and its rights therein and control thereof to the United States of America (Treaty of Annexation, Art. II, Rev. Laws, 1905, Hawaii, pp. 37, 40; Joint Res. Cong. of July 7, 1898), nevertheless the United States forthwith vested the possession, use, and control thereof in the government of the newly constituted Territory of Hawaii, reinvesting sovereignty subject to the future action of Congress.

Inasmuch, therefore, as the United States had so ceded to the Territory of Hawaii the control of these places and property, or, more strictly, having reinvested the Territory with such control, there was no jurisdiction left in the United States

courts, which are courts of limited jurisdiction and whose jurisdiction is never presumed but must always be found in the strict letter of the law.

There was a failure to prove the nationality of the vessel.

While it is no defense to an indictment, under § 5339, Rev. Stat., that the vessel on which the crime was committed was never legally registered or enrolled, provided that she was owned by a citizen of the United States, it must yet appear that either she was registered or enrolled, or so owned by a citizen; and as a general rule, to which this case offers no exception, courts of the United States have no jurisdiction of the crime of murder when committed on board a foreign vessel. *United States* v. *Plumer*, 3 Cliff. 28. See *United States* v. *Holmes*, 5 Wheat. 412.

And the general rule is that such courts have no jurisdiction of the offense even when committed upon the high seas, except when committed on board a ship of the United States, unless it appears that the vessel was sailing under no national flag.

Mr. Assistant Attorney-General Fowler for the United States:

The United States District Court for the Territory of Hawaii had jurisdiction of the offense.

It is insisted on behalf of the plaintiff in error that the courts of the government of the Territory of Hawaii alone had jurisdiction to try the accused. This contention is not maintainable for the following reasons:

The United States courts had jurisdiction of this offense prior to the passage of the act of April 30, 1900, to provide a government for the Territory of Hawaii. 31 Stat. 141.

The claim of plaintiff in error that the phrase "particular State," as used in § 5339, Rev. Stat., is not limited to the several States of the Union, but that it also includes any other government which is regularly organized and has courts in which punishment for offenses may be inflicted, cannot be sustained—for cases to the contrary see *United States* v. *Ross*, 1 Gall. 626; *St. Clair* v. *United States*, 154 U. S. 144; *Anderson*

v. *United States*, 170 U. S. 489. The indictments in all these cases were drawn upon the theory that the word "State" as used in the statute had reference to a State of the United States, and in each case they were treated as sufficient by the court.

If, however, the word "State" as used had the meaning insisted upon by plaintiff in error, the indictments in those cases were not sufficient, because they did not allege the necessary jurisdictional fact that the offense was committed outside of the United States or any other State or government. *United States* v. *Bevans*, 3 Wheat. 336.

There is nothing in the act under which the territorial government of Hawaii was organized which either expressly or by implication affects § 5339, Rev. Stat., or indicates that it was the intention of Congress to deprive the United States court of jurisdiction to try an offender for the crime of murder committed in any place mentioned in said section within the jurisdiction of said Territory of Hawaii. See 31 Stat. 141.

Section 6 of the organic act only continued in force all laws which had theretofore existed in Hawaii, except such as were repealed by the act and were inconsistent with the Constitution and laws of the United States, while the purpose of section 5 was to extend the Constitution and laws of the United States to the Territory of Hawaii.

Sections 5 and 6 of the organic act do nothing more than to leave the jurisdiction of the courts of Hawaii precisely as it was before the passage of the act, and certainly do not have the effect of increasing their jurisdiction to such an extent as to deprive the Federal courts of the jurisdiction which they had previously possessed under § 5339, Rev. Stat.

It is sufficiently proven by competent evidence that the vessel *Rosecrans*, upon which the murder was committed, was owned by a corporation organized under the laws of California.

Courts will notice without proof the signatures and official seals of public officers. 17 Am. Eng. Enc. of Law, 918, and

numerous cases cited; *Himmelmann* v. *Hoadley*, 44 California, 214.

MR. JUSTICE LURTON delivered the opinion of the court.

The plaintiff in error, John Wynne, has sued out this writ of error from a judgment and sentence of death for a murder committed on board the steamer *Rosecrans*, an American vessel, while lying in the harbor of Honolulu in the Territory of Hawaii. The indictment upon which he was tried included four counts. In each it was charged that the murder had been done on board the said American vessel, lying in the harbor of Honolulu, in the district and territory of Hawaii, and within the admiralty and maritime jurisdiction of the United States, "and out of the jurisdiction of any particular State of the said United States of America." In two of the counts the locality is described as a certain "haven" of the Pacific Ocean, and in the others as a certain "arm" of the Pacific Ocean.

The question to which the counsel for the plaintiff in error has chiefly invited the attention of the court is, whether the indictment charges an offense within the jurisdiction of the District Court of the United States for the Territory of Hawaii. It was founded upon § 5339, Rev. Stat., and particularly the second paragraph. The section is set out below:

"SEC. 5339. Every person who commits murder—

"First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

"Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

Shortly stated, the contention is, that the haven or arm of the Pacific Ocean which constitutes the harbor of Honolulu, although "within the admiralty and maritime jurisdiction of the United States," is a locality not "out of the jurisdiction of any particular State," because within the jurisdiction of the Territory of Hawaii. The basis for the contention is that the words, "out of the jurisdiction of any particular State," do not refer to the jurisdiction of a State of the United States, but are to be given the wider meaning of out of the jurisdiction of any separate political community, and that the Territory of Hawaii constitutes such a political organism. The postulate cannot be conceded. The Crimes Act of April 30, 1790, ch. 9, vol. 1, Statutes at Large, p. 112, contained the same limiting words. Thus in the eighth section of that act jurisdiction was asserted over the crime of murder, as well as certain other crimes, when committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State." The act was remolded by the act of March 3, 1825, ch. 65, § 4, p. 115, 4 Statutes at Large. The further limitation of "within the admiralty and maritime jurisdiction of the United States" was added, but otherwise the jurisdiction remained the same. Without substantial change the provision of the last act was carried into the Revised Statutes as part of § 5339.

To support the contention urged counsel have cited *United States* v. *Bevans*, 3 Wheat. 337, 388, and *Talbott* v. *Silver Bow County*, 139 U. S. 438, 444. The indictment in the *Bevans case* was for a murder done on board a war vessel of the United States while she lay at anchor a mile or more from the shores of the bay constituting the harbor of Boston, in the State of Massachusetts. The bay was wholly within the territorial jurisdiction of the State of Massachusetts, and the court said that it was not material whether the courts of that State had cognizance of the offense or not. "To bring the offense," said the court, "within the jurisdiction of the courts of the Union, it must have been committed in a river, etc., and out of the jurisdiction of any State. It is not the offense committed, but the

bay in which it is committed, which must be out of the jurisdiction of the State. If then it should be true that Massachusetts can take no cognizance of the offense; yet unless the place itself be out of her jurisdiction, congress has not given cognizance of that offense to its courts. If there be common jurisdiction, the crime cannot be punished in the courts of the Union." The case has no bearing upon the question here involved, except so far as that the jurisdiction of the courts of the United States was there held to be excluded, because the place where the offense was committed was within the territorial jurisdiction of one of the States of the Union. The question in the *Talbott case* was whether a Territory was within the meaning of § 5219, Rev. Stat., which permitted a "State within which" a national bank is located to tax its shares. The court held that the permission extended to States in that regard included Territories. The decision was based upon the obvious intent of Congress looking to the scope and purpose of the act; the court saying, among other things, "While the word State is often used in contradistinction to Territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the Government, it has the larger meaning of any separate political community, including therein the District of Columbia, and the Territories as well as those political communities known as States of the Union." But the word "State," as used in the eighth section of the act of 1790, and the subsequent act of 1825, as well as used in § 5339, Rev. Stat., must be determined from its own context. The word State as there used has been uniformly held as referring only to the territorial jurisdiction of one of the United States, and not to any other government or political community. Thus, in *United States* v. *Ross*, 1 Gall. 626, Mr. Justice Story said, in reference to the words in § 4 of the act of 1825, above referred to, that "The additional words of the act, 'in any river, haven, basin, or bay out of the jurisdiction of any particular State,' refer to such places without any of the United States, and not without foreign States, as will be very clear on examining the pro-

vision as to the place of trial, in the close of the same section." In *United States* v. *Brailsford*, 5 Wheat. 184, 189, 200, one of the questions certified was "whether the words, 'out of the jurisdiction of any particular State,' in the eighth section of the act of Congress of the 30th of April, 1790, ch. 9, vol. 1, Statutes at Large, must be construed to mean out of the jurisdiction of any particular State of the United States?" To this the court said: "We think it obvious that out of any particular State must be construed to mean 'out of any one of the United States.' By examining the context it will be seen that particular State is uniformly used in contradistinction to United States." In *United States* v. *Rodgers*, 150 U. S. 249, 265, the same meaning was attached to the words in question, and an offense committed on the Detroit River, on a vessel belonging to a citizen of the United States, was held cognizable by the District Court of the United States for the Eastern District of Michigan, although it appeared that the offense had been committed *within the territorial limits of the Dominion of Canada*, and therefore not within the jurisdiction of any particular State of the United States. See also *St. Clair* v. *United States*, 154 U. S. 134, 144, and *Andersen* v. *United States*, 170 U. S. 489.

That there existed an organized political community in the Hawaiian Islands, exercising political, civil and penal jurisdiction throughout what now constitutes the Territory of Hawaii, including jurisdiction over the bay or haven in question, when that Territory was acquired under the joint resolution of Congress of July 7, 1898, did not prevent the operation of § 5339, Rev. Stat. That "political community" did not constitute one of the States of the United States; and if the other jurisdictional facts existed, § 5339 came at once into operation.

Unless, therefore, there was something in the legislation of Congress found in the act of April 30, 1900, c. 339, 31 Stat. 141, providing a government for the Territory of Hawaii, which excluded the operation of the statute, the jurisdiction of the courts of the United States over the bay here in question

in respect of the murder there charged to have been committed, was beyond question.

Counsel have cited and relied upon the fifth, sixth and seventh sections of the organic act referred to, in connection with §§ 83, 84, 89 and 91, as operating to leave intact the jurisdiction of the territorial courts of the Territory under existing penal laws over this "haven" or "arm" of the sea in respect to homicides there committed. The fifth section of the organic act referred to provided, "That the Constitution, and except as herein otherwise provided, all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." The sixth section continued in force the laws of Hawaii "not inconsistent with the Constitution or laws of the United States, or the provisions of this act; . . . subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." The seventh section expressly repeals a long list of local laws, civil and criminal, and does not expressly include the chapter of the penal laws of Hawaii of 1897 relating to homicides. The eighty-first section vests the judicial power of the Territory in one Supreme Court and such inferior courts as the legislature may establish, and continues in force the laws of Hawaii concerning the jurisdiction and procedure of such courts, "except as herein provided." Section 83 continues in force the laws of Hawaii relating to the judicial department, including civil and criminal procedure, subject to modification by Congress or the legislature. Section 89 provides that the control of wharves and landings constructed by the Republic of Hawaii, on any seacoast, bay or harbor, shall remain under the control of the government of the Territory of Hawaii. Section 91 leaves public property, which had been ceded to the United States, under the control of the government of the Territory.

We cannot see that any of the things referred to have the effect claimed for them. The plain purpose of the fifth section was to extend the Constitution and laws of the United States,

not locally inapplicable, to the Territory, and of the sixth section, to leave in force the laws of Hawaii, except as repealed by the act or inconsistent with the Constitution or laws of the United States.

If, when that act was passed, one who committed murder in the harbor of Honolulu was subject to trial in the courts of the United States, though within the territorial waters of Hawaii, the organic act neither expressly nor impliedly deprives the courts of the Union of the jurisdiction which they had before. It was within the power of Congress to confer upon its courts exclusive jurisdiction over all offenses committed within the Territory, whether on land or water. This it did not elect to exercise. It provided for the establishment of a District Court of the United States, with all of the powers and jurisdiction of a District Court and of a Circuit Court of the United States. It provided also for the organization of local courts with the jurisdiction conferred by the existing laws of Hawaii upon its local courts, except as such laws were in conflict with the act itself or the Constitution and laws of the United States. If it be true, as claimed, that the territorial courts exercise jurisdiction over homicides in the harbor of Honolulu, under and by virtue of the laws of Hawaii thus continued in force, it only establishes that there may be concurrent jurisdiction in respect of certain crimes when committed in certain places, and is far from establishing that the courts of the Union have been deprived of a jurisdiction which they have at all times claimed and exercised over certain offenses when committed upon the high seas, or in any arm of the sea, or in any river, basin, haven, creek or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

We find nothing in the special legislation applicable to that Territory which prevented the operation of § 5339.

There are assignments touching the competency of certain evidence relied upon to establish the national character of the *Rosecrans*, and others which challenge the sufficiency of the

evidence to carry the case to the jury against a motion to direct a verdict for insufficiency of evidence upon that point. A certificate of enrollment, purporting to have been issued at San Francisco by one Coey, "acting deputy collector of customs," initialed "W," and signed by E. W. Marlin, deputy naval officer, as required by § 4332, Rev. Stat., which recited that the vessel was solely owned by the National Oil and Transportation Company, a corporation organized under the laws of California, was introduced for the purpose of establishing that the vessel was of American nationality. There was also evidence that she carried the flag of the United States, evidence admissible upon a mere question of nationality. *St. Clair* v. *United States*, 154 U. S. 134, 151. The principal objection is that this certificate was not the original, but a copy not sufficiently authenticated. The authentication was in these words:

"District and Port of San Francisco.

"I hereby certify the within to be a true copy of the original issued by this office.

"Given under my hand and seal this 5 day of October, 1907.

(Sgd.) N. S. FARLEY, [SEAL.]
Deputy Collector of Customs.
W."

The requirements for registration are set out in § 4142. The certificate in question was in form as required by § 4155.

There was evidence of a witness that he had himself received custom papers from the customhouse at San Francisco, signed by Farley, and was familiar with the signature from its appearance upon ship licenses on board ships. He had never seen Farley write, and only identified the signature from familiarity with it obtained from this and other like official papers. He also said he was familiar with the seal of the customs officials at San Francisco.

The appointment of deputy collectors is provided for by §§ 2630, 2633, Rev. Stat. By § 882, Rev. Stat., copies of any

papers or documents, in any of the executive departments, under the seal of the proper department, are made admissible in evidence equally with the original.

There was no evidence whatever casting suspicion upon the genuineness of the copy or of the seal or the signature of Farley, and none which challenged in any way the American character of the ship. Under such circumstances and for the purposes of this case it was not error to assume that the document was genuinely executed by Farley, that he was what he claimed to be, a deputy collector of customs, and that his signature had been signed by himself or one authorized to sign for him. 3 Wigmore on Evidence, § 2161.

There was no error, and the judgment is

Affirmed.

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY *v.* WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS.

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

SAME *v.* SAME.

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

Nos. 57, 301. Argued December 9, 1909.—Decided April 11, 1910.

Jurisdiction in case of an intervention is determined by that of the main case, and where the original foreclosure case was based solely upon diverse citizenship an appeal from the judgment of the Circuit Court of Appeals on a petition to enforce rights granted by a decree in an intervention in such foreclosure suit does not lie to this court.

Where the Circuit Court of Appeals remands a suit to the Circuit Court with instructions to enter a decree, the Circuit Court cannot,

without permission from the Circuit Court of Appeals, introduce new questions into the litigation; and the unwarranted introduction of new questions cannot be made the basis of jurisdiction. The mere construction of a decree involves no challenge of its validity.

It is proper for this court to grant certiorari where the questions involve the construction of a prior decree of a United States Circuit Court granting rights of use of railroad tracks and terminal facilities in a great city, and where not only the private interests of the railroad companies and of the shippers, but also the greater interests of the public, require such rights to be settled.

Where a decree gives to another company the equal use and benefit of the right of way of a railroad company in a terminal city on a basis of compensation and apportionment of expenses, with provision for modification in case of unexpected changes, it will be construed as applying to the terminal facilities and the connections with industrial establishments as the same naturally increase in a growing city, and not to the mere right of way as it existed when the decree was entered, and the court has power to provide for the use of such increased facilities on a proportionately increased rental based on the increased valuation.

152 Fed. Rep. 849, modified.

THE facts, which involve the construction of the decree of the Circuit Court in 29 Fed. Rep. 546, as affirmed by this court in the case of *Joy* v. *St. Louis*, 138 U. S. 1, are stated in the opinion.

Mr. Frank Hagerman, with whom *Mr. W. F. Evans* and *Mr. M. A. Low* were on the brief, for appellant in No. 57 and petitioner in No. 301.

Mr. James L. Minnis, with whom *Mr. Wells H. Blodgett* was on the brief for appellee in No. 57 and respondent in No. 301.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court, after reading the following memorandum:

This opinion was prepared by our Brother BREWER, and had been approved before his lamented death. It was then recirculated and is adopted as the opinion of the court.

On January 6, 1886, there was entered in the Circuit Court

of the United States for the Eastern District of Missouri a decree of foreclosure and sale of the Wabash, St. Louis and Pacific Railway Company, hereinafter called the Wabash Company. In that suit, before the execution of the deeds to the purchasing committee, a railway corporation known as the St. Louis, Kansas City and Colorado Railroad Company (hereinafter called the Colorado Company) and the city of St. Louis intervened to compel the Wabash Company to give to the Colorado Company the use of its tracks and a right of entrance over them to the Union Depot of that city. On that intervention a decree was entered finding the equities in favor of the intervenors, and granting the Colorado Company the use of the tracks and right of way. 29 Fed. Rep. 546. On appeal to this court the decree of the Circuit Court on the intervention was, on January 19, 1891, sustained. *Joy* v. *St. Louis*, 138 U. S. 1.

A dispute having arisen as to the rights granted by that decree, a petition was filed at the March term, 1902, of the Circuit Court in the original foreclosure case to enforce those rights as the Colorado Company claimed they existed. A large amount of testimony was taken upon this application, and a decree entered April 2, 1906. Thereupon an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, which, on April 3, 1907, reversed the decree and remanded the case "with directions to enter a decree not inconsistent with the views" expressed in the opinion of the court. 81 C. C. A. 643. The case went back to the Circuit Court, and after an amendment to the petition, which was allowed by the court, a decree was entered in obedience to the mandate, from which decree an appeal was again taken to the Circuit Court of Appeals, and also to this court. On the appeal to the Circuit Court of Appeals the record was filed in that court, and thereupon an application for a certiorari was made to this court, so that two cases are before us with records precisely alike, one the appeal from the Circuit Court directly to this court (being case No. 57) and the other the petition for a certiorari to the

Court of Appeals (being case No. 301). [This petition was filed and presented to the court November 30, 1908, and on December 7, 1908, consideration of the petition was postponed to be heard with No. 57.]

The Wabash Company has filed a motion to dismiss No. 57, the case appealed directly to this court. The jurisdiction of the original foreclosure suit was based solely upon diverse citizenship, and it has been repeatedly decided that the jurisdiction in the case of an intervention is determined by that of the main cause. *Rouse* v. *Letcher*, 156 U. S. 47; *Gregory* v. *Van Ee*, 160 U. S. 643; *Carey* v. *Railway Company*, 161 U. S. 115; *Rouse* v. *Hornsby*, 161 U. S. 588; *Pope* v. *Railway Company*, 173 U. S. 573.

If this be true in respect to an intervention, *a fortiori* must it be true in respect to a petition to enforce rights granted by the decree in the intervention. Nor is this rule changed by the fact that when this case went back from the Circuit Court of Appeals to the Circuit Court the latter court authorized an amendment to the petition, alleging that the decree ordered by the Court of Appeals failed to give full faith and credit to the original decree in the intervention proceedings, for, as said in *Pope* v. *Railway Company*, *supra* (p. 578):

"And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked. *Colorado Central Mining Company* v. *Turck*, 150 U. S. 138; *In re Jones*, 164 U. S. 691, 693; *Third St. and Suburban Railway Company* v. *Lewis*, *ante*, 456."

Further, the power of the Circuit Court was limited to the entry of a decree as ordered by the Court of Appeals, and it could not introduce new questions into the litigation without the permission of that court. *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *In re Sanford Fork & Tool Company*, 160 U. S. 247. Still further, the mere construction of a decree in-

volves no challenge of its validity. *Smithsonian Institution* v. *St. John*, 214 U. S. 19, 29, and cases cited in the opinion.

The motion to dismiss No. 57 must, therefore, be sustained with costs.

With reference to the application for a certiorari, the power of this court cannot be doubted. As said in *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court."

On the appeal to the Circuit Court of Appeals the case was there pending for consideration and decree, and, as for reasons heretofore stated, an appeal to this court would not lie, the case can be brought here by certiorari.

The question then is whether the writ of certiorari ought to be granted. That question involves the construction of a prior decree of a United States Circuit Court, affirmed by this court. It is not a question of the payment of money, but of the extent of the use belonging to one railroad company in the tracks, right of way and terminal facilities of another, as well as the rights of access by the one company to industries established along the line of the other. This, in view of the increasing number of industries in a great and growing city like St. Louis, is of constantly enlarging importance, and ought, so far as possible, to be settled. It seems to us that both the private interests of the railroad companies, and of the separate industries and the greater interests of the public call for the granting of the writ of certiorari, and it is, therefore, so ordered.

This brings before us the original decree on the intervention. That decree, and the facts upon which the original controversy arose, as well as those upon which the present dispute rests, will be found fully stated in 29 Fed. Rep. 546; *Joy* v. *St. Louis*,

138 U. S. 1, and 81 C. C. A. 643, *supra*, and need not be repeated. It is sufficient to say that the decree was founded upon contracts to which the railroad companies, or their predecessors, were parties, by which the Wabash Company agreed to "permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park, and up to the terminus of its road in the city of St. Louis, upon such terms, and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies." It provided that the Colorado Company should pay $2,500 a month "for the use of the right of way, and tracks, side tracks, switches, turnouts, turntables and other terminal facilities of the said Wabash, St. Louis and Pacific Railway at and between the north line of Forest Park and Eighteenth street in the city of St. Louis," and that of these properties it should "enjoy the equal use and benefit." It apportioned the expense of maintaining on a wheelage basis this right of way and other property during such joint use.

Two principal questions are presented, each having reference to the existence of the rights granted by the intervention decree. The eastern line of Forest Park is about three miles west of Eighteenth street, and at the time the decree was entered the Wabash Company owned a strip of land varying in width from twenty-eight to over two hundred feet and extending from Eighteenth street to the east line of the park, and also had an easement for the passage of its trains and engines through the park upon a strip of land forty-two feet wide from the east to the north side thereof. The ground owned by the Wabash is not, as stated, of equal width, portions having been obtained by deeds from different owners, some being only twenty-eight feet in width and others extending quite a distance, so as to furnish room for roundhouses and other terminal facilities. Now, it is contended that the only effect of this decree was to give to the Colorado Company the right to use the two continuous tracks from the north line of Forest

Park into the Union station, while, on the other hand, it is contended that it gave to the Colorado Company the equal use and benefit of the entire ground owned by the Wabash and used for its terminal facilities. Both the Circuit Court and the Circuit Court of Appeals sustained the latter construction, and with that conclusion we concur. The terminal facilities, and not simply a right of way over the tracks of the Wabash running to the Union station, were granted by the decree. As said by Circuit Judge Sanborn, delivering the opinion of the Court of Appeals (p. 646):

"The ordinary signification of the term 'right of way,' when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located. *Joy* v. *St. Louis*, 138 U. S. 1, 44, 45, 46; *Territory of New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 181–2; 174 U. S. 545, 546; *Chicago & Alton R. Co.* v. *People*, 98 Illinois, 350, 356–7; *Lake Erie & W. R. Co.* v. *Middlecoff*, 150 Illinois, 27, 37 N. E. Rep. 660, 663; *Pfaff* v. *Terre Haute & I. R. Co.*, 108 Indiana, 144, 148, 9 N. E. Rep. 93, 95.

"To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and when the terms of a decree are plain and clear their ordinary meaning and effect may not be lawfully contracted or extended unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it essayed to

prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only thirty feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street."

The other matter involves the question of the right of access to industrial establishments which have been built up near to the line of the Wabash road. As might be expected in a growing city like St. Louis, there are now many such establishments, access to which has been obtained by the construction of tracks connecting them with the main tracks of the railway. The use of these connecting tracks, which were constructed under different arrangements with the various establishments, is claimed by the intervenor, thus making itself a close and active competitor with the Wabash Company for their transportation business.

The general conclusion of the Court of Appeals is stated in these words (p. 657):

"The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street, which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U. S. 171."

From the latter part of this conclusion Circuit Judge Hook dissented, and that presents the question now to be considered. We are of opinion that the Circuit Court of Appeals erred, and that the views of Judge Hook are correct. That the matter was considered by the Circuit Court at the time of the original decree is evident from the opinion of the Circuit Judge, in which it was said (29 Fed. Rep. 559):

"The final matter is that of compensation. In this I think

the master erred. He fixed the value of the right of way at a million of dollars; and reported that, in his judgment, the share of the interest on this value and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the master; but in regard to the interest on the value, I think the intervenor should pay one-half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the carrier on the one hand and the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence I shall sustain the objections of the respondent to the report of the master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects the report of the master will be confirmed."

That is an interpretation of the language of the intervention decree giving the use of the right of way, side tracks, switches, turnouts, turntables and other terminal facilities. It is doubtless true that a connection with these industrial establishments has become a matter of far greater importance than at the time of the decree. If it be said that this has cast an unexpected burden upon the Wabash, it must also be remembered that provision was made for such unexpected changes. As said in the opinion (p. 558):

"An act of the legislature might be passed giving to one company the right to use the tracks of another, and prescribing all the terms and conditions—the details for the use. I take it, an act of the legislature would also be valid which simply declared that one company should have the right to use the tracks of another upon such terms and conditions as the parties might agree upon, or should be prescribed by the courts, and if such a legislative act would have to be adjudged valid and complete, I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and, determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act. It is continuous in its operation. It requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore, in a qualified sense, it may be true that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry by proceedings in the nature of contempt. It is also true that in the changing conditions of business the details of the use may require change. The time may come when the respondent's business may demand the entire use of its tracks, and the intervenor's right wholly cease. But other decrees are subject to modification and change, as in decrees for alimony. The courts are not infrequently called upon to modify them by reason of the changed condition of the parties thereto. So, when a decree passes in a case of this kind, it

remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract, in terms, provides that the regulation of the running of trains shall be subject to the control of the officers of the respondent."

See also the opinion of this court in 138 U. S. 1, 47.

The decree of the Circuit Court of December 20, 1907, is therefore modified in accordance with the views we have expressed as to terminal facilities in connection with the industrial establishments now existing near the right of way of the Wabash Company. If that company shall desire it may apply for a valuation of the additional properties of which the equal use and enjoyment is given to the intervenor, and upon that valuation the same per cent shall be paid by the intervenor. The costs, except so far as they have been already taxed, shall be charged against the respondents.

LUTCHER & MOORE LUMBER COMPANY *v.* KNIGHT.

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

No. 101. Argued January 24, 1910.—Decided April 11, 1910.

A party who as defendant in an equity case has successfully asserted that his adversary's claim is not cognizable in equity, cannot subsequently in an action at law brought by him against the plaintiff involving the same matter assert that the same claim set up as a defense is of an equitable character.

The objection in an action at law in the Federal courts that a defense is of equitable cognizance cannot be taken for the first time in the appellate court. *Burbank* v. *Bigelow*, 154 U. S. 558.

On certiorari granted under the provisions of the Court of Appeals Act

of 1891 the entire record is before this court with power to decide the case as presented to the Circuit Court of Appeals on the writ of error issued by it.

The great purpose of the Court of Appeals Act to which all its provisions are subservient is to distribute jurisdiction of the Federal courts and to relieve the docket of this court by casting on the Circuit Courts of Appeals the duty of deciding cases over which their jurisdiction is final.

Although ordinarily the mandate of this court in cases coming to it on certiorari to the Circuit Court of Appeals goes directly to the Circuit Court, where certiorari is granted, solely on the ground that the Circuit Court of Appeals has failed to consider the case, the judgment will be reversed and the case remanded to that court with instructions to hear and decide it.

THE facts are stated in the opinion.

Mr. A. P. Pujo, with whom *Mr. George E. Holland* was on the brief, for petitioners.

Mr. M. J. Cunningham, with whom *Mr. M. J. Cunningham, Jr.,* was on the brief, for respondents.

MR. JUSTICE WHITE delivered the opinion of the court.

On January 28, 1882, Dan R. Knight and John A. Lovett sold to William J. Knight several tracts of land situated in the State of Louisiana. The price stated in the act of sale was $15,000, $500 cash and the balance, $14,500, on credit, evidenced by a note of the purchaser. On February 5, 1887, W. J. Knight sold to Viola P. Knight, wife of Dan R. Knight, a one-half interest, and on February 7, 1887, he sold to J. C. Knight a one-fourth interest in the same lands. The remaining one-fourth interest was parted with by an act of sale dated April 13, 1889, wherein W. J. Knight joined with Viola P. Knight and John C. Knight in selling the entire land to Henry J. Lutcher and G. Bedell Moore. On April 3, 1901, Moore sold his undivided one-half interest to the Lutcher & Moore Lumber Company. All these acts of sale were duly recorded in the proper land conveyance records.

In March, 1903, William H. Knight, his brother, and two sisters, one a married woman, whose husband joined in the suit as a merely technical party, commenced this action in the state district court of Vernon Parish, Louisiana, against Henry J. Lutcher and the Lutcher & Moore Lumber Company, asking to be adjudged the owners of and to be entitled to the possession of an undivided half interest in the lands bought by William J. Knight in 1882 from D. R. Knight and John A. Lovett. The right of ownership was based upon the averment that the petitioners were children of William J. Knight; that the property bought by him was acquired during the marriage between their father and mother; that it formed a part of the community existing between them and constituted an acquet of the community at the time of the death of the mother in August, 1885. The right of the father to sell, in 1887 and 1889, the one-half interest belonging to their mother, as the result of her community estate, was denied, and it was charged that the defendants who were in possession in virtue of the attempted sale made by the father were mere trespassers. It was besides averred that William J. Knight, the father, married a second time, in June, 1886.

Because of diversity of citizenship the cause was removed into the Circuit Court of the United States for the Western District of Louisiana. In that court the defendants answered. In addition to averring that the petition disclosed no cause of action and denying generally all the allegations of the petition not expressly admitted, it was averred: That William J. Knight had never intermarried with the mother of the petitioners; that even if there had been such a marriage and a community resulting from it, the property sued for was not an acquet of such community, because it was the separate property of W. J. Knight, as no cash price was ever paid by him for the property and no note given as recited in the notarial act of sale, and, although the transaction was put in the form of a sale, it was only ostensibly so, having been merely intended to be a donation to him of the property. It was, how-

ever, moreover alleged that the property never formed part of a community existing between Knight and his alleged first wife, even if there was such community, because the property was conveyed to him under a secret agreement, for the benefit of his vendors, and that all the subsequent transfers were in pursuance of such agreement. It was further alleged that the sales to the defendants were executed in good faith for valuable considerations without notice or knowledge of the claims of plaintiffs, Knight being then married and there being no evidence of record of a previous marriage or of the death of the alleged previous wife. In a further paragraph of the answer it was claimed "that the pretended sale made July 28, 1882, to said William J. Knight was a simulation and a fiction," and that the seeming grantors made said pretended sale for the sole purpose of screening said property from the pursuit of their creditors; "that the property never became community property, but always belonged to said Knight and Lovett, as William J. Knight and his alleged wife and all parties well knew, until the sale made April 13, 1889, by W. J. Knight, John C. Knight and Viola P. Knight to Henry J. Lutcher and G. Bedell Moore." The respective interests of the defendants in the land were next averred, their vendors were called in warranty, and it was prayed that in the event of eviction defendants might recover of their warrantors the proportionate amount of the purchase price which they had received. An amendment to the answer was subsequently filed October 27, 1903, amplifying the claim that the sale in 1882 to William J. Knight was not *bona fide*, but was for the benefit of the grantors, and included both movable and immovable property belonging to said vendors, and averring that the $500 recited cash consideration was paid, but with money of the grantors, and that a note was executed, but with no intention to pay the same or to demand payment thereof, and that it was in fact redelivered to Knight without his making payment, and it was averred that the pretended sale constituted only a paper title to the property, "and same never in fact nor in law became the

property of the community between him and his so-called wife; and no interest whatever in said property vested in said community, and the said plaintiffs herein are without right or equity to any right, title or interest in the said lands." The prescriptions of one, two, four, five and ten years were also pleaded.

As expressly stated in the argument, both by counsel for the petitioners and by counsel for the respondents, and as appears from recitals contained in a petition for rehearing printed in the record, to which we shall hereafter more particularly refer, the defendants who had removed this action to the Circuit Court in December, 1903, filed in that court their bill of complaint, in which they made the plaintiffs in this action defendants. The bill, after substantially reiterating the averments which we previously recited, and which were contained in the answer filed in this cause, prayed that the further prosecution of the action be perpetually enjoined. The right to prevent the further prosecution of the action at law was based on the assertion that the law action "clouded your orators' title to the land in suit; that your orators' defenses are equitable, and that the pendency of said suit and the cloud cast on your orators' title works irreparable injury and damage to your orators and that they have no adequate remedy at law."

The following demurrer was interposed to the bill of complaint:

"First. Plaintiffs are estopped from attacking their own title.

"Second. The deed under which the defendants claim has been adjudged a good and valid title.

"Third. The complaint comes too late, the defendants having filed a suit in law, and the plaintiffs have answered to their demands, in which they set up a defense, which if sustained will be adequate in law.

"Fourth. That the allegations of plaintiffs' bill of complaint is simply a reiteration of their answer in suit No. 276 in the

Circuit Court of the United States for the Western District of Louisiana, at law, and that the allegations therein contained and set forth set up a plea of estopped *in pais* and constitute a complete and adequate remedy at law.

"Fifth. That the bill of complaint discloses no right or cause of action.

"Finally. Defendants especially demur to the right of plaintiffs to bring their bill in equity, as neither the law nor the jurisprudence of this State authorizes or provides suits in equity, and especially is this so as to real estate situated in the State. Hence, defendants *prove* that the injunction herein asked for be denied. That this branch of the case be dismissed at plaintiffs' cost and suit No. 276 be proceeded with according to law."

After argument, and on February 16, 1904, a decree was entered in favor of the respondents, in which it was recited that "The court sustained the demurrer and dismissed the suit at cost of complainants." This action, which had in the meanwhile been pending in the Circuit Court, upon the issues made up as heretofore stated, was tried and resulted in a verdict and judgment in favor of the defendants. Error having been prosecuted from the Circuit Court of Appeals in that court on April 4, 1905, the judgment was reversed and the cause remanded. The court did not pass upon the merits, because it found that the citizenship of the Lutcher & Moore Lumber Company, the corporation defendant, was not adequately averred in the petition for removal, and therefore the proper basis for jurisdiction in the court below had not been laid (136 Fed. Rep. 404) and a petition for rehearing was refused. 139 Fed. Rep. 1007.

In the Circuit Court, after the receipt of the mandate of the Circuit Court of Appeals, plaintiffs objecting and excepting, the defendants, in accordance with leave granted, amended the averments of citizenship in the petition for removal so as to cause them to be in all respects adequate. Subsequently, upon grounds which it is not necessary to state, plaintiffs

filed a paper styled a demurrer to portions of the answer of the defendants and pleas of *res judicata* and estoppel. The case was tried the second time to a jury in October, 1906. During the progress of the trial the deposition of J. A. Lovett, one of the original vendors of Knight, was offered by the defendants. The testimony tended to show that the note for $14,500, described in the act of sale by which Knight had acquired the property as having been given as part of the purchase price, had not been paid by him prior to the death of his first wife, and that it had subsequently been paid out of the purchase price realized from the various sales which were assailed, and that the amount was therefore a debt of the community, and the plaintiffs as heirs of their mother could not attack the sales without tendering their share of the community debt, which had been paid as the result of the sales. This testimony was excluded by the court, because, among other reasons, it was held not to be competent under the defenses made in the answers. Thereupon the defendants requested to be allowed to amend on the ground that on the former trial the testimony had been admitted as within the issues arising from the answers, and that the defendants "therefore took no steps to provide for the contingency of a change in the opinion of the court by amending their answers so as to clearly make such defenses admissible." To the action of the court in refusing to allow this amendment an exception was taken. Differing from the first trial, there was a verdict in favor of the plaintiff, upon which judgment was entered. Various exceptions additional to those to which we have just referred were taken by the defendants. Without going into detail it suffices to say that these exceptions were varied in character, embracing all the defenses made in the answers and covered rulings of the court on the admission and rejection of evidence and the refusal to give requested instructions. On error the case again went to the Circuit Court of Appeals for the Fifth Circuit, and as the result of the numerous exceptions taken below the assign-

ments of error in substance presented for decision the many questions raised in the trial court.

The Circuit Court of Appeals affirmed the judgment of the trial court, and the opinion delivered by it is as follows: "By the Court: After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiff in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law, we therefore affirm the judgment of the Circuit Court." A lengthy petition for rehearing was filed on December 26, 1907, and a few days thereafter there was also filed what was styled "Motion by plaintiffs in error to withhold mandate, stay proceedings, and order trial of the equitable issues, with suggestions of *res judicata* and waiver." Both in the petition and in the motion counsel contended that contrary to the ruling of the Circuit Court of Appeals the trial court held all the issues properly triable on the law side of the court, and that the plaintiffs in this action never at any time suggested that any of the matters of defense were equitable, and to dispose of the cause as the court had done would deprive the defendants of their rights and entail great hardship upon them. The defendants also incorporated in the motion the bill of complaint filed in the equity cause heretofore referred to and which was instituted by them to enjoin the prosecution of this action, as also the demurrer and the decree of dismissal. In connection therewith the suggestion was made that the decree in said cause ought in conscience to be treated as *res judicata* of the question of the nature of the defenses interposed in this action. Elaborate argument was advanced to sustain the contention that the defenses introduced amounted only to a denial of the case made by the plaintiffs, and that the evidence excluded by the trial court should have been received, and upon the undisputed record a verdict should have been directed for the defendants below. The appellate court was asked to allow an oral argument of the

petition for rehearing: "In view of the fact that the case has been disposed of on questions not raised by either party, and not considered when this cause was submitted, and in view of the attitude of the trial court with reference to the defenses being at law and not in equity, and in view of the attitude plaintiffs in error have been placed in, because of this question having been determined adversely to its rights for the first time in this court." The record does not show that any formal disposition was made of the petition for rehearing, and the motion to which we have referred, other than an entry, dated January 22, 1908, reading as follows: "Ordered, that the issuance of mandate in this case be, and it is hereby, stayed for thirty days from this date." The case thereupon came here in consequence of the allowance of a writ of certiorari.

The record unquestionably establishes that the Circuit Court, with the acquiescence of all parties, treated the defenses interposed by the answer of the defendants as legal in their nature. Aside, however, from the strict record, both the respondents and the petitioners call our attention to the transcript containing the proceedings in the equity cause. Indeed, counsel for respondents particularly press upon our attention that the defendants below, plaintiffs in the equity cause, acquiesced in the decree entered against them in the Circuit Court in such cause by not appealing therefrom, and that "it binds and estops them from now urging the same matters set up in that bill." There is no denial, but, on the contrary, by necessary implication, counsel for respondents admit the truth of the statement made in the petition for rehearing, filed in the Circuit Court of Appeals, that the cause was disposed of by that court "on questions not raised by either party, and not considered when this cause was submitted," and contrary to the "attitude of the trial court with reference to the defenses being at law and not in equity."

It is a reasonable inference that when, after the removal of the cause, the defendants filed their bill of complaint setting

up the defenses which they had urged in their answer in this action, such course must have been suggested by the fact that the distinction between law and equity did not prevail in the courts of the State of Louisiana, and that therefore it was well for them after they had removed the cause into a court of the United States to seek to conform to the practice there prevailing, and, in any event, to pursue a course which would render it certain that in the new forum they would not be deprived because of the form of pleading of their right to have their defenses passed upon. The plaintiffs in the action at law (this action) who were the defendants in the equity cause, having as a defense to that cause insisted that the defenses were not cognizable in equity, and having prevailed in such contention were certainly in conscience placed in a position where they could not by a change of attitude assert that the defenses were legal in their nature and thus deprive the defendants of all means of defense in this action. Indeed, the record does not intimate that they sought to do so, since it affirmatively establishes that the plaintiffs in this action, after having obtained as respondents the adjudication in their favor in the equity cause, an adjudication which was as well binding upon them as upon the complainants, acquiesced in the decree, an acquiescence which was manifestly concurred in by the opposing parties and sanctioned by the trial court. The case is altogether unlike that which would be presented by an objection urged by the respondents to a bill in equity, against the power of the court to exert jurisdiction over a cause of action indisputably cognizable only in a court of law, whereby a deprivation of the constitutional right of trial by jury would result. In this case, on the contrary, the question considered did not concern the inherent jurisdiction of the court over the subject-matter. The decision of the question before us is controlled by the case of *Burbank* v. *Bigelow*, 154 U. S. 558. That was an action at law in which the plaintiff recovered judgment. In this court, for the first time, the objection was made by the unsuccessful

party that the matter of the demand of plaintiff was one of equitable cognizance. The court, however, said (p. 559):

"The objection that the matter of plaintiffs' demand is one of equitable cognizance in the Federal courts cannot prevail. No such objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court."

Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard.

It is undoubted that by the operation of the writ of certiorari, granted in accordance with the provisions of the Judiciary Act of 1891, the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that court. Certain is it also that the Judiciary Act of 1891 contemplates that, as a general rule, where under its provisions a case comes to this court on certiorari to a Circuit Court of Appeals it will be disposed of so that the mandate of this court, to avoid circuity, will go directly to the Circuit Court. The great purpose of the act of 1891, however, to which all its provisions are subservient, is to distribute the jurisdiction of the courts of the United States, and thus to relieve the docket of this court by casting upon the Circuit Courts of Appeal the duty of finally deciding the cases over which the jurisdiction of those courts is by the act made final. The power to certiorari in accordance with the act, in its essence, is only a means to the end that this imperative and responsible duty may be

adequately performed. As it is patent from the statement we have made that the only ground upon which the power to certiorari could have been exerted was the failure of the court below to consider the case before it, we think this record presents an exception to the general rule of procedure above referred to. In other words, in a case like this we think the judgment of the Circuit Court of Appeals must be reversed and the case be remanded to that court to the end that the duty to hear and decide it may be performed. To hold otherwise would be repugnant to the plain intent of the act of 1891, since it would recognize a practice by which the concededly essential purpose of the act of 1891 could be disregarded or be made practically of no avail.

The judgment of the Circuit Court of Appeals is reversed and the case is remanded to that court for further proceedings in conformity with this opinion.

McCLELLAN *v.* CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

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

No. 630. Argued January 25, 26, 1910.—Decided April 11, 1910.

The power of this court to issue writs of certiorari to the Circuit Court of Appeals is not limited to the provisions of the Court of Appeals Act. It may issue them under § 716, Rev. Stat. *In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132.

Under § 716, Rev. Stat., and § 12 of the Court of Appeals Act the Circuit Court of Appeals has authority to issue writs of *scire facias* and all writs not specifically provided for by statute and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.

Where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below; and so held that the Circuit Court of Appeals may issue mandamus to compel the Circuit Court to vacate a stay pending proceedings in the state court to determine and thus render *res judicata* questions within the jurisdiction of the Circuit Court, and involved in the action in which the stay was granted.

The constitutional grant of chancery jurisdiction to Federal Courts in cases where diverse citizenship exists, to determine interests in estates, is the same as that possessed by the Chancery Courts of England and it cannot be impaired by subsequent state legislation creating courts of probate. *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33.

A Federal court cannot abandon its jurisdiction already properly obtained of a suit and turn the matter over for adjudication to the state court. *Chicot County* v. *Sherwood*, 148 U. S. 529.

The pendency of a suit in the state court is no bar to proceedings concerning the same matter in a Federal court having jurisdiction thereover.

The judgment in a suit between claimants of an estate and the administrator does not conclude the rights of the State claiming an escheat so long as it is not a party and has not been allowed to intervene on its own behalf.

On certiorari this court will consider only the record in the Circuit Court of Appeals as certified here in return to the writ, and it decides the case solely as presented in such return.

In this case *held* that the Circuit Court of Appeals should have issued an alternative writ of mandamus to, or order to show cause why, the Circuit Judge should not vacate a stay in an action brought against an administrator by one claiming to be an heir while and until proceedings brought by the State for escheat in the state court should be finally determined.

THE facts are stated in the opinion.

Mr. Melvin Grigsby for petitioners:

The Circuit Court cannot rightfully stay proceedings of an action there pending to await the commencement and determination of another action in a state court. *Barber Asphalt Co.* v. *Judge Morris*, 132 Fed. Rep. 945, citing *In-*

surance Co. v. *Harris*, 97 U. S. 331, 336; and see *Harkrader* v. *Wadly*, 172 U. S. 150; *Smyth* v. *Ames*, 169 U. S. 466; *Lang* v. *Choctaw & Gulf R. R. Co.*, 160 Fed. Rep. 359; *Sullivan* v. *Algrem*, 160 Fed. Rep. 366; *Gordon* v. *Logest*, 16 Pet. 97; *In re Langford*, 57 Fed. Rep. 570.

The writ of mandamus from the Circuit Court of Appeals was the proper and only available remedy for the correction of the error made by the Circuit Court in staying proceedings in that court. *Barber Asphalt Paving Company* v. *Morris*, *supra*.

The Circuit Court could not properly stay proceedings on the ground that it was necessary for the protection of the State of South Dakota, the State having appeared in that court claiming to be an interested party.

The opinion below is based on the theory that the Circuit Court could not proceed without making the State a party, and that to make the State a party would oust the jurisdiction of the court under the Eleventh Amendment, and that *Minnesota* v. *The Northern Securities Co.*, 184 U. S. 200; *California* v. *Southern Pacific Company*, 157 U. S. 229, controlled, relying on cases cited. *Shields* v. *Barrow*, 17 How. 130; *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipiseogee Woolen Co.*, 2 Black, 545; but in these cases this court held that the complaints disclosed that the relief could not be granted as prayed for without affecting the rights of others not parties to the suits.

In the case at bar it does not appear that the State or any party, except only the petitioners and the defendant, had any interest whatever in the subject-matter of the suit, unless it can be claimed that in every case wherein heirs seek to establish title to the property of a decedent the State is a necessary party, and can claim the right of intervention on the ground that the property of all decedents escheats to the State in default of legitimate heirs.

The State of South Dakota petitioned the Circuit Court for leave to intervene, claiming to be the owner of the prop-

erty in question, because the same had escheated to the State, making a case almost exactly in line with *United States* v. *Judge Peters*, 5 Cranch, 115; and see *South Carolina* v. *Wesley*, 155 U. S. 543, almost identical in principle with the case here presented, and in which, although it appeared that the property was in possession of and belonged to the State, the Circuit Court overruled the motion to dismiss, and was sustained by this court, citing *United States* v. *Peters*, 5 Cranch, 115, *supra; The Exchange* v. *McFadden*, 7 Cranch, 116; *Osborn* v. *Bank*, 9 Wheat. 738; *United States* v. *Lee*, 106 U. S. 196; *Stanley* v. *Schwalby*, 147 U. S. 508; see also *Tindal* v. *Wesley*, 167 U. S. 203, 206.

The same doctrine was laid down in *United States* v. *Lee*, 106 U. S. 196, 251; *Carr* v. *United States*, 98 U. S. 433; in which it was held that judgment against a defendant who claimed title under the United States could be set up by way of estoppel in an action brought by the United States to quiet title to the same land, was no estoppel, even though in the former action the United States district attorney for the district, and other counsel employed by the Secretary of the Treasury, attended at the trial on behalf of the defendant.

The Circuit Court had jurisdiction of the suit of *John McClellan* v. *Blackman*, as administrator; *Payne* v. *Hook*, 7 Wall. 425; *Byers* v. *McAuley*, 149 U. S. 608, 867; *Ingersoll* v. *Coram*, 211 U. S. 335.

The petitioners will be deprived of their rights under Art. III, § 2 of the Constitution of the United States unless the order of the Circuit Court of Appeals shall by this honorable court be reversed.

Mr. Frederic D. McKenney, with whom *Mr. S. W. Clark*, Attorney General of South Dakota, and *U. S. G. Cherry* were on the brief, presented a statement and suggestions on behalf of John E. Carland, United States District Judge for the District of South Dakota:

The statutory writ of certiorari under the provisions of

the act of March 3, 1891, is not available, nor is § 716, Rev. Stat.

The writ of mandamus in the Federal courts is never an independent suit, as it is in many States and in England. The courts of the United States have no power to acquire jurisdiction of a case or question by issuing a writ of mandamus. Their authority in this regard is limited to the issuance of writs of mandamus in aid of their appellate jurisdiction and in such cases as are already pending and wherein jurisdiction has been obtained on other grounds and by other process. *McClung* v. *Silliman*, 6 Wheat. 601; *McIntire* v. *Wood*, 7 Cr. 504; *Kendall* v. *United States*, 12 Pet. 524; *Riggs* v. *Johnson County*, 6 Wall. 166, 197, 198; *Secretary* v. *McGarrahan*, 9 Wall. 311; *Bath County* v. *Amy*, 13 Wall. 244; *Graham* v. *Norton*, 15 Wall. 427; *Greene County* v. *Daniel*, 102 U. S. 187; *Davenport* v. *Dodge County*, 105 U. S. 237; *Smith* v. *Bourbon County*, 127 U. S. 105; *United States* v. *Williams*, 67 Fed. Rep. 384; *United States* v. *Judges*, 85 Fed. Rep. 179; *In re Forsyth*, 78 Fed. Rep. 301; *Waite* v. *Santa Cruz*, 89 Fed. Rep. 619; *Shepard* v. *Irrigation Dist.*, 94 Fed. Rep. 3; *Rosenbaum* v. *Supervisors*, 28 Fed. Rep. 223.

If the Circuit Courts of Appeals have the power to issue writs of mandamus at all, that power is derived from the provisions of § 716, Rev. Stat., as read into the Circuit Court of Appeals Act by § 12, such writ can issue only in aid of their appellate jurisdiction, and in the exercise of their discretionary authority. *Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. Rep. 945; *In re Pacquet*, 114 Fed. Rep. 437; *Travers Co.* v. *Bridge Co.*, 92 Fed. Rep. 690; *United States* v. *Severens*, 71 Fed. Rep. 768.

But if the case here should be retained on the writ of certiorari under § 6 of the act of 1891, no order purporting to direct or control the conduct of District Judge Carland in the future course of the cause could well be issued without said District Judge first being accorded an opportunity to show cause in the premises.

The record shows that petitioners invoked the jurisdiction of the proper state courts to determine the very matter, namely, the question of his and their relationship to John McClellan, deceased. Under § 80, Probate Code of South Dakota, "administration of the estate of a person dying intestate must be granted to some one or more of the persons herein mentioned."

The refusal of the county court to appoint any of the petitioners administrator carries with it, at least by necessary implication, the finding that none of said petitioners was either the son or grandson of the intestate as alleged.

Where the order or judgment of a state court in proceedings for administration depends upon the question as to whether the party claiming the right to administer such estate is next of kin or heir at law of the intestate, such order or judgment is conclusive upon that question until vacated or reversed in any and all subsequent suits or proceedings, whether in the state or Federal courts. Such order or judgment until vacated or reversed is pleadable in bar and as *res adjudicata* in such subsequent proceedings. *Caujolle* v. *Curtis*, 13 Wall. 465; *Howell* v. *Budd*, 91 California, 342.

Under § 5651, Laws of South Dakota, being § 26, Probate Code, the county court, when acting as a probate court and in respect to probate matters, is a court of general jurisdiction. *Matson* v. *Swenson*, 5 So. Dak. 191; and see Woerner on Administration, 2d. ed., 1234. Matters of administration affecting decedents' estates in the courts of South Dakota are proceedings *in rem*. *Byers* v. *McAuley*, 149 U. S. 608; *O'Callaghan* v. *O'Brien*, 199 U. S. 89; *Hook* v. *Payne*, 14 Wall. 253.

In South Dakota no right of action exists in favor of an heir, devisee or legatee to recover his portion or share of an estate, against an administrator, independent of a proceeding either direct or ancillary in probate. A suit *inter partes* between the administrator and the heir, devisee or legatee is not provided for. Final distribution must be made in the

probate court before the person entitled to the estate can recover it.

In South Dakota the order or decree of the probate court must name the persons and the proportions or parts to which each is entitled before any right of action accrues in favor of any person to recover from an administrator. The final order and decree is conclusive and can only be reversed, set aside, or modified on an appeal. *Carrau* v. *O'Calligan*, 125 Fed. Rep. 657; *Richardson* v. *Green*, 61 Fed. Rep. 423; *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33.

The application of the State to intervene in the Federal court was proper. *Gumbel* v. *Pitkin*, 124 U. S. 143; *Krippendorf* v. *Hyde*, 110 U. S. 276, 283; *State of Florida* v. *Georgia*, 17 How. 478; *Paradise* v. *Farmers' & Mechanics' Bank*, 5 La. Ann. 710.

The bill of complainant as drawn, considered in the light of the scope of its prayers, is clearly beyond the jurisdictional powers of the Circuit Court. *Waterman* v. *Canal-Louisiana &c.*, 215 U. S. 33.

In either event, and as well for the want of an indispensable party—the State of South Dakota, as above noted—the Circuit Court of the United States for the District of South Dakota is without jurisdiction to proceed with the cause otherwise than by dismissing the bill of complaint for want of jurisdiction.

Mr. Justice Day delivered the opinion of the court.

This case comes here upon a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. In that court McClellan and others, petitioners, filed a petition for a writ of mandamus against the United States District Judge for the District of South Dakota, praying a writ of mandamus to said judge, sitting as a judge of the Circuit Court of said district, commanding him to set aside and vacate certain orders staying proceedings in an action pending in the Cir-

cuit Court, and to proceed to try and determine the suit in the usual course of procedure, without regard to the pendency of certain proceedings, to be hereinafter referred to, in the courts of the State of South Dakota. The Circuit Court of Appeals upon the petition for a writ of mandamus being presented to it denied the prayer thereof and dismissed it. Thereafter this court granted the writ of certiorari.

From the transcript of the record of the case in the Circuit Court of Appeals it appears that petitioner and others, on the eighth day of September, 1908, commenced suit against George T. Blackman, special administrator of the estate of John C. McClellan, deceased, and others, in the Circuit Court of the United States for the District of South Dakota, in which suit complainants were citizens of States other than South Dakota, and respondent, George T. Blackman, a citizen of South Dakota, was sued as special administrator of the estate of John C. McClellan, deceased. The bill set up that complainants were the sole surviving heirs at law and next of kin of John C. McClellan, deceased, who died on or about the thirty-first of August, 1899, intestate, in the city of Sioux Falls, county of Minnehaha, South Dakota, leaving an estate of real and personal property of the value of about $33,000. The bill sets out the issuing of letters of administration to one William Van Eps, who held possession of the estate until July 12, 1906, when he died; that subsequently thereto special letters of administration were issued to George T. Blackman, the respondent. The bill further avers that there was in possession of said Blackman, as said special administrator, belonging to said estate, assets in excess of the sum of $35,000, consisting of real estate, cash on hand, etc. The bill avers that there were no claims against the estate, and that all the creditors of John C. McClellan had been paid, and that the estate was ready for distribution according to the laws of South Dakota. The bill further prayed that the complainants might be adjudicated the sole heirs at law and next of kin of said decedent, and entitled to

inherit the estate, real and personal, and that the said Blackman render a just and true account of the property in his hands belonging to said estate, and, after deducting his lawful fees and expenses, be required to distribute the same in certain proportions to the complainants, as heirs at law of the decedent. The defendant Blackman appeared and answered the bill, admitting certain allegations thereof, and denying others, and demanding proof thereof, and stating that he held the property described in the bill of complaint subject to the order of the court. A general replication was filed to the answer, and thereupon it appears that the State of South Dakota came, by its attorney general and its attorney for the county of Minnehaha, and special counsel, and asked leave to intervene in the case, and, upon hearing, the Circuit Court of the United States overruled the motion, and ordered that the further prosecution of the action then pending before it be stayed for the period of ninety days, for the purpose of allowing the State of South Dakota to commence a proper action or proceeding to establish its title and interest in and to the property in the estate of the decedent, and that in the event that such action be commenced within that time, then the pending action to be stayed until the determination of such action brought by the State of South Dakota. Afterwards the complainants filed an application for the vacation of the orders staying the prosecution of their suit until the determination of the suit in the state court, but the same was denied, and thereafter the petition for mandamus in the Circuit Court of Appeals was filed, with the result already stated.

The matters we have stated constitute the entire record before the Circuit Court of Appeals. Upon that record it appears that the Circuit Court of the United States having an action before it to determine the interest of the complainants in the estate of John C. McClellan, upon which issue had been joined, upon application of the State of South Dakota refused to permit it to intervene in the case to set

up its right and title to the property in the estate of the decedent, upon the claim that he died without legal heirs, and stayed the proceedings in the case before it until the State of South Dakota could bring an action in the state court for the purpose of determining such rights; and afterwards, it appearing that the State had commenced such action against all persons having or claiming a right, title, or interest therein, stayed the pending action until the determination of the action in the state court.

It is first objected on behalf of the respondent herein that this is not a case in which this court has the authority to issue the writ of certiorari. It is contended that the application for the writ in this case was under the act of March 3, 1891 c. 517, 26 Stat. 826, and that the right to grant writs of certiorari to the Circuit Court of Appeals is limited by the act to certain cases made final in the Circuit Court of Appeals, and that by § 10 of the Court of Appeals Act it is declared that whenever on appeal, writ of error, or otherwise, a case coming from the Circuit Court of Appeals shall be reviewed and determined in the Supreme Court, it shall be remanded to the proper District or Circuit Court for further proceedings in pursuance of such determination.

These provisions, it is contended, show that a writ of certiorari is not warranted in this case, it being an original application in mandamus in the Court of Appeals, and the jurisdiction in the Circuit Court not depending upon the opposite parties to the suit being citizens of different States, and, therefore, the judgment not final in the Circuit Court of Appeals, nor could the case be remanded to the proper District or Circuit Court, as it was an original proceeding in mandamus in the Circuit Court of Appeals. But the power of this court to issue writs of certiorari is not limited to the Court of Appeals Act. Section 716 of the Revised Statutes of the United States provides:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall

also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Of this section it was said in *In re Chetwood*, 165 U. S. 443, 461:

"By section 14 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 81, carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. 398; Bacon's Abr. Certiorari."

In *Whitney* v. *Dick*, 202 U. S. 132, a writ of certiorari was granted to the Circuit Court of Appeals for the Ninth Circuit to review the judgment of that court where an original application had been made for the writ of *habeas corpus* and a writ of certiorari in that court. This court held, upon the question of jurisdiction, that there could be no appeal from the Circuit Court of Appeals in such a case, but that a writ of certiorari might issue to bring the case here from the Circuit Court of Appeals upon the authority of *In re Chetwood*, 165 U. S. *supra*. The case at bar being a petition for mandamus there is no amount in controversy, and, consequently, there could be no appeal to this court; and, as in *Whitney* v. *Dick*, *supra*, the judgment of the Circuit Court of Appeals was not final because

of the diversity of citizenship in the court below, and, consequently, certiorari would not issue under the act of 1891. In *Whitney* v. *Dick* the case was remanded to the Circuit Court of Appeals, with instructions to quash the writ of certiorari issued by that court and to dismiss the petition for *habeas corpus*.

In the present case we have no doubt of the authority of this court to issue the writ of certiorari under § 716 of the Revised Statutes of the United States as construed and applied in the cases just cited—*In re Chetwood*, 165 U. S., and *Whitney* v. *Dick*, 202 U. S. *supra*. The suggestion, therefore, that this case should be dismissed for want of power in this court to grant the writ of certiorari cannot be entertained. While the power to grant this writ will be sparingly used, as has been frequently declared by this court, we should be slow to reach a conclusion which would deprive the court of the power to issue the writ in proper cases to review the action of the Federal courts inferior in jurisdiction to this court.

It is further objected that the Circuit Court of Appeals had no jurisdiction to issue the writ of mandamus, as that writ can only be issued in aid of the appellate jurisdiction of the Circuit Court of Appeals, and, it is contended, as that court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed. Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in § 716 of the Revised Statutes of the United States. That section we have already had occasion to quote, and when read in connection with § 12 of the Court of Appeals Act it gives to the Circuit Court of Appeals the authority, as this court has, to issue writs of *scire facias*, and all writs not specifically provided for by statute, and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.

In this case it appears that the original action commenced in the Circuit Court of the United States might have been taken on appeal to the Circuit Court of Appeals. The suit involved over $2,000 in amount and was between citizens of

different States. There are not wanting decisions in the Federal courts holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below. This rule was distinctly stated and the previous cases referred to in *Insurance Company* v. *Comstock*, 16 Wall. 258, 270. In that case the rule was recognized that this court had the power to issue the writ of mandamus to compel the Circuit Courts to proceed to final judgment in order that this court may exercise the jurisdiction of review given by law. In that case the court said:

"Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause."

In *Ex parte Bradstreet*, 7 Pet. 634, the same rule was laid down by Chief Justice Marshall, speaking for the court, requiring a Federal court of inferior jurisdiction to reinstate a case, and to proceed to try and adjudicate the same. And see *In re Pennsylvania Co.*, 137 U. S. 451, 452; *Virginia* v. *Rives*, 100 U. S. 313; *United States, Petitioner*, 194 U. S. 194; *Barber Asphalt Co.* v. *Morris*, 132 Fed. Rep. 945.

Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it.

The question then arises, was the Circuit Court justified in staying the proceedings in the case, and withholding further action until the case involving the same question might be brought and determined in the state court? We think that there can be but one answer to this question. The case made upon the bill was within the original jurisdiction of the Circuit Court of the United States. The right of the Circuit Court to maintain such actions, notwithstanding the legislation of the State creating probate courts, has been so recently before this court as to require no further consideration now. *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33. In that case, following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different States to determine interests in estates, and to have the same fixed and declared, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate. The action was therefore within the jurisdiction of the Circuit Court of the United States.

So far as the record presented to the Circuit Court of Appeals shows, the only ground upon which the Circuit Court acted in postponing the suit was because the State of South Dakota, which had applied to be made a party, and which application was denied, was about to begin a suit in the state court to determine an escheat of the estate of John C. McClellan, therefore the action was stayed, first, until the beginning of such suit, and then until it was determined. It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County* v. *Sherwood*, 148 U. S. 529, 534.

It cannot be denied that a Circuit Court of the United

States, like other courts, had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata*, and thus prevent further proceedings in the Federal court.

The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different States the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case. In the present case, so far as the record before the Circuit Court of Appeals discloses, the Circuit Court of the United States had acquired jurisdiction, the issues were made up, and when the State intervened the Federal court practically turned the case over for determination to the state court. We think it had no authority to do this, and that the Circuit Court of Appeals, upon the record before it, should have issued the writ of mandamus to require the judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case.

Whether the State ought to have been allowed to intervene in the Federal court is not a question now before us; but, if not made a party to the suit, its rights would not have been concluded by any adjudication made therein. *Tindal* v. *Wesley*, 167 U. S. 204, 223.

We have thus far considered the case upon the record made in the Circuit Court of Appeals and certified here upon the writ of certiorari. In this court the honorable judge of the District Court entered special appearance, and filed an affidavit as to the proceedings before him, in which much appears which is not in the record presented to the Circuit Court of Appeals. In that appearance and affidavit the petition in intervention

filed in the Circuit Court of the United States is set forth in full, as well as certain affidavits which were filed. We shall not enter upon a consideration of these papers, because they are not in the record, as the same has been certified to us from the Circuit Court of Appeals as the one upon which it acted, and declined to issue the writ of mandamus. They set forth at length certain proceedings in the state courts of South Dakota, in which it is alleged that the issue of the right of the complainants in the equity suit to take the estate of John C. McClellan, as his heirs at law, was determined adversely to them, and that such proceedings were had as showed that further proceedings in reference to the escheat of the estate of McClellan for want of legal heirs ought to be determined by proceedings in the state court. In making his appearance in this court, and in presenting these papers, it is evident that the District Judge was much influenced in ordering the stay of proceedings, and withholding judgment until the state court had rendered its judgment, by the proceedings already had in the state courts of South Dakota.

As we have said, we do not pass upon the sufficiency of those proceedings to authorize the orders in question. We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the Circuit Court of Appeals. Upon that record, we think, the Circuit Court of Appeals should not have dismissed the writ of mandamus, but should have ordered the alternative writ, or an order to show cause, to issue, in order that the District Judge might have been fully heard before the question was determined as to whether mandamus should issue or not.

We shall, therefore, reverse the judgment of the Circuit Court of Appeals and remand the case to that court, with directions to issue the alternative writ, or an order to show cause. All we decide is that upon the petition and record made in the Circuit Court of Appeals and as now presented by the transcript filed in this court such alternative writ or order to show cause ought to have issued. The judgment dismissing

the petition is reversed and the case is remanded to the Circuit Court of Appeals for further proceedings, as herein indicated.

Reversed.

BRANTLEY *v.* STATE OF GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 692. Argued April 6, 1910.—Decided April 11, 1910.

Where one has been tried in a state court for murder and convicted of manslaughter, and, on his own motion, obtains a reversal and new trial, on which he is convicted of a higher offense, and the constitution of the State provides that no one shall be put in second jeopardy for the same offense save on his own motion for new trial or in case of mistrial, there is no question involved of twice in jeopardy under the Constitution of the United States.

132 Georgia, 573, affirmed.

THE facts are stated in the opinion.

Mr. John Randolph Cooper for plaintiff in error.

Mr. John C. Hart, Attorney General of the State of Georgia, for defendant in error, submitted.

PER CURIAM: Brantley was indicted in the Superior Court of Washington County, Georgia, charged with the offense of murder; was tried and found guilty of voluntary manslaughter; filed a motion for new trial, and upon appeal to the state Court of Appeals obtained a reversal of the judgment, and a new trial was ordered.

At the second trial he filed a plea of former jeopardy, claiming that he had been tried for murder, and having been found guilty of a lesser grade of homicide that operated to acquit him of the charge of murder, and to try him again for murder under the same indictment would be to try him again for an

offense of which he had been previously acquitted, and that he could only be arraigned for voluntary manslaughter. This plea was demurred to and the demurrer sustained by the court. The case then proceeded to trial, and the jury found him guilty of murder, whereupon he was sentenced to life imprisonment. He moved for new trial, which motion was overruled, and thereupon he appealed to the Supreme Court of the State of Georgia, which affirmed the judgment of the lower court. *Brantley* v. *State*, 132 Georgia, 573.

The constitution of the State of Georgia provides that "No person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for new trial, after conviction, or in case of mistrial." This writ of error was sued out and plaintiff in error contended that the judgment of the Supreme Court of Georgia was in violation of the Fifth Amendment of the Constitution of the United States, and that the provision of the constitution of the State of Georgia was null and void as construed by the state Supreme Court.

The contention is absolutely without merit. It was not a case of twice in jeopardy under any view of the Constitution of the United States.

Judgment affirmed.

UNITED STATES *v.* OBERLIN M. CARTER.

OBERLIN M. CARTER *v.* UNITED STATES.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

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

PETITION FOR WRIT OF PROHIBITION.

Nos. 551, 552. No. 10, Original. Argued January 13, 14, 1910.—Decided April 18, 1910.

Where both the courts below have concurred upon material facts, the burden rests on the appellant to satisfy this court that such conclusions are erroneous.

Where both courts below have found on conceded facts the appellant accountable for illicit gains the burden rests on him to satisfy the courts that such conclusion is erroneous as matter of law.

A public official may not retain any profit or advantage realized through an interest in conflict with his fidelity as an agent.

Where an officer of the United States secretly receives a part of the profits gained by others in the execution of contracts with the Government over which he has control, the United States is entitled to a decree in equity for the amount so received; and this, even if the Government cannot prove fraud or abuse of discretion on the part of such officer or that it has suffered actual loss.

In determining whether an officer of the Government has been guilty of fraud in connection with contracts under his control, abnormal profits arouse suspicion and demand clear explanation.

The receipt in any manner as a gratuity or otherwise by an officer of the United States of a share of profits on government contracts under his control through a third party is the same, as to his liability to account therefor, as though he received such share direct from the contractor.

The fact that a close friend of the accused, having intimate relations with him in connection with the matter in suit, and whose testimony would benefit him if statements made by accused in regard to their relations are true, does not voluntarily appear in any of several proceedings, but sees the accused convicted, justifies a presumption that his testimony would not have borne out the defense.

When an officer of the United States has received a share of profits from contracts under his control the Government is not limited, in a suit to recover the same and in which it has impounded securities, to the traced securities; the officer must account for all his gains and, under a prayer for other and general relief, the Government is entitled to a judgment for money had and received to its use, and may enforce it against any property of the defendant including property in the hands of third parties with notice of how it was obtained.

The Government in a suit to recover illicit gains is justified in agreeing to allow the payment of certain expenses connected with the litigation and to determine title of securities which have been impounded by it with difficulty, and in regard to which there are conflicting claims, in consideration of the surrender of the securities to abide the decision of the court in the case.

Where two courts in succession have concurred in finding that counsel fees are reasonable as allowed, this court does not feel authorized to disturb the finding.

An agreement on the part of one holding securities in trust, to turn over all that have not been disposed of *bona fide*, is not necessarily broken by a failure to turn over some that are held under claim that they were retained for services and disbursements properly earned and incurred, even if the claim cannot be sustained, if it is made in good faith and the question submitted to the court.

Where a stipulation for surrender of securities in suit is made by the Government and other parties, even though the Government may make what appears to be a bad bargain, the stipulation must be observed if it is actually a contract.

172 Fed. Rep. 1, affirmed.

THE facts are stated in the opinion.

Mr. Marion Erwin, with whom *Mr. Edwin W. Sims* was on the brief for the United States, Appellant in No. 551 and

Appellee in No. 552, and *The Solicitor General* for the United States in No. 10, Original:[1]

The right of the Government to the full measure of the relief prayed in its bill in this cause, and granted to it by the decree of the Circuit Court of Appeals, depends primarily upon the sufficiency of the proof establishing the conspiracy between Oberlin M. Carter and the contractors to defraud the United States as charged in the bill.

The proof submitted established that in devising projects of improvement, drafting specifications, advertising, letting contracts, supervision and acceptance, large discretion and options were reserved to and exercised by Carter as engineer officer in charge.

The proof establishes the fact that during the period in controversy, Carter's discretion and options after the letting of the contracts were so exercised uniformly as to create the largest possible profit to the contractors at the expense of the United States, and did in fact cause an advance of more than 300 per cent.

The foregoing facts cannot be seriously disputed, but it is asserted the exercise of the discretions which Carter claimed he had the right to use in the manner in which they were exercised, were either justified by special circumstances excusable for absence of corrupt motive.

The Government claims that the element of corrupt motive is demonstrated by the proof especially by the establishment of the system of division by currency deposits aggregating more than $578,299.66 up to 1896—which method of concealment raises an overwhelming presumption of the existence of the conspiracy. Wharton Criminal Evidence, §§ 32–38; *The Slavers*, 2 Wall. 401; *Rea* v. *Missouri*, 17 Wall. 543.

[1] The briefs in this case were very voluminous, amounting in all to over 600 pages; they were largely on the facts, the record consisting of over thirteen thousand pages, and it has not been practicable to make abstracts of them except on a few points of law referred to.

The facts proved supply the corrupt motive in the acts of Carter by which the exorbitant profits were created, and establish the existence of the fraudulent relations between Carter and the contractors, as the ultimate fact. Tiedeman on Equity Jur., § 235; Eaton on Equity, § 135.

Both the Circuit Court and Circuit Court of Appeals in this cause, having found as an ultimate fact that all of the profits of the contracts are fraudulent profits, and that the Government is entitled to recover all the investments made therewith in the hands of Carter or his agents, or other persons taking with notice, this court will not disturb the finding unless shown to be clearly erroneous. *Stuart* v. *Hayden*, 169 U. S. 1–14; *Brainard* v. *Buck*, 184 U. S. 105; *Towson* v. *Moore*, 173 U. S. 17; *Dravo* v. *Fabel*, 132 U. S. 487; *Baker* v. *Cumming*, 169 U. S. 189; *Smith* v. *Burnett*, 173 U. S. 430, 436; *Sabine* v. *The Richmond*, 103 U. S. 540.

The fundamental question of the guilt of Oberlin M. Carter of conspiracy with Benjamin D. Greene and John F. Gaynor to defraud the United States in the river and harbor contracts under consideration has been passed upon affirmatively prior to the decrees in the present suit, by numerous courts, notably in the following proceedings in this and other courts:

Verdict of guilty against Captain Carter by General Court-Martial.

Reviewed by Attorney General Griggs and affirmed by President McKinley, September 29, 1899. See *Carter Case*, 22 Opin. Atty. Genl., 589.

Reviewed by this court and sentence affirmed on *habeas corpus*. *Carter* v. *McClaughy*, 183 U. S. 365.

Verdict of guilty against Benjamin D. Greene and John F. Gaynor, on trial by jury on indictment, April 12, 1906, U. S. Dist. Court, Southern Dist. Ga. *United States* v. *Greene*, 146 Fed. Rep. 803.

Reviewed and affirmed on writ of error by U. S. Circuit Court of Appeals, Fifth Circuit. *Greene* v. *United States*, 154 Fed. Rep. 401–414.

Petition of Greene and Gaynor for certiorari denied by this court. *Greene* v. *United States*, 207 U. S. 596.

Although owing to Carter's pleading the statute of limitations before the court-martial, barred criminal prosecution for acts done in connection with all the contracts let prior to 1896, the convictions in the criminal cases were for acts done under the contracts of 1896, alone, and the bulk of the assets sought to be recovered in the present suits are charged to have arisen from funds fraudulently diverted under contracts let from 1891 to 1895, the proof shows that the conspiracy was in continuous operation from 1891 to 1897 under all the contracts.

When the object is to show system, subsequent as well as prior offenses when tending to establish identity or intent can be put in evidence. Wharton, Crim. Ev., §§ 32, 38.

As to tracing trust funds and trusts *ex maleficio*, see 2 Pomeroy's Eq. Jr., 2d ed., 1053.

As to elections which the *cestui que* trust may exercise in respect to the right to claim fraudulently diverted property or its proceeds, or to take a money judgment for the trust assets dissipated, and also as to the election which may be exercised as to the remedy at common law or in equity, see *May* v. *Claire*, 11 Wall. 217; *Smith* v. *Vodges*, 92 U. S. 186; *Moore* v. *Crawford*, 130 U. S. 122; *Oliver* v. *Piatt*, 3 How. 333; 17 A. & E. Enc. Law, 475.

Where the trustee commingles trust money with his own the right and lien of the beneficiary attaches to this entire combined fund. 2 Pomeroy's Eq. Jr., § 1076; Eaton on Equity, § 210.

If the trustee has withdrawn and dissipated a part of the commingled fund from a bank account, there will be a conclusive presumption that he dissipated his own fund and the balance not dissipated will be held to be the trust fund. The ordinary rule attributing the first withdrawals to the first payments into the account does not apply. *Nat. Bk.* v. *Ins. Co.*, 104 U. S. 68; *Knatchball* v. *Hallett*, 13 Ch. Div. 696.

Where a trustee or bailee exchanges with himself the trust fund for other property or money of his own, the trust will attach to property taken in exchange, precisely as if the exchange had been made with a third person. *Van Allen* v. *Amer. Nat. Bk.*, 52 N. Y. 15; *Nat. Bk.* v. *Ins. Co.*, 104 U. S. 70.

The beneficiary has a right to elect to take a money judgment for such part of the assets which the person taking with notice may have dissipated, or to reject an improper investment and take a money judgment for the conversion, and to recover the profits of the trust fund. 17 A. & E. Enc. Law, 475; *Oliver* v. *Piatt*, 3 How. 333; *May* v. *Claire*, 11 Wall. 236.

Neither the contractors, nor Carter or Westcott kept any regular books showing the division of the profits of the contracts, such as would be kept in the conduct of a legitimate business, in which millions were divided between the parties interested. The proof of the facts has been supplied by the Government through their accounts with banks and brokers and other documentary evidence. When therefore the system of the division of the profits between Carter, Greene and Gaynor month by month for a series of years is established, every doubt and difficulty bearing on the question as to whether any particular piece of property in Carter's possession constitutes an investment of the profits of the contracts, should be resolved against him. *Rubber Company* v. *Goodyear*, 9 Wall. 788–803.

After the Government closed the taking of evidence in its behalf, Carter undertook by his own testimony to set up a claim as to the origin of his alleged title to a large part of the securities in controversy wholly different from the claim he had set up in his sworn answer filed Feb. 1, 1902. It is impossible if his last position be true, that he did not know the facts when he filed his answer. He will not be allowed to change his position under such circumstances. *Henderson* v. *Louisville & Nashville R. R.*, 123 U. S. 64; *The Santissima*

Trinidad, 7 Wheat, 339. Much less can such a right of Carter to the securities be sustained under a variance of the proof, where that offered is totally inconsistent with his answer not amended. *Garland* v. *Davis*, 4 How. 131, 148; *Boone* v. *Chiles*, 10 Pet. 178, 179.

If a party attempts to impose upon this court by knowingly or fraudulently claiming as his own, property belonging in part to others, he shall not be entitled to restitution of that portion which he may ultimately establish as his own. *The Dos-Hermanos*, 5 Wheat. 76, 96.

On the direct appeal of the United States from allowance of fees to defendants, counsel, etc, the government contends, besides the errors assigned as to the exorbitant character of the allowances to defendants' counsel, that defendants did not perform the stipulation under which it is claimed the allowances were made.

The Government had already tied up in the hands of receivers on auxiliary bills in other districts some $288,346.92 of the assets in controversy, and rules for contempt of court were pending in the present suit in the Northern District of Illinois against I. Stanton Carter, the brother, and Lorenzo D. Carter, the uncle of Oberlin M. Carter, for failure to turn over the assets described in the bill when the stipulation of Nov. 6, 1901,was entered into.

By paragraph "2" of that stipulation the brother and uncle were required *forthwith*, to turn over to the receiver all the assets claimed by complainant in its bill as being a part of the trust funds, which were or might be in the possession, power, custody or control of the said defendants. By paragraph "4" the brother and uncle were required to file forthwith or simultaneously with the delivery of the assets to the receiver, answers *disclaiming all personal interest* in the assets in controversy. By paragraph "9" the allowance of attorneys' fees to defendants' counsel out of the fund to be turned over was made conditional upon the delivery of substantially all the assets referred to in paragraph "2." The

delivery to the receiver referred to in paragraph "9" was not simply the delivery in paragraph "2" but the delivery accompanied by the disclaimer of all personal interest in all the assets claimed and described in the bill, which by paragraph "4" the defendants were to forthwith file. The consideration to the Government was to get the assets at once into the hands of a receiver, and to relieve itself from the trouble, difficulties and expense of forcing the assets out of the hands of the brother and uncle, and to eliminate from the case any claims they might individually set up. The brother and uncle did not forthwith deliver $23,000, Kentucky Central bonds claimed and described in the bill, but in their answers did admit their possession and retention, and did set up personal claims or liens thereon for alleged salaries due them by Carter. The Government was therefore forced to conduct a long litigation before the master and the courts, until it overcame these personal claims set up by the brother and uncle and forced the delivery of the bonds, and finally obtained deficiency judgments against the brother and uncle for assets not even yet turned over. It is contended therefore that the defendants' counsel were not entitled to the allowances by reason of the failure of the Carters to perform that part of the stipulation upon which the right to the allowances were predicated.

Mr. J. B. Foraker, with whom *Mr. John B. Daish* was on the brief, for appellants in No. 552; appellees in No. 551:

The United States is not entitled to a deficiency decree for any amount under the pleadings and the record in the case.

The theory of the complainant's case is that certain property and securities being in the possession of the defendants, and the property and securities having been purchased with the fruits of fraud practiced upon the complainant, it is entitled to said property and securities. Such is the basis of the complainant's claim and the specific prayer for relief is in harmony therewith.

The specific prayer must be in consonance with the case made in the bill; and the relief grantable under the general prayer must be in harmony with the facts in the bill and such as the proof will justify. Equity Rule XXI, 410 U. S.

In many classes of cases in equity the general prayer will permit the granting of relief other than that specifically prayed for, but only that relief which is in harmony with the theory of the case. See *English* v. *Foxhall*, 2 Pet. 595; *Hobson* v. *McArthur*, 16 Pet. 182, 195; Street's Fed. Eq. Prac., §§ 247, 252. And see *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

In cases alleging fraud, however, if proof of fraud be wanting, the complainant is not entitled to substituted relief. *Eyre* v. *Potter*, 15 How. 42.

Even in cases where the general prayer is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill. Story, Eq. Plead., § 38; Cooper Eq. Pl. 14; *Jones* v. *Parishes of Montgomery, etc.*, 3 Swanst. 208; *Lehal* v. *Miller*, 2 Ves. 209; *Lord Walpole* v. *Lord Orford*, 3 Ves. 416; *Hiern* v. *Mill*, 13 Ves. 119; 3 Wooddes Lect. 55, p. 372; *Walker* v. *Devereaux*, 4 Paige, 229; *Scudder* v. *Young*, 25 Maine, 153.

The theory of this case is the same as one for the recovery of an ancient silver altar claimed as treasure trove; for a cabinet of family jewels; for a picture or statue of a particular artist; and for other objects of a like kind. See Adams' Eq., p. 91, and Mitf., 117; *Duke of Somerset* v. *Cookson*, 3 P. W. 389; *Earl of Macclesfield* v. *Davis*, 3 Ves. & B. 16; *Wood* v. *Rowcliffe*, 3 Hare, 304.

The claim in the bill is modified by the stipulation of November 6, 1901, and particularly by paragraphs "2" and "9" thereof. The former provides for turning over of assets which have "not heretofore been *bona fide* disposed of," the latter for turning over "substantially all" of the Paul, Westcott and Bragg securities, not heretofore "*bona fine* paid out or pledged."

Prior to the stipulation of November 6, 1901, the claim of the complainant was the specific property, real and personal, above set forth.

By virtue of the stipulation, the claim of the Government was reduced by the amounts *bona fide* disposed of.

The decree must conform to the prayers of the bill. *Phipps* v. *Sedgwick*, 95 U. S. 3; *Clark* v. *Beecher*, 154 U. S. 631; *Hayward* v. *Eliot National Bank*, 96 U. S. 611.

In the present case, the decree did not conform to the prayers of the bill, as it awarded to the complainant relief other than that prayed for, either specifically or generally, to wit, money other than that claimed by means of deficiency, money decrees against L. D. Carter for $7,577.04 and against I. S. Carter for $18,204.18.

The bill herein sought to have decreed to the complainant certain property and securities in specie, and the prayers asked for such relief. Story, Eq. Pl., § 8, 42*a* and 42*b*; *Hardin* v. *Boyd*, 113 U. S. 756, citing *Terry* v. *Rosewell*, 32 Arkansas, 492; *Colton* v. *Ross*, 2 Paige, 396; *Lloyd* v. *Brewster*, 4 Paige, 540; *Lingen* v. *Henderson*, 1 Bland, 252; *Murphy* v. *Clark*, 1 Sm. & M. 236. The prayer for alternative relief may be by amendment. *Hubbard* v. *Urton*, 67 Fed. Rep. 419.

Having elected to pursue the property and securities in specie the Government cannot now claim any other thing than the property and securities.

The decree must conform to the pleadings; the relief granted must always be in conformity with the case made in the pleadings. *Simms* v. *Guthrie*, 9 Cranch, 19; *Crockett* v. *Lee*, 7 Wheat. 523; *Carneal* v. *Banks*, 10 Wheat. 181; *Harding* v. *Handy*, 11 Wheat. 103.

Complainant cannot ask for relief by relying on the general prayer. The theory of the case is that the United States was defrauded by means of a conspiracy, and the principle, that if one fails to make out a case for the special relief relief can be secured under the general prayer does not apply to cases alleging fraud. *Brittan* v. *Brewster*, 2 Fed. Rep. 160;

Kent v. *Lake Superior Ship Canal R. & I. Co.*, 144 U. S. 75; *Hendryx* v. *Perkins*, 114 Fed. Rep. 801.

The decree entered by the Circuit Court on March 18, 1908, was not in accord with the allegations of the bill, was not in conformity with the proof, was not in harmony with the relief prayed for, and was not proper under the rights of the litigants as defined by the stipulation of November 6, 1901.

The United States was not entitled to an accounting as such from the defendants because: The bill is not framed upon such a theory as will justify an accounting; the prayers of the bill did not ask such relief; there was no reference to a master for an accounting generally but only particularly as hereafter stated; the right to general accounting was expressly waived by the complainant in the stipulation of November 6, 1901.

But even if harmony exists between the allegations of the bill; the relief prayed; the proof in the main case; and the decree, nevertheless the Government is not entitled on the facts to a deficiency decree against any of the defendants.

The stipulation of November 6, 1901, did not require the defendants in the trial court to turn over to the receiver all of what remained of the property formerly in the hands of Paul, Westcott and Bragg, but only "substantially all" of it.

The right of the complainant below to a deficiency decree against the defendants, if any it had, is the same as to each.

The present deficiency decrees against L. D. Carter and I. S. Carter are predicated in part upon the testimony of Robert F. Westcott in the Gaynor-Greene removal proceedings before Shields, Commissioner.

This testimony, assuming that it may be used to give notice to the two defendants (which is denied), is not entitled to any weight for the reason that it is discredited by numerous false statements that were palpably made for the purpose of misleading.

The contract of November 6, 1901, expressly exempted the Carters from turning over anything which had been *bona fide*

disposed of or pledged. The complainant in writing conceded that payments for salary were proper under that contract.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill which seeks to compel the defendant, Oberlin M. Carter, late a captain in the army of the United States, to account for illicit gains, gratuities and profits received by him through collusion with contractors for river and harbor improvements in the Savannah, Georgia, improvement district, and to follow such illicit profits into securities and other property held for him by other defendants to the suit.

In substance, the bill charges that under an appropriation made by Congress for the improvement of the harbor of Savannah certain contracts were entered into with John F. Gaynor and Benjamin D. Greene, doing business either in their joint names, or the name of one of them, or as the Atlantic Contracting Company. That these contracts were made in pursuance of plans and specifications prepared and let out under biddings conducted by the defendant Oberlin M. Carter, then an engineer officer assigned as local engineer of the improvements projected in the Savannah district. These contracts were executed, the appropriations disbursed and the work supervised and accepted by said officer, or under his advice and recommendations, by the War Department.

It is charged that Carter entered into a corrupt arrangement with the said contractors, by which he undertook to use his power and discretion in the preparation of specifications and contracts, and in advertising and letting the same out in such a way as to enable Gaynor and Greene to become contractors under conditions which would insure them a large profit, and to use his influence, power and discretion in the supervision and acceptance of the work to their greatest advantage. It is then, in substance, averred that in consideration of such service to them and the betrayal of his trust he should share in the profits and receive one-third of every distribution made. It is

charged in substance that under such agreement or understanding there was paid over to the defendant Carter about $500,000 as his share of the profits, and that the same was converted into real estate, bonds, stocks and negotiable notes, and that much of these gains were later placed in the custody of certain other defendants named in the bill, two of them being brothers of defendant Carter, to wit, Lorenzo D. Carter and I. Stanton Carter, who are charged as holding same as agents for Oberlin M. Carter. Securities aggregating in value some $400,000, into which the larger part of the share of the defendant Oberlin M. Carter is said to have gone, were attached under this and other bills, ancillary in character, and placed in the hands of a receiver to abide the result of a decree in this case, the same decree to go down in the ancillary suits in other jurisdictions in which any part of the property or securities has been impounded.

There was a decree in favor of the United States in the Circuit Court substantially as prayed for. Upon an appeal by the defendants and cross-appeal by the United States, to the Circuit Court of Appeals, the decree was affirmed as far as it went, and was enlarged in certain matters upon the appeal of the United States. The original defendants have appealed from this last decree so far as it was favorable to the complainant, and the United States has perfected a cross-appeal with reference to certain parts of the decree with which it is discontent. Thus the whole case is here as upon a broad appeal and the several appeals have been heard upon the entire record, consisting of some thirty printed volumes.

The facts essential to be stated, as sifted out of this great record of pleadings and evidence, are these: From some time in 1889 until July 20, 1897, Oberlin M. Carter, then a brilliant and rising officer of engineers in the army of the United States, was assigned to duty and placed in charge of certain improvements, for which an appropriation had been made, in the harbor of Savannah. It is enough to say, without going into particulars, that this duty involved large powers and con-

siderable discretion in the matter of plans, preparation of contracts, advertising for and acceptance of bids, superintendence and acceptance of the work as it progressed, and some latitude in the construction and modification of contracts. It is undoubtedly true that the plans, the form of contracts, the character and time of advertising, and acceptance of bids, as well as most matters involving the exercise of judgment and discretion during the execution of contracts, were reported to the War Department for its approval or rejection. Nevertheless it is most thoroughly made out that the action and recommendation of a local engineer officer in charge of such work practically determined the situation so long as he had the confidence of his superiors and kept within the general limits of the appropriation by Congress for the work in hand. Passing by a number of comparatively small contracts made prior to 1892, as well as a very large one made in 1896, but not completed when Captain Carter was succeeded in July, 1897, the bill charges:

"That commencing with the contract No. 4820 of September 16, 1892, let in the name of Edward H. Gaynor, contractor, that after the payment of the cost of the work, and after the payment to the other persons, parties to the said fraudulent scheme as aforesaid, the profits amounting to over two million dollars, of all the aforesaid contracts so fraudulently let as aforesaid, were divided from time to time between Oberlin M. Carter, Benjamin D. Greene and John F. Gaynor in three equal shares, one of which shares was apportioned to the said Oberlin M. Carter as his share of the profits arising from the consummation of said scheme to defraud the United States."

Aside from certain contracts prior to September, 1892, and subsequent to May, 1896, the Circuit Court found, and the Circuit Court of Appeals confirmed the finding, that between September 16, 1892, and May 12, 1896, the United States, through the defendant Oberlin M. Carter, as its disbursing officer, paid to Gaynor and Greene, or the Atlantic Contracting Company, a corporation of which they owned all of the shares

except a few assigned to certain kinsmen for organization purposes, on account of what we shall hereafter describe as Gaynor and Greene contracts, the sum of $2,567,493.48. They also found that of this sum $1,815,941.62 was distributed as net profits between John F. Gaynor, Benjamin D. Greene and some third person not publicly known to be interested. The remainder, $751,551.86, was the sum disbursed by Greene and Gaynor for labor, supplies and salaries, being the actual cost of the work for which the Government had in some way been induced to pay, under contracts drawn and supervised by Captain Carter, the sum of $2,567,493.48. These figures are not derived from any set of books kept by either the contractors or by Carter. Though the execution of these contracts extended over a period of four years and involved the receipt and expenditure of millions, yet the contractors say they kept no books other than one which related to supplies bought and ordinary labor or salary accounts, and that that book could not be produced. The plan under which Greene and Gaynor carried on these great affairs, as shown by the evidence, was to apply monthly payments received from Carter, as the Government's disbursing officer, to the payment of the monthly expenses and advances which might have been made by one or the other of the contractors, and then divide the balance into three parts, one part being at once handed over to Greene, another to Gaynor and the third to some third person, who both courts found upon the evidence to have been one Robert F. Westcott, the father-in-law of the defendant Oberlin M. Carter, or to accounts kept in his name, and that this third was ultimately turned over to Carter himself.

Without any distinct finding as to the *method* by which the Government had been defrauded *or as to the extent of actual loss sustained*, both courts concurred in the conclusion that the Government had been defrauded, and had suffered great loss. Without any distinct finding as to whether one-third of the profits realized had been paid over to Robert F. Westcott, as a secret partner with Greene and Gaynor, or to him as the

representative of Captain Carter, yet both courts concurred in holding that, if Westcott was interested as a partner in the contracts, Carter, under all of the facts, was chargeable with knowledge of such partnership relation, and that, if with such knowledge he accepted from Westcott the share of profit so received, he was accountable to the Government for all such illicit gratuities or gains. In view of this concurrence of opinion upon these material facts the burden rests heavily upon the appellant Oberlin M. Carter to satisfy this court that their conclusions are plainly erroneous, or that, conceding the facts to be as found, the decree holding him accountable is erroneous as matter of law. *The Carib Prince*, 170 U. S. 655, 658; *Brainard* v. *Buck*, 184 U. S. 99.

But counsel have urged with great force and much confidence that the conclusion of both of the courts below rests upon no secure foundation, and that there has been a great miscarriage of justice in finding that Captain Carter was ever in any way interested in these contracts or that he ever, directly or indirectly, consciously shared in any profits arising therefrom. This protest does not, as we understand it, involve any serious denial of the fact that nearly two millions of dollars were realized as profit upon contracts drawn by, let out and supervised by Captain Carter at a net cost to the contractors of less than one million dollars; nor does it involve any serious denial that approximately one-third of this abnormal profit was paid over to some third person not publicly known to have had any connection with the contracts or the contractors. If, however, we are in error in assuming such a limitation upon the contention of counsel, there is no reasonable ground, upon this record, for doubting the correctness of the conclusion reached by the courts below as to either of these matters. It may be conceded that no witness proves an express agreement between the contractors and Carter that he should serve them in the letting or execution of these contracts. So far as the principals have spoken, they have denied any such agreement.

But it is said that none of the specific averments of the bill

as to the methods by which the Government had been defrauded were sustained by either the Circuit Court or the Circuit Court of Appeals. Thus it was averred that Carter had shortened the time required by regulations for advertising for bids, that he had made it difficult for some intending bidders to secure the plans and specifications, that he had deterred others by unduly magnifying the risks of the work, that the specifications were so drawn as to leave to the Government the option of two or more materials of different value, or two or more methods of doing parts of the work, or the right to substitute one material for another. It was also averred that Greene and Gaynor were in advance advised as to how such options would be exercised, but that other proposing bidders were not, and that by this and other artifices Greene and Gaynor were enabled to secure contracts at unreasonable prices. It is then averred that Carter had collusively and fraudulently increased unduly the quantity of some materials required and diminished that of other kinds; that he had exercised options reserved in such a way as to greatly increase the cost of the work and the profit of the contractors; that he had permitted changes in materials and methods of using the materials and of doing the work in such manner as to be of disadvantage to the United States and of advantage to the contractors, and that he had permitted the use of cheap and inferior materials and had accepted bad and inferior work.

Aside from the elusiveness of a fraud well concocted and unsuspected while going on, there was in the way of the Government in this case the fact that in respect to almost everything which had served to add to the cost of the work and to the profit of the contractors Carter had confessedly a wide discretion. That he might be controlled in the exercise of this by his superior officers or by the War Department when important changes, modifications or substitutions were made, is true. But, in actual practice, this War Department approval was largely official and formal when the engineer in charge was regarded as capable and honest and his recommendation

within the limit of the appropriation or of the contract as made. It was the fact that such an officer in control of such work had a wide discretion which at once made his fidelity of the utmost importance to the Government and his co-operation and collusion of such large value to the contractors. This discretion was the stumbling block in the way of the Circuit Court. It was not easy to show in some instances that the work had suffered by the substitution of one material for another, or by the increase of one kind of mat in mattress work for another, or by one method of measuring or paying for mattress work rather than by another. When contracts and specifications were elastic enough, as seems to have been the case with the Greene and Gaynor contracts, to justify varying interpretations, or full of options as to materials or methods, as was the fact here, nothing short of conduct or action plainly indefensible as an exercise of honest judgment would justify an inference of corruption. When to this situation there was added the fact that as a whole the harbor improvement had been intelligently and scientifically carried out and was apparently an engineering success, and that this result had been reached within the limit of the Congressional appropriation, it was not surprising that upon this line of evidence, considered apart from all other things, the Circuit Judge found himself unable to predicate fraud and corruption upon the conduct of Carter in these details which the bill pointed out as the methods by which he had enabled a great fraud upon the Government to be carried out and by which his corrupt collusion was to be established.

The Circuit Court, upon this aspect of the evidence, said:

"The evidence leaves the court with the impression that there was carelessness in the manner in which some of the work was done, indeed, carelessness for which Carter was justly entitled to be criticised, but considering the material results, the magnitude of the work, and assuming the absence of any mercenary or other ulterior motive on Carter's part, except such as might be justly deduced from the facts so far

considered, I am of the opinion, as was Senator Edmunds in the court-martial case, that Carter's course in the premises was not necessarily an abuse of the discretion vested in him, nor seriously inconsistent with his claim that he discharged his duty to the government, and that, limited as above stated, under the rule of evidence obtaining in such case, the government has failed to maintain its case."

Excluding, as the Circuit Court did, all consideration of the extraordinary profit which the contractors had in some way realized upon these contracts, and that through indirect ways approximately five hundred thousand dollars of this profit had come at last to the possession of Carter it is not surprising that that court did not find evidence of such gross abuse of discretion as to justify a finding that he had conspired with Greene and Gaynor to defraud the Government.

But the case of the United States against the defendants is not to be determined by the consideration of the sufficiency of any one fact or group of facts, but by a judgment based upon the evidence as a whole. The learned Circuit Judge very nearly fell into error by such a partial view of the case. From ultimate error he was saved by the subsequent consideration of the principal, and really determinative, factors in the case, namely, the abnormal profit which the contractors had in some way been able to realize, and the evidence tracing one-third of that profit into Carter's hands, with no credible reason for such result. The Circuit Court of Appeals took a somewhat wider view of the matter. Thus that court said:

"We concur, therefore, in the view expressed in the opinion filed by the trial judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to, is: (*a*) neither established by direct evidence, (*b*) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (*c*) nor under one or

the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances. But these conclusions are not the tests of sufficiency of the entire chain of circumstantial evidence to sustain that charge. While the fact is established, as there stated, 'that a great wrong was practiced in this raid upon the government,' we are not satisfied that the right of the United States, 'to a decree awarding to it' all property in question 'arising from funds made up of profits realized by the contractors' therein, may rightly rest, as there stated, upon the proposition that Carter must 'as a conclusion of law be held chargeable with knowledge of what was being done in the premises.'

"Under the settled facts above recited, however, linked with cumulative evidence, tending to prove actual knowledge on the part of Captain Carter of the excessive profit in the mattress work and of divisions thereof with Wescott in New York, and complicity in the fraudulent transactions, of which (at one time or another) he acquired approximately one-third of the net proceeds, we are constrained to the belief that the evidence is decisive, not only of frauds perpetrated by the contractors, but of concurrence and participation therein by Captain Carter."

If it be once assumed that the defendant Carter did secretly receive from Greene and Gaynor a proportion of the profits gained by them in the execution of the contracts in question, the right of the United States in equity to a decree against him for the share so received is made out. It is immaterial if that appears whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, "You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct." Such an agent has the power to con-

ceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

The doctrine is well established and has been applied in many relations of agency or trust. The disability results not from the subject-matter but from the fiduciary character of the one against whom it is applied. It is founded on reason and the nature of the relation and is of paramount importance. "It is of no moment," said Lord Thurlow, in *The New York Buildings Company* v. *Alexander Mackenzie*, 3 Paton, 378, "what the particular name or description, whether of character or office, situation or position is, on which the disability attaches." Thus, in *Aberdeen Railroad Company* v. *Blaikie Brothers*, 1 MacQueen's Appeal Cases, 461, 472, it was applied to a contract of a director dealing in behalf of his company. Lord Chancellor Cranworth, in respect to the general rule, said:

"And it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict with the interest of those he is bound to protect.

"So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

"It obviously is, or may be, impossible to demonstrate

how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain.

"It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better.

"But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

"The principle was acted on by Lord King in *Keech* v. *Sandford*,[1] and by Lord Hardwick in *Whelpdale* v. *Cookson*,[2] and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very learned and able judge in *Ex parte James*.

"It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land."

In *City of Findlay* v. *Pertz*, 66 Fed. Rep. 427, 435, it was applied to a contract where it was shown that a municipal official, buying for the municipality, had received a commission from the seller. In that case the Circuit Court of Appeals said:

"His duty was to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicted with his private interest was corrupting in its

[1] Select Cases, temp. King, p. 61. [2] 1 Ves. Sen. 8.

tendency. We know of no more pernicious influence than that brought about through a system of commissions paid to public agents engaged in buying public supplies. Such arrangements are a fruitful source of public extravagance and peculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmixed evil. Justice, morality and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement."

In Leake on Contracts, 409, it is said:

"Any profit made by an agent in the execution of his agency must be accounted for to the principal, who may claim it as a debt for money received to his use. A gratuity given to an agent for the purpose of influencing the execution of his agency vitiates a contract subsequently made by him, as being presumptively made under that influence, and a gratuity to an agent after the execution of the agency, must be accounted for to his principal."

See also Perry on Trusts, § 430, and Parsons on Contracts, 6th ed., § 89.

The principle is most often applied in cases where one holding the relation of a trustee buys the trust property, though at public sale. Examples are numerous. *Michoud* v. *Girod*, 4 How. 503, 555, is a leading case decided by this court. Referring to the general rule, which forbids one to buy in an estate, directly, or indirectly, when he is acting for the seller, this court said:

"The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the

faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."

In *Robertson* v. *Chapman*, 152 U. S. 673, 681, this court, in dealing with the matter of a sale by an agent to himself effected under cover of another, said:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a *bona fide* purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues he must act in the matter of such agency solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal."

Reading the evidence in relation to Captain Carter's conduct in drafting the specifications, advertising, acceptance of bids, and more particularly his almost invariable exercise of options and other discretionary powers in the subsequent execution of the contracts let to Greene and Gaynor, in the light of the abnormal profit realized by them, of which, approximately, five hundred thousand dollars ultimately found its way into his possession, we can but entertain a strong conviction that his relations with them from the beginning were inconsistent with his fidelity to the United States, and that he must account to his principal for every dollar of gain or profit or advantage which has been derived by him from these contracts.

The defense against such a conclusion rests upon three propositions:

1. That the affirmative evidence that he abused his discretion and secretly and corruptly favored Greene and Gaynor is not sufficient.

We shall not consider this proposition apart from the other two, for it is not material whether the evidence referred to, considered out of relation to the other parts of the case, would or would not make out a case of fraud.

2. That, in view of the great risk attendant upon such works, the profit claimed to have resulted was not so abnormal as to justify an inference of fraud, and that it was in part due to cheap labor, bordering upon peonage.

Neither should this contention be considered apart from the chain of evidence which leads to but one inevitable result, namely, that this great profit was not legitimate. Looked at, apart from everything else, a profit of $1,815,941.62 upon a job which cost the contractor but $751,551.86 arouses deep suspicion, and demands a clear explanation. That explanation does not appear in the facts of this record.

3. It is urged that Captain Carter's greatly increased personal expenditures during the progress of this work, and his acquisition of some four hundred thousand dollars' worth of

bonds, stock and other property, much of which has been impounded in this case as property into which his illicit gains and gratuities have been traced, arose from the generous bounty of Robert F. Westcott, and that Carter was ignorant of any interest Westcott had in the Greene and Gaynor contracts, and of the fact, if it be a fact, that Westcott's gratuities came from his participation in the distribution of the profit on the Greene and Gaynor contracts.

This last proposition presents the very crux of the case. What was Westcott's relation to the Greene and Gaynor contracts? It has been suggested rather than urged that he was, secretly, a partner in these enterprises. There is no evidence that he was, other than the fact that very many profit dividends are traced to bank accounts standing in his name. But, if he was, and Carter bargained with him for a share in the profit, knowing his relation, the legal consequence is the same as if he had received the same interest from Greene or Gaynor. But the apparent participation of Mr. Westcott in the profit arising from the Greene and Gaynor contracts is not inconsistent with a mere agency for Carter, and such an agent we think he was. That Carter could not openly receive any gains or gratuities from Greene and Gaynor is obvious. Some go-between was essential. The requisite conditions for such a screen would suggest Mr. Westcott. He was an aged retired business man of some fortune, residing in New York. Captain Carter, in October, 1890, married one of his daughters. Mrs. Carter died in December, 1892, leaving no issue. During the marriage Mr. Westcott made Mrs. Carter a small monthly allowance. His regard and esteem for Captain Carter during the time of and subsequent to this marriage was, on the evidence, very pronounced, and this relation affords the basis for the claim that Captain Carter's greatly increased personal expenditures during the progress of the Greene and Gaynor contracts was due to Mr. Westcott's generous and unceasing gratuities. It is shown that Captain Carter's income was substantially limited to his pay as captain and that his personal

expenditures did not exceed three or four thousand dollars per annum down to 1892. From then on his expenditures steadily increased, until they reached and passed twenty thousand dollars per annum. Now it cannot escape observation that this great change in his manner of living began with the Greene and Gaynor contracts and became more and more marked through the progress of the work under his supervision. It does not follow, of course, that the means for such widening expenditures came from these contracts, but the circumstance is suspicious and calls for satisfactory explanation.

Among other details averred in the bill of complaint is, that, beginning in 1892 and continuing down to 1896, Captain Carter was continuously engaged in making investments in loans, real estate, bonds and stocks, and that the amount so invested aggregated more than four hundred thousand dollars. Many of these investments turned out to be in the identical securities, which, after much difficulty, were impounded under the process in this case, and are now in the hands of the receiver.

That the increase from these investments was collected by him, ostensibly for Mr. Westcott, is not questioned. That he applied it to his own personal use is shown by a comparison of the bank accounts standing in his name and those in the name of Westcott, as well as by the inference to be drawn from the remarkable correspondence between the increasing volume of this income and his own personal expenditures. Now Carter does not deny that he did make large investments during 1892, and the years following, nor that the properties and other securities impounded in this case are in large part the result of such investments. What he does claim is that in making such investments he was acting for Westcott under powers of attorney which cover most of the time, and under oral authority during the rest. His use of the income from such investments or of means approximating such income, he says, was due to the generous bounty of Mr. Westcott. His title and right to the property in which he made such investments

for Mr. Westcott he distinctly sets up in his sworn answer as resting alone upon donations made to him in October, 1897, and he sets out as evidence of title two receipts. In that he says that he "never had any interest, direct or indirect, in the securities described in the receipts of October 11 and 29, 1897, *until the same were respectively given to this defendant as a pure and original donation by said Westcott at the time of said respective receipts in October, 1897.*"

The first of these receipts reads thus: "Received New York Oct. 11, 1897, from R. F. Westcott the following bonds, sixty-three in all." Then follows the numbers and description of bonds. Signed "O. M. Carter." The other reads thus: "Received New York Oct. 29, 1897, from R. F. Westcott, the following instruments." Then follows a long list of notes, mortgages, stocks and bonds. Signed "O. M. Carter." The securities described in these receipts are undoubtedly the same securities bought by him from time to time, ostensibly for Mr. Westcott. These purchases and investments show a remarkable correspondence in date and amounts with the dividend distributions of Greene and Gaynor profits, and undoubtedly represent the one-third of such profit nominally paid to the account or credit of Westcott. During the years covering these distributions Captain Carter, according to his own account of matters, stood for and represented Mr. Westcott, sometimes by oral direction and sometimes by power of attorney. Certain it is that there was a blending of the business affairs of these two men rarely ever seen. Under Carter's powers of attorney he checked upon Westcott's bank account as his own. He had free access to his safe deposit box, where these securities were kept, and collected interest and dividends as they accrued. Certain investments of large amounts were shown to have been made by him which did not appear in Westcott's bank account. This was explained by Carter, who, in substance, said that Mr. Westcott had, on going off to Europe, left a large amount of currency in his safe deposit box, and that he invested this money for Westcott. Not less than

one hundred thousand dollars of money appears to have come from that source, and yet Carter says that he cannot say how much Mr. Westcott left there, nor how much remained when he returned, and that although he and Mr. Westcott had occasional settlements, they neither gave nor received receipts nor rendered accounts. There is no positive, competent evidence explaining just why these securities were in the personal custody of Mr. Westcott in October, 1897. Captain Carter was relieved at Savannah in July, 1897, by Captain Gillette, who very early discovered indications of maladministration by his predecessor. By direction of General Wilson he pressed his investigations and caused charges to be preferred. In August, 1897, and before Gillette's discoveries had been made public, Captain Carter was sent to England as military attache with the American embassy. Within a month he returned, doubtless due to orders, only to find that serious charges, involving his career and his honor, had been preferred, and that his management of the Savannah district improvements was about to undergo a thorough investigation. There is evidence, as we have before stated, strongly tending to show that he had himself collected the interest and dividends upon the shares and bonds mentioned in these receipts up to the time he went abroad, a fact which points to his having had personal custody of these securities up to that time. Though there is no competent positive evidence that he did turn these securities over to Westcott, or caused them to be placed in his hands, for safekeeping, before his trip abroad, there is good reason for believing so. Frederick P. Solley, another son-in-law of R. F. Westcott, says that he went with Mr. Westcott to his safe deposit box in October, 1897, to get these securities. The statement then made to him by Westcott as to why he had possession of these instruments was objected to as not competent, being declarations in the absence of Carter. The objection was sustained, and there is no error assigned. Solley says "that he and Westcott carried them to the office of Mr. Stimson, Westcott's lawyer;" there a list was made out and the witness checked them

over. He did not see them delivered to Carter. But Mr. Stimson did. What explanation Mr. Westcott made to him of the transaction before Carter's arrival and delivery to him has been excluded, because not made in Carter's presence. He, however, saw the transfer, and saw the receipt signed. The significance of Stimson's evidence as to what was said in the presence of both Westcott and Carter is that nothing was said as to this being a gift, and that no acknowledgment was made so indicating. He does not recall anything said by Westcott in the presence of Carter. He does, however, say that after Carter had taken the securities, alluding to a number of bonds which were among the securities, he said: "Daddy, I want you to take these," or "Daddy, I want to give these bonds to you. Something substantially to that effect, and that Mr. Westcott replied: 'No,' either verbally or with some gesture of dissent. Captain Carter put the bonds which he had referred to back with the others and took them all." A proposal to give to Westcott a part of the very securities which Westcott was then giving to Carter as a "pure donation," is incompatible with the latter contention; it accords more with the attitude of one who was receiving back his own from one who had performed a great service as custodian of property which the owner had reason for concealing from publicity.

A more significant fact pointing to the same conclusion is that Robert F. Westcott did not come forward and testify in favor of his son-in-law before the board of inquiry, or before the subsequent court-martial. The investigation before the board of inquiry and the trial before the court-martial involved Carter's execution of the contracts in question, and his business relations with both the contractors and with Westcott. In both investigations Carter claimed, then as now, that his large personal expenditures were met by gifts to his wife and, after her death, to himself by Mr. Westcott, and that in the purchase of large amounts of securities and other property he had only acted for Mr. Westcott. The testimony of Mr. Westcott was vital to his defense upon the merits. The board of

inquiry sat in the fall of 1897, and the court-martial later. Westcott was living during both proceedings; but he appeared in neither, though urged to appear by General Gillespie, the president of the board. When the evidence was taken in the pending case he was dead, having died in July, 1901. If it be conceded that the testimony of one not in the service could not have been required in a purely military investigation, it was within Westcott's power to have voluntarily testified as many other witnesses did. After Carter had been convicted there occurred in the city of New York certain removal proceedings before a United States commissioner, for the purpose of removing Greene and Gaynor from New York to Savannah for trial upon indictments there pending for the very fraud here under consideration. Carter was included in the same indictments, but was not a party to the removal proceedings mentioned. In that case Mr. Westcott was examined by the United States. His evidence then delivered was offered by the United States in the Circuit Court as evidence in this case, but was excluded upon objection, as having been given in a proceeding to which Carter was not a party and without opportunity for cross-examination by him. The objection was rightly sustained. The evidence was, however, admitted for the purpose of fixing notice upon the defendants Lorenzo D. Carter and I. Stanton Carter of the character of the title of their brother, Oberlin M. Carter, to the securities involved in this suit. The evidence was properly admitted solely for the purpose of showing Westcott's disclaimer of any title to or interest in the securities which he handed over to Carter, as shown by his receipts mentioned above. We, however, exclude any statement made by him as against the defendant Oberlin M. Carter. The significant fact remains that Robert F. Westcott, though the close friend, and, indeed, the affectionate friend of his ex-son-in-law, Oberlin M. Carter, did not voluntarily appear before either of the military tribunals in his defense, and, figuratively, stood by and saw him broken in rank and sent in ignominy to serve a term of five years for

having betrayed his trust. It is true that Captain Carter says that he did all he could to persuade Mr. Westcott to appear and testify. Nevertheless the failure of Captain Carter to secure his evidence, in view of their relation, justifies a presumption that it would not have borne out the defense.

The conclusion we must reach is, that Robert F. Westcott was but the agent and representative of Oberlin M. Carter in the receipt of a share in the profit made by Greene and Gaynor.

For whatever gains, profits or gratuities he is shown to have received he must account.

The contention that any recovery must be limited to property or securities into which such illicit gains have been traced is not sound.

The facts stated by the bill and supported by the evidence show that Carter received from Greene and Gaynor, directly or indirectly, something in excess of five hundred thousand dollars as his share in the Greene and Gaynor contracts. Under the legal principle, which we have heretofore announced, the United States may require Captain Carter to account for all he has received by way of gain, gifts or profits out of the Greene and Gaynor contracts, irrespective of the actual damage it has sustained or its ability to follow such gains into specific property. Undoubtedly it may, as by its bill it sought to do, follow the fund so corruptly received and assert title to any property into which such illegal gains have gone. But there was a prayer for "other, further and general relief," and under that it was entitled to a judgment, as for money had and received for its use, for any difference between the cost of the specific property recovered and the gains so received which it is unable to trace. The decree against O. M. Carter was for a much less sum than such difference.

Neither did the agreement of November 6, 1901, between the parties, of which we shall speak later, afford any defense to the judgments against I. S. and L. D. Carter. Those judgments were for securities traced to their possession, which

had not been disposed of in good faith, in view of the knowledge they had of the character of Captain Carter's title and the legal right of the United States to pursue his illegal gains into the property in their hands. There is no error in the decree below of which the cross-appellants can complain.

There remains for consideration the appeal by the United States. This involves allowances made out of the funds in court into which the gains of Carter had been traced, under an agreement between the United States and the defendants O. M. Carter and his brothers. Only the second, seventh, eighth and ninth paragraphs of the agreement need be set out, and they are set out in the margin.[1]

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[1] (2) That as to the assets claimed by the Government as assets into which it charges the funds intrusted to Oberlin M. Carter as disbursing officer was diverted, with the proceeds, income and reinvestments thereof, where the form of the investments have been changed, and which assets have or may be hereafter traced into the possession, custody or control of said defendants, and have not heretofore been *bona fide* disposed of by them and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause. But the court will determine whether the one Kentucky Central bond and one Michigan Telephone bond charged in the bill to be reinvestments of said alleged trust fund, and which bonds are claimed by I. Stanton Carter, should be held by the receiver pending the litigation.

(7) From said fund to be accounted for to the receiver the sum of $5,000 shall be left in the hands of H. G. Stone, chief counsel for said Oberlin M. Carter, from which to compensate and cover the expense of employment of local counsel in any of the districts in which local counsel have been or may be employed in any branch of this case.

(8) From said fund, to be accounted for to the receiver, there shall be paid:

(*a*) The fees, traveling expenses and other expenses of Oberlin M. Carter's chief counsel and of his attorney at Chicago, to be fixed and allowed by the court.

The importance of the case, and the means and methods taken to bring the same to a just determination speedily and not the length to which the proceedings may be protracted, to be considered as the elements of merits in fixing such fees.

The United States assigns as error the allowance of a fee of $60,000 to Mr. H. G. Stone for his services in this and the ancillary suits, of which a balance of $42,500 was directed to be paid by the receiver out of the fund in court. Certain other payments to other counsel and for other expenses are also objected to. The ground of objection is that the allowance to Mr. Stone is excessive, and that neither that fee nor any of the other items should have been paid, *because the condition upon which the United States agreed to the use of the fund had not been complied with.*

So far as the amount of the allowance is concerned, we do not feel authorized to disturb it, as two courts in succession

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(*b*) Also the fee of his attorney for representing said Carter in case of any criminal trial in Georgia, if Carter should be placed on trial there prior to the final disposition of this case.

(*c*) The expenses of taking evidence on behalf of said Carter, including the services of an accountant at not exceeding ten dollars per day for his services when needed and actually employed, plus his expenses, if any.

(*d*) And if before the final determination of this cause the said Oberlin M. Carter shall be liberated from prison he shall be allowed his reasonable personal expenses incurred by him while engaged in work in this cause, including the taking of evidence, but with no compensation for his time. Such expenses to be determined by the court and paid out of the moneys in court.

Payments and allowances under paragraph numbered "(8)" of this agreement to be determined by the court from time to time on petition, with the right of the United States to contest the same as unreasonable, or that any expense was not incurred as stated.

(9) The assent of the United States to paragraphs numbered "(1)," "(7)," and "(8)" of this agreement is predicated upon the understanding that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as has been, prior to the receivership, *bona fide* paid out or pledged by them for attorney's fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession by receivers in this cause.

have concurred in the amount allowed as reasonable. The consideration for the stipulation was abundantly sufficient to justify the assent of the United States. As it turns out, the bargain may appear to have been too generous, for the right of the United States to the entire fund which had been turned over to Lorenzo D. and I. Stanton Carter, as things now appear, was clear. Whether the securities which were the subject of this stipulation could have been seized and subjected was not so clear then, nor was the character of the claims which might be asserted by L. D. and I. S. Carter to these assets then fully known. Upon this stipulation they agreed to turn over to the receiver the assets claimed by the United States in the pending bill, which had not been theretofore "*bona fide disposed of by them, and therefore beyond their control.*" This agreement necessarily left open for adjustment the question as to what assets received from O. M. Carter by his brothers, the defendants L. D. and I. S. Carter, *had been theretofore disposed of by them bona fide*, and which were therefore beyond their control. Immediately thereafter I. S. Carter delivered to the receiver assets in specie aggregating $71,660. The receiver's receipt is dated November 11, 1901. On May 23, 1900, I. S. Carter and Ditson P. Carter received from one J. H. Paul, in trust, for O. M. Carter, a long list of securities, of which a part went into the possession of Ditson P. Carter and the rest into the possession of I. S. Carter. The securities turned over on November 11, 1901, by I. S. Carter are a part of those covered by the receipt given to J. H. Paul. On December 23, 1901, Mr. H. G. Stone, counsel for the Carters, reported to Mr. Edward I. Johnson, representing the United States, that, aside from the securities theretofore turned over by I. S. Carter on November 11, 1901, there remained to be accounted for assets which he listed, aggregating $69,704.53. Against this he claimed that I. S. Carter and L. D. Carter had disbursed $119,127.42. This left the parties very wide apart. The matter was referred to Mr. William M. Booth, as special master. In the

accounting which ensued it appeared that many of the securities which had been received by one or the other of the Carter brothers in trust for O. M. Carter had been sold and the proceeds either reinvested or disbursed by them, or retained as salaries under agreements made between them and O. M. Carter. The master reported that there were very wide divergencies between the defendants and the United States as to the rule of accountability, the defendants insisting that any disbursements made by them satisfactory to O. M. Carter were proper credits, including large sums appropriated as salaries for managing these assets, as well as other large amounts for which no vouchers could be furnished. On the other hand, it was claimed that disbursements made by them must be accounted for to the complainant, as to a *cestui que trust*, and that all sums retained by them as compensation for their services should be disallowed, in view of their undoubted knowledge of the character of Carter's title.

We shall not go further into this matter than to say that the final result in the Court of Appeals was to disallow the salary claims and some of the disbursements, for which no good reason was shown, or no vouchers produced. Among the assets in the hands of these trustees, at the date of the account, were twenty-one Kentucky Central bonds of one thousand dollars each, which appeared to have been the result of reinvestments which had been appropriated by them on account of salaries. These the court required them to account for. The result was that, although they were allowed many thousand dollars on account of very questionable disbursements, there was a considerable decree against each of them for assets not accounted for or turned over in specie. The single question to which we shall apply this generalization of facts respecting this accounting is as it affects the condition upon which the United States agreed that out of the funds in court Captain Carter's expenses in conducting his defense, including counsel fees, should be paid. The stipulation was that "fees, traveling expenses and other expenses of Oberlin

M. Carter's chief counsel [meaning Mr. H. G. Stone] and of his attorney at Chicago, to be fixed and allowed by the court," etc. The "condition" which the United States claims was violated was "that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. S. Carter and L. D. Carter by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as has been prior to the receivership *bona fide* paid out or pledged by them for attorney's fees, or as expenses in defense of said Carter, or expended by them legitimately in the handling of said properties," etc. This condition, we think, has not been violated by the insistence upon a credit for all disbursements made by them in Captain Carter's defense and in the care of his estate in their hands, nor by their claim to the compensation which he had agreed to allow them. The original agreement, as well as the provision inserted by the United States, alike provided that they should not be required to turn over that which had been disbursed in good faith. This involved the right to have their disbursements and their claims for services inquired into from their point of view. The Central Kentucky bonds represented, as the court found, reinvestments of funds or income from funds. They claimed that these bonds were rightfully their own property under the agreement with Captain Carter for a salary of $10,000 per year for one of them and $3,600 per year for the other. The court decided against this claim, but we do not believe that counsel, who, in good faith, presented the defense of the Carters for such salaries or for other disbursements made by them should be deprived of the benefit of the stipulation which provided for their compensation. The bargain with the Government may appear a bad one, but it was a contract and should be observed.

The petition for a writ of prohibition, being calendar No. 10, Original, will be dismissed, as the court, in view of the affirmance of the decree appealed from, finds it now

unnecessary to decide any question as to the jurisdiction of the Circuit Court pending the appeal just disposed of.

The errors assigned by the United States are overruled and the decree affirmed in all particulars.

STEWART *v.* GRIFFITH, EXECUTOR OF BALL, DECEASED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 145. Argued April 8, 11, 1910.—Decided April 25, 1910.

Where, as in this case, a condition of forfeiture in a contract of sale of real estate declaring it to be null and void in case of failure on the part of the vendee to perform is plainly for the benefit of the vendor, the word void means voidable with election to the vendor to waive or to insist upon the condition.

A contract of purchase and sale of real estate, the tenor of which imports mutual undertakings, held in this case to be an absolute contract and not merely an option to purchase.

In this case a letter from an executor to a purchaser under an uncompleted contract of sale held not to be a waiver of right to compel specific performance.

The party executing a sealed contract for purchase of real estate as principal cannot avoid specific performance on the ground that he executed as agent for another not mentioned in the instrument.

Under the provisions of § 329, Code of the District of Columbia, an executor who can maintain an action for specific performance in the jurisdiction in which the land lies can maintain it in the District if the defendant there resides.

Under the law of Maryland an executor may maintain an action for specific performance of a contract made by his testator, to convey real estate, and the title conveyed by him is good and valid if he satisfies the Orphans' Court that the entire purchase price is paid, and such condition is a condition subsequent.

A provision giving executors full and complete power over the entire estate, real, personal and mixed, held in this case to imply a devise to the executor of real estate under contract of sale and authority

to convey in order to carry out the contract on receiving the balance due.

As against heirs, real estate under contract of sale made by testator may be treated as personalty and conveyed by the executor safe from any collateral attack upon the will.

31 App. D. C. 29, affirmed.

THE facts are stated in the opinion.

Mr. James E. Padgett and *Mr. Henry E. Davis* for the appellant:

The appellee has no right to bring or maintain this suit, and the alleged action of the Orphans' Court was without jurisdiction and void; the court had no jurisdiction to pass the order of December 15, 1903, and it is a nullity.

When a court exercises an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed, and jurisdictional facts must appear in order to show that its proceedings are *coram judice*. *Thatcher* v. *Powell, Lessee,* 6 Wheat. 119; *Thompson* v. *Whitman,* 18 Wall. 457; *United States* v. *Walker,* 109 U. S. 258; *Windsor* v. *McVeigh,* 93 U. S. 274. Orphans' courts have power to take probate of wills but not to adjudicate questions of title dependent upon their operation or effect, or to decide upon the rights of disposition. *Schull* v. *Murray,* 32 Maryland, 9; *Ramsay* v. *Welby,* 63 Maryland, 584; *Grant Coal Company* v. *Clary,* 59 Maryland, 445; *Baltimore* v. *Hood,* 62 Maryland, 378.

The record does not show any existing contract which can be enforced by specific performance against the appellant, or any contract binding the appellant existing after November 7, 1903. The contract does not provide that either the appellee or appellant shall have the option to consider the contract continuing, and enforce the same after the happening of the contingency, which the contract itself says shall terminate its own existence.

This contract being a Maryland contract, affecting lands in that State, must, of course, be construed and its meaning

determined in accordance with the decisions of the courts and the laws of that State.

The primary technical, as well as ordinary, meaning of the words is, without legal effect or force, incapable to bind parties or support a right. 29 Amer. & Eng. Ency. Law (2d ed.), 525. But the contract itself shows that the parties did not intend the result of the happening of the contingency to make the contract merely voidable, because they use not only the term "null and void" but added to it the term "and of no effect in law." See *Pullman Palace Car Co.* v. *Central Trans. Co.*, 139 U. S. 24; *Cherry* v. *Stein*, 11 Maryland, 1, as to the terms of avoidance of a contract for the sale of real estate came before the court for determination. The contract begins by saying, "I have this day purchased from C. R. Tate, Administrator," and concludes with "this sale to be null and void in case the whole square, as advertised, shall be sold together, otherwise to remain in full force." The court said: "Such an instrument constitutes a valid and effective sale, subject to become a nullity upon a single contingency." *Hazelton* v. *Le Duc*, 10 App. D. C. 379, does not support appellee's position, and see *Jones* v. *Holliday*, 2 App. D. C. 279. When the contingency happened the contract terminated and has since had no existence. But if there should be doubt, the conduct and conversations of the parties and their agents maintain this contention. *Varnum* v. *Thurston*, 17 Maryland, 471; *Roberts* v. *Bonaparte*, 73 Maryland, 191; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 118.

The acts and declarations of agents of the parties in the course of their employment are admissible. *Main* v. *Aukam*, 12 App. D. C. 375. So that it is quite certain that all the parties understood that if the first payment was not made on November 7, the contract would become void and ended.

To avoid the effect of this ending of the alleged optional right the appellee contends that as he had not then received his letters testamentary his action was without authority and not binding upon him under § 48, Art. 93, of the Maryland

Code, but a contract void by statute cannot be enforced directly or indirectly. It confers no right and creates no obligation as between the parties to it. The party who refuses stands upon the law and has a right to refuse. *Dunphy* v. *Ryon*, 116 U. S. 491; *May* v. *Rice*, 101 U. S. 231. The record shows that the heirs of Alfred W. Ball are indispensable parties to this suit. 3 Pom. Eq. Jur., § 129; *Lynn* v. *Zephart*, 27 Maryland, 547; *Kellar* v. *Harper*, 64 Maryland, 74.

Where the court appoints a trustee to sell real estate and the trustee sells the property no conversion takes place until the court ratifies the sale and the purchaser pays the purchase money. *Dalrymple* v. *Taneyhill*, 2 Md. Ch. 125; *Jones* v. *Plummer*, 20 Maryland, 416. So where the testator directs his real estate to be sold and the proceeds applied to a special purpose, no conversion takes place if the purpose fails. *Rizer* v. *Perry*, 58 Maryland, 112; 3 Pom. Eq. Jur. 138, 141.

Until the appellant had made his first payment under the contract, or, in the event of his default, until Ball had made his election, assuming that he had the right so to do, to enforce the contract there could be no equitable conversion. 3 Pom. Eq. Jur. 132; 30 Beav. 206; *White's Estate*, 167 Pa. St. 206; *Edward* v. *West*, 7 Ch. Div. 858; *Smithers* v. *Loehenstein*, 50 Ohio St. 346.

Mr. Charles H. Merillat and *Mr. George R. Gaither*, with whom *Mr. Charles J. Kappler* was on the brief, for appellee.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity, brought by the executor of one Ball for the specific performance of a contract made by the appellant to purchase certain land. The plaintiff had a decree in the Court of Appeals of the District of Columbia, and the defendant appealed. 31 App. D. C. 29.

The material parts of the contract are as follows: "This agreement, Made by and between L. A. Griffith, duly authorized Agent and Attorney under a certain power of At-

torney from Alfred W. Ball both of Prince George's County, Maryland, parties of the first part, and Wm. W. Stewart of Washington D. C. of the second part. Witnesseth that the said W. W. Stewart has paid to the said L. A. Griffith, Agent, the sum of Five Hundred Dollars ($500) part purchase price of the total sum to be paid for a certain tract of land, owned by the said Alfred W. Ball," in Maryland as described, "same being sold at the rate of $40 per acre." "And the said L. A. Griffith as the Agent and duly authorized Attorney of said Alfred W. Ball, hereby grants bargains and sells, and agrees to convey by proper deed . . . duly executed by the said Ball to the said Stewart, the said Two Hundred and forty acres of land upon further payments and conditions hereinafter named to wit: The balance of one-half of the purchase price of the said 240 acres, more or less, at the rate of Forty dollars per acre is to be paid to the party of the first part on the 7th day of November 1903, and the remaining one-half of the total purchase price, is to be divided into five equal payments secured by five promissory mortgage notes, secured by purchase money mortgage upon the said property to be given by the said Stewart and Wife," with immaterial details. A burial lot of one acre is reserved "conditioned however that if the said Ball should desire to abandon the said burial tract . . . he shall have paid to him therefor by the said party of the second part the sum of ($40) Forty Dollars," &c. "The said land is to be surveyed and a plat made thereof, and the total purchase-price is to be at the rate of Forty Dollars per acre as determined by the said Survey the costs of the said Survey is to be borne equally by the said parties of the first part and the second parts; the said L. A. Griffith and W. W. Stewart each to pay one half of the total survey costs. Proper Deed or Deeds of Conveyance and abstracts of title of the said land based upon title search therefor is to be made and by J. K. Roberts . . . showing clear and unencumbered fee simple title, in the said land above mentioned and described, in the said Alfred W. Ball, and one half of the total costs for

same not exceeding $50, is to be borne equally by the parties hereto. In case the remainder of the first half of the purchase price be not paid on November 7, 1903 then the said $500 so paid to the said Griffith is to be forfeited and the Contract of sale and conveyance to be null and void, and of no effect in law, otherwise to be and remain in full force." . . . "The possessory right to all of the said premises on the property mentioned herein is to remain in the said Ball, until the one half payment of the total purchase price herein provided for on November 7th, 1903, has been fully paid and satisfied, to the said L. A. Griffith Agent. Witness our hands and seals this 5th day of June 1903. L. A. Griffith. Wm. W. Stewart." With seals.

The first defense is based on this document itself. It is said that the defendant made no covenant and therefore was free to withdraw if he chose to sacrifice the five hundred dollars that he had paid. This contention should be disposed of before we proceed to the other questions in the case. The argument is that the condition of forfeiture just stated and the consequence that the contract is to be void and of no effect in law disclose the only consequences of default on the purchaser's part, much as until well after Lord Coke's time the only consequence of breaking the condition of a bond was an obligation to pay the penalty. The obligor was held to have an election between performing the condition and payment. *Bromage* v. *Genning*, 1 Roll. R. 368; 1 Inst. 206*b*; *Hulbert* v. *Hart*, 1 Vern. 133 (1682). Some circumstances were referred to in aid of this conclusion, but as we think the meaning of the document plain we shall not mention them, except in connection with other matters, further than to say that there is nothing that would change or affect our view.

It seems to have been held within half a century after *Hulbert* v. *Hart*, that, under some circumstances at least, a bond would be construed to import a promise of the event constituting the condition. *Hobson* v. *Trevor*, 1 Strange, 533, *S. C.*, 2 P. Wms. 191 (1723). *Anonymous*, Moseley, 37 (1728);

Roper v. *Bartholomew*, 12 Price, 797, 811, 822, 826, 832. *Hooker* v. *Pynchon*, 8 Gray, 550, 552. But in this case we are not confined to a mere implication of a promise from the penalty. The tenor of the 'agreement' throughout imports mutual undertakings. The $500 is paid as 'part purchase price of the total sum to be paid,' that is, that the purchaser agrees to pay. The land is described as 'being sold.' There are words of present conveyance inoperative as such but implying a concluded bargain, like the word 'sold' just quoted. So one-half of the purchase price 'is to be' divided and the notes secured by mortgage 'to be given;' and in the case of the burial lot Ball 'shall have paid to him' $40 if he elects to abandon it. Here is an absolute promise in terms, which it would be unreasonable to make except on the footing of a similar promise as to the main parcel that the purchaser desired to get. We are satisfied that Stewart bound himself to take the land. See *Wilcoxson* v. *Stitt*, 65 California, 596. *Dana* v. *St. Paul Investment Co.*, 42 Minnesota, 194. The condition plainly is for the benefit of the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word void means voidable at the vendor's election and the condition may be insisted upon or waived at his choice. *Insurance Co.* v. *Norton*, 96 U. S. 234. *Oakes* v. *Manufacturers' Insurance Co.*, 135 Massachusetts, 248, 249. *Titus* v. *Glen Falls Ins. Co.*, 81 N. Y. 410, 419.

Ball died on November 5 or 6, 1903, just before the date fixed by the contract for the payments (November 7). He left a will appointing Griffith his executor and containing provisions to which we shall refer later. Before probate Griffith wrote to Stewart as follows on November 10:

"I have consulted two lawyers and am satisfied that I am fully authorized and empowered to complete sale of land and give deed. It rests with you. Please let me know positively on or before Monday next (16th) what you intend to do. There is a proposition on hand from other sources and I have under

this will power to act. I will make private arrangements at once for the disposition of it, if you do not take it. If you do not meet the requirements and satisfactory arrangements are not made before Monday, 16th at 12 o'clock please consider the matter ended. I think you entitled to the property and I desire that you shall get it, but I must do for the best interests of the estate, and I will gladly wait for you until Monday, 16th." There is a suggestion in argument not quite unwarranted by the language of this letter, that so far as in Griffith's power he then left the choice to Stewart whether to go on with the bargain or not. But apart from Griffith's lack of authority to change rights at that time, we are satisfied that the true import of the letter was politely to apply a spur to Stewart on the assumption that he had a bargain that he would not want to let go. The land was supposed to contain oil.

The stipulations in the contract were performed on the part of the vendor, and it now may be assumed that Stewart's obligation is outstanding, although repudiated by him, and that the only question is whether it can be enforced by Griffith in this action. To be sure, there was some attempt on Stewart's part, earlier, to say that he merely represented an oil company, and that the company alone was bound; but this properly was abandoned at the argument—Stewart's name is the only one appearing in the instrument, and he signed and sealed it, so that no such escape is open. *Glenn* v. *Allison*, 58 Maryland 527; *M'Ardle* v. *Irish Iodine & Marine Salts Manf. Co.*, 15 Ir. C. L. 146, 153.

Coming, then, to the question that remains, it is to be noticed as a preliminary that if Ball's executor could have maintained this suit in Maryland, where the land lies, he can maintain it here, where the defendant resides. Code, D. C., § 329. Some technical objections were raised before us as to the proof of the probate proceedings, but it sufficiently appears that Ball's will was proved and that the plaintiff qualified as executor under the same.

By the Maryland code an executor may prosecute any personal action whatever, whether at law or in equity, that the testator might have prosecuted, except an action for slander. Code of 1888, Art. 93, § 104. And by § 81 of the same article the executor of a person who shall have made sale of real estate, and has died before receiving the purchase money or conveying the same, may convey said real estate to the purchaser, and his deed shall be good and valid in law, and shall convey all the right, title, claim and interest of such deceased person in such real estate as effectually as the deed of the party so dying would have conveyed the same; provided, the executor of the person so dying shall satisfy the Orphans' Court granting him administration that the purchaser has paid the full amount of the purchase money. These seem sufficient to make out the plaintiff's case, if there were nothing more. The proviso in the Maryland statute obviously must create a condition subsequent only, as it is not to be supposed that a purchaser would pay unless he got what he paid for at the same time. In substance, the code points out the executor as the proper person to enforce the contract, gives him a right of action to that end and empowers him to make the deed. We do not perceive how a conveyance could be questioned, if made by an executor upon a cotemporaneous payment of the price, in pursuance of a binding contract of his testator, even without obtaining antecedent authority from the Orphans' Court. Therefore we do not perceive why the executor is not entitled to require specific performance if he is ready to deliver a deed at the moment of receiving the price. In this case the executor obtained an order from the Orphans' Court, purporting to authorize him to complete the sale, as if it had been an application for leave to sell under § 276. This seems to us to have been superfluous, but it did no harm, and it does not narrow the plaintiff's right to recover, by being set out as one of the foundations of the bill.

Next, apart from statute, it would be going far in search of possible doubts to say that sufficient authority could not be

derived from the will. The language is, "I direct, authorize and empower" the executor "to have full and complete power and authority over my entire estate, real, personal and mixed," and it directs and empowers him to sell the testator's real estate at public sale, after one month's notice, upon such terms as he thinks proper. We are not inclined to disagree with the Court of Appeals in its opinion that the words taken with the whole will imply a devise of the legal title to his executor and an authority sufficient to warrant his carrying out the sale. It is urged that the probate of the will does not establish it conclusively as to real estate, and that the heirs might attack it hereafter, but it is answered that by the contract the land had become personalty as against them, and that therefore so far as this land is concerned the will is safe from collateral attack. Moreover, as it is clear that the estate has and is subject to a binding contract, it is hard to see how it matters to the heirs who does the formal acts of accomplishment so long as he is accountable to the Orphans' Court.

No question was raised on either side as to the covenants of Stewart being enforceable only by Griffith personally, because the agreement was under seal, and Griffith alone was party to it. *Berkeley* v. *Hardy*, 5 B. & C. 355; *Frontin* v. *Small*, 2 Ld. Raym. 1418, 1419. It is enough to say that Stewart could not have profited by the suggestion had it been made.

Decree affirmed.

Mr. Justice Harlan concurs in the result.

UNITED STATES *v.* WELCH.

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

No. 147. Argued April 11, 1910.—Decided April 25, 1910.

A private right of way is an easement and is land, and its destruction for public purposes is a taking for which the owner of the dominant estate to which it is attached is entitled to compensation.

The value of an easement cannot be ascertained without reference to the dominant estate to which it is attached. In this case an award for destruction of a right of way and also for damages to the property to which it was an easement sustained.

THE facts are stated in the opinion.

Mr. John Q. Thompson, Assistant Attorney General, with whom *Mr. A. C. Campbell* and *Mr. Percy M. Cox* were on the brief, for the United States:

The six assignments of error all refer to the rulings of the court in respect to the private road, and but one question, Did the court err in awarding damages to plaintiffs' land by reason of the destruction of said private road?

It may be admitted that where the Government by the erection of a public improvement takes private property there is an implied contract on its part to make compensation therefor.

But if private property is merely lessened in value by the erection of a public improvement and is not invaded or encroached upon, there is no such implied contract. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *United States* v. *Lynah*, 188 U. S. 445, 465; *Mills* v. *United States*, 46 Fed. Rep. 738, 742, 748.

To constitute a taking of private property such as is inhibited by the Fifth Amendment unless just compensation

is made, it must be shown that the owner thereof has been wholly deprived of the use of the same. If it has been merely injured or its use impaired, there is no taking such as is contemplated by said Amendment. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *Bedford* v. *United States*, 192 U. S. 217, 223, 224, 225; *Manigault* v. *Springs*, 199 U. S. 473, 484, 485; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 583, 584.

Where ingress and egress to and from private property is rendered more difficult by reason of the erection of a public improvement and the value of the property is thereby lessened, there is not a taking such as is contemplated by said Amendment. *Gibson* v. *United States*, 166 U. S. 269, 270, 275.

A claim for damages against the Government which arises out of the construction of a lock and dam to improve the navigable capacity of a river, whereby a private road has been destroyed which afforded to the owners of the farm convenient access to and from a public highway, is not a claim "founded upon the Constitution," even though the destruction of the private road has lessened the value of the farm. *Scranton* v. *Wheeler*, 179 U. S. 141, 164.

No action will lie for damages consequent upon the erection of public improvements in a skillful and prudent manner, although the result of such erection may impair the value of property by rendering ingress and egress thereto more difficult. It is axiomatic that private rights are always subservient to the public good. Grotius de Jure Belli, Bk. 3, chap. 20, § 7, p. 1; *Surroco* v. *Geary*, 3 California, 70; *S. C.*, 58 Am. Dec. 385; *Lansing* v. *Smith*, 8 Cow. 146, 149; *Stevens* v. *Patterson R. R. Co.*, 34 N. J. L. 532, 549; Cooley on Const. Lim., p. 666; Dillon on Mun. Corp., § 987; Sedgwick on Stat. Const., 2d ed.; *Harvard College* v. *Stearns*, 15 Gray, 1; *Louisville & Frankfort R. R.* v. *Brown*, 17 B. Mon. 763.

With reference to the vacating or closing a street, see Lewis on Em. Dom., 3d ed., § 202; *Shrunk* v. *Schuylkill Nav. Co.*, 14 S. & R. 71; *Keasy* v. *Louisville*, 4 Dana, 154; *Wolfe* v. *C. & L.*

R. R., 15 B. Mon. (Ky.) 404; *Hollister* v. *The Union Co.*, 9 Connecticut, 436; *Sharp* v. *United States*, 191 U. S. 341; *Currie* v. *Waverly &c. Railroad Co.*, 23 Vroom, 392; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 320, 324; *Transportation Co.* v. *Chicago*, 99 U. S. 642. See also *Union Bridge Co.* v. *United States*, 204 U. S. 364.

In *Bauman* v. *Ross*, 167 U. S. 548, it is held that Congress may direct that when a part of a parcel of land is appropriated for public use the tribunal vested by law with the duty of assessing the compensation or damages due to the owner shall take into consideration the injury to the rest. But Congress has made no provision for the payment of such damages as are claimed in the case at bar.

A city is not liable for inconvenience occasioned by a ditch along a street which is constructed under proper authority, even though it becomes enlarged by erosion so as greatly to impair access to adjoining property. *Lambar* v. *St. Louis*, 15 Missouri, 610; *Benjamin* v. *Wheeler*, 8 Gray, 409; and see *Gould* v. *Hudson River R. R. Co.*, 6 N. Y. 522.

Dams constructed in a stream which indirectly injured a canal, held not a taking. *Susquehanna Canal Co.* v. *Wright*, 9 W. & S. 9; *Monongahela Nav. Co.* v. *Coon*, 6 W. & S. 101. The owner of a way is not entitled to compensation for the establishment of a railroad over it, although he is inconvenienced thereby. *Boston & Worc. R. R.* v. *Old Colony*, 12 Cush. 605. So as to an embankment. *Richardson* v. *Vt. Cent. R. R.*, 25 Vermont, 465, and see *Beseman* v. *Railroad Co.*, 50 N. J. L. 235.

Mere inconvenience or additional expense in operation does not constitute a taking. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, does not apply to the facts in this case. See *Manigault* v. *Springs*, 199 U. S. 473, 481; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141.

No action can be maintained against the United States under the act of March 3, 1887 (24 Stat. L. 505), to recover damages in the nature of a trespass, whether proximate or

consequential, because such action would necessarily "sound in tort," and therefore without the jurisdiction of the court. Necessarily, an action on the case—in other words, an action for damages "sounding in tort." *Railroad Co.* v. *Towboat Co.*, 23 How. 209; *Mills* v. *United States*, 46 Fed. Rep. 738, 747–8; *Wright* v. *Freeman*, 5 Harr. & J. 467; *Lambert* v. *Hoke*, 14 Johns. 383; *Cushing* v. *Adams*, 18 Pick. 110; *Shrieve* v. *Stokes*, 8 B. Mon. (Ky.) 453.

Nor can claimants by any evasion in pleading create an action *ex contractu* out of one purely sounding in tort. *Bigby* v. *United States*, 188 U. S. 400; *Hill* v. *United States*, 149 U. S. 593, 598; *Gibson Case*, 29 C. Cls. 18.

Mr. Edward S. Jouett, with whom *Mr. W. M. Beckner* was on the brief, for defendants in error:

The private right of way which one landholder owns over the land of his neighbor is an easement. In fact, of all easements it is one of the commonest and best known, particularly in the agricultural districts. And it is oftentimes, as in this case, a property interest of great value. 14 Cyc. 1139.

An easement is as subject to condemnation under the right of eminent domain as any other interest in lands is. See Eminent Domain, in 15 Cyc. 607; *Ross* v. *Georgia &c. Rwy. Co.*, 33 S. Car. 477; *Deavitt* v. *Washington*, 53 Atl. Rep. 563.

Railroad rights of way, which are in a sense private property, furnish many instances of the application of the rule. *West. Un. Tel. Co.* v. *Penn. R. R. Co.*, 195 U. S 540.

A fee simple interest is taken in the southern end of the roadway because it is a part of the farm itself.

As to the propriety of considering the impairment of the value of the remainder of a tract by reason of its relation to the part taken, see *High Bridge Lumber Company* v. *United States*, 69 Fed. Rep. 320.

Permanent overflowing is a "Taking" within the meaning of the constitutional provision. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166. See Rose's Notes showing that this case has

been cited and approved more than fifty times. The authorities relied upon by the counsel for the Government do not sustain its position.

The damages are not merely consequential in the legal meaning of that term. Wherever there is an actual physical invasion compensation is due, and the law then fixes the measure of that compensation to be the value of the part taken plus the damage to the remainder of the property resulting from such taking. Cooley on Const. Lim.; Sedgwick on Stat. Const.; *Louisville & Frankfort R. R.* v. *Brown*, 17 B. Mon. 763; *Hollister* v. *The Union Co.*, 9 Connecticut, 436; *Currie* v. *Waverly &c. Railroad Co.*, 23 Vroom, 392, can all be distinguished and really support contention of defendant in error.

Treating the farm and its easement separately would not avail the Government, as the value of the easement, which was taken and entirely extinguished, would still have to be allowed.

Damages to the residue of a tract caused by taking a part are allowable in fixing just compensation. *Sharp* v. *United States*, 191 U. S. 341; *S. C.*, 112 Fed. Rep. 693. The doctrine of "inconvenience" only applies where there is no actual taking and it cannot be substituted for a taking; but when there is a taking of a part, then "inconvenience" to the residue becomes one of the legitimate elements of damage to the residue. The Welch farm and its private roadway should be considered as one property. *Sharp* v. *United States, supra.* The converse of that case is presented in the case at bar. See note in 57 L. R. A. 932, citing *Westbrook* v. *Muscatine Co.*, 88 N. W. Rep. 202; *Potts* v. *Penn. S. Valley R. Co.*, 119 Pa. St. 278; *Peck* v. *Superior Short Line R. Co.*, 36 Minnesota, 343.

The same amount would necessarily be allowed even if the farm and the easement were not considered as one piece of property.

The easement, which constitutes one end of the private

roadway, was totally destroyed, rendering compensation equal to its value necessary. If the easement had not been touched the outlet was still destroyed by the submerging of fifty yards of roadway. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 545; *Hill* v. *United States*, 149 U. S. 593; and *Bigby* v. *United States*, 188 U. S. 400, distinguished; and see *United States* v. *Lynah*, 188 U. S. 446.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding under the act of March 3, 1887, c. 359, § 2, 24 Stat. 505, to recover the value of land taken by the United States. It is admitted that a strip of about three acres of land lying along the side of Four Mile Creek and running east and west was taken, and is to be paid for. It was permanently flooded by a dam on the Kentucky River, into which Four Mile Creek flows. *United States* v. *Lynah*, 188 U. S. 445. *Manigault* v. *Springs*, 199 U. S. 473, 484. The plaintiffs owned other land south of and adjoining the strip taken, and had a private right of way at right angles to the creek northerly across land of other parties to the Ford County Road, which ran parallel to the creek and at some distance from it. This was the only practical outlet from the plaintiffs' farm to the county road. The taking of the intervening strip of course cut off the use of the way, and the judge who tried the case found that it lessened the value of the farm $1,700. He allowed this sum in addition to $300 for the land taken. The United States took a writ of error on the ground that the former item was merely for collateral damage not amounting to a taking and of a kind that cannot be allowed; that at most it was only a tort. The case is likened to the depreciation in value of a neighboring but distinct tract by reason of the use to which the Government intends to put that which it takes. *Sharp* v. *United States*, 191 U. S. 341, 355.

The petition like the form of the finding lends some countenance to this contention, by laying emphasis on the damage

to the farm, although it is to be noted that even in this aspect the damage is to the tract of which a part is taken. *Sharp* v. *United States*, 191 U. S. 354. But both petition and finding in substance show clearly that the way has been permanently cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. *Miller* v. *Horton*, 152 Mass. 540, 547. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner, and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached. The argument is only confused by reference to cases like *Gibson* v. *United States*, 166 U. S. 269, *Harvard College* v. *Stearns*, 15 Gray, 1, *Smith* v. *Boston*, 7 Cush. 354, &c., where it was held, although there are decisions the other way, that a landowner cannot recover for the obstruction of a public water course, the discontinuance of a public way, or the like. The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the rest of the public, is the same in kind. Here there is no question of the plaintiffs' private right.

Judgment affirmed.

MR. JUSTICE HARLAN concurs in the judgment only so far as it allows the item of $300.

LORD & HEWLETT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 162. Argued April 20, 1910.—Decided May 2, 1910.

An act of Congress appropriating for a competition for plans of a proposed building, the successful ones to be transmitted to Congress, and which does not appropriate for the building itself creates no obligation on the part of the United States to use the plans of the successful competitor, and so held in regard to the act of March 2, 1901, c. 805, 31 Stat. 922, 938, providing for competition for building for Department of Agriculture.

Under the act of February 9, 1903, c. 528, 32 Stat. 806, providing for plans for a building for the Department of Agriculture not to exceed $1,500,000, the Secretary of Agriculture was not obliged to use the successful plans under the competition provided in the act of March 2, 1901, and in the absence of a contract to use such plans the architects submitting them have no claim for fees against the United States.

There is no contract unless the minds of the parties meet; and although there were negotiations in this case the architects, having declined to accept a contract submitted by the Department of Agriculture, have no contractual claim against the United States.

43 C. Cl. 282, affirmed.

THE appellants, doing business as architects under the name of Lord & Hewlett, brought this action to recover from the United States the sum of seventy-five thousand dollars as due them on account of certain transactions relating to a public building which the United States proposed to have constructed and used by the Department of Agriculture.

The Court of Claims adjudged, upon the facts found, that the plaintiffs had no cause of action against the United States and dismissed the claimants' petition.

The material facts are as will be now stated: By the act of March 2d, 1901, c. 805, 31 Stat. 922, 938, Congress appropriated the sum of five thousand dollars, to be immediately available,

"to enable the Secretary of Agriculture to have prepared, under his direction, plans for a fireproof administrative building, to be erected on the grounds of the Department of Agriculture, in the city of Washington, said plans, and such recommendations thereon as the Secretary of Agriculture may deem necessary, *to be transmitted to Congress* at it next regular session."

Thereafter, the Supervising Architect of the Treasury Department prepared what is described in the record as a "Programme and conditions of a competition for a building for the Department of Agriculture in Washington, D. C." That Programme was approved by the Secretary of Agriculture. It recited the purpose to obtain designs for the proposed building by competition between ten architects of good professional standing and citizens of the United States, to be designated by a special commission, and consisting of the Secretary of Agriculture, the Supervising Architect of the Treasury, and three named persons not in the service of the Government, who should report as to the relative merits of the designs submitted. The Programme contained, among other provisions, the following: "It must be understood, however, that while the ultimate purpose of the competition is the selection of an architect, *the act does not provide for a building, but simply for a design to be approved by Congress at the next session;* and, therefore, while it is to be supposed that the architect or firm of architects whose design shall be placed first in this competition will receive the commission to carry out the work *when the building is authorized,* it must be understood that the Secretary of Agriculture *has no authority at this time to enter into any contract further than is provided for by this programme.* The programme sets forth, approximately, the conditions and location of the building, modifications of which may become necessary. If Congress provides for the erection of the building the selected architect is then to prepare such design or designs as may, in the judgment of the Supervising Architect of the Treasury, be necessary to meet the

conditions finally adopted by him. . . . The three members of this commission, not in Government service, shall receive in full compensation for their services, including traveling and subsistence expenses, the sum of two hundred and fifty dollars ($250). . . . A uniform sum of three hundred and fifty dollars ($350) will be paid to each of the competitors invited, with the understanding and agreement that unless otherwise provided for by act of Congress, the architect or architects whose design shall be placed first will be awarded the commission for carrying out the work, at a fee computed on the basis of the schedule of charges adopted by the American Institute of Architects. It must be understood that no claim shall be made upon the United States by any competitor for any fee, percentage, or payment whatever, or for any expense incident to or growing out of his participation in this competition, other than is expressly provided for by the terms mentioned herein."

On the twenty-fourth of October, 1901, the appellants—who were among the ten architects selected to furnish necessary designs in competition—received notice from the Secretary of Agriculture that their plans for the building were selected by the commission, and they received and accepted the compensation ($350) which had been fixed by the Programme of competition as full compensation for this preliminary work. Subsequently, October 28th, 1901, the Secretary of Agriculture notified Congress that the award had been made to the appellants.

However, the parties, after discussion, concurred in the view that as the Department proposed a building of increased size and of more expensive materials, the cost would probably amount to $2,500,000, and a bill appropriating that amount was sent to Congress for its consideration and action. But Congress took no action on the general subject of a public building for the Agricultural Department until February 9th, 1903, when, without the knowledge of the Secretary of Agriculture, it passed an act entitled "An act for the erection of a

building for the use and accommodation of the Department of Agriculture." That act, it may be observed, did not refer to the above act of 1901, or to anything done under it. It yet provided for a commodious fireproof building on the grounds of the Department of Agriculture for the use of that Department and its Bureaus, "to be constructed in accordance with plans, to be procured, based on accurate estimates, providing for the erection of said building, complete in all of its details, as herein described, and within the total cost of not exceeding the sum herein stipulated, and he is hereby authorized, after procuring such plans, and after due advertisement for proposals, to enter into contracts within the limit of cost hereby fixed and subject to appropriations to be made by Congress, for the erection of said building complete, including heating and ventilating apparatus, elevators, and approaches, and the removal of the present building or buildings of the Department of Agriculture on said grounds. Sec. 2. That the supervision of the construction of said building shall be placed in charge of an officer of the Government especially qualified for the duty, to be appointed by the Secretary of Agriculture, subject to the approval of the head of the department in which such officer is employed, who shall receive for his additional services an increase of twenty-five per centum of his present salary, such increase to be paid out of the appropriation for the building herein authorized. Sec. 3. That the limit of cost for the construction of said building complete, including heating and ventilating apparatus, elevators, and approaches, and the cost for removal of the present building or buildings of the Department of Agriculture, is hereby fixed at one million five hundred thousand dollars, and no contract shall be entered into or expenditure authorized in excess of said amount." February 9, 1903, c. 528, 32 Stat. 806.

The Sundry Civil Appropriation Act of March 3d, 1903, contained this additional provision: "To commence the erection of a new building for the Department of Agriculture, authorized by the Act approved February ninth, nineteen hundred

and three, two hundred and fifty thousand dollars, of which sum one hundred thousand dollars shall be immediately available; and the Secretary of Agriculture is hereby authorized to enter into a contract or contracts for the completion of said building within the limit of cost of one million five hundred thousand dollars, fixed by said Act." March 3d, 1903, c. 1007, 32 Stat. 1139.

Shortly after the passage of the act of March 2d, 1901, the Supervising Architect of the Treasury, Mr. James Knox Taylor, was designated by the Secretary of Agriculture as expert adviser, and an advisory building committee, of which B. T. Galloway was chairman, was also formed. It was found by the Court of Claims that "neither Mr. Taylor nor any of the members of this committee had authority to enter into any contract or agreement with the claimants, which arrangement was continued under the act of 1903 until May 4, 1903, when Taylor was superseded as expert adviser to the Secretary of Agriculture by the appointment of Capt. John S. Sewell in his stead.

After the passage of the act of February 9th, 1903, negotiations were had with the claimants, in relation to the detail of plans and specifications for the erection of a building provided for in that act. But it is found that at no time prior to May 4th, 1903, when Sewell succeeded Taylor as expert adviser, "had the claimants and the Secretary of Agriculture or any person or committee appointed by him to act for him, agreed upon or accepted any specific plans or specifications theretofore prepared and submitted by claimants for the erection of said building." On the contrary, they could not agree, and their relations were terminated by the letter from the Advisory Committee, addressed to the appellants under date of April 15th, 1903. Subsequently, negotiations between the parties were resumed, Capt. Sewell representing the Department as expert adviser. The findings state: "On May 4, 1903, and subsequent thereto, the negotiations between claimants and Captain Sewell, superintendent as aforesaid, had

to do exclusively with the preparation and execution of a written contract providing for their employment as architects for said building. Captain Sewell had prepared and submitted to claimants two forms of contract wherein claimants' compensation for services as architects for said building was fixed at 3½ per cent of contract price. After much lengthy correspondence, discussing the propriety of such a fee, and likewise the respective duties of the architects and superintendent of construction provided for by the act of February 9, 1903, claimants declined to accept the terms of the said agreement, at the same time insisting that the compensation provided for in the original programme of the Secretary, to wit, 5 per cent, should obtain; that they were employed under and by virtue of said programme, and subsequent proceedings thereto."

The findings further show that on February 16th, 1903, Taylor, who was then expert adviser to the Secretary, had submitted to claimants for their examination and approval a form of contract looking toward their employment as architects for the construction of said building, in which contract the compensation set forth was 5 per cent of the sum expended in the erection of the same. Claimants do not appear to have examined, approved, executed, or returned said contract. What disposition was ever made of it is not shown. Finally, on May 13th, 1903, the Secretary of Agriculture addressed a letter to the claimants, in which he referred to the failure of the claimants to accept the above contracts submitted to them by the Department, and announced his purpose to look elsewhere than to them for assistance.

Mr Charles Fuller, with whom *Mr. Benjamin F. Tracy* and *Mr. Paul Fuller* were on the brief, for appellants:

The programme of competition with its conditions, offered the claimants by the Secretary of Agriculture under the act of March 2, 1901; the acceptance by the claimants of its terms; the selection thereunder by the Secretary of Agriculture of the claimants' plans, and the subsequent act

of February 9, 1903, authorizing the building, constitute a binding contract between claimants and the United States.

The nominal sum of $350 was named in the programme of competition as compensation for the efforts of the competitors, and the additional inducement of permanent employment was expressly proffered the successful architect in the event of subsequent legislation authorizing the construction of the building in accordance with the said programme.

The "additional inducement" was the real consideration offered by the defendant to the claimants, subject to a future negative condition; namely, that no adverse action should be taken by Congress, and unless such adverse action were taken, the agreement was final and complete.

Appellants, at request of defendant, undertook to make plans for the building, to use their professional knowledge, skill and labor, things which prior to the agreement they were not bound to do. This consideration is sufficient: *Newell* v. *Page et al.*, 10 Gray, 366; *Devecmon* v. *Shaw*, 69 Maryland, 199; *Hamer* v. *Sidway*, 124 N. Y. 538.

For cases similar to this see *Walsh* v. *St. Louis Exposition &c. Assn.*, 16 Mo. App. 502; affirmed, 90 Missouri, 459; *Palmer* v. *Board of Education*, 220 Pa. St. 568, 575; *Molyneaux* v. *Collier*, 17 Georgia, 46.

Admitting that the offer of the Secretary was *ultra vires* Congress could, of course, ratify it. The act of 1903, passed by Congress, as above indicated with the proceedings of the Secretary before it and without negativing his course in any way was clearly such a ratification.

It was so recognized by the Secretary of Agriculture, who upon the passage of the act of February 9, 1903, called upon the claimants for its performance. Claimants performed fully under such contract so far as permitted by the Secretary of Agriculture, and without default on their part and without just cause, were prevented from completing the performance.

The compensation had been fixed by the programme of competition, and any change in this matter was a violation of the claimants' rights and a breach of the agreement. *Smithmeyer* v. *United States,* 147 U. S. 342.

The measure of the damages which the claimants are entitled to recover for the breach of their contract, is the compensation which the contract awarded them, and which they would have received had they been permitted to complete their performance of it. 8 Amer. & Eng. Ency. of Law, 633; *Wicker* v. *Hoppock,* 6 Wall. 94, 99; *Thompson* v. *Wood,* 1 Hilton (N. Y.), 93; 2 Sedgwick on Damages, 8th ed., 272, citing *Hunt* v. *Test,* 8 Alabama, 713; *Baldwin* v. *Bennett,* 4 California, 392; *Lake Shore Railway Co.* v. *Richards,* 126 Illinois, 448.

In this case the architect's office must continue and be maintained at the same expense, though part of the anticipated and agreed compensation fails.

No successful or serious attempt has been made to in any way justify the arbitrary and unjustifiable action of the defendant in discharging the claimants without cause, and preventing their completing the contract.

Mr. John Q. Thompson, Assistant Attorney General, with whom *Mr. George M. Anderson* was on the brief, for the United States.

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

This statement of the controlling facts is quite sufficient to show that the judgment below was right. We perceive no ground whatever for a judgment against the United States. Nothing done under the act of March 2d, 1901 created any obligation upon the part of the Secretary of Agriculture, as representing the United States, to proceed under the plans made by the appellants for the construction of the building

referred to *in that act*. The "Programme" of competition devised, under that act, by the Architect of the Treasury, under the direction of the Secretary, contemplated the payment of $350 to each of the ten competing architects, in full compensation for their services in preparing and submitting designs. That amount was paid to the appellants. And they were expressly informed by the above act that the plans and recommendations of the Secretary were to be transmitted to Congress. Besides, the Programme of competition explicitly stated that the act did not provide for a building, but only for designs to be approved by Congress. The Secretary was without authority under the act of 1901 to make any binding contract for the erection of the proposed building; and Congress, it seems, took no action in reference to the designs prepared by the appellants under that act. Nothing more was done by either side until Congress, by the act of February 9th, 1903, made independent provisions for the erection of a building for the use of the Department of Agriculture, at a cost not exceeding $1,500,000. But no contract was made under that act with the appellants. On the contrary, the minds of the parties never met as to the terms of any contract in execution of the provisions of the act of February 9th, 1903. The appellants declined to accept the contract prepared and submitted by the Department. Clearly, the appellants were not entitled, simply because of the acceptance of their plans, prepared under the act of 1901, to construct the building provided for in the separate, independent act of February 9th, 1903; and as no contract was made with them by the Secretary under the latter act, they have no cause of action against the United States.

Judgment affirmed.

WEEMS *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 20. Argued November 30, December 1, 1909.—Decided May 2, 1910.

A paramount governmental authority may make use of subordinate governmental instruments, without the creation of a distinct legal entity as is the case of the United States and the United States Government of the Philippine Islands.

Under the Philippine Criminal Code of Procedure a public offense need not necessarily be described in the information in exact words of the statute but only in ordinary and concise language, so as to enable a person of common understanding to understand the charge and the court to pronounce judgment.

A charge describing the accused as a public official of the United States Government of the Philippine Islands and his offense as falsifying a public and official document in this case held sufficient. *Carrington* v. *United States*, 208 U. S. 1, distinguished.

The provision in Rule 35 that this court may at its option notice a plain error not assigned, is not a rigid rule controlled by precedent but confers a discretion exercisable at any time, regardless of what may have been done at other times; the court has less reluctance to disregard prior examples in criminal, than in civil, cases; and will act under the Rule when rights constitutional in nature or secured under a bill of rights are asserted.

Although not raised in the courts below, this court will, under Rule 35, consider an assignment of error made for the first time in this court that a sentence is cruel and unusual within the meaning of the Eighth Amendment to the Constitution or of the similar provision in the Philippine bill of rights.

In interpreting the Eighth Amendment it will be regarded as a precept of justice that punishment for crime should be graduated and proportioned to the offense.

A provision of the Philippine bill of rights taken from the Constitution of the United States must have the same meaning, and so held that the provision prohibiting cruel and unusual punishments must be interpreted as the Eighth Amendment has been.

What constitutes a cruel and unusual punishment prohibited by the Eighth Amendment has not been exactly defined and no case has heretofore occurred in this court calling for an exhaustive definition.

While legislation, both statutory and constitutional, is enacted to remedy existing evils, its general language is not necessarily so confined and it may be capable of wider application than to the mischief giving it birth.

The Eighth Amendment is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice, and a similar provision in the Philippine bill of rights applies to long continued imprisonment with accessories disproportionate to the offense.

While the judiciary may not oppose its power to that of the legislature in defining crimes and their punishment as to expediency, it is the duty of the judiciary to determine whether the legislature has contravened a constitutional prohibition and in that respect and for that purpose the power of the judiciary is superior to that of the legislature.

It is within the power of this court to declare a statute of the Penal Code defining a crime and fixing its punishment void as violative of the provision in the Philippine bill of rights prohibiting cruel and unusual punishment.

In determining whether a punishment is cruel and unusual as fixed by the Philippine Commission, this court will consider the punishment of the same or similar crimes in other parts of the United States, as exhibiting the difference between power unrestrained and that exercised under the spirit of constitutional limitations formed to establish justice.

Where the statute unites all the penalties the court cannot separate them even if separable, unless it is clear that the union was not made imperative by the legislature; and in this case held that the penalties of *cadena temporal*, principal and accessories, under art. 56 of the Penal Code of the Philippine Islands are not independent of each other.

Where the minimum sentence which the court might impose is cruel and unusual within the prohibition of a bill of rights, the fault is in the law and not in the sentence, and if there is no other law under which sentence can be imposed it is the duty of the court to declare the law void.

Where sentence cannot be imposed under any law except that declared unconstitutional or void the case cannot be remanded for new sentence but the judgment must be reversed with directions to dismiss the proceedings.

In this case the court declared § 56 of the Penal Code of the Philippine

Islands and a sentence pronounced thereunder, void as violating the provision in the Philippine bill of rights contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691, against the imposition of excessive fines and the infliction of cruel and unusual punishment, in so far as being prescribed for an offense by an officer of the Government of making false entries in public records as to payments of 616 pesos; the punishment being a fine of 4,000 pesos, and *cadena temporal* of over twelve years with accessories, such accessories including the carrying of chains, deprivation of civil rights during imprisonment and thereafter perpetual disqualification to enjoy political rights, hold office, etc., and subjection besides to surveillance.

The history of the adoption of the Eighth Amendment to the Constitution of the United States and cases involving constitutional prohibitions against excessive fines and cruel and unusual punishment reviewed and discussed in the opinion of the court and the dissenting opinion.

THE facts, which involve the legality of § 56 of the Penal Code of the Philippine Islands, and a sentence thereunder, under the guarantees against cruel and unusual punishments of the bill of rights of the Philippine Islands as expressed in the act of July 1, 1902, are stated in the opinion.

Mr. A. S. Worthington for plaintiff in error:

If Weems was a public official of any Government, it was the government of the Philippine Islands, and not the United States Government. See acts of March 8, 1902, 32 Stat. 54; July 1, 1902, 32 Stat. 691, in which in a great variety of ways they distinguish between the Government of the United States and the government of the Philippine Islands, especially in §§ 4, 53, 67, 71, 74 and 76–83.

The same distinction is maintained in the Coinage Act of March 2, 1903, 32 Stat. 952; and in the legislation of the island government. See §§ 3395, 3399, 3402, 1366 and 2570, Comp. Acts of the Phil. Comm.

This objection does not relate to a matter of form, but is substantial. *Carrington* v. *United States*, 208 U. S. 1. The omission of any statement in the record that the defendant

was present at the trial is another fatal defect. Certainly something more than an inference from the opinion of an appellate court is required to show that a person accused of a crime, that may be punished by a long term of imprisonment, was present at his trial. His presence was essential to a valid trial and could not be waived. 1 Bish. Cr. Pro. 271, 1353; *Hoyt* v. *Utah*, 110 U. S. 574.

The sentence in this case imposed a cruel and unusual punishment, and for that reason it should be set aside, even if the conviction be not reversed.

In *O'Neil* v. *Vermont*, 144 U. S. 323, the majority of the court refused to consider this question, because it was not assigned as error, and because the Eighth Amendment has always been held not to apply to the States; but see dissents of Justices Field, Harlan and Brewer. In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 111, it was held that a fine may be so unreasonable as to amount to taking property without due process of law. In *Paraiso* v. *United States*, 207 U. S. 368, the question arose but was not decided.

Adjudications on this question are few in number, but see *State* v. *G. H. & S. A. R. Co.*, 100 Texas, 153, 174, 175.

While all of the provisions of the Constitution of the United States relating to criminal proceedings, have not been extended to the Philippines certain provisions of the Constitution have been made applicable to the Philippine Islands under the act of July 1, 1902, including the prohibition against excessive bail and fines and cruel and unusual punishment.

The language of the act is the same as that of the Eighth Amendment, except that the word "punishment" is used instead of "punishments." *Pervear* v. *Commonwealth*, 5 Wall. 475; *Kemmler's Case*, 136 U. S. 436; *Howard* v. *Fleming*, 191 U. S. 126, 135, do not affect the present case.

As to the limitations on punishment under Amendment VIII, see Cooley's Const. Lim., 7th ed.; Maxwell's Crim. Proc., p. 661, cited with approval in *Charles* v. *State*, 27 Nebraska, 881; *Stoutenburg* v. *Frazier*, 16 App. D. C. 229, and *State* v. *Driver*,

78 N. C. 423, in which a punishment was held unusual because it was excessive. In it, the court citing the case of Lord Devonshire, 11 State Trials, 1354, in which the House of Lords held that a fine of £30,000 was excessive and exorbitant, against Magna Charta, and the common right of the subject and the laws of the land. See also *Hobbs* v. *State*, 32 N. E. Rep. 1019, and *Johnson* v. *Waukesha Co.*, 64 Wisconsin, 281, 288.

Penalties must be fixed with regard to the offense and cannot all be thrown in together, large and small, under the same measure of punishment. *Matter of Frazee*, 63 Michigan, 397, 408, and see *People* v. *Murray*, 76 Michigan, 10, reversing the judgment in the case for errors at the trial, and commenting upon the severity of a sentence of fifty years as being in violation of a clause of the state constitution prohibiting unusual punishments. In *State* v. *Whitaker*, 48 La. Ann. 527 a judgment was held void under a constitutional provision identical with the Eighth Amendment, because it sentenced the relators to imprisonment for 2,160 days in default of their paying fines aggregating $720. The legislature cannot inflict the death penalty as a punishment for a simple misdemeanor. *Thomas* v. *Kincaid*, 55 Arkansas, 502; *Martin* v. *Johnston*, 33 S. W. Rep. 306.

Where a statute fixes a minimum penalty but gives the court or jury a discretion to go beyond it such discretion must be exercised in reason and justice and in subordination to the constitutional provision prohibiting cruel and unusual punishments. *State* v. *Baker*, 3 So. Dak. 2941.

Courts would not be justified in interfering with the discretion and judgment of the legislature, except in very extreme cases, *Matter of Bayard*, 63 How. Pr. (N. Y.) *73, of punishments so disproportionate to the offense as to shock the sense of the community. Whether the punishment in a given case is cruel or unusual depends, of course, in some degree, upon the punishment inflicted for other offenses. See Penal Laws of the United States as revised and amended by act of March 4, 1909, 35 Stat. 1088, and Code of District of Colum-

bia of March 3, 1891, from which it will be seen, that, in many cases, either in the Federal statutes or in the District Code, there is no minimum term of imprisonment, that being left to the court. A law requiring a convicted person to be imprisoned for *not less than twelve years* cannot be found in any statute in this country save for the most enormous crimes. Certainly not for such a petty offense as that of which plaintiff in error has been convicted.

While under the Philippine laws some crimes are punished with a severity unknown to any jurisdiction in the United States, even there this sentence is oppressive to the last degree. For illustrations of penalties prescribed in the Philippines for other crimes, see § 390 of the Penal Code, by which a public official embezzling public funds can be punished as severely as the plaintiff in error, only if his embezzlement exceeds 125,000 pesetas.

Even under Philippine laws, one who is guilty of treason or misprision of treason or conspiracy to overthrow the Government of the United States or sedition or perjury may be sent to prison for only thirty days and, except only in case of treason, cannot be imprisoned for a longer term than from six to ten years; and one who embezzles any sum, however great, cannot be imprisoned for more than ten years, and may escape with two years.

Mr. Assistant Attorney General Fowler, with whom *Mr. Henry M. Hoyt,* formerly Solicitor General, was on the brief, for the United States:

The fact that the record fails to show that plaintiff in error was present during the trial is not a valid ground for reversal.

The third ground relied upon, that the punishment inflicted upon plaintiff in error is cruel and unusual, does not afford ground for jurisdiction, nor is the punishment cruel and unusual within the meaning of that expression as used in the act of July 1, 1902.

This question does not give ground for jurisdiction, be-

cause it was for the first time mentioned in brief of plaintiff in error in this court. *Paraiso* v. *United States*, 207 U. S. 368, 370; *Lawler* v. *Walker*, 14 How. 149, 152; *Spies* v. *Illinois*, 123 U. S. 131, 181; *Brooks* v. *Missouri*, 124 U. S. 394; *Morrison* v. *Watson*, 154 U. S. 111, 115; *Winona &c. Land Co.* v. *Minnesota*, 159 U. S. 540; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648, 658; *Citizens' Bank* v. *Owensboro*, 173 U. S. 636, 643; *Home for Incurables* v. *New York*, 187 U. S. 155, 157; *Johnson* v. *Insurance Co.*, 187 U. S. 491, 495; *Chicago Ry. Co.* v. *McGuire*, 196 U. S. 128; *Hurlbert* v. *Chicago*, 202 U. S. 275; *Osborne* v. *Clark*, 204 U. S. 565; *Serra* v. *Mortiga*, 204 U. S. 470; *Arkansas* v. *Schlierholz*, 179 U. S. 598; *Carey* v. *Houston &c. Ry. Co.*, 150 U. S. 170, 181; *Ansbro* v. *United States*, 159 U. S. 695; *Cornell* v. *Green*, 163 U. S. 75, 78; *Cincinnati &c. Ry. Co.* v. *Thiebaud*, 177 U. S. 615, 620.

The sentence imposed is not a cruel and unusual punishment within the meaning of that expression as used in the act of July 1, 1902, nor are the provisions of the Philippine Criminal Code, under which the sentence was pronounced, in contravention of the provisions of said act.

The law was one existing in the Philippine Islands at the time of their cession to the United States, and the Philippine Commission was charged by the President to maintain the body of laws which regulated the rights and obligations of the people, with as little change as expedient, and although this law has been enforced by the courts ever since the Philippines became territory of the United States, yet the Philippine Commission has not deemed it proper to modify this provision in any respect, notwithstanding the fact that they have enacted a very extensive criminal code which defines and provides punishment for a large variety of offenses. See Compilation of Acts of Phil. Com., tit. 44, pp. 1026–1052.

The prohibition of cruel and unusual punishment has no application to a punishment which only exceeds in degree such punishment as is usually inflicted in other jurisdictions for the same or like offense.

The statute which prohibits the falsification of records by a public official was not abrogated by the clause in the act of July 1, 1902, prohibiting cruel and unusual punishment, and it still remains unlawful to falsify such records even if the punishment provided be regarded as too severe; the court will not hold that that clause of the law is a nullity, and that there is no means of enforcing it, nor will it undertake to draw a line beyond which the law is a nullity and just where the punishment begins to be cruel and unusual.

The punishment imposed is not cruel or unusual within the meaning of the Philippine bill of rights.

The Philippine courts are guided in fixing the amount of a penalty by the circumstances attending the offense, whether extenuating or aggravating. See § 81 of the Penal Code.

The fine imposed is a moderate one.

There is nothing cruel or unusual in a long term of imprisonment, as the words are used in the Bill of Rights. The description there refers rather to mutilations and degradations, and not to length or duration of the punishment. The penalty of *cadena temporal*, which article 300 prescribes for this class of offenses, includes a term of imprisonment ranging from twelve years and one day to twenty years; articles 28, 96, Penal Code; and the sentence of fifteen years imposed here is therefore well within the law.

This court has not passed upon the meaning of the words cruel and unusual punishment. See *Wilkerson* v. *Utah*, 99 U. S. 130; *In re Kemmler*, 136 U. S. 436.

While the state courts are not entirely in accord as to the meaning of the term, the majority of the cases hold that the words employed in the Constitution signify such punishment as would amount to torture, or which is so cruel as to shock the conscience and reason of men; that something inhuman and barbarous is implied. *State* v. *Williams*, 88 Missouri, 310; *Miller* v. *State*, 49 N. E. Rep. 894; *Hobbs* v. *State*, 32 N. E. Rep. 1019; *In re Bayard*, 25 Hun, 546; *State* v. *Becker*, 51 N. W. Rep. 1018; *Territory* v. *Ketchum*, 65 Pac. Rep. 169;

People v. *Morris*, 45 N. W. Rep. 591. See also *O'Neil* v. *Vermont*, 144 U. S. 323, 331, quoting without disapproval, the opinion of the Supreme Court of Vermont sustaining a very large fine in the aggregate and a very long term of imprisonment in addition as not violating the constitutional guaranties.

If the punishment in this case seems excessive compared with the offense, it is for the Philippine legislative power or for Congress to change the law.

MR. JUSTICE MCKENNA delivered the opinion of the court.[1]

This writ of error brings up for review the judgment of the Supreme Court of the Philippine Islands, affirming the conviction of plaintiff in error for falsifying a "public and official document."

In the "complaint," by which the prosecution was begun, it was charged that the plaintiff in error, "a duly appointed, qualified and acting disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," did, as such, "corruptly and with intent, then and there, to deceive and defraud the United States Government of the Philippine Islands, and its officials, falsify a public and official document, namely, a cash book of the captain of the Board of Manila, Philippine Islands, and the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," kept by him as disbursing officer of that bureau. The falsification, which is alleged with much particularity, was committed by entering as paid out, "as wages of employés of the Light House Service

[1] This case was argued before seven justices, Mr. Justice Moody being absent on account of sickness and Mr. Justice Lurton not then having taken his seat. Mr. Justice Brewer died before the opinion was delivered. Mr. Justice McKenna delivered the opinion of the court, the Chief Justice, Mr. Justice Harlan and Mr. Justice Day concurring with him. Mr. Justice White delivered a dissenting opinion (p. 382, *post*), Mr. Justice Holmes concurring with him.

of the United States Government of the Philippine Islands," at the Capul Light House of 208 pesos, and for like service at the Matabriga Light House of 408 pesos, Philippine currency. A demurrer was filed to the "complaint," which was overruled.

He was convicted, and the following sentence was imposed upon him: "To the penalty of fifteen years of Cadena, together with the accessories of section 56 of the Penal Code, and to pay a fine of four thousand pesetas, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause."

The judgment and sentence were affirmed by the Supreme Court of the islands.

It is conceded by plaintiff in error that some of the questions presented to the Supreme Court of the Philippine Islands cannot be raised in this court, as the record does not contain the evidence. Indeed, plaintiff in error confines his discussion to one point raised in the court below and to three other questions, which, though not brought to the attention of the Supreme Court of the islands, and not included in the assignment of errors filed with the application for the writ of error are of such importance, it is said, that this court will consider them under the right reserved in Rule 35.[1]

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[1] Rule 35. Assignments of Errors. 1. Where an appeal or a writ of error is taken from a District Court or a Circuit Court direct to this court, under § 5 of the act entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the

These questions which are assigned as error on the argument here are as follows:

"1. The court below erred in overruling the demurrer to the complaint, this assignment being based upon the fact that in the complaint the plaintiff in error is described as the 'disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands,' and the cash book referred to in the complaint is described as a book 'of the captain of the port of Manila, Philippine Islands,' whereas there is no such body politic as the 'United States Government of the Philippine Islands.'

"2. The record does not disclose that the plaintiff in error was arraigned, or that he pleaded to the complaint after his demurrer was overruled and he was 'ordered to plead to the complaint.'

"3. The record does not show that the plaintiff in error was present when he was tried, or, indeed, that he was present in court at any time.

"4. The punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground."

The second assignment of error was based upon a misapprehension of the fact, and has been abandoned.

The argument to support the first assignment of error is based upon certain acts of Congress and certain acts of the Philippine Commission in which the Government of the United States and the government of the Islands are distinguished.

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part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of §§ 2, 3, 4, 5, 6, and 9 of Rule 10.

For this and all rules of the Supreme Court of the United States, see Appendix 210 U. S.

And it is urged that in one of the acts (§ 3396 of the acts of the commission) it is recognized that there may be allegiance to or treason against both or "either of them," and (§ 3397) that there may be "rebellion or insurrection against the authority" of either, and (§ 3398) that there may be a conspiracy to overthrow either or to "prevent, hinder or delay the execution of any law of either." Other sections are cited, in which, it is contended, that the insular government is spoken of as an "entity," and distinguished from that of the United States. Section 1366, which defines the duty of the Attorney General, it is pointed out, especially distinguishes between "causes, civil or criminal, to which the United States or any officer thereof in his official capacity is a party," and causes, civil or criminal, to which the "government of the Philippine Islands or any officer thereof in his official capacity is a party." And still more decisively, it is urged, by subdivision "C" of § 1366, in which it is recognized that the cause of action may be for money, and that the judgment may be for money "belonging to the Government of the United States, that of the Philippine Islands or some other province." It is, therefore, contended that the Government of the United States and that of the Philippine Islands are distinct legal entities, and that there may be civil obligations to one and not to the other, that there may be governmental liability to the one and not to the other, and that proceedings, civil or criminal, against either must recognize the distinction to be sufficient to justify a judgment. To apply these principles, let us see what the information charges. It describes Weems, plaintiff in error, as "a public official of the United States Government of the Philippine Islands, to wit, a duly appointed and qualified acting disbursing official of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," and it is charged that by taking advantage of his official position to intend to "deceive and defraud the United States Government of the Philippine Islands," he falsified a public and official document. In the same manner the Gov-

ernment is designated throughout the information. It is contended that "there is no such body politic as the 'United States Government of the Philippine Islands,'" and, it is urged, that the objection does not relate to a matter of form. 'It is as substantial," it is said, as the point involved in *Carrington's Case,* 208 U. S. 1, where a military officer of the United States was prosecuted as a civil officer of the government of the Philippines. His conviction was reversed, this court holding that, "as a soldier, he was not an official of the Philippines but of the United States."

It is true that the distinctions raised are expressed in the statutes, and necessarily so. It would be difficult otherwise to provide for government where there is a paramount authority making use of subordinate instrumentalities. We have examples in the States of the Union and their lesser municipal divisions, and rights may flow from and to such lesser divisions. And the distinction in the Philippine statutes means no more than that, and, conforming to that, a distinction is clearly made in the information. Weems' official position is described as "Disbursing Officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands." There is no real uncertainty in this description, and whatever technical nicety of discrimination might have been insisted on at one time, cannot now be, in view of the provisions of the Philippine Criminal Code of Procedure, which require a public offense to be described in "ordinary and concise language," not necessarily in the words of the statute, "but in such form as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to the right." And it is further provided that "No information or complaint is insufficient nor can the trial, judgment, or other proceeding be affected by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits" (§ 10).

Carrington v. *United States,* 208 U. S. 1, is not in point. In

that case it was attempted to hold Carrington guilty of an offense as a civil officer for what he had done as a military officer. As he was the latter, he had not committed any offense under the statute. The first assignment of error is therefore not sustained.

It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the courts below, but a consideration of them is invoked under Rule 35, which provides that this court, "at its option, may notice a plain error not assigned."

It is objected on the other side that *Paraiso* v. *United States*, 207 U. S. 368, stands in the way. But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in *Paraiso* v. *United States*, but we exercised it in *Wiborg* v. *United States*, 163 U. S. 632, 658; *Clyatt* v. *United States*, 197 U. S. 207, 221, and *Crawford* v. *United States*, 212 U. S. 183. It may be said, however, that *Paraiso* v. *United States* is more directly applicable, as it was concerned with the same kind of a crime as that in the case at bar, and that it was contended there as here that the amount of fine and imprisonment imposed inflicted a cruel and unusual punishment. It may be that we were not sufficiently impressed with the importance of those contentions or saw in the circumstances of the case no reason to exercise our right of review under Rule 35. As we have already said, the rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights. And such rights are asserted in this case.

The assignment of error is that "A punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground." Weems was convicted, as we

have seen, for the falsification of a public and official document, by entering therein, as paid out, the sums of 208 and 408 pesos, respectively, as wages to certain employés of the Light House service. In other words, in entering upon his cash book those sums as having been paid out when they were not paid out, and the "truth," to use the language of the statute, was thereby perverted "in the narration of facts."

A false entry is all that is necessary to constitute the offense. Whether an offender against the statute injures any one by his act or intends to injure any one is not material, the trial court held. The court said: "It is not necessary that there be any fraud nor even the desire to defraud, nor intention of personal gain on the part of the person committing it, that a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to pervert the truth and to falsify the document, and that by it damage might result to a third party." The court further, in the definition of the nature of the offense and the purpose of the law, said, "in public documents the law takes into consideration not only private interests, but also the interests of the community," and it is its endeavor (and for this a decision of the Supreme Court of Spain, delivered in 1873, was quoted) "to protect the interest of society by the most strict faithfulness on the part of a public official in the administration of the office intrusted to him," and thereby fulfill the "responsibility of the State to the community for the official or public documents under the safeguard of the State." And this was attempted to be secured through the law in controversy. It is found in § 1 of chapter IV of the Penal Code of Spain. The caption of the section is "falsification of official and commercial documents and telegraphic dispatches." Article 300 provides as follows: "The penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification. . . . by perverting the truth in the narration of facts. . . ."

By other provisions of the code we find that there are only

two degrees of punishment higher in scale than *cadena temporal*, death, and *cadena perpetua*. The punishment of *cadena temporal* is from twelve years and one day to twenty years (arts. 28 and 96), which "shall be served" in certain "penal institutions." And it is provided that "those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." Arts. 105, 106. There are besides certain accessory penalties imposed, which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life. These penalties are defined as follows:

"Art. 42. Civil interdiction shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*. Those cases are excepted in which the law explicitly limits its effects.

"Art. 43. Subjection to the surveillance of the authorities imposes the following obligations on the persons punished.

"1. That of fixing his domicil and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing.

"2. To observe the rules of inspection prescribed.

"3. To adopt some trade, art, industry, or profession, should he not have known means of subsistence of his own.

"Whenever a person punished is placed under the surveillance of the authorities, notice thereof shall be given to the government and to the governor general."

The penalty of perpetual absolute disqualification is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to

public office, the disqualification to acquire honors, etc., and the loss of retirement pay, etc.

These provisions are attacked as infringing that provision of the bill of rights of the islands which forbids the infliction of cruel and unusual punishment. It must be confessed that they, and the sentence in this case, excite wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime. In a sense the law in controversy seems to be independent of degrees. One may be an offender against it, as we have seen, though he gain nothing and injure nobody. It has, however, some human indulgence—it is not exactly Draconian in uniformity. Though it starts with a severe penalty, between that and the maximum penalty it yields something to extenuating circumstances. Indeed, by article 96 of the Penal Code the penalty is declared to be "divisible," and the legal term of its "duration is understood as distributed into three parts forming the three degrees—that is, the minimum, medium, and maximum," being respectively from twelve years and one day to fourteen years and eight months, from fourteen years eight months and one day to seventeen years and four months, from seventeen years four months and one day to twenty years. The law therefore allows a range from twelve years and a day to twenty years, and the Government in its brief ventures to say that "the sentence of fifteen years is well within the law." But the sentence is attacked as well as the law, and what it is to be well within the law a few words will exhibit. The minimum term of imprisonment is twelve years, and that, therefore, must be imposed for "perverting the truth" in a single item of a public record, though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it. Twenty years is the maximum imprisonment, and that only can be imposed for the perversion of truth in every item of an officer's accounts, whatever be the time covered and whatever fraud it conceals or tends to conceal. Between these two possible sentences, which seem to have no adaptable relation, or rather

in the difference of eight years for the lowest possible offense and the highest possible, the courts below selected three years to add to the minimum of twelve years and a day for the falsification of two items of expenditure, amounting to the sums of 408 and 204 pesos. And the fine and "accesories" must be brought into view. The fine was four thousand pesetas, an excess also over the minimum. The "accesories" we have already defined. We can now give graphic description of Weems' sentence and of the law under which it was imposed. Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned. Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain. Such penalties for such offenses amaze those

who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

Is this also a precept of the fundamental law? We say fundamental law, for the provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning. This was decided in *Kepner* v. *United States*, 195 U. S. 100, 122; and *Serra* v. *Mortiga*, 204 U. S. 470. In *Kepner* v. *United States* this court considered the instructions of the President to the Philippine Commission and quoted from them the admonition to the commission that the government that we were establishing was not designed "for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government." But, it was pointed out, a qualification accompanied the admonition, and the commission was instructed "to bear in mind" and the people of the islands "made plainly to understand" that certain great principles of government had been made the basis of our governmental system which were deemed "essential to the rule of law and the maintenance of individual freedom." And the President further declared that there were "certain practical rules of government which we have found to be essential to the preservation of those great principles of liberty and law." These he admonished the commission to establish and maintain in the islands "for the sake of their liberty and happiness," however they might conflict with the customs or laws of procedure with which they were familiar. In view of the importance of these principles and rules, which the President said the "enlightened

thought of the Philippine Islands" would come to appreciate, he imposed their observance "upon every division and branch of the government of the Philippines."

Among those rules was that which prohibited the infliction of cruel and unusual punishment. It was repeated in the act of July 1, 1902, providing for the administration of the affairs of the civil government in the islands, and this court said of it and of the instructions of the President that they were "intended to carry to the Philippine Islands those principles of our government which the President declared to be established as rules of law for the maintenance of individual freedom." The instructions of the President and the act of Congress found in nominal existence in the islands the Penal Code of Spain, its continuance having been declared by military order. It may be there was not and could not be a careful consideration of its provisions and a determination to what extent they accorded with or were repugnant to the "great principles of liberty and law" which had been "made the basis of our governmental system." Upon the institution of the government of the commission, if not before, that consideration and determination necessarily came to the courts and are presented by this record.

What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like. *McDonald* v. *Commonwealth*, 173 Massachusetts, 322. The court, however, in that case conceded the possibility "that imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." Other cases have selected certain tyrannical acts of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition.

The provision received very little debate in Congress. We find from the Congressional Register, p. 225, that Mr. Smith of South Carolina "objected to the words 'nor cruel and

unusual punishment,' the import of them being too indefinite." Mr. Livermore opposed the adoption of the clause, saying:

"The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

The question was put on the clause, and it was agreed to by a considerable majority.

No case has occurred in this court which has called for an exhaustive definition. In *Pervear* v. *The Commonwealth*, 5 Wall. 475, it was decided that the clause did not apply to state but to national legislation. But we went further, and said that we perceive nothing excessive, or cruel or unusual in a fine for fifty dollars and imprisonment at hard labor in the house of correction for three months, which was imposed for keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors. A decision from which no one will dissent.

In *Wilkerson* v. *Utah*, 99 U. S. 130, the clause came up again for consideration. A statute of Utah provided that "a person convicted of a capital offense should suffer death by being shot, hanged or beheaded," as the court might direct, or he should "have his option as to the manner of his execution." The statute was sustained. The court pointed out that death was an usual punishment for murder, that it pre-

vailed in the Territory for many years, and was inflicted by shooting, also that that mode of execution was usual under military law. It was hence concluded that it was not forbidden by the Constitution of the United States as cruel or unusual. The court quoted Blackstone as saying that the sentence of death was generally executed by hanging, but also that circumstances of terror, pain or disgrace were sometimes superadded. "Cases mentioned by the author," the court said, "are where the person was drawn or dragged to the place of execution, in treason; or where he was disembowelled alive, beheaded and quartered, in high treason. Mention is also made of public dissection in murder and burning alive in treason committed by a female." And it was further said: "Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's treatise. Arch. Crim. Pr. Pl. (eighth edition) 548."

This court's final commentary was that "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr. L. (7th ed.), § 3405."

That passage was quoted in *In re Kemmler*, 136 U. S. 436, 447, and this comment was made: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life." The case was an application for *habeas corpus* and went off on a question of jurisdiction, this court holding that the Eighth Amendment did not apply to state legislation. It was not meant in the language we have quoted to give a comprehensive definition of cruel and unusual

punishment, but only to explain the application of the provision to the punishment of death. In other words, to describe what might make the punishment of death, cruel and unusual, though of itself it is not so. It was found as a fact by the state court that death by electricity was more humane than death by hanging.

In *O'Neil* v. *Vermont*, 144 U. S. 323, the question was raised but not decided. The reasons given for this were that because it was not as a Federal question assigned as error, and, so far as it arose under the constitution of Vermont, it was not within the province of the court to decide. Moreover, it was said, as a Federal question, it had always been ruled that the Eighth Amendment of the Constitution of the United States did not apply to the States. Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Brewer were of the opinion that the question was presented, and Mr. Justice Field, construing the clause of the Constitution prohibiting the infliction of cruel and unusual punishments, said, the other two justices concurring, that the inhibition was directed, not only against punishments which inflict torture, "but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." He said further: "The whole inhibition is against that which is excessive in the bail required or fine imposed, or punishment inflicted."

The law writers are indefinite. Story in his work on the Constitution, vol. 2, § 1903, says that the provision "is an exact transcript of a clause in the bill of rights framed in the revolution of 1688." He expressed the view that the provision "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." He, however, observed that it was "adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as has taken place in England in the arbitrary reigns of some of the Stuarts." For this he cites 2 Elliott's Debates, 345, and refers to 2 Lloyd's

Debates, 225, 226; 3 Elliott's Debates, 345. If the learned author meant by this to confine the prohibition of the provision to such penalties and punishment as were inflicted by the Stuarts, his citations do not sustain him. Indeed, the provision is not mentioned except in 2 Elliott's Debates, from which we have already quoted. The other citations are of the remarks of Patrick Henry in the Virginia Convention, and of Mr. Wilson in the Pennsylvania Convention. Patrick Henry said that there was danger in the adoption of the Constitution without a bill of rights. Mr. Wilson considered that it was unnecessary, and had been purposely omitted from the Constitution. Both, indeed, referred to the tyranny of the Stuarts. Henry said that the people of England in the bill of rights prescribed to William, Prince of Orange, upon what terms he should reign. Wilson said that "The doctrine and practice of a declaration of rights have been borrowed from the conduct of the people of England on some remarkable occasions; but the principles and maxims on which their government is constituted are widely different from those of ours." It appears, therefore, that Wilson, and those who thought like Wilson, felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation. Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealously of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty

could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say "coercive cruelty," because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. There is an example of this in *Cummings* v. *State of Missouri*, 4 Wall. 277, where the prohibition against *ex post facto* laws was given a more extensive application than what a minority of this court

thought had been given in *Calder* v. *Bull*, 3 Dall. 386. See also *Ex parte Garland*, 4 Wall. 333. The construction of the Fourteenth Amendment is also an example for it is one of the limitations of the Constitution. In a not unthoughtful opinion Mr. Justice Miller expressed great doubt whether that Amendment would ever be held as being directed against any action of a State which did not discriminate "against the negroes as a class, or on account of their race." *Slaughterhouse Cases*, 16 Wall. 36, 81. To what extent the Amendment has expanded beyond that limitation need not be instanced.

There are many illustrations of resistance to narrow constructions of the grants of power to the National Government. One only need be noticed, and we select it because it was made against a power which more than any other is kept present to our minds in visible and effective action. We mean the power over interstate commerce. This power was deduced from the eleven simple words, "to regulate commerce with foreign nations and among the several States." The judgment which established it was pronounced by Chief Justice Marshall (*Gibbons* v. *Ogden*), and reversed a judgment of Chancellor Kent, justified, as that celebrated jurist supposed, by a legislative practice of fourteen years and fortified by the opinions of men familiar with the discussions which had attended the adoption of the Constitution. Persuaded by such considerations the learned chancellor confidently decided that the Congressional power related to "external, not to internal, commerce," and adjudged that under an act of the State of New York, Livingston and Fulton had the exclusive right of using steamboats upon all of the navigable waters of the State. The strength of the reasoning was not underrated. It was supported, it was said, "by great names, by names which have all the titles to consideration that virtue, intelligence and office can bestow." The narrow construction, however, did not prevail, and the propriety of the arguments upon which it was based was questioned. It was said, in effect, that they supported a construction which "would cripple the govern-

ment and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent; . . ."

But general discussion we need not farther pursue. We may rely on the conditions which existed when the Constitution was adopted. As we have seen, it was the thought of Story, indeed, it must come to a less trained reflection than his, that government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men.

Cooley, in his "Constitutional Limitations," apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, is not very clear or decisive. He hesitates to advance definite views and expresses the "difficulty of determining precisely what is meant by cruel and unusual punishment." It was probable, however, he says, that "any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual, in a constitutional sense." And he says further that "probably any new statutory offense may be punished to the *extent* [italics ours] and in the mode permitted by the common law for offenses of a similar nature."

In the cases in the state courts different views of the provision are taken. In *State* v. *Driver*, 78 N. C. 423, 427, it was said that criminal legislation and its administration are so uniformly humane that there is seldom occasion for complaint. In that case a sentence of the defendant for assault and battery upon his wife was imprisonment in the county jail for five years, and at the expiration thereof to give security to keep the peace for five years in the sum of $500 with sureties, was held to be cruel and unusual. To sustain its judgment the court said that the prohibition against cruel and unusual punishment was not "intended to warn against merely erratic

modes of punishment or torture, but applied expressly to 'bail,' 'fines' and 'punishments.'" It was also said that "the earliest application of the provision in England was in 1689, the first year after the adoption of the bill of rights in 1688, to avoid an excessive pecuniary fine imposed upon Lord Devonshire by the court of King's Bench (11 State Trials, 1354)." Lord Devonshire was fined thirty thousand pounds for an assault and battery upon Colonel Culpepper, and the House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land." Other cases have given a narrower construction, feeling constrained thereto by the incidences of history.

In *Hobbs* v. *State*, 32 N. E. Rep. 1019, the Supreme Court of Indiana expressed the opinion that the provision did not apply to punishment by "fine or imprisonment or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel," etc.

It was further said: "The word, according to modern interpretation, does not affect legislation providing imprisonment for life or for years or the death penalty by hanging or electrocution. If it did, our laws for the punishment of crime would give no security to the citizen." That conclusion certainly would not follow and its expression can only be explained by the impatience the court exhibited at the contention in that case, which attacked a sentence of two years' imprisonment in the state prison for combining to assault, beat and bruise a man in the night time. Indeed the court ventured the inquiry "whether in this country, at the close of the nineteenth century," the provision was "not obsolete," except as an admonition to the courts "against the infliction of punishment so severe as not to 'fit the crime.'" In other words, that it had ceased to be a restraint upon legislatures and had become an admonition only to the courts not to abuse the discretion which might be entrusted to them. Other cases might

be cited in illustration, some looking backwards for examples by which to fix the meaning of the clause; others giving a more expansive and vital character to the provision, such as the President of the United States thought it possessed and admonished the Philippine Commission that it possessed as "essential [with other rights] to the rule of law and the maintenance of individual freedom."

An extended review of the cases in the state courts interpreting their respective constitutions we will not make. It may be said of all of them that there was not such challenge to the import and consequence of the inhibition of cruel and unusual punishments as the law under consideration presents. It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source.

Many of the state cases which have been brought to our attention require no comment. They are based upon sentences of courts, not upon the constitutional validity of laws. The contentions in other cases vary in merit and in their justification of serious consideration. We have seen what the contention was in *Hobbs* v. *State, supra.* In others, however, there was more inducement to an historical inquiry. In *Commonwealth* v. *Wyatt,* 6 Rand. 694, the whipping post had to be justified and was justified. In comparison with the "barbarities of quartering, hanging in chains, castration, etc.," it was easily reduced to insignificance. The court in the latter case pronounced it "odious but not unusual." Other cases have seen something more than odiousness in it, and have regarded it as one of the forbidden punishments. It is certainly as odious as the pillory, and the latter has been pro-

nounced to be within the prohibitory clause. Whipping was also sustained in *Foot* v. *State*, 59 Maryland, 264, as a punishment for wife beating. And, it may be, in *Aldridge* v. *Commonwealth*, 2 Va. Cases, 447. The law considered was one punishing free negroes and mulattoes for grand larceny. Under the law a free person of color could be condemned to be sold as a slave and transported and banished beyond the limits of the United States. Such was the judgment pronounced on the defendant by the trial court and in addition thirty-nine stripes on his bare back. The judgment was held valid on the ground that the bill of rights of the State was "never designed to control the legislative right to determine *ad libitum* upon the adequacy of punishment, but is merely applicable to the modes of punishment." Cooley in his Constitutional Limitations says that it may be well doubted if the right exist "to establish the whipping post and the pillory in those States where they were never recognized as instruments of punishment, or in those States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments." The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice. See *Ex parte Wilson*, 114 U. S. 417, 427; *Mackin* v. *United States*, 117 U. S. 348, 350.

In *Hobbs* v. *State*, *supra*, and in other cases, prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the

instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions.

Our meaning may be illustrated. For instance, in *Territory* v. *Ketchum*, 10 N. M. 718, a case that has been brought to our attention as antagonistic to our views of cruel and unusual punishments, a statute was sustained which imposed the penalty of death upon any person who should make an assault upon any railroad train, car or locomotive for the purpose and with the intent to commit murder, robbery or other felony upon a passenger or employé, express messenger or mail agent. The Supreme Court of the Territory discussed the purpose of the Eighth Amendment and expressed views opposed to those we announce in this opinion, but finally rested its decision upon the conditions which existed in the Territory and the circumstances of terror and danger which accompanied the crime denounced. So also may we mention the legislation of some of the States enlarging the common-law definition of burglary, and dividing it into degrees, fixing a severer punishment for that committed in the night time from that committed in the day time, and for arson of buildings in which human beings may be from arson of buildings which may be

vacant. In all such cases there is something more to give character and degree to the crimes than the seeking of a felonious gain and it may properly become an element in the measure of their punishment.

From this comment we turn back to the law in controversy. Its character and the sentence in this case may be illustrated by examples even better than it can be represented by words. There are degrees of homicide that are not punished so severely, nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the Government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny and other crimes. Section 86 of the Penal Laws of the United States, as revised and amended by the act of Congress of March 4, 1909, c. 321 (35 Stat. 1088), provides that any person charged with the payment of any appropriation made by Congress who shall pay to any clerk or other employé of the United States a sum less than that provided by law and require a receipt for a sum greater than that paid to and received by him shall be guilty of embezzlement, and shall be fined in double the amount so withheld and imprisoned not more than two years. The offense described has similarity to the offense for which Weems was convicted, but the punishment provided for it is in great contrast to the penalties of *cadena temporal* and its "accesories." If we turn to the legislation of the Philippine Commission we find that instead of the penalties of *cadena temporal*, medium degree, (fourteen years eight months and one day to seventeen years and four months, with fine and "accesories"), to *cadena perpetua*, fixed by the Spanish penal code for the falsification of bank notes and other instruments authorized by the law of the kingdom, it is provided that the forgery of or counterfeiting the obligations or securities of the United States or of the Philippine Islands shall be punished by a fine of not more than ten thousand pesos and by imprisonment of not more than

fifteen years. In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.

It is suggested that the provision for imprisonment in the Philippine code is separable from the accessory punishment, and that the latter may be declared illegal, leaving the former to have application. *United States* v. *Pridgeon*, 153 U. S. 48, is referred to. The proposition decided in that case was that "where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal and authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack." This proposition is not applicable to the case at bar. The imprisonment and the accessories were in accordance with the law. They were not in excess of it, but were positively required by it. It is provided in article 106, as we have seen, that those sentenced to *cadena temporal* shall labor for the benefit of the State; shall always carry a chain at the ankle, hanging from the wrist; shall be employed at hard and painful labor; shall receive no assistance whatsoever from without the penal institutions. And it is provided in article 56 that the penalty of *cadena temporal* shall include the accessory penalties.

In *In re Graham*, 138 U. S. 461, it was recognized to be "the

general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void. . . ." In *Ex parte Karstendick*, 93 U. S. 396, 399, it was said: "In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence." A similar view was expressed in *In re Mills*, 135 U. S. 263, 266. It was recognized in *United States* v. *Pridgeon* and the cases quoted which sustained it.

The Philippine code unites the penalties of *cadena temporal*, principal and accessory, and it is not in our power to separate them, even if they are separable, unless their independence is such that we can say that their union was not made imperative by the legislature. *Employers' Liability Cases*, 207 U. S. 463. This certainly cannot be said of the Philippine code, as a Spanish enactment, and the order putting it into effect in the islands did not attempt to destroy the unity of its provisions or the effect of that unity. In other words, it was put into force as it existed with all its provisions dependent. We cannot, therefore, declare them separable.

It follows from these views that, even if the minimum penalty of *cadena temporal* had been imposed, it would have been repugnant to the bill of rights. In other words, the fault is in the law, and, as we are pointed to no other under which a sentence can be imposed, the judgment must be reversed, with directions to dismiss the proceedings.

So ordered.

MR. JUSTICE LURTON, not being a member of the court when this case was argued, took no part in its decision.

MR. JUSTICE WHITE, dissenting.

The Philippine law made criminal the entry in a public record by a public official of a knowingly false statement. The

punishment prescribed for violating this law was fine and imprisonment in a penal institution at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subjected, as accessories to the main punishment, to carrying during his imprisonment a chain at the ankle hanging from the wrist, deprivation during the term of imprisonment of civil rights, and subjection besides to perpetual disqualification to enjoy political rights, hold office, etc., and, after discharge, to the surveillance of the authorities. The plaintiff in error, having been convicted of a violation of this law, was sentenced to pay a small fine and to undergo imprisonment for fifteen years, with the resulting accessory punishments above referred to. Neither at the trial in the court of first instance nor in the Supreme Court of the Philippine Islands was any question raised concerning the repugnancy of the statute defining the crime and fixing its punishment to the provision of the Philippine bill of rights, forbidding cruel and unusual punishment. Indeed, no question on that subject was even indirectly referred to in the assignments of error filed in the court below for the purpose of this writ of error. In the brief of counsel, however, in this court the contention was made that the sentence was void, because the term of imprisonment was a cruel and unusual one and therefore repugnant to the bill of rights. Deeming this contention to be of such supreme importance as to require it to be passed upon, although not raised below, the court now holds that the statute, because of the punishment which it prescribes, was repugnant to the bill of rights and therefore void, and for this reason alone reverses and remands with directions to discharge.

The Philippine bill of rights which is construed and applied is identical with the cruel and unusual punishment clause of the Eighth Amendment. Because of this identity it is now decided that it is necessary to give to the Philippine bill of rights the meaning properly attributable to the provision on the same subject found in the Eighth Amendment, as in using the language of that Amendment in the statute it is to be

presumed that Congress intended to give to the words their constitutional significance. The ruling now made, therefore, is an interpretation of the Eighth Amendment, and announces the limitation which that Amendment imposes on Congress when exercising its legislative authority to define and punish crime. The great importance of the decision is hence obvious.

Of course, in every case where punishment is inflicted for the commission of crime, if the suffering of the punishment by the wrongdoer be alone regarded the sense of compassion aroused would mislead and render the performance of judicial duty impossible. And it is to be conceded that this natural conflict between the sense of commiseration and the commands of duty is augmented when the nature of the crime defined by the Philippine law and the punishment which that law prescribes is only abstractly considered, since the impression is at once produced that the legislative authority has been severely exerted. I say only abstractly considered, because the first impression produced by the merely abstract view of the subject is met by the admonition that the duty of defining and punishing crime has never in any civilized country been exerted upon mere abstract considerations of the inherent nature of the crime punished, but has always involved the most practical consideration of the tendency at a particular time to commit certain crimes, of the difficulty of repressing the same, and of how far it is necessary to impose stern remedies to prevent the commission of such crimes. And, of course, as these considerations involve the necessity for a familiarity with local conditions in the Philippine Islands which I do not possess, such want of knowledge at once additionally admonishes me of the wrong to arise from forming a judgment upon insufficient data or without a knowledge of the subject-matter upon which the judgment is to be exerted. Strength, indeed, is added to this last suggestion by the fact that no question concerning the subject was raised in the courts below or there considered, and, therefore, no opportunity was afforded those courts, presumably, at least, relatively familiar with the local

conditions, to express their views as to the considerations which may have led to the prescribing of the punishment in question. Turning aside, therefore, from mere emotional tendencies and guiding my judgment alone by the aid of the reason at my command, I am unable to agree with the ruling of the court. As, in my opinion, that ruling rests upon an interpretation of the cruel and unusual punishment clause of the Eighth Amendment, never before announced, which is repugnant to the natural import of the language employed in the clause, and which interpretation curtails the legislative power of Congress to define and punish crime by asserting a right of judicial supervision over the exertion of that power, in disregard of the distinction between the legislative and judicial departments of the Government, I deem it my duty to dissent and state my reasons.

To perform this duty requires at the outset a precise statement of the construction given by the ruling now made to the provision of the Eighth Amendment. My inability to do this must, however, be confessed, because I find it impossible to fix with precision the meaning which the court gives to that provision. Not for the purpose of criticising, but solely in order to indicate my perplexity on the subject, the reasons for my doubt are briefly given. Thus to my mind it appears as follows: First. That the court interprets the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature of the crime, and casts upon the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute, and if not to decline to enforce it. This seems to me to be the case, because of the reference made by the court to the harshness of the principal punishment (imprisonment), and its comments as to what it deems to be the severity, if not inhumanity, of the accessories which result from or accompany it, and the declaration in substance that these things offend against the just principle of proportioning punishment to the nature of the crime punished, stated to be a

fundamental precept of justice and of American criminal law. That this is the view now upheld, it seems to me, is additionally demonstrated by the fact that the punishment for the crime in question as imposed by the Philippine law is compared with other Philippine punishments for crimes deemed to be less heinous, and the conclusion is deduced that this fact in and of itself serves to establish that the punishment imposed in this case is an exertion of unrestrained power condemned by the cruel and unusual punishment clause.

Second. That this duty of apportionment compels not only that the lawmaking power should adequately apportion punishment for the crimes as to which it legislates, but also further exacts that the performance of the duty of apportionment must be discharged by taking into view the standards, whether lenient or severe, existing in other and distinct jurisdictions, and that a failure to do so authorizes the courts to consider such standards in their discretion and judge of the validity of the law accordingly. I say this because, although the court expressly declares in the opinion, when considering a case decided by the highest court of one of the Territories of the United States, that the legislative power to define and punish crime committed in a Territory, for the purpose of the Eighth Amendment, is separate and distinct from the legislation of Congress, yet in testing the validity of the punishment affixed by the law here in question, proceeds to measure it not alone by the Philippine legislation, but by the provisions of several acts of Congress punishing crime and in substance declares such Congressional laws to be a proper standard, and in effect holds that the greater proportionate punishment inflicted by the Philippine law over the more lenient punishments prescribed in the laws of Congress establishes that the Philippine law is repugnant to the Eighth Amendment.

Third. That the cruel and unusual punishment clause of the Eighth Amendment controls not only the exertion of legislative power as to modes of punishment, proportionate or otherwise, but addresses itself also to the mainspring of the

legislative motives in enacting legislation punishing crime in a particular case, and therefore confers upon courts the power to refuse to enforce a particular law defining and punishing crime if in their opinion such law does not manifest that the lawmaking power, in fixing the punishment, was sufficiently impelled by a purpose to effect a reformation of the criminal. This is said because of the statements contained in the opinion of the court as to the legislative duty to shape legislation not only with a view to punish but to reform the criminal, and the inferences which I deduce that it is conceived that the failure to do so is a violation of constitutional duty.

Fourth. That the cruel and unusual punishment clause does not merely limit the legislative power to fix the punishment for crime by excepting out of that authority the right to impose bodily punishments of a cruel kind, in the strict acceptation of those terms, but limits the legislative discretion in determining to what degree of severity an appropriate and usual mode of punishment may in a particular case be inflicted, and therefore endows the courts with the right to supervise the exercise of legislative discretion as to the adequacy of punishment, even although resort is had only to authorized kinds of punishment, thereby endowing the courts with the power to refuse to enforce laws punishing crime if in the judicial judgment the legislative branch of the Government has prescribed a too severe punishment.

Not being able to assent to these, as it to me seems, in some respects conflicting, or at all events widely divergent propositions, I shall consider them all as sanctioned by the interpretation now given to the prohibition of the Eighth Amendment, and with this conception in mind shall consider the subject.

Before approaching the text of the Eighth Amendment to determine its true meaning let me briefly point out why in my opinion it cannot have the significance which it must receive to sustain the propositions rested upon it. In the first place, if it be that the lawmaker in defining and punishing crime is imperatively restrained by constitutional provisions to apportion

punishment by a consideration alone of the abstract heinousness of the offenses punished, it must result that the power is so circumscribed as to be impossible of execution, or at all events is so restricted as to exclude the possibility of taking into account in defining and punishing crime all those considerations concerning the condition of society, the tendency to commit the particular crime, the difficulty of detecting the same, the necessity for resorting to stern measures of repression, and various other subjects which have at all times been deemed essential to be weighed in defining and punishing crime. And certainly the paralysis of the discretion vested in the lawmaking authority which the propositions accomplish is immeasurably magnified when it is considered that this duty of proportioning punishment requires the taking into account of the standards prevailing in other or different countries or jurisdictions, thereby at once exacting that legislation on the subject of crime must be proportioned, not to the conditions to which it is intended to apply, but must be based upon conditions with which the legislation when enacted will have no relation or concern whatever. And when it is considered that the propositions go further and insist that if the legislation seems to the judicial mind not to have been sufficiently impelled by motives of reformation of the criminal, such legislation defining and punishing crime is to be held repugnant to constitutional limitations, the impotency of the legislative power to define and punish crime is made manifest. When to this result is added the consideration that the interpretation by its necessary effect does not simply cause the cruel and unusual punishment clause to carve out of the domain of legislative authority the power to resort to prohibited kinds of punishments, but subjects to judicial control, the degree of severity with which authorized modes of punishment may be inflicted, it seems to me that the demonstration is conclusive that nothing will be left of the independent legislative power to punish and define crime, if the interpretation now made be pushed in future application to its logical conclusion.

But let me come to the Eighth Amendment, for the purpose of stating why the clause in question does not, in my opinion, authorize the deductions drawn from it, and therefore does not sanction the ruling now made.

I shall consider the Amendment *a*, as to its origin in the mother country and the meaning there given to it prior to the American Revolution; *b*, its migration and existence in the States after the Revolution and prior to the adoption of the Constitution; *c*, its incorporation into the Constitution and the construction given to it in practice from the beginning to this time; and, *d*, the judicial interpretation which it has received, associated with the construction affixed, both in practice and judicially, to the same provision found in various state constitutions or bills of rights.

Without going into unnecessary historical detail, it is sufficient to point out, as did the court in *In re Kemmler*, 136 U. S. 436, 446, that "the provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled An act declaring the rights and liberties of the subject and settling the succession of the crown." And this act, it is to be observed, was but in regular form a crystallization of the declaration of rights of the same year. Hallam, Const. Hist., vol. 3, p. 106. It is also certain, as declared in the *Kemmler case*, that "this declaration of rights had reference to the acts of the executive and judicial departments of the government of England," since it but embodied the grievances which it was deemed had been suffered by the usurpations of the crown and transgressions of authority by the courts. In the recitals, both in the declaration of rights and the bill of rights, the grievances complained of were that illegal and cruel punishments had been inflicted, "which are utterly and directly contrary to the known laws and statutes and freedom of this realm," while in both the declaration and the bill of rights the remedy formulated was a declaration against the infliction of cruel and unusual punishments.

Whatever may be the difficulty, if any, in fixing the mean-

ing of the prohibition at its origin, it may not be doubted, and indeed is not questioned by any one, that the cruel punishments against which the bill of rights provided were the atrocious, sanguinary and inhuman punishments which had been inflicted in the past upon the persons of criminals. This being certain, the difficulty of interpretation, if any is involved, in determining what was intended by the unusual punishments referred to and which were provided against. Light, however, on this subject is at once afforded by observing that the unusual punishments provided against were responsive to and obviously considered to be the illegal punishments complained of. These complaints were, first, that customary modes of bodily punishments, such as whipping and the pillory, had, under the exercise of judicial discretion, been applied to so unusual a degree as to cause them to be illegal; and, second, that in some cases an authority to sentence to perpetual imprisonment had been exerted under the assumption that power to do so resulted from the existence of judicial discretion to sentence to imprisonment, when it was unusual, and therefore illegal, to inflict life imprisonment in the absence of express legislative authority. In other words, the prohibitions, although conjunctively stated, were really disjunctive, and embraced as follows: *a*, Prohibitions against a resort to the inhuman bodily punishments of the past; *b*, or, where certain bodily punishments were customary, a prohibition against their infliction to such an extent as to be unusual and consequently illegal; *c*, or the infliction, under the assumption of the exercise of judicial discretion, of unusual punishments not bodily which could not be imposed except by express statute, or which were wholly beyond the jurisdiction of the court to impose.

The scope and power of the guarantee as we have thus stated it will be found portrayed in the reasons assigned by the members of the House of Lords who dissented against two judgments for perjury entered in the King's Bench against Titus Oates. 10 Howell's State Trials, col. 1325.

The judgments and the dissenting reasons are copied in the margin.[1]

As well the dissent referred to as the report of the conferees

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[1] Judgment against Titus Oates upon conviction upon two indictments for perjury, as announced by the court, (10 Howell's State Trials, col. 1316–1317 & 1325).

"First, The Court does order for a fine, that you pay 1000 marks upon each Indictment.

"Secondly, That you be stript of all your Canonical Habits.

"Thirdly, The Court does award, That you do stand upon the Pillory, and in the Pillory, here before Westminster-hall gate, upon Monday next, for an hour's time, between the hours of 10 and 12; with a paper over your head (which you must first walk with round about to all the Courts in Westminster-hall) declaring your crime. And that is upon the first Indictment.

"Fourthly, (on the Second Indictment), upon Tuesday, you shall stand upon, and in the Pillory, at the Royal Exchange in London, for the space of an hour, between the hours of twelve and two; with the same inscription.

"You shall upon the next Wednesday be whipped from Aldgate to Newgate.

"Upon Friday, you shall be whipped from Newgate to Tyburn, by the hands of the common hangman.

"But, Mr. Oates, we cannot but remember, there were several particular times you swore false about; and therefore, as annual commemorations, that it may be known to all people as long as you live, we have taken special care of you for an annual punishment.

"Upon the 24th of April every year, as long as you live, you are to stand upon the Pillory and in the Pillory, at Tyburn, just opposite to the gallows, for the space of an hour, between the hours of ten and twelve.

"You are to stand upon, and in the Pillory, here at Westminster-hall gate, every 9th of August, in every year, so long as you live. And that it may be known what we mean by it, 'tis to remember, what he swore about Mr. Ireland's being in town between the 8th and 12th of August.

"You are to stand upon, and in the Pillory, at Charing-cross, on the 10th of August, every year, during your life, for an hour, between ten and twelve.

"The like over-against the Temple gate, upon the 11th.

"And upon the 2d of September, (which is another notorious time,

on the part of the House of Commons, made to that body concerning a bill to set aside the judgments against Oates above referred to, (Cobbett's Parl. History, vol. V, col. 386), proceeded upon the identity of what was deemed to be the illegal practises complained of and which were intended to be rectified by the prohibition against cruel and unusual punishments

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which you cannot but be remember'd of) you are to stand upon, and in the Pillory, for the space of one hour, between twelve and two, at the Royal Exchange; and all this you are to do every year, during your life; and to be committed close prisoner, as long as you live."

Dissenting statement of a minority of the House of Lords:

"1. For that the king's bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.

"2. For that the said judgments are barbarous, inhuman, and unchristian; and there is no precedents to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him.

"3. For that the particular matters upon which the indictments were found, were the points objected against Mr. Titus Oates' testimony in several of the trials, in which he was allowed to be a good and credible witness, though testified against him by most of the same persons, who witnessed against him upon those indictments.

"4. For that this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed.

"5. Because sir John Holt, sir Henry Pollexfen, the two chief justices, and sir Robert Atkins chief baron, with six judges more (being all that where then present), for these and many other reasons, did, before us, solemnly deliver their opinions, and unanimously declare, That the said judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed.

"6. Because it is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled, and by their declaration engrossed in parchment, and enrolled among the records of parliament, and recorded in chancery; whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."

made in the declaration of rights, and treated that prohibition, as already stated, as substantially disjunctive, and as forbidding the doing of the things we have above enumerated. See, for the disjunctive character of the provision, Stephen, Comm. Law of England, 15th ed., p. 379.

When the origin and purpose of the declaration and the bill of rights is thus fixed it becomes clear that that declaration is not susceptible of the meaning now attributed to the same language found in the Constitution of the United States. That in England it was nowhere deemed that any theory of proportional punishment was suggested by the bill of rights or that a protest was thereby intended against the severity of punishments, speaking generally, is demonstrated by the practise which prevailed in England as to punishing crime from the time of the bill of rights to the time of the American Revolution. Speaking on this subject, Stephen, in his history of the criminal law of England, vol. 1, pp. 470–471, says:

"The severity of the criminal law was greatly increased all through the eighteenth century by the creation of new felonies without benefit of clergy. . . . However, after making all deductions on these grounds, there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system."

For the sake of brevity a review of the practises which prevailed in the colonial period will not be referred to. Therefore, attention is at once directed to the express guarantees in certain of the state constitutions adopted after the Declaration of Independence and prior to the formation of the Constitution of the United States, and the circumstances connected with the subsequent adoption of the Eighth Amendment.

In 1776, Maryland, in a bill of rights declared (1 Charters and Constitutions, pp. 818, 819):

"XIV. That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State; and no law to inflict

cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter."

"XXII. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law."

The constitution of North Carolina of 1776 in general terms prohibited the infliction of "cruel or unusual punishments."

Virginia, by § 9 of the bill of rights adopted in 1776, provided as follows:

"That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In the Massachusetts declaration of rights of 1780 a direct prohibition was placed upon the infliction by magistrates or courts of cruel or unusual punishments, the provision being as follows:

"ART. XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The declaration of rights of New Hampshire of 1784, was as follows:

"XVIII. All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity exerted is against all offenses; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind."

"XXXIII. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The substantial identity between the provisions of these several constitutions or bills of rights shows beyond doubt that

their meaning was understood, that is to say, that the significance attributed to them in the mother country as the result of the bill of rights of 1689 was appreciated, and that it was intended in using the identical words to give them the same well-understood meaning. It is to be observed that the New Hampshire bill of rights contains a clause admonishing as to the wisdom of the apportionment of punishment of crime according to the nature of the offense, but in marked contrast to the reënactment, in express and positive terms, of the cruel and unusual punishment clause of the English bill of rights, the provision as to apportionment is merely advisory, additionally demonstrating the precise and accurate conception then entertained of the nature and character of the prohibition adopted from the English bill of rights.

Undoubtedly, in the American States, prior to the formation of the Constitution, the necessity for the protection afforded by the cruel and unusual punishment guarantee of the English bill of rights had ceased to be a matter of concern, because as a rule the cruel bodily punishments of former times were no longer imposed, and judges, where moderate bodily punishment was usual, had not, under the guise of discretion, directed the infliction of such punishments to so unusual a degree as to transcend the limits of discretion and cause the punishment to be illegal, and had also not attempted, in virtue of mere discretion, to inflict such unusual and extreme punishments as had always been deemed proper to be inflicted only as the result of express statutory authority. Despite these considerations, it is true that some of the solicitude which arose after the submission of the Constitution for ratification, and which threatened to delay or prevent such ratification, in part at least was occasioned by the failure to guarantee against the infliction of cruel and unusual punishments. Thus, in the Massachusetts convention, Mr. Holmes, discussing the general result of the judicial powers conferred by the Constitution and referring to the right of Congress to define and fix the punishment for crime, said (2 El. Deb. 111):

"They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."

That the opposition to the ratification in the Virginia convention was earnestly and eloquently voiced by Patrick Henry is too well known to require anything but statement. That the absence of a guarantee against cruel and unusual punishment was one of the causes of the solicitude by which Henry was possessed is shown by the debates in that convention. Thus Patrick Henry said (3 El. Deb. 447):

"In this business of legislation, your members of Congress will lose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome when we can by a small interference prevent our rights from being lost? If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds? But, if you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication."

These observations, it is plainly to be seen, were addressed to the fear of the repetition either by the sanction of law or by the practice of courts, of the barbarous modes of bodily punishment or torture, the protest against which was embodied in the bill of rights in 1689.

The ultimate recognition by Henry of the patriotic duty to ratify the Constitution and trust to the subsequent adoption of a bill of rights, the submission and adoption of the first ten amendments as a bill of rights which followed ratification, the connection of Mr. Madison with the drafting of the amendments, and the fact that the Eighth Amendment is in the precise words of the guarantee on that subject in the Virginia bill of rights, would seem to make it perfectly clear that it was only intended by that Amendment to remedy the wrongs which had been provided against in the English bill of rights, and which were likewise provided against in the Virginia provision, and therefore were intended to guard against the evils so vividly portrayed by Henry in the debate which we have quoted. That this was the common understanding which must have existed on the subject is plainly to be inferred from the fact that the Eighth Amendment was substantially submitted by Congress without any debate on the subject. 2 Elliot's Deb. 225. Of course, in view of the nature and character of the government which the Constitution called into being, the incorporation of the Eighth Amendment caused its provisions to operate a direct and controlling prohibition upon the legislative branch (as well as all other departments), restraining it from authorizing or directing the infliction of the cruel bodily punishments of the past, which was one of the evils sought to be prevented for the future by the English bill of rights, and also restrained the courts from exerting and Congress from empowering them to select and exert by way of discretion modes of punishment which were not usual, or usual modes of punishment to a degree not usual and which could alone be imposed by express authority of law. But this obvious result lends no

support to the theory that the adoption of the Amendment operated or was intended to prevent the legislative branch of the Government from prescribing, according to its conception of what public policy required, such punishments, severe or otherwise, as it deemed necessary for the prevention of crime, provided only resort was not had to the infliction of bodily punishments of a cruel and barbarous character against which the Amendment expressly provided. Not to so conclude is to hold that because the Amendment in addition to depriving the lawmaking power of the right to authorize the infliction of cruel bodily punishments had restricted the courts, where discretion was possessed by them, from exerting the power to punish by a mode or in a manner so unusual as to require legislative sanction, it thereby deprived Congress of the power to sanction the punishments which the Amendment forbade being imposed merely because they were not sanctioned. In other words, that because the power was denied to the judiciary to do certain things without legislative authority, thereby the right on the part of the legislature to confer the authority was taken away. And this impossible conclusion would lead to the equally impossible result that the effect of the Amendment was to deprive Congress of its legitimate authority to punish crime, by prescribing such modes of punishment, even although not before employed, as were appropriate for the purpose.

That no such meaning as is now ascribed to the Amendment was attributed to it at the time of its adoption is shown by the fact that not a single suggestion that it had such a meaning is pointed to, and that on the other hand the practise from the very beginning shows directly to the contrary and demonstrates that the very Congress that adopted the Amendment construed it in practice as I have construed it. This is so, since the first crimes act of the United States prescribed a punishment for crime utterly without reference to any assumed rule of proportion or of a conception of a right in the judiciary to supervise the action of Congress in respect to

the severity of punishment, excluding always the right to impose as a punishment the cruel bodily punishments which were prohibited. What clearer demonstration can there be of this than the statement made by this court in *Ex parte Wilson*, 114 U. S. 427, of the nature of the first crimes act, as follows:

"By the first Crimes Act of the United States, forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable with death; most other offences were punished by fine and imprisonment; whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods; disqualification to hold office was part of the punishment of bribery; and those convicted of perjury or subornation of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United States. Act of April 30, 1790, ch. 9; 1 Stat. 112–117; Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wilson's Works, 380, 381."

And it is, I think, beyond power even of question that the legislation of Congress from the date of the first crimes act to the present time but exemplifies the truth of what has been said, since that legislation from time to time altered modes of punishment, increasing or diminishing the amount of punishment as was deemed necessary for the public good, prescribing punishments of a new character, without reference to any assumed rule of apportionment or the conception that a right of judicial supervision was deemed to obtain. It is impossible with any regard for brevity to demonstrate these statements by many illustrations. But let me give a sample from legislation enacted by Congress of the change of punishment. By § 14 of the first crimes act (Art. April 30, 1790, ch. 9, 1 Stat. 115), forgery, etc., of the public securities of the United States, or the knowingly ut-

tering and offering for sale of forged or counterfeited securities of the United States with intent to defraud, was made punishable by death. The punishment now is a fine of not more than $5,000, and imprisonment at hard labor for not more than fifteen years. Rev. Stat., § 5414.

By the first crimes act also, as in numerous others since that time, various additional punishments for the commission of crime were imposed, prescribing disqualification to hold office, to be a witness in the courts, etc., and as late as 1865 a law was enacted by Congress which prescribed as a punishment for crime the disqualification to enjoy rights of citizenship. Rev. Stat., §§ 1996, 1997, 1998.

Comprehensively looking at the rulings of this court,[1] it may be conceded that hitherto they have not definitely interpreted the precise meaning of the clause in question, because in most of the cases in which the protection of the Amendment has been invoked the cases came from courts of last resort of States, and the opinions leave room for the contention that they proceeded upon the implied assumption that the Eighth Amendment did not govern the States by virtue of the adoption of the Fourteenth Amendment. However, in *Wilkerson* v. *Utah*, 99 U. S. 130, a case coming to this court from the Territory of Utah, the meaning of the clause of the Eighth Amendment in question came directly under review. The question for decision was whether a sentence to death by shooting, which had been imposed by the court under the assumed exercise of a discretionary power to fix the mode of execution of the sentence, was repugnant to the clause. While the court in deciding that it was not, did not undertake to fully interpret the meaning of the clause, it nevertheless, reasoning by exclusion, expressly negatived the construction now placed upon it. It was said (pp. 135–136):

[1] *Pervear* v. *Massachusetts*, 5 Wall. 475; *Wilkerson* v. *Utah*, 99 U. S. 130; *In re Kemmler*, 136 U. S. 436; *McElvaine* v. *Brush*, 142 U. S. 155; *Howard* v. *Fleming*, 191 U. S. 126.

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.), 408; Wharton, Cr. L. (7th ed.), sec. 3405."

And it was doubtless this ruling which caused the court subsequently to say in *In re Kemmler*, 136 U. S. 436, 447:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Generally viewing the action of the States in their bills of right as to the prohibition against inhuman or cruel and unusual punishments, it is true to say that those provisions substantially conform to the English bill of rights and to the provision of the Eighth Amendment we are considering, some using the expression cruel and unusual, others the more accurate expression cruel or unusual, and some cruel only, and in a few instances a provision requiring punishments to be proportioned to the nature of the offense is added to the inhibition against cruel and unusual punishments. In one (Illinois) the prohibition against cruel and unusual punishments is not expressed, although proportional punishment is commanded, yet in *Kelley* v. *The People*, 115 Illinois, 583, discussing the extent of punishment inflicted by a criminal statute, the Supreme Court of Illinois declared that "it would not be for the court to say the penalty was not proportioned to the nature of the offense." In another State (Ohio) where in the early constitution of the State proportionate punishment was conjoined with the cruel and unusual punishment provision, the proportionate provision was omitted in a later constitution.

Here, again, it is true to say, time forbidding my indulging in a review of the statutes, that the legislation of all the States is absolutely in conflict with and repugnant to the construction now given to the clause, since that legislation but exemplifies the exertion of legislative power to define and punish crime according to the legislative conception of the necessities of the situation, without the slightest indication of the assumed duty to proportion punishments, and without the suggestion of the existence of judicial power to control the legislative discretion, provided only that the cruel bodily punishments forbidden were not resorted to. And the decisions of the state courts of last resort, it seems to me, with absolute uniformity and without a single exception from the beginning, proceed upon this conception. It is true that when the reasoning employed in the various cases is critically examined a difference of conception will be manifested as to the occasion for the adoption of the English bill of rights and of the remedy which it provided. Generally speaking, when carefully analyzed, it will be seen that this difference was occasioned by treating the provision against cruel and unusual punishment as conjunctive instead of disjunctive, thereby overlooking the fact, which I think has been previously demonstrated to be the case, that the term unusual, as used in the clause, was not a qualification of the provision against cruel punishments, but was simply synonymous with illegal, and was mainly intended to restrain the courts, under the guise of discretion, from indulging in an unusual and consequently illegal exertion of power. Certain it is, however, whatever may be these differences of reasoning, there stands out in bold relief in the State cases, as it is given to me to understand them, without a single exception, the clear and certain exclusion of any prohibition upon the lawmaking power to determine the adequacy with which crime shall be punished, provided only the cruel bodily punishments of the past are not resorted to. Let me briefly refer to some of the cases.

In *Aldridge* v. *Commonwealth*, 2 Va. Cas. 447, decided about twenty years after the ratification of the Eighth Amendment, speaking concerning the evils to which the guarantee of the Virginia bill of rights against cruel and unusual punishments was addressed, the court, after referring to the punishments usually applicable in that State to crime at the time of the adoption of the bill of rights of Virginia, said (p. 450):

"We consider these sanctions as sufficiently rigorous, and we knew that the best heads and hearts of the land of our ancestors had long and loudly declaimed against the wanton cruelty of many of the punishments practiced in other countries; and this section in the bill of rights was framed effectually to exclude these, so that no future legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our code by the introduction of any of those odious modes of punishment."

And, four years later, in 1828, applying the same doctrine in *Commonwealth* v. *Wyatt*, 6 Rand. 694, where a punishment by whipping was challenged as contrary to the Virginia bill of rights, the court said (p. 700): "The punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

Until 1865 there was no provision in the constitution of Georgia expressly guaranteeing against cruel and unusual punishments. The constitution of that year, however, contained a clause identical in terms with the Eighth Amendment, and the scope of the guarantee arose for decision in 1872 in *Whitten* v. *State*, 47 Georgia, 297. The case was this: Upon a conviction for assault and battery Whitten had been sentenced to imprisonment or the payment of a fine of $250 and costs. The contention was that this sentence was so disproportionate to the offense committed as to be cruel and unusual and repugnant to the guarantee. In one of its immediate aspects the case involved the guarantee against excessive fines, but as the imprisonment was the coercive means for the payment of the fine, in that aspect the case

involved the cruel and unusual punishment clause, and the court so considered, and, in coming to interpret the clause said (p. 301):

"Whether the law is unconstitutional, a violation of that article of the Constitution which declares excessive fines shall not be imposed nor cruel and unusual punishments inflicted, is another question. The latter clause was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, castration, etc. When adopted by the framers of the Constitution of the United States, larceny was generally punished by hanging; forgeries, burglaries, etc., in the same way, for, be it remembered, penitentiaries are of modern origin, and I doubt if it ever entered into the mind of men of that day that a crime such as this witness makes the defendant guilty of deserved a less penalty than the judge has inflicted. It would be an interference with matters left by the Constitution to the legislative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and made one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion."

In *State* v. *White* (1890), 44 Kansas, 514, it was sought to reverse a sentence of five years' imprisonment in the penitentiary, imposed upon a boy of sixteen for statutory rape. The girl was aged sixteen, and had consented. It was contended that if the statute applied it was unconstitutional and void, "for the reason that it conflicts with section 9 of the bill of rights, because it inflicts cruel and unusual punishment, and is in conflict with the spirit of the bill of rights generally, and is in violation of common sense, common reason, and common justice."

The court severely criticised the statute. After deciding that the offense was embraced in the statute, the court said:

"With respect to the severity of the punishment, while we think it is true that it is a severer one than has ever before been provided for in any other State or county for such an offense, yet we cannot say that the statute is void for that reason. Imprisonment in the penitentiary at hard labor is not of itself a cruel or unusual punishment, within the meaning of section 9 of the bill of rights of the Constitution, for it is a kind of punishment which has been resorted to ever since Kansas has had any existence, and is a kind of punishment common in all civilized countries. That section of the Constitution probably, however, relates to the kind of punishment to be inflicted, and not to its duration. Although the punishment in this case may be considered severe, and much severer indeed than the punishment for offenses of much greater magnitude, as adultery, or sexual intercourse coupled with seduction, yet we cannot say that the act providing for it is unconstitutional or void."

In *State* v. *Hogan* (1900), 63 Ohio St. 218, the court sustained a "tramp law," which prescribed, as the punishment to be imposed on a tramp for threatening to do injury to the person of another, imprisonment in the penitentiary not more than three years nor less than one year. In the course of the opinion the court said:

"The objection that the act prescribes a cruel and unusual punishment we think not well taken. Imprisonment at hard labor is neither cruel nor unusual. It may be severe in the given instance, but that is a question for the lawmaking power. *In re Kemmler*, 136 U. S. 436; *Cornelison* v. *Com.*, 84 Kentucky, 583. The punishment, to be effective, should be such as will prove a deterrent. The tramp cares nothing for a jail sentence. Often he courts it. A workhouse sentence is less welcome, but there are but few workhouses in the State. A penitentiary sentence is a real punishment. There he has to work, and cannot shirk."

In Minnesota a register of deeds was convicted of misappropriating the sum of $62.50, which should have been turned

over by him to the county treasurer. He was sentenced to pay a fine of $500 and be imprisoned at hard labor for one year. The contention that the sentence was repugnant to the state constitutional guarantee against cruel and unusual punishment was considered and disposed of by the court in *State* v. *Borgstrom*, 69 Minnesota, 508, 520. Among other things the court said:

"It is claimed that the sentence imposed was altogether disproportionate to the offense charged, and of which the defendant was convicted, and comes within the inhibition of Const. art. 1, § 5, that no cruel or unusual punishments be inflicted. . . . We are not unmindful of the importance of this question, and have given to it that serious and thorough examination which such importance demands. . . . In England there was a time when punishment was by torture, by loading him with weights to make him confess. Traitors were condemned to be drowned, disemboweled, or burned. It was the 'law that the offender shall be drawn, or rather dragged, to the gallows; he shall be hanged and cut down alive; his entrails shall be removed and burned while he yet lives; his head shall be decapitated; his body divided into four parts.' Browne, Bl. Comm. 617. For certain other offenses the offender was punished by cutting off the hands or ears, or boiling in oil, or putting in the pillory. By the Roman law a parricide was punished by being sewed up in a leather sack with a live dog, a cock, a viper, and an ape, and cast into the sea. These punishments may properly be termed cruel, but happily the more humane spirit of this nation does not permit such punishment to be inflicted upon criminals. Such punishments are not warranted by the laws of nature or society, and we find that they are prohibited by our Constitution. But, within this limitation or restriction, the legislature is ordinarily the judge of the expediency of creating new crimes and of prescribing the penalty. . . . While the amount of money misappropriated in this instance was not great, the legislature evidently had in mind the fact that the misappropriation by a

public official of the public money was destructive of the public rights and the stability of our government. But fine and imprisonment are not ordinarily cruel and unusual punishments. . . ."

In *Territory* v. *Ketchum*, 10 N. M. 721, the court considered whether a statute which had recently been put in force and which imposed the death penalty instead of a former punishment of imprisonment, for an attempt at train robbery, was cruel and unusual. In sustaining the validity of the law the court pointed out the conditions of society which presumably had led the lawmaking power to fix the stern penalty, and after a lengthy discussion of the subject it was held that the law did not impose punishment which was cruel or unusual.

The cases just reviewed are typical, and I therefore content myself with noting in the margin many others to the same general effect.[1]

In stating, as I have done, that in my opinion no case could be found sustaining the proposition which the court now

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[1] Cases decided in state and territorial courts of last resort, involving the question whether particular punishments were cruel and unusual: *Ex parte Mitchell*, 70 California, 1; *People* v. *Clark*, 106 California, 32; *Fogarty* v. *State*, 80 Georgia, 450; *Kelley* v. *State*, 115 Illinois, 583; *Hobbs* v. *State*, 133 Indiana, 404; *State* v. *Teeters*, 97 Iowa, 458; *In re Tutt*, 55 Kansas, 705; *Cornelison* v. *Commonwealth*, 84 Kentucky, 583, 608; *Harper* v. *Commonwealth*, 93 Kentucky, 290; *State* v. *Baker*, 105 Louisiana, 378; *Foot* v. *State*, 59 Maryland, 264, 267; *Commonwealth* v. *Hitchings*, 5 Gray, 482; *McDonald* v. *Commonwealth*, 173 Massachusetts, 322; *Luton* v. *Newaygo Circuit Judge*, 69 Michigan, 610; *People* v. *Morris*, 80 Michigan, 637; *People* v. *Smith*, 94 Michigan, 644; *People* v. *Whitney*, 105 Michigan, 622; *Dummer* v. *Nungesser*, 107 Michigan, 481; *People* v. *Huntley*, 112 Michigan, 569; *State* v. *Williams*, 77 Missouri, 310; *Ex parte Swann*, 96 Missouri, 44; *State* v. *Moore*, 121 Missouri, 514; *State* v. *Van Wye*, 136 Missouri, 227; *State* v. *Gedicke*, 14 Vroom, 86; *Garcia* v. *Territory*, 1 N. M. 415; *State* v. *Apple*, 121 N. C. 584; *State* v. *Barnes*, 3 N. D. 319; *State* v. *Becker*, 3 S. D. 29; *State* v. *Hodgson*, 66 Vermont, 134; *State* v. *De Lane*, 80 Wisconsin, 259; *State* v. *Fackler*, 91 Wisconsin, 418; *In re MacDonald*, 4 Wyoming, 150.

holds, I am of course not unmindful that a North Carolina case (*State* v. *Driver*, 78 N. C. 432) is cited by the court as authority, and that a Louisiana case (*State ex rel. Garvey et al.* v. *Whitaker, Recorder*, 48 La. Ann. 527) is sometimes referred to as of the same general tenor. A brief analysis of the *Driver case* will indicate why in my opinion it does not support the contention based upon it. In that case the accused was convicted of assault and battery, and sentenced to imprisonment for five years in the county jail. The offense was a common-law misdemeanor, and the punishment not being fixed by statute, as observed by the court (page 429), was left to the discretion of the judge. In testing whether the term of the sentence was unusual and therefore illegal, the court held that a long term of imprisonment in the county jail was unlawful because unusual, and was a gross abuse by the lower court of its discretion. Although the court made reference to the constitutional guarantee, there is not the slightest indication in its opinion that it was deemed there would have been power to set aside the sentence had it been inflicted by virtue of an express statutory command. But this aside, it seems to me as the test applied in the *Driver case* to determine what was an unusual punishment in North Carolina was necessarily so local in character that it affords no possible ground here for giving an erroneous meaning to the Eighth Amendment. I say this because an examination of the opinion will disclose that it proceeded upon a consideration of the disadvantages peculiar to an imprisonment in a county jail in North Carolina as compared with the greater advantages to arise from the imprisonment for a like term in the penitentiary, the court saying:

"Now, it is true our terms of imprisonment are much longer, but they are in the penitentiary, where a man may live and be made useful; but a county jail is a close prison, where life is soon in jeopardy, and where the prisoner is not only useless but a heavy public expense."

As to the Louisiana case, I content myself with saying that it, in substance, involved merely the question of error com-

mitted by a magistrate in imposing punishment for many offenses when, under the law, the offense was a continuing and single one.

From all the considerations which have been stated I can deduce no ground whatever which to my mind sustains the interpretation now given to the cruel and unusual punishment clause. On the contrary, in my opinion, the review which has been made demonstrates that the word cruel, as used in the Amendment, forbids only the lawmaking power, in prescribing punishment for crime and the courts in imposing punishment from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the bill of rights of 1689, and against the recurrence of which the word cruel was used in that instrument. To illustrate. Death was a well-known method of punishment prescribed by law, and it was of course painful, and in that sense was cruel. But the infliction of this punishment was clearly not prohibited by the word cruel, although that word manifestly was intended to forbid the resort to barbarous and unnecessary methods of bodily torture, in executing even the penalty of death.

In my opinion the previous considerations also establish that the word unusual accomplished only three results: First, it primarily restrains the courts when acting under the authority of a general discretionary power to impose punishment, such as was possessed at common law, from inflicting lawful modes of punishment to so unusual a degree as to cause the punishment to be illegal because to that degree it cannot be inflicted without express statutory authority; second, it restrains the courts in the exercise of the same discretion from inflicting a mode of punishment so unusual as to be impliedly not within its discretion and to be consequently illegal in the absence of express statutory authority; and, third, as to both the foregoing it operated to restrain the lawmaking power from endowing the judiciary with the right to exert an illegal

discretion as to the kind and extent of punishment to be inflicted.

Nor is it given to me to see in what respect the construction thus stated minimizes the constitutional guarantee by causing it to become obsolete or ineffective in securing the purposes which led to its adoption. Of course, it may not be doubted that the provision against cruel bodily punishment is not restricted to the mere means used in the past to accomplish the prohibited result. The prohibition being generic, embraces all methods within its intendment. Thus, if it could be conceived that to-morrow the lawmaking power, instead of providing for the infliction of the death penalty by hanging, should command its infliction by burying alive, who could doubt that the law would be repugnant to the constitutional inhibition against cruel punishment? But while this consideration is obvious, it must be equally apparent that the prohibition against the infliction of cruel bodily torture cannot be extended so as to limit legislative discretion in prescribing punishment for crime by modes and methods which are not embraced within the prohibition against cruel bodily punishment, considered even in their most generic sense, without disregarding the elementary rules of construction which have prevailed from the beginning. Of course, the beneficent application of the Constitution to the ever-changing requirements of our national life has in a great measure resulted from the simple and general terms by which the powers created by the Constitution are conferred or in which the limitations which it provides are expressed. But this beneficent result has also essentially depended upon the fact that this court, while never hesitating to bring within the powers granted or to restrain by the limitations created all things generically within their embrace, has also incessantly declined to allow general words to be construed so as to include subjects not within their intendment. That these great results have been accomplished through the application by the court of the familiar rule that what is generically included in the words

employed in the Constitution is to be ascertained by considering their origin and their significance at the time of their adoption in the instrument may not be denied (*Boyd* v. *United States*, 116 U. S. 616, 624; *Kepner* v. *United States*, 195 U. S. 100, 124, 125), rulings which are directly repugnant to the conception that by judicial construction constitutional limitations may be made to progress so as to ultimately include that which they were not intended to embrace, a principle with which it seems to me the ruling now made is in direct conflict, since by the interpretation now adopted two results are accomplished: *a*, the clause against cruel punishments, which was intended to prohibit inhumane and barbarous bodily punishments, is so construed as to limit the discretion of the lawmaking power in determining the mere severity with which punishments not of the prohibited character may be prescribed, and, *b*, by interpreting the word unusual adopted for the sole purpose of limiting judicial discretion in order thereby to maintain the supremacy of the lawmaking power, so as to cause the prohibition to bring about the directly contrary result, that is, to expand the judicial power by endowing it with a vast authority to control the legislative department in the exercise of its discretion to define and punish crime.

But further than this, assuming for the sake of argument that I am wrong in my view of the Eighth Amendment, and that it endows the courts with the power to review the discretion of the lawmaking body in prescribing sentence of imprisonment for crime, I yet cannot agree with the conclusion reached in this case that because of the mere term of imprisonment it is within the rule. True, the imprisonment is at hard and painful labor. But certainly the mere qualification of painful in addition to hard cannot be the basis upon which it is now decided that the legislative discretion was abused, since to understand the meaning of the term requires a knowledge of the discipline prevailing in the prisons in the Philippine Islands. The division of hard labor into classes, one more irksome and it may be said more painful than the other in the

sense of severity, is well known. English Prisons Act of 1865, Pub. Gen. Stat., § 19, page 835. I do not assume that the mere fact that a chain is to be carried by the prisoner causes the punishment to be repugnant to the bill of rights, since while the chain may be irksome it is evidently not intended to prevent the performance of the penalty of hard labor. Such a provision may well be part of the ordinary prison discipline, particularly in communities where the jails are insecure, and it may be a precaution applied, as it is commonly applied in this country, as a means of preventing the escape of prisoners, for instance where the sentence imposed is to work on the roads or other work where escape might be likely. I am brought, then, to the conclusion that the accessory punishments are the basis of the ruling now made, that the legislative discretion was so abused as to cause it to be necessary to declare the law prescribing the punishment for the crime invalid. But I can see no foundation for this ruling, as to my mind these accessory punishments, even under the assumption, for the sake of argument, that they amounted to an abuse of legislative discretion, are clearly separable from the main punishment—imprisonment. Where a sentence is legal in one part and illegal in another it is not open to controversy that the illegal, if separable, may be disregarded and the legal enforced. *United States* v. *Pridgeon*, 153 U. S. 48. But it is said here the illegality is not merely in the sentence, but in the law which authorizes the sentence. Grant the premise. The illegal is capable of separation from the legal in the law as well as in the sentence, and because this is a criminal case it is none the less subject to the rule that where a statute is unconstitutional in part and in part not, the unconstitutional part, if separable, may be rejected and the constitutional part maintained. Of course it is true that that can only be done provided it can be assumed that the legislature would have enacted the legal part separate from the illegal. The ruling now made must therefore rest upon the proposition that because the law has provided an illegal in addition to a legal punish-

ment it must be assumed that the legislature would not have defined and punished the crime to the legal extent, because to some extent the legislature was mistaken as to its powers. But this I contend is to indulge in an assumption which is unwarranted and has been directly decided to the contrary at this term in *United States* v. *Union Supply Company*, 215 U. S. 50. In that case a corporation was proceeded against criminally for an offense punishable by imprisonment and fine. The corporation clearly could not be subjected to the imprisonment, and the contention was that the lawmaker must be presumed to have intended that both the punishments should be inflicted upon the person violating the law, and therefore it could not be intended to include a corporation within its terms. In overruling the contention it was said (p. 55):

"And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape."

I am authorized to say that MR. JUSTICE HOLMES concurs in this dissent.

STANDARD OIL COMPANY OF KENTUCKY *v.* STATE OF TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 160. Argued April 20, 1910.—Decided May 2, 1910.

The Fourteenth Amendment will not be construed as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment.

Where a distinction may be made in the evil that delinquents are forced to suffer, a difference in establishing the delinquency may also be justifiable, and a State may provide for a different method of de-

termining the guilt of a corporation from that of an individual without violating the equal protection clause of the Fourteenth Amendment; and so held as to the provisions in the anti-trust statute of Tennessee of 1903 prohibiting arrangements for lessening competition under which corporations are proceeded against by bill in equity for ouster while individuals are proceeded against as criminals by indictment, trial and punishment on conviction.

A transaction is not necessarily interstate commerce because it relates to a transaction of interstate commerce; and so held that a statute of Tennessee prohibiting arrangements within the State for lessening competition is not void as a regulation of interstate commerce as to sales made by persons without the State to persons within the State.

While a Federal question exists as to whether unequal protection of the law is afforded by excluding a class from the defense of the statute of limitations, the construction of the statute as to its scope is for the state court and does not present a Federal question.

120 Tennessee, 86, affirmed.

THE facts, which involve the constitutionality of certain provisions of the anti-trust statute of Tennessee of 1903, are stated in the opinion.

Mr. John J. Vertrees for plaintiff in error:

The anti-trust act of Tennessee, upon which the present proceeding is based, is not a statute prescribing the conditions on which foreign corporations are admitted to do business in Tennessee, neither is it a statute prescribing the procedure to be employed against corporations to punish them for corporate wrongdoing.

It is a general criminal law denouncing combinations, agreements, and conspiracies against trade, as crimes and prescribing the punishment therefor. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 409; *Cargill* v. *Minnesota*, 180 U. S. 468; *Fidelity Mut. Life Ins. Co.* v. *Mettier*, 185 U. S. 332; *Am. Smelting Co.* v. *Colorado*, 204 U. S. 103.

A violation of the provisions of this anti-trust act of Tennessee, is a conspiracy against trade.

The offense, when committed by a corporation, is a mis-

demeanor. Acts of Tennessee, c. 140; Code of Tennessee (Shannon), §§ 6694, 6736, 6993, 6942–6945.

Corporations may be punished for crime, although they are not capable of having a guilty or criminal intent. Upon grounds of public policy, the guilty intent of the agents who act for them may, and indeed oftentimes should, be imputed to the corporations, and the corporations be punished accordingly. *N. Y. Cent. R. R.* v. *United States*, 212 U. S. 495.

Foreign trading corporations doing business in Tennessee are entitled to the equal protection of the laws, like natural persons.

The anti-trust act of Tennessee, as construed and applied in the present case, is void, because it is a regulation of interstate commerce. *Gen. Oil Co.* v. *Crain*, 209 U. S. 228; *Reovick* v. *Pennsylvania*, 203 U. S. 507; *People* v. *Hawkins*, 157 N. Y. 1; *Jerver* v. *The Carolina*, 66 Fed. Rep. 1013; *Knop* v. *Monongahela &c. Co.*, 211 U. S. 485; *Adams Ex. Co.* v. *Kentucky*, 214 U. S. 221.

The anti-trust act of Tennessee as construed and applied, is unconstitutional and void, because it denies to the defendant the equal protection of the laws, and in these respects namely: It accords to natural persons accused of violating its provisions the right to a preliminary inquiry by a grand jury; the right to be put to answer the charge by indictment or presentment; the right to a trial by a jury; the right to an acquittal unless guilt be established by evidence beyond a reasonable doubt; and the right to interpose the statute of limitations (when it has run) as a defense.

All these defensive rights are accorded to natural persons, but denied to corporations. That denial is capricious, arbitrary and unreasonable, and therefore a denial of the equal protection of the laws. *Crowley* v. *United States*, 194 U. S. 473; 23 Am. & Eng. Ency. Law (2d ed.), 948; *Turley* v. *State*, 3 Heisk. (Tenn.) 11.

The transactions at Gallatin, alleged in the present proceeding to be a conspiracy against trade, if an unlawful conspiracy

at all, is a conspiracy against interstate trade—a violation of the act of Congress, the Sherman Act, and not a violation of the anti-trust act of Tennessee. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 229, 230; *Northern Securities Co.* v. *United States*, 193 U. S. 344; *Railroad* v. *Husen*, 95 U. S. 465; *United States* v. *Swift & Co.*, 122 Fed. Rep. 534.

The defendant cannot be punished in the present proceeding for a violation of the Sherman Act, because (1) the pleadings are not framed to that end; (2) and the state court has no jurisdiction to entertain a proceeding for that purpose. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48; *Loewe* v. *Lawlor*, 130 Fed. Rep. 633.

The statute of limitations in the case of a violation of the provisions of this act by a corporation, is one year.

More than three years elapsed between the commission of the alleged offense, and the institution of the suit in this case; and the bar of the statute is a complete defense. *Turley* v. *State*, 3 Heisk. (Tenn.) 11; Code of Tennessee (Shannon), §§ 6736, 6942–6945, 6993, 6694.

Mr. Charles T. Cates, Jr., Attorney General of Tennessee, for defendant in error:

No Federal question is involved in the decision of the state court that the transactions at Gallatin complained of in the bill were forbidden by the state statute.

The meaning and application of a state statute is to be determined by the decision of the state court. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 42, 43; *Leeper* v. *Texas*, 139 U. S. 462, 467; *Smiley* v. *Kansas*, 196 U. S. 447, 455.

That the State of Tennessee had the right to deal with the subject-matter of the act of 1903, and to prevent unlawful agreements and arrangements in restraint of trade, or which are designed or tend to prevent competition in the sale of commodities or products, and to prohibit and punish such unlawful agreements or contracts is no longer open to question. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v.

Kansas, 196 U. S. 447; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86.

The proper construction to be given to a state statute and as to what is to be regarded as among its terms presents no Federal question. *Phœnix Ins. Co.* v. *Gardner*, 11 Wall. 204; *Morley* v. *Lake Shore &c. Co.*, 146 U. S. 162. This court does not sit to review the findings of fact made in the state court, but accepts the findings of the state court upon matters of fact as conclusive. *Quimby* v. *Boyd*, 128 U. S. 489; *Eagan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Thayer* v. *Spratt*, 189 U. S. 346; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86.

The acts of plaintiff in error were interstate transactions. *Standard Oil Co.* v. *State*, 117 Tennessee, 618, also approved by the Supreme Court of the State in this case.

The Tennessee anti-trust act does not deprive plaintiff in error of its rights, liberty and property without due process of law, or deny to it the equal protection of the law.

A complete remedy was presented by bill in equity to be conducted according to the recognized practice in courts of equity, against corporations violating the law, which has been sustained as "due process of law" by the Supreme Court of the State. *State* v. *Schlitz Brewing Company*, 104 Tennessee, 715.

By this method of procedure against offending corporations, according to the well-established practice of courts of equity, the alleged offender has full opportunity to be heard upon all its defenses in the same and as full a manner as other persons or corporations sued in such courts, and the right to have any issue of fact submitted to a jury.

Whether a foreign corporation is entitled to the right of a trial by jury does not involve any Federal question. The first ten amendments were not intended to restrict the powers of the State, but to operate solely on the Federal Government. *Brown* v. *New Jersey*, 175 U. S. 174; *Barrington* v. *Missouri*, 205 U. S. 483; *Spies* v. *Illinois*, 123 U. S. 131; *Jack* v. *Kansas*, 199 U. S. 372, 380. Nor are the "safeguards" of personal

rights, enumerated in the first eight amendments among privileges and immunities, within the meaning of the Fourteenth Amendment. *Twining's Case*, 211 U. S. 78. The right to a trial by jury is not one of the fundamental rights inherent in national citizenship. *Walker* v. *Sauvinet*, 92 U. S. 90; *Hurtado* v. *California*, 110 U. S. 516; *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Maxwell* v. *Dow*, 176 U. S. 581.

Plaintiff in error is not deprived of due process of law or denied the equal protection of the law, in that it was not put to trial under an indictment as upon a criminal charge and, in this way, arbitrarily discriminated against by being denied a trial by jury, and the right to plead the statute of limitations, applicable to criminal charges, under the statutes of Tennessee, and forced to submit to a conviction upon preponderance of testimony rather than have its guilt established beyond a reasonable doubt—all of which rights—it claims, were granted to natural persons under § 3 of said act. *Waters-Pierce Oil Co.* v. *State*, 19 Tex. Civ. App. 1, aff'd in *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *West* v. *Louisiana*, 194 U. S. 258, 263; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Iowa Central Railroad Co.* v. *Iowa*, 160 U. S. 389, 393; *Louisville &c. Co.* v. *Schmidt*, 177 U. S. 236; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Rogers* v. *Peck*, 199 U. S. 425. See also *Rawlins* v. *Georgia*, 201 U. S. 638; *Felts* v. *Murphy*, 201 U. S. 123; *Twining's Case*, 211 U. S. 78; *Hager* v. *Reclamation District*, 111 U. S. 701; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 360.

Nor was plaintiff in error discriminated against by being put to trial under a bill in equity according to the practice of courts of equity and thus denied a trial by a jury, or the right of the statute of limitations. *Magoun* v. *Illinois Trust and Savings Bank*, 179 U. S. 283; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Hager* v. *Missouri*, 120 U. S. 68; *Missouri* v. *Lewis*, 101 U. S. 22, approved in *Maxwell* v. *Dow*, 176 U. S. 598, 599.

There is no palpably arbitrary classification or discrimination. A corporation cannot be imprisoned; the only method of procedure appropriate to the case, adapted to the end to be attained, is to prohibit it from carrying on its business, through the injunction process of a court of equity. An injunction issuing out of a criminal court is a thing unknown to the law.

As to the statute of limitations, as this is a civil action, under the Code of Tennessee (Shannon's Code, § 4453), no statute of limitations is applicable thereto as against the State.

The state court held that the offense denounced by § 3 of the act of 1903 is a felony of such grade and punishment that no statute of limitations applies thereto. Therefore, plaintiff in error has not been deprived of any right. The construction and effect given by the Supreme Court of the State to the state statute is not subject to reëxamination by this court under a writ of error. *Harbinger* v. *Myer*, 92 U. S. 111; *McStacy et al.* v. *Friedman*, 92 U. S. 723.

Mr. Justice Holmes delivered the opinion of the court.

The plaintiff in error is a Kentucky corporation and seeks to reverse a decree of the Supreme Court of Tennessee forbidding it to do business, other than interstate commerce, in the latter State. 120 Tennessee, 86. The ground of the decree is that the corporation and certain named agents entered into an arrangement for the purpose and with the effect of lessening competition in the sale of oil at Gallatin, Tennessee, and with the further result of advancing the price of oil there. The acts proved against the corporation were held to entail the ouster under a statute of Tennessee. Act of March 16, 1903. The corporation brings the case here on the contentions that the statute as construed by the court is contrary to the Fourteenth Amendment and also is an unconstitutional interference with commerce among the States.

The basis of the former contention is that by § 3 of the act any violation of it is made a crime, punishable by fine, imprisonment or both, and that this section has been construed as applicable only to natural persons. *Standard Oil Co.* v. *The State*, 117 Tennessee, 618. Hence, it is said, this statute denies to corporations the equal protection of the laws. For although it is addressed generally to the prevention of a certain kind of conduct, whether on the part of corporations or unincorporated men, the latter cannot be tried without a preliminary investigation by a grand jury, an indictment or presentment, a trial by jury, the right to an acquittal unless their guilt is established beyond a reasonable doubt, and the benefit of a statute of limitations of one year. Corporations, on the other hand, are proceeded against by bill in equity on relation of the Attorney General without any of these advantages, except perhaps the right to a jury. Complaint is not made of the difference between fine or imprisonment and ouster, but it is insisted that this is a general criminal statute, that ouster is a punishment as much as a fine, and that it is not a condition attached to the doing of business by foreign corporations, *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 409, or indeed a regulation of the conduct of corporations as such at all. Therefore the plaintiff in error complains that it is given a wrongful immunity from the procedure of the criminal law. This suit is for the same transaction for which, in the earlier case cited above, an agent of the company was indicted and fined.

The foregoing argument is one of the many attempts to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. The law of Tennessee sees fit to seek to prevent a certain kind of conduct. To prevent it the threat of fine and imprisonment is likely to be efficient for men, while the latter is impossible and the former less serious to corporations. On the other hand, the threat of extinction or ouster is not

monstrous, and yet is likely to achieve the result with corporations, while it would be extravagant as applied to men. Hence, this difference is admitted to be justifiable. But the admission goes far to destroy the argument that is made. For if a fundamental distinction may be made in the evils that different delinquents are forced to suffer, surely the less important and ancient distinction between the modes of establishing the delinquency, according to the nature of the evil inflicted, even more easily may be justified. The Supreme Court of the State says that the present proceeding is of a civil nature, but assuming that nevertheless it ends in punishment, there is nothing novel or unusual about it. We are of opinion that subjection to it, with its concomitant advantages and disadvantages, is not an inequality of which the plaintiff in error can complain, although natural persons are given the benefit of the rules to which we have referred before incurring the possible sentence to prison, which the plaintiff in error escapes.

The second objection to the statute is that, although construed by the court to apply to domestic business only, nevertheless it is held to warrant turning the defendant out of the State for an interference with interstate trade. The transaction complained of was inducing merchants in Gallatin to revoke orders on a rival company for oil to be shipped from Pennsylvania, by an agreement to give them 300 gallons of oil. It is said that as the only illegal purpose that can be attributed to this agreement is that of protecting the defendant's oil against interstate competition, it could not be made the subject of punishment by the State; that the offense, if any, is against interstate commerce alone.

The cases that have gone as far as any in favor of this proposition are those that hold invalid taxes upon sales by travelling salesmen, so far as they affect commerce among the States. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Rearick* v. *Pennsylvania*, 203 U. S. 507. These cases fall short of the conclusion to which they are supposed to

point. Regulations of the kind that they deal with concern the commerce itself, the conduct of the men engaged in it and as so engaged. The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the State disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the States as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in peddling goods from another State. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power. See *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 623.

There is an attempt also to bring this case within the statute of limitations. It was permissible for the corporation to contend that it was discriminated against unconstitutionally by being excluded from that defense, and we have dealt with the argument that it was so. But the scope of the state statutes was for the state court to determine and is not open here.

Decree affirmed.

HEIKE *v.* UNITED STATES.

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

No. 849. Submitted April 11, 1910.—Decided May 2, 1910.

Appellate jurisdiction in the Federal system of procedure is purely statutory. *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372.

A case cannot be brought to this court by piecemeal; it can only be reviewed here after final judgment.

A decree is final for the purposes of review by this court when it terminates the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined. *St. Louis, Iron Mountain & Southern R. R. Co.* v. *Express Co.*, 108 U. S. 24.

A judgment overruling a special plea of immunity under statutory provisions, with leave to plead over, does not, in a criminal case, terminate the whole matter in litigation, and is not a final judgment to which a writ of error will lie from this court.

The immunity of one testifying before a grand jury, under the act of February 25, 1903, 32 Stat. 904, as amended June 30, 1906, 34 Stat. 798, does not render him immune from any prosecution whatever, but furnishes a defense which, if improperly overruled, is a basis for reversal of a final judgment of conviction.

THE facts are stated in the opinion.

Mr. John C. Spooner, with whom *Mr. John B. Stanchfield* and *Mr. George S. Graham* were on the brief, for plaintiff in error:

A judgment, to be appealable, need not be one that finally determines the case. If the judgment from which an appeal is taken, settles a collateral matter distinct from the general subject of the litigation, it is a final, appealable judgment within the law. *McLish* v. *Roff*, 141 U. S. 661; *Bowker* v. *United States*, 186 U. S. 135, only hold that appeals direct to this court under § 5 of the act of March 3, 1891, may be taken from a final judgment alone. They leave unsettled what constitutes a final judgment.

The immunity statute provides: "No person shall be prosecuted," etc., and unless this court entertains this writ of error, the defendant will be denied an immunity from prosecution, given to him under the statute in lieu of the constitutional privilege and safeguard against self-accusation embodied in the Fifth Amendment; and no subsequent action of this court, after either conviction or acquittal, can repair the wrong thus done.

This question is an absolutely new one. While a judgment of *respondeat ouster* is usually not a final or appealable order, the judgment herein is not one of *respondeat ouster*. There is no analogy between this case and those involving *autrefois acquit* or *convict*, former jeopardy, senatorial privilege, and the like. See *Counselman* v. *Hitchcock*, 142 U. S. 547.

No substitute for the protection contemplated by the Amendment would be sufficient were its operation less extensive and efficient. It constituted a protection in advance. The substitute provided by the statute must equal the privilege that has been taken away, and furnish protection from prosecution in advance. See Shiras, J., in *Brown* v. *Walker*, 161 U. S. 592.

This court, having declared that the immunity statute is constitutional, is all the more bound to see that the substitute which it provided shall not be a mockery and a snare.

The order of the court directing plaintiff in error to go to trial, is a violation of the rights of the plaintiff in error as guaranteed to him by the immunity statutes.

To permit the trial to proceed takes away that which never can be restored. In fact, plaintiff in error will have been compelled to testify against himself.

The rule as to what will constitute finality and give the appealable quality is alike in civil and criminal matters. For instances in which decrees analogous to the one involved were held final, see *Forgay* v. *Conrad*, 6 How. 201; *Brush Electric Co.* v. *Electric Imp. Co.*, 51 Fed. Rep. 557.

The controversy in this case over the immunity of plain-

tiff in error settles a collateral matter distinct from the general subject of litigation. See *McGourkey* v. *Toledo &c. Railway Co.*, 146 U. S. 536.

Whenever there is a determination of some question of right, a decision is final in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the case as between the parties on that issue. *Alexander* v. *United States*, 201 U. S. 117, distinguished. That and other similar cases admit that where the court below proceeds to compel the witness to answer, there is a final, reviewable decision or judgment; and see *Interstate Comm. Comm.* v. *Brimson*, 154 U. S. 447; *Interstate Comm. Comm.* v. *Baird*, 194 U. S. 25.

The only thing that can follow in this case, is prosecution; and the court has ordered prosecution, and this stands in the place of the order of the court directing punishment for contempt. The question of immunity is not one involved in the general issue, but a separate and distinct privilege. *Williams* v. *Morgan*, 111 U. S. 684, 698.

Plaintiff in error might have allowed sentence to go against him without asking for any further opportunity of defense, and thus have created a final judgment, but why should he? The judgment entered upon his plea, and the order to proceed to trial, constitute as complete a violation of his rights as that which is reached where a witness is ordered to answer and, upon refusal, is committed for contempt. *Hazeltine* v. *Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173.

Appeals taken from the judgment relate to the highest court of a State reversing and remanding the cause for further proceedings, and have no application to this question; nor has *California* v. *San Pablo & Tulare Co.*, 149 U. S. 308, 314; *Mills* v. *Green*, 159 U. S. 651; *Kimball* v. *Kimball*, 174 U. S. 158; *Rankin* v. *The State*, 11 Wall. 380.

The immunity statute does more than merely furnish a defense to a defendant when put on trial. It gives him freedom from actually being put on trial.

An immunized person has greater rights than an innocent person. The former has given up and surrendered something on the strength of the pledge of the United States contained in the statute, while the innocent person has given up nothing. It cannot be said of the innocent person that he shall not be prosecuted; while it has been said most emphatically that the immunized person shall not be prosecuted.

The cases of *Rebstock* v. *Superior Court of San Francisco*, 146 California, 308, those quoted from Wisconsin, and *Regina* v. *Skeen*, 8 Cox, C. C. 143, 153, etc., are inapplicable.

The reference to the Criminal Appeals Act has no relevancy. *United States* v. *Bitty*, 208 U. S. 393, simply decided that this act was constitutional.

Plaintiff in error suffers a grievous hardship if he be compelled to await the end of the case below before having his rights under the immunity plea reviewed. There is no ground for the fears expressed by the Government with reference to the increase of business through interlocutory reviews. *Alexander* v. *United States*, 201 U. S. 117, cited by the Government in fact sustains the contention of plaintiff in error.

The Solicitor General, *Mr. Henry L. Stimson*, Special Assistant to the Attorney General, and *Mr. Felix Frankfurter*, Assistant United States Attorney, for the United States.

Mr. Justice Day delivered the opinion of the court.

The plaintiff in error, Charles R. Heike, was indicted with others on January 10, 1910, for alleged violations of the customs laws of the United States in connection with the fraudulent importation of sugar, and also for conspiracy under § 5440 of the Revised Statutes of the United States to defraud the United States of its revenues. Heike appeared and filed a special plea in bar claiming immunity from prosecution under the act of February 25, 1903, c. 755, 32 Stat. 904, as amended June 30, 1906, c. 3920, 34 Stat. 798. The plea set up in substance that Heike had been called upon to

testify before the grand jury in matters concerning the prosecution against him, and had thereby become immune from prosecution under the law. The Government filed a replication, taking issue upon the matters set up in the plea. The issues thus raised were brought to trial before a jury in the Circuit Court of the United States for the Southern District of New York, and at the conclusion of the testimony the Government and the defendant each moved for direction of a verdict, and the court thereupon instructed the jury to find the issues joined in favor of the Government. Upon application by Heike he was granted the privilege of pleading over, and he thereupon entered a plea of not guilty, and the case was set for trial on March 1, 1910.

No judgment having been entered in the case mandamus proceedings were brought in this court, and in pursuance of its order a judgment *nunc pro tunc* was entered as of February 14, 1910, as follows: "Judgment be and is hereby entered for the United States upon the verdict with leave to the defendant to plead over."

On February 25, 1910, a writ of error was allowed to the Circuit Court from this court by one of its justices. The Government then moved, February 28, 1910, to vacate the order allowing the writ. That motion was overruled, March 14, 1910, and the Government made the present motion to dismiss the writ of error, upon the ground that the judgment entered as of February 14, 1910, is not a final judgment within the meaning of the Court of Appeals Act.

The motion to dismiss brings to the attention of the court the important question of practice as to whether, after a judgment has been entered upon a verdict setting up the plea of immunity under the act of February 25, 1903, as amended June 30, 1906, finding the issues against the defendant, with leave given to plead over, and a plea of not guilty entered, on which no trial has been had, such judgment is, or is not, a final judgment reviewable by writ of error

from this court where a constitutional question is involved, under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826.

The appellate jurisdiction in the Federal system of procedure is purely statutory. *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 378. For many years it did not exist in criminal cases. It has been granted by statute in certain cases; and criminal cases in which are involved a deprivation of constitutional rights, may be brought to this court by writ of error under § 5 of the Court of Appeals Act. *Burton* v. *United States*, 196 U. S. 283.

In the case at bar it is the contention of the plaintiff in error that he was deprived of the constitutional right of trial by jury in the direction by the court that the jury find a verdict against him upon his plea in bar. The question then is, Is the judgment entered *nunc pro tunc* as of February 14, 1910, a reviewable one under the statute? That judgment in effect denied the validity of the plea in bar, and left the defendant to plead over, which he did, putting in issue the averments of the indictment.

The construction of § 5 of the Court of Appeals Act was before this court in the case of *McLish* v. *Roff*, 141 U. S. 661, 665, and it was there held that the allowance of appeals or writs of error under that section must be understood to have the meaning which those terms had always had under acts of Congress relating to the appellate jurisdiction of this court, and that taken in that sense appeals or writs of error could only be allowed in cases in which there had been a final judgment. Mr. Justice Lamar, who spoke for the court in that case, pointed out that under the Judiciary Act of 1789 no appeal would lie to this court except from final judgments or decrees, and further stated that this was only declaratory of the settled practice of England, where no writ of error would lie except from a final judgment; and if the writ was made returnable before such judgment it would be quashed, and in this connection, speaking for the court, the learned justice said:

"From the very foundation of our judicial system the ob-

ject and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

McLish v. *Roff, supra,* has been followed and approved in this court. *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.,* 148 U. S. 372; *Kirwan* v. *Murphy,* 170 U. S. 205, 209; *Ex parte National Enameling Co.,* 201 U. S. 156.

It may, therefore, be regarded as the settled practice of this court that a case cannot be brought here by piecemeal, and is only to be reviewed here after final judgment by direct appeal or writ of error in a limited class of cases under § 5 of the Court of Appeals Act.

It is unnecessary to enter upon a full consideration of what constitutes a final judgment, a subject of much discussion. The definition of a final judgment or decree was tersely stated by Mr. Chief Justice Waite in *St. Louis, Iron Mountain & S. R. R. Co.* v. *Express Co.,* 108 U. S. 24, 28, in these terms: "A decree is final for the purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."

If we apply the definition herein contained of a final judgment or decree it appears certain that the judgment of *respondeat ouster,* leaving the case with issue joined upon the plea of not guilty, does not dispose of the whole matter litigated in this proceeding, leaving nothing to be done except the ministerial act of executing the judgment. The thing litigated in this case is the right to convict the accused of the crime charged in the indictment. Certainly that issue has not been disposed of, much less has a final order been made concerning it, leaving nothing but an execution of it yet undone. The defendant was indicted for the crime alleged, and being apprehended he had a right to raise an issue of law upon the indictment by demurrer, to plead in bar, or to plead the general

issue. He chose to plead in bar immunity from prosecution by reason of the statute referred to. That issue was, by direction of the court, whether properly or improperly, held against him and the verdict of the jury and the judgment of *respondeat ouster* duly entered. At the common law upon the failure of such plea in a case of misdemeanor it was usual at once to sentence the defendant as upon conviction of guilt of the offense charged. In cases of felony it was usual to permit a plea of not guilty after judgment over. In the case at bar the record shows after the return of the verdict the plaintiff in error's counsel asked to be permitted to plead, and was allowed that privilege. As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. It may be that upon trial the defendant will be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case. It is true that in a certain sense an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory rulings and orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error. The purpose of the statute is to give a review in one proceeding after final judgment of matters in controversy in any given case. Any contrary construction of the Court of Appeals Act may involve the necessity of examining successive appeals or writs of error in the same case, instead of awaiting, as has been the practice since the beginning of the Government, for one review after a final judgment, disposing of all controversies in that case between the parties.

But it is urged by the learned counsel for the plaintiff in error that this judgment must be held to be final for the purpose of review, otherwise the Government cannot keep the contract of immunity which it has made with the accused, by virtue of the terms of the immunity statute, which provides:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts [Sherman anti-trust and interstate commerce acts]. . . ."

By the amendatory act of June 30, 1906, c. 3920, 34 Stat. 798, it was provided that the above immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

In view of the provisions of this act it is argued that the complete immunity promised is not given unless the person entitled to the benefits of the act is saved from prosecution, for, it is contended, that if the act is to be effective it means not only immunity from punishment, but from prosecution as well. It is admitted in the brief of the learned counsel for the plaintiff in error that prosecution must necessarily proceed so far as an indictment and apprehension are concerned, but when the plea of immunity under this act is entered, if well taken, the prosecution must be ended, as the statutes provide that no person shall be prosecuted, etc. But we are of opinion that the statute does not intend to secure to a person making such a plea immunity from prosecution, but to provide him with a shield against successful prosecution, available to him as a defense, and that when this defense is improperly overruled it may be a basis for the reversal of a final judgment against him. Such promise of immunity has not changed the Federal system of appellate procedure, which is not affected by the immunity statute, nor does the immunity operate to give a right of review upon any other than final judgments.

A question very analogous to the one before us was made and decided in the case of *Brown* v. *Walker*, 161 U. S. 591, in which the constitutionality of an immunity statute was sustained. The statute undertook to give immunity after testimony before the Interstate Commerce Commission, and to

provide that no person should be prosecuted nor subject to any penalty, etc., concerning matters which he testified to by the production of documents or otherwise before the Commission. In that case, as in this, the contention was made that the immunity was not perfect, because the witness might still be prosecuted, and, therefore, the promised immunity was insufficient to afford constitutional protection. Answering that contention this court said (161 U. S. 608):

"The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution and put to the expense of defending himself, but unless such prosecution be malicious he is remediless, except so far as a recovery of costs may partially indemnify him."

The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment. In the case of *Rankin* v. *The State*, 11 Wall. 380, an attempt was made to bring to this court a judgment of a state court upon a plea in bar of former conviction in a capital case. But this court, speaking by Mr. Justice Bradley, said:

"It is a rule in criminal law *in favorem vitæ*, in capital cases, that when a special plea in bar is found against the prisoner, either upon issue tried by a jury or upon a point of law decided by the court, he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, 'not guilty.' 4 Blackstone's Commentaries, 338. And this is the effect of the judgment of reversal rendered by the Supreme Court of Tennessee in this case, so that in no sense can that judgment

be deemed a final one. The case must go back and be tried upon its merits, and final judgment must be rendered before this court can take jurisdiction. If after that it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency."

It may thus be seen that a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution, and this notwithstanding the person is in jeopardy a second time if after one conviction or acquittal the jury is empanelled to try him again. We think, then, that the effect of the immunity statute in question is not to change the system of appellate procedure in the Federal courts and give a right of review before final judgment in a criminal case, but was intended to provide an effectual defense against further prosecution, which if denied may be brought up for review after a final judgment in the case.

We therefore reach the conclusion that the motion to dismiss the present writ be sustained, and it is so ordered.

Writ of error dismissed.

GRENADA LUMBER COMPANY *v.* STATE OF MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 493. Submitted January 10, 1910.—Decided May 2, 1910.

This court accepts the construction of the state court; and where that court has held that an agreement between retailers not to purchase from wholesale dealers who sell direct to consumers within prescribed localities amounts to a restraint of trade within the meaning of the anti-trust statute of the State, the only question for this court is whether such statute so unreasonably abridges freedom of con-

tract as to amount to deprivation of property without due process of law within the meaning of the Fourteenth Amendment.

An act harmless when done by one may become a public wrong when done by many acting in concert, and when it becomes the object of a conspiracy and operates in restraint of trade the police power of the State may prohibit it without impairing the liberty of contract protected by the Fourteenth Amendment; and so held that while an individual may not be interfered with in regard to a fixed trade rule not to purchase from competitors, a State may prohibit more than one from entering into an agreement not to purchase from certain described persons even though such persons be competitors and the agreement be made to enable the parties thereto to continue their business as independents.

Whether a combination is or is not illegal at common law is immaterial if it is illegal under a state statute which does not infringe the Fourteenth Amendment.

A combination that is actually in restraint of trade under a statute which is constitutional, is illegal whatever may be the motive or necessity inducing it.

In determining the validity of a state statute, this court is concerned only with its constitutionality; it does not consider any question of its expediency.

In determining the constitutionality of a state statute this court considers only so much thereof as is assailed, construed and applied in the particular case.

One not within a class affected by a statute cannot attack its constitutionality.

Where the penalty provisions of a statute are clearly separable, as in this case, and are not invoked, this court is not called upon to determine whether the penalties are so excessive as to amount to deprivation of property without due process of law and thus render the statute unconstitutional in that respect.

In this case, in an action by the State in equity and not to enforce penalties, held that the anti-trust statute of Mississippi, § 5002, Code, is not unconstitutional as abridging the liberty of contract as against retail lumber dealers uniting in an agreement, which the state court decided was within the prohibition of the statute, not to purchase any materials from wholesale dealers selling direct to consumers in certain localities.

THIS is a writ of error to the Supreme Court of the State

of Mississippi to review a decree dissolving a voluntary association of retail lumber dealers as a combination in restraint of trade under a statute of the State.

So much of the Mississippi act as is here involved is set out in the margin, being part of § 5002, Mississippi Code.[1]

The proceeding under this statute was by a bill filed in a chancery court of the State, by the State, upon relation of its Attorney General. The bill averred that the defendants, some seventy-seven individuals and corporations, were retail dealers in lumber, sash, doors, etc., doing business, some of them, in the State of Mississippi and others in the State of Louisiana, and were competitors in business, each engaged in buying and selling again for profit, and in competition with each other for the business of consumers; that the defendants had entered into an agreement, compact or combination for the purpose and with the intent to destroy, prevent or sup-

[1] 5002. (4437) Definition of term; criminal conspiracy (laws, 1900, ch. 88).—A trust and combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms, or associations or persons, or between one or more of either with one or more of the other:

(*a*) In restraint of trade;

(*b*) To limit, increase or reduce the price of a commodity;

(*c*) To limit, increase or reduce the production or output of a commodity;

(*d*) Intended to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(*e*) To engross or forestall a commodity;

(*f*) To issue, own or hold the certificates of stock of any trust or combine;

(*g*) To place the control, to any extent, of business, or of the products and earnings thereof, in the power of trustees, by whatever name called;

(*h*) By which any other person than themselves, their proper officers, agents and employees shall, or shall have the power to dictate or control the management of business, or,

(*i*) To unite or pool interests in the importation, manufacture, production, transportation or price of a commodity; and is inimical to the public welfare, unlawful and a criminal conspiracy.

press all competition between themselves, as retail dealers in the materials mentioned, and manufacturers, wholesale dealers, brokers or commission men, keeping no stock, from selling the like articles or commodities directly to consumers in competition with retailers. To accomplish this suppression of competition for the trade of consumers it was in substance averred that they had organized an association and had obligated themselves not to purchase any of their stock or commodities from any wholesale dealer or manufacturer who sold such products direct to the consumers in competition with the members of their combination and to carry out this end had adopted articles of agreement, called a constitution, and appointed a secretary to ascertain such sales and to see that the obligation of the members was respected. The material parts of the agreement under which the defendants combined consist of a preamble, called "Declaration of Purpose," the relevant part of which, together with articles 2, 3 and 7, are set out in the margin.[1]

It was then averred that the necessary effect of such agreement among the defendants, who, it was said, composed a majority of all the retail lumber dealers in the States covered by their compact, was to limit or destroy competition between

[1] Declaration of Purpose.

We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price, they may see fit.

We also recognize the disastrous consequences which result to the retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition, where any exists.

And, recognizing that, we, as retail dealers in lumber, sash, doors and blinds, cannot meet competition from those from whom we buy, we are pledged as members of this association to buy only from manufacturers and wholesalers who do not sell direct to consumers, where there are retail lumber dealers who carry stock commensurate with the demands of their communities, and we are pledged not to buy from lumber commission merchants, agents and brokers, who sell to

the retailers and the wholesalers or manufacturers for the trade or business of the consumer, and that they constituted a combination or conspiracy in restraint of trade, etc.

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consumers, but do not carry stocks, nor from a manufacturer who sells to such lumber commission merchants, agent or broker.

Article Two.

The Object.

The object of this association is and shall be to secure and disseminate among its members any and all legal and proper information which may be of interest or value to any member or members thereof in his or their business as retail lumber dealers, and to carry into actual effect our "Declaration of Purpose."

Article Three.

Limitation and Restriction.

SEC. 1. No rules, regulations or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices or pooling profits.

SEC. 2. No coercive measures of any kind shall be practiced or adopted toward any retailer, either to induce him to join the association or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this association be used or allowed against any retailer for the reason that he may not be a member of the association, or to induce or persuade him to become such member.

SEC. 3. No promises or agreements shall be requisite to membership in this association, save those provided in these "Articles of Association and Declaration of Purpose," nor shall any members be restricted to any particular territory, but may compete any and everywhere.

Article Seven.

SEC. 1. Report of secretary: Any member of this association having cause of complaint against a manufacturer or wholesale dealer, or his agents because of shipment to a consumer, shall notify the secretary of this association in writing, giving as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor, and consignee the purpose for which the material was or is to be used, and such other particulars as may be obtainable.

Such notice must be sent with or without information in detail, within thirty days after the receipt of shipment at point of destination, and no notice shall be filed of any such sale or shipment occurring

The answer admitted the substantial facts, but denied that the object or purpose was to restrain trade or to suppress competition, or that such a result has ensued or would or

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within fifteen days after the first issue of membership list succeeding the acceptance of his application.

Upon the receipt of such notice the secretary shall first ascertain whether or not the complaining member carries a stock commensurate with the demands of his community, and if he finds that such stock is not carried, he shall ignore the complaint unless upon application of such complaining member the executive committee shall reverse his finding, but if he find that such stock is carried he shall then notify the manufacturer or wholesaler that the rules of this association do not allow its members to buy from those manufacturers and wholesalers who sell to consumers, and unless such manufacturer or wholesaler shall satisfy the secretary that the complaint is not well founded the secretary shall report the facts to the executive committee, and upon the approval of his finding by a majority of the executive committee the secretary shall then notify the members of this association of such sale, and they shall discontinue to buy from such manufacturer or wholesaler until notified by the secretary that such wholesaler or manufacturer does not sell to consumers where there is a retail dealer who carries a stock commensurate with the demands of his community, but this section shall not apply in cases where the business methods or financial condition of such retailer will not justify a manufacturer or wholesaler in dealing with him.

Under no circumstances shall the secretary enter into any agreement with a manufacturer or wholesaler that any one of the association members will deal with him, nor shall he in any case exact a promise from the wholesaler or manufacturer that he will not sell to consumers, nor shall any result other than that of the members refusing to buy from any such manufacturer or wholesaler follow from the steps taken as hereby provided for.

SEC. 2. The foregoing provisions, shall apply in reported cases of lumber commission merchants, agents and brokers, who sell to consumers, but do not carry stock, and as against the manufacturers who sell to such commission merchants, agents or brokers.

SEC. 3. Each member, when he joins this association, and once each year thereafter, and oftener if the secretary shall request it, shall furnish the secretary a list of those manufacturers and wholesalers and their agents from whom he makes purchases of lumber and other building material.

could follow, or that the agreement had any other object than to "conserve and advance their business interests as retailers." That their agreement is defensive of and not injurious to public interests is asserted by many paragraphs of the answer upon economic considerations.

The chancery court, upon the pleadings and exhibits, held that the association and agreement among the members was "a combination in restraint of trade and intended to hinder competition in the sale and purchase of a commodity, and was inimical to the public welfare, and unlawful." The dissolution of the association was adjudged and an injunction against further operations granted. This decree was affirmed upon appeal to the Supreme Court of the State.

Mr. Edward Mayes and *Mr. C. D. Joslyn* for plaintiffs in error.

Mr. J. B. Stirling for defendant in error.

Mr. Justice Lurton, after making the above statement, delivered the opinion of the court.

The agreement and combination which offends against the Mississippi anti-trust statute is one between a large majority of the independent and competitive merchants engaged in the retail lumber trade in the territory covered by their articles of association, whereby they have obligated themselves not to deal with any manufacturer or wholesale dealer in lumber, sash or doors, etc., who sells to consumers in localities in which they conduct their business and keep a sufficient stock to meet demands, and to inform each other of any sale made by manufacturers or wholesalers who sell to consumers.

That such an agreement and combination was, within the meaning of the Mississippi statute, a conspiracy "in restraint of trade," "intended to hinder competition in the production,

importation, manufacture, transportation, sale or purchase of a commodity," is the express decision of the Supreme Court of Mississippi. That the object and purpose of the compact was to suppress competition between the plaintiffs in error and another class of dealers in or producers of the same commodity and the consumer is avowed in the "Declaration of Purpose," set out heretofore, in which it is stated that the members of the association, as retailers, "cannot meet competition from those from whom they buy." This concession means, if it means anything, that those against whom the plaintiffs in error are acting in concert will undersell them in the competition for the trade of the consuming public, and must therefore be stopped by concerted refusal to deal with them if they should persist in such competition. This constitutes under the interpretation of the Mississippi statute by the Mississippi court a "restraint of trade," and a hindrance to competitors in the sale of a commodity. Accepting, as we must, this interpretation and application of a state statute by the highest court of the State, there is no question for our consideration other than the insistence that the statute is in conflict with the Fourteenth Amendment to the Constitution of the United States. The contention is that this statute abridges unreasonably the freedom of contract which is as much within the protection of that Amendment as is liberty of person.

That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand. But when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then

takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed. *Callan* v. *Wilson,* 127 U. S. 555, 556.

But the plaintiffs in error say that the action which they have taken is purely defensive, and that they cannot maintain themselves as independent dealers supplying the consumer if the producers or wholesalers from whom they buy may not be prevented from competing with them for the direct trade of the consumer.

For the purpose of suppressing this competition they have not stopped with an individual obligation to refrain from dealing with one who sells within his own circle, and thereby deprives him of a possible customer, but have agreed not to deal with any one who makes sales to consumers, which sales might have been made by any one of the seventy-seven independent members of the association. Thus they have stripped themselves of all freedom of contract in order to compel those against whom they have combined to elect between their combined trade and that of consumers. That such an agreement is one in restraint of trade is undeniable, whatever the motive or necessity which has induced the compact. Whether it would be an illegal restraint at common law is not now for our determination. It is an illegal combination and conspiracy under the Mississippi statute. That is enough if the statute does not infringe the Fourteenth Amendment.

The argument that the situation is one which justified the defensive measures taken by the plaintiffs in error is one which we need neither refute nor concede. Neither are we required to consider any mere question of the expediency of such a law. It is a regulation of commerce purely intrastate, a subject as entirely under the control of the State as is the delegated control over interstate commerce exercised by the United States. The power exercised is the police power reserved to the States. The limitation upon its exercise con-

tained in the Federal Constitution is found in the Fourteenth Amendment, whereby no State may pass any law by which a citizen is deprived of life, liberty or property without due process of law. A like limitation upon the legislative power will be found in the constitution of each State. That legislation might be so arbitrary or so irrational in depriving a citizen of freedom of contract as to come under the condemnation of the Amendment may be conceded.

In dealing with certain Kansas legislation in regulation of state commerce, which was claimed to be so extreme as to be an unwarranted infringement of liberty of contract, this court, in *Smiley* v. *Kansas*, 196 U. S. 447, 457, said:

"Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends. This is as far as we need go in sustaining the judgment in this case."

We confine ourselves to so much of the act assailed as was construed and applied in the present case. If there should arise a case in which this legislation is sought to be applied where any interference with freedom of contract would be beyond legislative restraint, it will be time enough for interference by the courts.

As observed in *Smiley* v. *Kansas*, where the breadth of the act was criticised, "Unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint." The same principle has been often announced by this court in many cases, the

last instance being in *Citizens' National Bank* v. *Kentucky,* an opinion handed down with, and immediately following, this.

The excessive penalties provided by the Mississippi statutes have been urged as making the act unconstitutional under *Ex parte Young,* 209 U. S. 123. No penalties were demanded in the present case, the State contenting itself with a bill in equity to dissolve the association. The penalty provisions are plainly separable from the section under which such a combination is declared illegal. The penalty section not being invoked, we are not called upon to give any opinion in respect to it. *United States* v. *Delaware &c. R. Co.,* 213 U. S. 366, 417; *Southwestern Oil Co.* v. *Texas,* handed down April 4, *ante,* p. 114.

It is enough to say that the act as construed and applied to the facts of this case by the Supreme Court of Mississippi exhibits no such restraint upon liberty of contract as to violate the Federal Constitution. The decree must therefore be

Affirmed.

CITIZENS NATIONAL BANK *v.* COMMONWEALTH OF KENTUCKY FOR THE USE AND BENEFIT OF BOYLE COUNTY.

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

No. 135. Argued March 10, 1910.—Decided May 2, 1910.

An act assessing stockholders of national banks, although illegal as to a class of stockholders not similarly taxed on shares in other moneyed institutions, may be legal as to the class which is similarly taxed; and so held that § 3 of the act of March 21, 1900, of Kentucky, providing for back assessments on shares of national banks, although not legal as to non-resident stockholders, there having been no statute prior to 1900, providing for the assessing of stock of non-resident stockholders of other moneyed corporations, is not illegal as to res-

ident stockholders, as there were statutory provisions for assessing them for stocks in other moneyed corporations of the State prior to 1900. *Covington* v. *First National Bank*, 198 U. S. 100, distinguished.

A statute is not lacking in due process of law within the Fourteenth Amendment if it simply provides a new remedy for collecting a tax liability already legally existing under prior law.

A state statute may make a bank the agent for its own shareholders in compelling returns, and make it liable for taxes assessed against the shareholders.

The constitutionality of a statute cannot be attacked because it relates to a certain class by one not of that class.

Shares of stock of a national bank pass from one holder to another subject to the burden of taxes and if not properly returned for taxation as required by law the liability remains until barred by limitation and may be enforced although the stock has been transferred.

Liability for a tax is not subject to rules applicable to the vendor's equity of one buying without notice. *Seattle* v. *Kelleher*, 195 U. S. 351.

The fact that the par value of shares of a national bank has been reduced does not affect the right of taxation or to back assess unlisted shares. The shares are the same although reduced.

Citizens' Savings Bank v. *Owensboro*, 173 U. S. 636; *Covington* v. *First National Bank*, 198 U. S. 100, followed to effect that the act of March 21, 1900, of Kentucky, does not impair the obligation of the supposed contract under the Hewitt Bank Act of that State.

THE facts, which involve the validity of the statute of Kentucky of March 21, 1900, in regard to taxation of shares of stock of national banks, are stated in the opinion.

Mr. Robert Taylor Quisenberry for plaintiffs in error:

The interpretation placed on § 3, of the act of March 21, 1900, by the Court of Appeals of Kentucky, not only brings its operation into violation of § 5219, Revised Statutes, but departs from the rule that a statute shall have a prospective operation only, unless its terms show clearly a legislative intent that it shall operate retrospectively. *Watts* v. *Commonwealth*, 78 Kentucky, 331; *Lawrence* v. *City of Louisville*, 96 Kentucky, 598; *Ohio Valley Telephone Co.* v. *City of Louis-*

ville, 94 S. W. Rep. 17; *United States* v. *American Sugar Co.*, 202 U. S. 577; *United States* v. *Barr*, 159 U. S. 778.

But a tax upon shares of stock in national banks is the individual debt of the owner of the shares. If the judgment in this proceeding is sustained, then the bank must pay it out of the assets of the bank, thereby using the property in which the shareholder of 1909 or 1910 has an interest, to pay the debt of another party, together with a twenty per cent penalty, which would not only violate the Constitution and laws of the United States, but all known principles of law.

The court below erred in declaring that the shares of resident stockholders were taxable under general law of the States for the years prior to 1900. *Covington* v. *First National Bank*, 198 U. S. 100; *National Bank* v. *Owensboro*, 173 U. S. 676; *Owen County Court* v. *Farmers' National Bank*, 59 S. W. Rep. 7; *Scobee* v. *Bean*, 109 Kentucky, 526, do not sustain this contention, or are in error.

The rule in Kentucky is that the *situs* of personal property is the domicil of its owner, and is there taxable. *Lexington* v. *Fishback*, 109 Kentucky, 770; *Frankfort* v. *Fidelity Trust Co.*, 111 Kentucky, 667.

Therefore to tax national bank shares according to "general law," as defined by the state court would result in taxing only those shares which were owned by the residents and citizens of Kentucky, and omitting all shares of stock owned by non-residents. If all the shares of stock were owned and controlled by non-residents then, according to the law of taxation so laid down no tax could be assessed against said shares in Kentucky, but they would have to be taxed, like other choses in action, at the domicil of their owner. But see § 5219, Revised Statutes.

This proceeding neither discloses the name nor residence of any owners or holders of shares of stock in the Citizens' National Bank, nor the agent or attorney of such owner, nor the name of the person in possession of said shares. The owner of said shares is excluded from all participation in the

valuation, assessment and taxation of said shares, and the whole matter is relegated into the hands of those who neither own nor possess said shares. No notice is given to the owner and no forum is provided before which he can be heard in defense of his property upon the ground that the valuation placed thereon is either unreasonable, or confiscatory. The act denies him any voice in the matter and is in conflict with § 5219, Rev. Stat., in that respect and denies the shareholders due process of law. See also *Holden* v. *Hardy*, 169 U. S. 366; *Palmer* v. *McMahon*, 133 U. S. 669. Section 5219 is plain, and the right therein given a State to tax shares of stock in national banks cannot be delegated to counties, cities, towns, and taxing districts, except in the case of shares owned by non-residents of the State, which must be taxed by the city or town wherein the bank is located.

As this proceeding is instituted against the bank, its president and its cashier, for the purpose of enforcing the act of March 21, 1900, by compelling them to comply with its terms and provisions, it therefore becomes their duty to raise and urge every ground upon which said act is conceived to be repugnant to the Constitution and laws of the United States. The aforesaid defenses are not confined solely to shareholders. *Hills* v. *Exchange Bank*, 105 U. S. 319; *Boyer* v. *Boyer*, 113 U. S. 689; *Cummings* v. *National Bank*, 101 U. S. 153; *Pelton* v. *Commercial National Bank*, 101 U. S. 143.

The act permits an illegal discrimination against shares of stock in national banks and in favor of moneyed capital in the hands of individual citizens of the State by requiring these shares to be assessed as real estate, while no tax whatever is placed upon shares of stock in state banks, these institutions being taxed under §§ 4077, 4020, Kentucky Statutes. And the shares of stock in said corporations are exempt from taxation by § 4085, Kentucky Statutes. See *Citizens National Bank of Lebanon* v. *Burton*, 121 Kentucky, 876; *Home Savings Bank* v. *Des Moines*, 205 U. S. 510.

The act is illegal in that it declares shares of stock in na-

tional banks subject to taxation, and makes it the duty of the president and cashier to list said shares, and declares that the bank shall be and remain liable for the taxes upon said shares, without any provision being made whereby the bank may recover the amount of the taxes so paid on behalf of its shareholders.

An analysis of the act shows that it simply contemplates the taxation of the property of the bank, and not its shares, and the opinion of the Court of Appeals of Kentucky herein shows that that court construed that act to levy a tax upon the property of the bank, and not upon its shares of stock. *Commonwealth* v. *Citizens' National Bank*, 117 Kentucky, 946; *S. C.*, 80 S. W. Rep. 158. See *Van Allen* v. *The Assessors*, 3 Wall. 581; and dissenting opinion in *Hager &c.* v. *Citizens' National Bank*, 105 S. W. Rep. 403.

Mr. John W. Yerkes for the defendants in error.

Mr. Justice Lurton delivered the opinion of the court.

This was a proceeding under the law of Kentucky to back assess the shares of stock in the Citizens National Bank as property omitted from the tax list. After much petitioning, pleading and demurring, and two appeals to the Court of Appeals of the State of Kentucky, 1,473 shares were assessed for the taxes of 1896, 1897 and 1898, and 990 shares for the taxes of 1899, with a penalty of twenty per cent added to the tax each year. The proceeding under which this result has been reached was started in the County Court of Boyle County, Kentucky, in March, 1901, by a petition filed by the sheriff of the county for the purpose of causing the shares of the bank to be assessed as property omitted by the assessor. The authority under which the petition was filed is found in § 4241, Kentucky Statutes, and the Kentucky act of March 21, 1900. As the validity of this later act is challenged, we set it out in the margin.[1]

[1] Whereas the Supreme Court of the United States has lately de-

In the case of the *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, this court held invalid certain legislation of the State of Kentucky providing for the taxation of national banks as laying a tax, not upon shares, which was permissible, but upon the property and franchises of such banks which was

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cided that article three (3), chapter 103 of the acts of 1891–1892–1893 is void, and of no effect in so far as the same provides for taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since the adoption of said article in 1892, any adequate mode of taxing national banks, while State banks are now and have been ever since 1892 taxable for all purposes, State and local, therefore.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town, and taxing district in which the bank is located.

SEC. 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be, and remain liable to the State, county, city, town, and district for the taxes upon said shares of stock.

SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and the cashier to list the same for taxation under said levy or levies: Provided, That where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years: And provided further, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, verified and reported by the officers as assessments of real estate are entered, certified, and reported, and the same shall be certified to the proper collecting officer

inadmissible under the restrictions of § 5219, Rev. Stat. In consequence of this decision this act of March 21, 1900, was passed, as shown both by its subject-matter and the recital in the preamble. The act is both prospective and retrospective. Of its prospective features, we need say nothing. The third section is retrospective, in that it provides for the return of shares in national banks which, during the years of the operation of the legislation held invalid by this court, had not been returned for taxation, by making it the duty of certain officers of such banks to list for taxation for the years between 1892 and 1899 all shares in such banks which had not been returned, and by requiring all such banks to pay the tax and penalty upon all such omitted shares, subject, however, to certain deductions and credits on account of taxes paid by such banks under the act held invalid, as well as under the prior Hewitt act.

In *Covington* v. *First National Bank,* 198 U. S. 100, this court was required to consider the effect of the third section of the act in imposing upon national banks a liability for the taxes and penalties upon such omitted shares, which, during the years covered by this section, had been held by persons not domiciled within the State of Kentucky. The question arose under a bill filed in a Circuit Court of the United States

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for collection as assessments of real estate are certified for collection of taxes thereon.

SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

SEC. 6. The purpose of this act is to place national banks of this State with respect to taxation upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes an emergency exists, and this act shall take effect and be in force from and after its passage.

Approved March 21, 1900.

to enjoin the imposition of liability upon a national bank for taxes and penalties upon shares held between 1892 and 1900 by persons who were not domiciled in Kentucky, it being alleged that the purpose of the proceeding against the bank was to charge the bank without discrimination between domestic and foreign-held shares. Prior to this act of March 21, 1900, there was no law requiring a return for taxation of bank shares held by owners not domiciled within the State, either by such holder or by the bank in which such shares were held. For this reason we held in the case referred to that this act imposed, for the years prior to its passage, a liability upon national banks for taxes upon shareholders, domiciled outside of the State, which was not borne by other incorporated moneyed institutions. Upon this subject the court, speaking by Mr. Justice Day, said:

"Without considering the question of constitutional power to tax nonresident shareholders by means of this retroactive law, it seems to us that in imposing upon the bank the liability for the past years, for taxes and penalty, upon stock held without the State, and which before the taking effect of the act under consideration it was not required to return, there has been imposed upon national banks in this retroactive feature of the law a burden not borne by other moneyed capital in the State. This law makes a bank liable for taxes upon property beyond the jurisdiction of the State, not required to be returned by the bank as agent for the shareholders, by a statute passed in pursuance of the authority delegated in § 5219, thus imposing a burden not borne by other moneyed capital within the State." (*Covington* v. *First National Bank*, 198 U. S. 114).

In the case now before us for consideration a liability has been imposed upon the Citizens Bank, the plaintiff in error, not for taxes and penalties upon shares of the bank held by shareholders domiciled beyond the State—as was attempted in *Covington* v. *First National Bank*, 198 U. S. 100—but exclusively upon shareholders domiciled within the State. The liability is limited to the tax and penalty upon shares owned

by shareholders domiciled within the State, the name, residence and amount due from each such shareholders being distinctly set down in the decree.

Neither is the act lacking in due process if, as we shall assume for the moment is the case, the procedure under the third section is but a new remedy for a tax liability imposed by prior law of the State upon resident holders of shares of the bank.

Section 5210, Rev. Stat., requires every such bank to keep a correct list of its shareholders accessible to taxing officers, and by § 5219, Rev. Stat., the legislature of each State may, for itself, determine the manner and method for taxing shares in such banks, subject only to the restrictions named therein. In making the bank the agent for its own shareholders in proceedings brought to compel a return and secure an assessment, and in imposing upon the bank a liability for the tax so assessed against the shareholders, the act only follows the well-settled procedure sanctioned in *National Bank* v. *Commonwealth,* 9 Wall. 353; *Van Slyke* v. *Wisconsin,* 154 U. S. 581, and *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440.

That the third section does not impose a liability upon either the domestic shareholders or the bank which did not exist before under the prior law of the State, was settled by the case of *Scobee* v. *Bean,* 109 Kentucky, 526. In that case the shares of certain resident shareholders had been assessed for taxes laid for years prior to this act of 1900, and it was urged that since the special legislation for the taxation of such shares had been held void by this court in *Owensboro National Bank* v. *Owensboro,* that there was no law of the State under which these shares could be assessed. But the Kentucky court, after an elaborate review of the general taxing law of the State, held that there was full prior statutory authority for the taxation of such shares, and that under that law, if the bank failed to return and pay the tax upon such shares, it was the duty of the shareholders to do so. That case has been followed in a number of other cases by the same court, and it is the basis upon

which the third section of this act of March 21, 1900, was upheld in the present case as not imposing a new liability, but as simply providing another method for the assessment of shares which had escaped assessment under the prior law, because neither the shareholders nor the bank had returned them for taxation. In *Covington* v. *First National Bank*, 198 U. S. 100, 111, this court, speaking by Mr. Justice Day, accepted this as the interpretation of the statutory law of Kentucky by the highest court of the State, saying:

"Following the State court in the interpretation of its own statutes, it may be said that, as to shareholders residing in Kentucky and over whom the State has jurisdiction, the Supreme Court of that State has construed its statutes as requiring shareholders in national banks for the years 1893 to 1900, inclusive, to return their shares for taxation; and if they did not make the return the duty was required of the corporation. In this view of the law it may be that, as to local shareholders, the act of March 21, 1900, as held by the Supreme Court of Kentucky, created no new right of taxation, but gave simply a new remedy, which by the law is operative to enforce preexisting obligations. It may be admitted that section 5219 permits the State to require the bank to pay the tax for the shareholders. *National Bank* v. *Commonwealth*, 9 Wall. 353; *Van Slyke* v. *Wisconsin*, 154 U. S. 581; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440."

This construction of the prior law and of the act of 1900 was reaffirmed upon the first appeal of the present case, where the court said:

"The act of March 21, 1900, did not, therefore, make that taxable which was not taxable before, but simply provided another mode for the assessment of the shares of stock and the payment of the taxes. It was the duty of the assessor to make the assessment. It was also the duty of the president and cashier of the bank to list the shares of stock with the assessor; but when the assessment was not made the property was simply omitted from the tax list, and the sheriff is authorized

by section 4241, Ky. Stat. 1903, to institute the proceedings to have any omitted property assessed. A penalty may be properly imposed in the proceeding because the property was not listed with the assessor as required by law, and stood as any other property for the assessment of which a proceeding under section 4241 may be instituted. While neither the bank, nor its president, nor its cashier is the owner of the shares of stock, the bank is made by the act the agent of the shareholders, and the notice to it is notice to his agent, within the meaning of section 4241. The president and cashier were properly made defendants because it is made their duty by the statute to list the stock. The bank is required to keep a list of its shareholders, and therefore knows who they are. Notice to the agent in an assessment of property is sufficient notice to his principal." *Commonwealth* v. *Citizens National Bank*, 117 Kentucky, 946, 957.

But it is said that in *Covington* v. *First National Bank* this court held the third section broad enough to include liability for omitted returns of shares held by non-resident shareholders, and for that reason discriminated against national banks. But in that case the proceeding enjoined was one for the purpose of fixing liability upon the bank without discriminating between resident and non-resident shareholders. But in the present case the state court has not imposed liability upon the bank for taxes or penalties upon shareholders who were non-residents, but has applied it as affording a valid remedy for the collection of taxes and penalties upon residents who had not made return as required under the prior law. As thus applied, the bank has neither been deprived of any rights nor compelled to bear any burden in conflict with § 5219, Rev. Stat., upon which it relies for protection. But if it be assumed—an assumption not sustained by any decision of the Kentucky Court of Appeals—that the third section is broad enough to include liability for delinquent taxes claimed from both resident and non-resident stockholders, none of the latter class are here complaining, and such an objection cannot be

made by one unaffected by the alleged invalid feature. *Austin* v. *The Aldermen*, 7 Wall. 694; *Supervisors* v. *Stanley*, 105 U. S. 305; *The Winnebago*, 205 U. S. 354.

That the body of shareholders in 1901, when the proceeding was started, was not composed of the same individuals as the body during the years for which the taxes were due, is doubtless true. But the shares pass from one holder to another subject to the burden of taxes, and if not returned by either the shareholder or the bank, as required by the prior law, the liability remains to be enforced until barred by limitation of time. The liability of the bank is that of the shareholder, and its reimbursement must come from those who hold the shares when the bank liability is enforced. In *Seattle* v. *Kelleher*, 195 U. S. 351, it is said that liability for a tax is not subject to the rules applicable to the vendor's equity. "A man cannot get rid of his liability to a tax by buying without notice." The liability of the purchaser of shares for taxes not paid, and of the bank, as agent for its shareholders, is one of the notorious and necessary consequences of the long sanctioned right of the States to compel such banks to return its shares for taxation and to pay the assessment thereon if the shareholder does not. The legality of this method was reasoned out in *National Bank* v. *Commonwealth*, 9 Wall. 353, a case arising under the Kentucky law imposing liability upon banks for the tax upon shareholders. This answers the objection that in 1898 a reduction in the number of shares had occurred. That only means that each share of $1,000 was reduced to a share of $666.66; the shareholders remained the same, the proportion held by each in the capital being the same as before the reduction. The tax upon the share before it was reduced rested upon the same share after it had been reduced. None of the shares taxed had in fact gone out of existence before the proceeding to compel returns for purposes of taxation. The original 1,500 shares were represented by the outstanding 1,000 shares, and were in the hands of the same general body of shareholders.

The objection made that the act violates the supposed contract under the Hewitt act is answered by *Citizens Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, and *City of Covington* v. *First National Bank*, 198 U. S. 100.

The other assignments present no question which need be more particularly answered.

Judgment affirmed.

MR. JUSTICE WHITE, dissenting.

I am constrained to dissent because I think, in substance and effect the retroactive tax now upheld is a tax on the bank and its assets, and is therefore void. The power to tax is controlled by § 5219, Rev. Stat., and, as in my judgment, the tax which is now sustained is in conflict with that section, in my opinion there should be a judgment of reversal.

FAY *v.* CROZER.

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

No. 165. Argued April 21, 22, 1910.—Decided May 2, 1910.

A writ of error based on constitutional question will not lie unless the controversy is a substantial one and the question open to discussion.

If the identical question has been determined in a suit involving a state statute it is foreclosed although it may subsequently arise in connection with the provision of the constitution of the State under which the statute was enacted, and the writ of error will be dismissed.

There is no greater objection under the Constitution of the United States to the forfeiture of land for five years' neglect to pay taxes than there is to a similar forfeiture by the statute of limitations for neglect to assert title against one by whom the former owner has been disseized.

The questions involved in this case having been determined in *King* v. *Mullin*, 171 U. S. 404; *King* v. *West Virginia*, 216 U. S. 92; the writ of error is dismissed.

THE facts are stated in the opinion.

Mr. George E. Price for plaintiff in error.

Mr. J. F. Brown, Mr. W. W. Hughes and *Mr. D. J. F. Strother* for defendants in error.

PER CURIAM: This is a writ of error to the Circuit Court of the United States for the Southern District of West Virginia, brought directly to this court, and as such falls within the rule that the controversy must be substantial and the question open to discussion. Tested by that rule, we think the writ of error must be dismissed on the authority of *King* v. *Mullins*, 171 U. S. 404; *King* v. *West Virginia*, 216 U. S. 92. And see *King* v. *Panther Lumber Company*, 171 U. S. 437; *Swann* v. *State*, 188 U. S. 739. It is contended that the question of the forfeiture of plaintiffs' title under the constitution of West Virginia was not ruled in those cases, because they also involved the statute of the State referred to, while this case presents the validity of the forfeiture provision of the state constitution alone. But it was pointed out in *King* v. *West Virginia*, 216 U. S. 100, that the right to redeem given by the statute was not coextensive with the forfeiture under the state constitution, and yet the constitution was upheld, as it was in *King* v. *Mullins*, 171 U. S. 404. It follows, therefore, that the state constitution must be upheld in the present case. The only hearing that could be necessary would be whether the facts constitute a forfeiture, and that question when it arises between a former owner and a claimant under the State can be tried in a case between those parties, as it was here. There is no greater objection under the Constitution of the United States to the forfeiture of land for five years' neglect to pay taxes than there is to a similar forfeiture by the statute of limitations for neglect to assert title against one by whom the former owner has been disseised. We think that the question suggested is so plainly covered by the preceding cases that the writ of error must be dismissed.

It is so ordered.

HUTCHINSON, PIERCE & CO. *v.* LOEWY.

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

No. 182. Argued April 29, 1910.—Decided May 16, 1910.

In a suit in the Circuit Court under the Trade-mark Act where diverse citizenship does not exist the court's jurisdiction extends only to the use of the registered trade-mark in commerce between the States with foreign nations and the Indian Tribes.

Under §§ 17, 18, of the Trade-mark Act of February 20, 1905, c. 592, 33 Stat. 724, and § 6 of the Circuit Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 826, a final decision of the Circuit Court of Appeals in a case brought under the Trade-mark Act can only be reviewed by this court upon certiorari. *Atkins* v. *Moore*, 212 U. S. 284.

Appeal from 163 Fed. Rep. 42, dismissed.

THE facts, which involve the jurisdiction of this court of an appeal from the Circuit Court of Appeals in a suit brought under the Trade-mark Act of 1905, are stated in the opinion.

Mr. Archibald Cox for appellant:

On the question of jurisdiction of the appeal by this court:

This is the first appeal based on the fact that the jurisdiction of the Circuit Court was founded on the Trade-mark Act of February 20, 1905.

Appellant's right to this appeal depends upon that act and the Judiciary Act of March 3, 1891, which latter act provides for the distribution of the entire appellate jurisdiction of our national judicial system. *McLish* v. *Roff*, 141 U. S. 661; *Macfadden* v. *United States*, 213 U. S. 288. An appeal lies from the Court of Appeals to this court in all cases except those wherein an appeal lies to this court direct from the court of first instance and those wherein the decision of the Court of Appeals is expressly made final. That right of appeal is not

to be defeated by implication, but exists unless the decision of the Court of Appeals is "made final in terms" see *Press Publishing Co.* v. *Monroe*, 164 U. S. 105; *Werner* v. *Searle Hereth Co.*, 144 U. S. 47.

The Judiciary Act of March 3, 1891, applies equally to laws of the United States enacted before and after that date, *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Lau Ow Bew* v. *United States*, 144 U. S. 56, and under the Judiciary Act the Court of Appeals had appellate jurisdiction in the case at bar and an appeal could be taken to this court, because the jurisdiction of the Circuit Court rested on a law of the United States and the case was accordingly not a case in which the judgment of the Court of Appeals is made final in terms, but a case not expressly made final by the section.

The Trade-mark Act of 1905 is in no way inconsistent with the Judiciary Act of 1891 and does not make the decision of the Court of Appeals final. The provision as to the jurisdiction of courts in the Trade-mark Act was enacted following the Judiciary Act which contained words "manifestly inserted out of abundant caution in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were intended to be thereby guarded against. *Lau Ow Bew* v. *United States*, *supra*.

With this before it Congress carefully avoided making the decision of the Court of Appeals final in trade-mark cases, as will be seen by comparing the words of the Judiciary Act and the Trade-mark Act.

There is nothing inconsistent. There is nothing making the decision of the Circuit Court of Appeals final. And it would seem that Congress took pains to leave the right of appeal to this court untouched.

The Trade-mark Act of 1905 also provides in § 18, that writs of certiorari may be granted by this court. This is not inconsistent with the right of appeal and is not unnecessary. The right of appeal to this court is limited by the Judiciary

Act to causes in which the amount involved exceeds one thousand dollars. The provision for certiorari in cases under the Trade-mark Act applies regardless of the amount of the controversy.

Mr. E. T. Fenwick and *Mr. L. L. Morrill* for appellee.

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

This was a bill in equity for an injunction and accounting, the complainant alleging the defendant had infringed its technical trade-mark applied to shirts, and also was guilty of unfair competition. As complainant is a corporation of the State of New York and defendant is a citizen of the same State, the court's jurisdiction extends only to the use of the registered trade-mark in commerce between the States, with foreign nations and the Indian tribes.

There was no attempt to prove that defendant had passed off, or intended to pass off, his goods for complainant's, or had made profits, or that complainant had sustained damage. The cause proceeded solely on complainant's ownership of its technical trade-mark.

The Circuit Court held that defendant's trade-mark or brand was clearly distinguishable from that of complainant, and said:

"There is no reasonable probability of the ordinary purchaser being deceived into buying the defendant's manufacture as that of complainant. The rule is well established that a trade-mark, word or symbol has the elements of a property right and may not be unlawfully used by a rival in business either alone or as an accessory to such prior appropriation and in such cases a right to injunctive relief follows without proof of confusion of proprietorship or that buyers have been actually misled by such use. But if a defendant's design or symbol is essentially different and distinguishable in appearance so

that by no possibility can his article be taken for complainant's genuine production, a cause of unlawful appropriation is not maintainable." 163 Fed. Rep. 44.

The bill was thereupon dismissed, and having been taken by appeal to the United States Circuit Court of Appeals for the Second Circuit, the decree below was affirmed. 163 Fed. Rep. 42.

Appellants thereupon petitioned for an appeal to this court, which was allowed.

Sections 17 and 18 of the act of Congress approved February 20, 1905, c. 592, 33 Stat. 724, in respect to trade-marks, reads as follows:

"SEC. 17. That the Circuit and Territorial Courts of the United States and the Supreme Court of the District of Columbia shall have original jurisdiction, and the Circuit Courts of Appeal of the United States and the Court of Appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this act, arising under the present act, without regard to the amount in controversy.

"SEC. 18. That writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this act in the same manner as provided for patent cases by the act creating the Circuit Court of Appeals."

We are of opinion that this appeal will not lie, and that the remedy by certiorari is exclusive. By the sixth section of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828, the final decisions of the Circuit Courts of Appeal are made final "in all cases under the patent laws, under the revenue laws, under the criminal laws and in admiralty cases," with power in this court to require any such cases to be certified thereto for its review and determination, "with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

We think that the language of § 18 places suits brought under the Trade-mark Act plainly within the scope of the act

establishing the Court of Appeals, and that a final decision of that court can be reviewed in this court only upon certiorari, and that therefore the pending appeal must be dismissed. And this conclusion is sustained by *Atkins* v. *Moore*, 212 U. S. 285, 291.

Appeal dismissed.

KIDD, DATER AND PRICE COMPANY *v.* MUSSELMAN GROCER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 149. Argued April 13, 14, 1910.—Decided May 16, 1910.

Where this court has held a state statute constitutional it will follow that decision in a case involving the constitutionality of a statute of another State which fundamentally is similar and which is attacked on the same ground by persons similarly situated; and so held that the Michigan Sales-in-Bulk Act of 1905 which is fundamentally similar to the Sales-in-Bulk Act of Connecticut, sustained in *Lemieux* v. *Young*, 211 U. S. 489, is not unconstitutional under the due process or equal protection clauses of the Fourteenth Amendment.

It is within the police power of the State to require tradesmen making sales in bulk of their stock in trade to give notice to their creditors and also to prescribe how such notice shall be given, and unless the provisions as to such notice are unreasonable and arbitrary a statute to that effect does not amount to deprivation of property, abridge liberty of contract or deny equal protection of the law within the meaning of the Fourteenth Amendment; nor is the requirement in the Michigan Sales-in-Bulk Act of 1905 that such notice be either personal or by registered mail unreasonable or arbitrary.

151 Michigan, 478, affirmed.

THE facts, which involve the constitutionality of the Sales-in-Bulk Act of 1905 of Michigan, are stated in the opinion.

Mr. G. M. Valentine, with whom *Mr. E. L. Hamilton*,

Mr. G. W. Bridgman and *Mr. E. B. Valentine* were on the brief, for the plaintiff in error:

The enforcement of the act deprives a merchant of his property without due process of law, by making it extremely difficult, if not impossible, whenever he may be in debt, as he usually is when he makes such a sale, to sell his stock otherwise than in the ordinary course of trade, even though he may desire to make the sale for honest purposes.

The requirements for an inventory and list of creditors impose unreasonable restraints upon trade.

Suppose that the list is not full, accurate, and complete, may the purchaser rely upon the sworn certificate of the seller, or must he independently ascertain its accuracy and rely upon it at his peril?

The requirement that notice be given to all creditors, whether their claims are due or not, five days in advance of the sale, either personally or by registered mail is onerous and arbitrary.

The argument in support of the act in *Spurr* v. *Travis*, 145 Michigan, 721, is that, if an owner owes no debts, no delay is required, and an owner who is in debt may qualify himself at once by paying his debts, or if not, the sale is postponed until notice is given as the statute provides. But how shall the purchaser know that there are no creditors? The act may not literally take property without due process of law, but it annihilates its value and destroys its attributes. *Wright* v. *Hart*, 182 N. Y. 330.

If this legislation is valid, then it is competent for the legislature to make every transfer of a debtor's property, real and personal, void. The property rights guaranteed by the Fourteenth Amendment consist not merely in the title or right to the possession of property, but also the right to make any lawful use of the property and the right to pledge or mortgage it, sell or transfer it, and the right to buy it, so long as the sale or transfer is not made for fraudulent purposes. *Kuhn* v. *Common Council*, 70 Michigan, 534.

Nothing less than an opportunity to be heard in court upon the question of the honesty of a purchase and sale can be due process of law. *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701.

The enforcement of the act deprives an honest purchaser of a stock of goods of his property without due process of law, by compelling him to pay for the goods twice, if the terms and conditions of the act have not been followed, and good faith is no defense. Every citizen is entitled to the presumption of honesty, and his dishonesty and his fraud must be proved before he can be deprived, either of his liberty, his property, or his good name. *Kuhn* v. *Common Council*, 70 Michigan, 534.

The statute is not of the slightest use as a protection to creditors, for it may always be evaded, as, for instance, by *Hannah & Hogg* v. *Richter Brewing Company*, 149 Michigan, 220; 12 L. R. A. (N. S.) 178.

The only benefit to the creditors is in case the requirements of the statute are not observed, and then the benefit is not *pro rata* but only to those bringing suits.

A distinguishing peculiarity of this statute is that no benefits flow to creditors of merchants from its observance.

The enforcement of the act enables a purchaser who has obeyed it, and who is also a creditor of the seller, to deprive other creditors of their property without due process of law.

The enforcement of the act deprives a creditor of his property without due process of law, by destroying all remedy against the debtor's goods, probably at once, and certainly after five days from time of receiving notice of the proposed sale.

Before the enactment of this statute, a creditor might in a proper case maintain an action of replevin or trover within six years from the time the cause of action accrued, Comp. Laws of Michigan, 1897, § 9728, or obtain an attachment; Comp. Laws of Michigan, 1897, c. 292; but all these remedies against the property of the debtor are destroyed by the act

in question, unless brought within five days after receiving the notice of the transfer.

To prescribe an unreasonably short period of limitation is an impairment of the obligation of contracts, or a taking of property without due process of law. 19 Am. & Eng. Enc. of Law, 2d ed., 169, 170; *Price* v. *Hopkin*, 13 Michigan, 318, 324, and cases cited.

Legislation similar to the act here involved, and for the same general purpose, has been enacted in many States. Such acts have been held violative of both the state and United States Constitutions, in the States of New York, Ohio, Indiana, Illinois, Utah, and Virginia, on the ground that the effect of such statutes is to cause the deprivation of property without due process of law, and that the same does not afford to persons interested, the equal protection of the laws. *Wright* v. *Hart*, 182 N. Y. 330; 75 N. E. Rep. 404; *Miller* v. *Crawford*, 70 Oh. St. 207; 71 N. E. Rep. 631; *McKinster* v. *Sager*, 163 Indiana, 671; 72 N. E. Rep. 854; *Block* v. *Schwartz*, 27 Utah, 387; 101 Am. St. Rep. 971; 65 L. R. A. 308; *Off & Co.* v. *Morehead*, 235 Illinois, 40; 85 N. E. Rep. 264.

Statutes for the same general purpose have been held valid in Massachusetts, Tennessee, Washington, and Oklahoma, but the statutes of all those States are easily differentiated from the Michigan statute. *Squire & Co.* v. *Tellier*, 185 Massachusetts, 18; 69 N. E. Rep. 312; *Neas* v. *Borches*, 109 Tennessee, 398; 97 Am. St. Rep. 851; 71 S. W. Rep. 50; *McDaniels* v. *J. J. Connelly Shoe Company*, 30 Washington, 549; 60 L. R. A. 347; 94 Am. St. Rep. 889; *Williams* v. *Fourth National Bank*, 82 Pac. Rep. 496 (Okla.); 2 L. R. A. (N. S.) 334.

In Wisconsin and Maryland, such statutes have been before the court, but the question of their constitutionality does not seem to have been raised. See *Fisher* v. *Herrman*, 118 Wisconsin, 424; *Hart* v. *Roney*, 93 Maryland, 432. A statute of Connecticut, having but slight resemblance to the Michigan statute, was held valid by this court in *Lemieux* v.

Young, 211 U. S. 489, but the case can be distinguished as the statutes differ in many respects.

Liberty of a citizen includes the right to acquire property, to own it, use it, buy it, or sell it, so long as his acts are without intent to defraud. When the owner is deprived of the right to sell property, he is deprived of the property itself, within the meaning of the Constitution, by having one of the incidents of ownership taken away from him. *Allgeyer* v. *State of Louisiana*, 165 U. S. 578; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746; *Lochner* v. *New York*, 198 U. S. 53; *In re Jacobs*, 98 N. Y. 98; *People* v. *Gillson*, 109 N. Y. 389; *Braceville Coal Co.* v. *People*, 147 Illinois, 66, 71; *Ritchie* v. *People*, 155 Illinois, 98, 104; *Frorer* v. *People*, 141 Illinois, 171; *Commonwealth* v. *Perry*, 155 Massachusetts, 117; *Cleveland* v. *Clements Bros. Const. Co.*, 67 Ohio St. 197, 219. Dissenting opinion in *Neas* v. *Borches*, 109 Tennessee, 398; *Bank* v. *Divine Grocery Co.*, 12 Pickle, 611; *Off & Co.* v. *Morehead*, 85 N. E. Rep. 266. An act of the legislature which takes away a right by refusing a remedy *in toto* or except on impossible conditions, is as much a violation of the Constitution as though the right were taken away in express terms. *Gilman* v. *Tucker*, 128 N. Y. 190.

The terms, "law of the land" and "due process of the law" do not mean merely an act of the legislature. *Board of Education* v. *Bakewell*, 122 Illinois, 339; *Clark* v. *Mitchell*, 64 Missouri, 578; *Calhoun* v. *Fletcher*, 63 Alabama, 574; *Saco* v. *Wentworth*, 37 Maine, 165.

The law of the land does not mean merely an act of the legislature, for such a construction would abrogate all restrictions on legislative power. 10 Am. & Eng. Enc. of Law, 2d ed., 291, 292; citing Cooley's Cons. Limit., 6th ed., 431; *Taylor* v. *Porter*, 4 Hill, 140, 145; and see *In re Siebold*, 23 Fed. Rep. 791; *Moore* v. *State*, 14 Vroom (43 N. J. L.), 203; *Dorman* v. *State*, 34 Alabama, 216.

There is no justification for the legislation under the police power. The individual may pursue without let or hindrance

from anyone all such callings as are innocent in themselves, and not injurious to the public.

The statute has no such effect as the preservation of the public safety or welfare, but under the guise of police regulation is an invasion of the property rights of the individual. *Chaddock* v. *Day*, 75 Michigan, 527; *Matter of Frazee*, 63 Michigan, 396; *People* v. *Gillson*, 109 N. Y. 389; *In re Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *Fisher Co.* v. *Wood*, 187 N. Y. 90; *Gilman* v. *Tucker*, 128 N. Y. 190; *People* v. *Warden*, 157 N. Y. 116; *Lawton* v. *Steele*, 152 U. S. 133; *Richmond* v. *Southern Bell Telephone Co.*, 85 Fed. Rep. 19; *Chicago* v. *Netcher*, 183 Illinois, 104.

Sales statutes are not within the police power. *Miller* v. *Crawford*, 70 Ohio St. 207; *McKinster* v. *Sager*, 163 Indiana, 671; *Off & Co.* v. *Morehead*, 235 Illinois, 40; *Wright* v. *Hart*, 182 N. Y. 330; *Neas* v. *Borches*, 109 Tennessee, 398.

The decisions cited from the state courts do not differ from the law as laid down by this court. *Slaughter House Cases*, 16 Wall. 36; *Lochner* v. *New York*, 198 U. S. 45; *Davidson* v. *New Orleans*, 96 U. S. 97; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hennington* v. *Georgia*, 163 U. S. 299, 303; *Mugler* v. *Kansas*, 123 U. S. 623; *State of Minnesota* v. *Barber*, 136 U. S. 313.

The act in question is substantially an insolvency law, and therefore of no effect when a national bankruptcy law is in force. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Tua* v. *Carriere*, 117 U. S. 201; 1 Fed. Stat. Annot. 526, 527, notes; Brandenburg on Bankruptcy, 3d ed., § 16, and cases cited.

Mr. Benn M. Corwin for defendant in error:

The existence of an evil, so universal as to challenge the attention of almost every legislative body in the country, cannot be passed lightly by. *People* v. *Arensberg*, 103 N. Y. 388, 394.

Forty-one States and Territories, together with the Dis-

trict of Columbia, have passed statutes regulating the sale of stocks of goods in bulk.

These statutes may be divided into five groups or classes:

First. Arizona, California, Connecticut, Ohio, require notice of the proposed sale to be recorded, from five to ten days, before completing the sale. Such provisions sustained in *Calkins* v. *Howard*, 2 Cal. App. Rep. 233; *Walp* v. *Moore*, 76 Connecticut, 515; *Spencer* v. *Broughton*, 77 Connecticut, 38; *In re Paulis*, 144 Fed. Rep. 472 (Conn.); *Young* v. *Lemieux*, 79 Connecticut, 434; *Lemieux* v. *Young*, 211 U. S. 489.

Second. In the District of Columbia, Florida, Idaho, Kentucky, Maryland, New Hampshire, New Jersey, New York (new), Oregon, Pennsylvania, Rhode Island, Texas, West Virginia and Wisconsin, fourteen in all, the purchaser is required to demand and receive of the seller a list of names and addresses of his creditors and amount due each; the purchaser is also required to notify each creditor of the terms and conditions of the sale, either personally or by registered mail, from five to ten days before completion.

Three of these statutes have been construed and enforced without reference to their constitutionality in *Hart* v. *Roney*, 93 Maryland, 432; *Wilson* v. *Edwards*, 32 Pa. Sup. Ct. 295; *Fiengold & Co.* v. *Barsh & Co.*, 33 Pa. Sup. Ct. 39; *Fisher* v. *Herrmann*, 118 Wisconsin, 424.

Third. Colorado, Delaware, Georgia, Michigan, Indiana (new), Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Virginia, and Vermont, eighteen in all. In each of these States, the statute in force contains substantially the same provisions as those in the second group, and in addition to the requirements of the statutes in the second group, requires an inventory to be taken and notice to be given in person or by registered mail, as in the second group.

The constitutionality of six of this group of statutes, all containing substantially the same provisions as the Michigan

statute, has been upheld. *Spurr* v. *Travis*, 145 Michigan, 721; *Musselman Grocer Co.* v. *Kidd, Dater & Price*, 151 Michigan, 478; *Squire* v. *Tellier*, 185 Massachusetts, 18; *Thorpe* v. *Pennock*, 99 Minnesota, 22; *Jaques & Tinsley Co.* v. *Carstorphen Warehouse Co.*, 131 Georgia, 1; *Williams* v. *Fourth National Bank*, 15 Oklahoma, 477; *Neas* v. *Borches*, 109 Tennessee, 398.

In addition to the cases cited which have passed directly upon the validity of these statutes, the validity of such statutes has been assumed without question in *Wasserman* v. *McDonnell*, 190 Massachusetts, 326; *Kelley-Buckley Co.* v. *Cohen*, 195 Massachusetts, 585; *Hart* v. *Brierley*, 189 Massachusetts, 598; *Hannah & Bogg* v. *Brewing Co.*, 149 Michigan, 220; *Farrar* v. *Lonsby Lumber Co.*, 149 Michigan, 118; *Pierson & Hough Co.* v. *Noret*, 154 Michigan, 268; *Bixler* v. *Fry*, 122 N. W. Rep. (Mich.) 119; *Carstorphen* v. *Fried*, 124 Georgia, 544; *Parham & Co.* v. *Potts-Thompson Liquor Co.*, 127 Georgia, 303; *Sampson* v. *Brandon Grocery Co.*, 127 Georgia, 454; *Taylor* v. *Folds*, 58 S. E. Rep. (Ga.) 683; *Gilbert* v. *Gonyea*, 103 Minnesota, 459; *Kolander* v. *Dunn*, 95 Minnesota, 422.

Fourth. Montana, Nevada, Washington, and Utah, require the purchaser to demand a sworn statement containing a list of the seller's creditors, and provides that all sales in bulk shall be void unless the purchaser shall pay or see to it that the purchase money of said property is applied to the payment of all *bona fide* claims of the creditors of the vendor, share and share alike.

The Washington statute, has been upheld in *McDaniell* v. *Connelly Shoe Co.*, 30 Washington, 549, and see also the following cases under this statute: *In re Gaskill et al.*, 130 Fed. Rep. (Wash.) 235; *Fitz Henry* v. *Munter*, 33 Washington, 629; *Kohn* v. *Fishback*, 36 Washington, 69; *Plass* v. *Morgan*, 36 Washington, 160; *Holford* v. *Trewella*, 36 Washington, 654; *Seattle Brewing &c. Co.* v. *Donofrio*, 34 Washington, 18; *Albrecht* v. *Cudihee*, 37 Washington, 206; *Everett Produce Co.* v. *Smith Bros.*, 40 Washington, 566.

Fifth. The Louisiana statute makes it a misdemeanor to purchase goods on credit and sell or otherwise dispose of them out of the usual course of business, with intent to defraud, and also for a purchaser to purchase a stock of goods in bulk without first obtaining a sworn statement from the vendor that the same are paid for.

For a conviction for fraud thereunder see *State* v. *Artus*, 110 Louisiana, 441.

Counsel for plaintiff erred in stating that the statute of Virginia has been held invalid. Of all the cases decided under statutes regulating the sales of stocks in bulk, only five have held statutes invalid: *Off & Co.* v. *Morehead*, 235 Illinois, 40; *McKinster* v. *Sager*, 163 Indiana, 671; *Wright* v. *Hart*, 182 N. Y. 332; *Miller* v. *Crawford*, 70 Ohio St. 207; *Block* v. *Schwartz*, 27 Utah, 387.

MR. JUSTICE WHITE delivered the opinion of the court.

This case involves the inquiry whether Act No. 223 of the Public Acts of the State of Michigan of the year 1905, commonly known as the "Sales-in-Bulk Act," is repugnant to the Fourteenth Amendment. The act is copied in the margin.[1]

[1] SEC. 1. The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferor or assignor, shall be void as against the creditors of the seller, transferor, assignor, unless the seller, transferor, assignor and purchaser, transferee and assignee, shall, at least five days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller, transferor and assignor of each article to be included in the sale; and unless the purchaser, transferee and assignee demands and receives from the seller, transferor and assignor a written list of names and addresses of the creditors of the seller, transferor and assignor, with the amount of the indebtedness due or owing to each, and certified by the seller, transferor and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall,

The controversy thus arose: Early in the year 1906 Frank B. Ford operated a store in the village of Berrien Springs, Michigan, consisting of various departments—hardware, grocery, meat market and furniture department and buggies and machinery department. Prior to May 23, 1906, Ford made sale of the stock included in the buggies and machinery department. On the day mentioned plaintiff in error, after taking an inventory of the stock in the grocery department, valuing it at cost less ten per cent, purchased the same for $2,100, deducting an indebtedness due from Ford of $415.45 and paying the balance in cash. In making purchase the requirements of the Sales-in-Bulk Act referred to were not complied with in any particular. After the sale Ford still owned the meat market, worth between eight hundred and a thousand dollars, and the stock of hardware, worth between five and six thousand dollars. He afterwards sold the stock of hardware for about forty-one hundred dollars, and on such

at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge of the proposed sale and of the price, terms and conditions thereof.

Sec. 2. Sellers, transferors and assignors, purchasers, transferees and assignees, under this act, shall include corporations, associations, copartnerships and individuals. But nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process.

Sec. 3. Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferor or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment: Provided, however, That any purchaser, transferee, or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller, transferor or assignor, or to the seller, transferor or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment.

sale the requirements of the Sales-in-Bulk Act were complied with. The meat market was also disposed of, and in February, 1907, bankruptcy proceedings were commenced against Ford, with what result the record does not disclose.

After the sale of the stock of the grocery department to Kidd, Dater & Price Company, plaintiff in error, the Musselman Grocer Company, defendant in error, sued Ford upon an account and joined as garnishee the Kidd, Dater & Price Company, upon the theory that the latter company incurred a liability to respond as garnishees for the property acquired from Ford, because of non-compliance with the requirements of the act in question. Upon the trial it was contended by counsel for Kidd, Dater & Price Company that, if valid, the statute did not authorize garnishment proceedings for its enforcement, and that the act was invalid because repugnant both to the constitution of the State and to the Constitution of the United States. The last contention, with which alone we are concerned, was thus expressed:

"The act violates section 1 of the Fourteenth Amendment to the Federal Constitution, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of the 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 trial court held the contentions as to the proper construction of the statute and its constitutionality to be without merit, and by direction a verdict was returned for the plaintiff, upon which judgment was duly entered. Upon appeal the Supreme Court of Michigan affirmed the judgment. 151 Michigan, 478. It held the Sales-in-Bulk Act to be constitutional, without discussion, upon the authority of a previous decision (*Spurr* v. *Travis*, 145 Michigan, 721), and further decided that the failure to comply with the act made the sale by Ford to Kidd, Dater & Price Company void as to creditors, and that the plaintiff in garnishment was entitled to avail of the gar-

nishment provisions of the compiled laws of the State. This writ of error was then prosecuted.

The errors assigned embody the proposition that the Sales-in-Bulk Act in question was not a valid exercise of the police powers of the State, and is hence repugnant to the Fourteenth Amendment, because wanting in due process of law and denying the equal protection of the laws. Substantially the same arguments are urged as were presented in *Lemieux* v. *Young*, 211 U. S. 489, decided after this writ of error was sued out. In the *Lemieux case* the validity of legislation of the general character of that embodied in the Michigan statute was passed on. The Connecticut law, the constitutionality of which was particularly involved, was held to be a valid exercise of the police power of the State, and not to be repugnant to the due process or equal protection clauses of the Fourteenth Amendment, although it avoided as against creditors sales by retail dealers in commodities of their entire stock at a single transaction, and not in the regular course of business, unless notice of intention to make such sale was recorded seven days before its consummation. The opinion in that case thus concluded:

"As the subject to which the statute relates was clearly within the police powers of the State, the statute cannot be held to be repugnant to the due process clause of the Fourteenth Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. *Booth* v. *Illinois*, 184 U. S. 425. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws."

These principles are decisive against the contentions made

in this case, as we do not find in the provisions of the Michigan statute when compared with the Connecticut statute such differences as would warrant us in holding that the regulations of the Michigan statute are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. The purpose of both statutes is the same, viz., to prevent the defrauding of creditors by the secret sale of substantially all of a merchant's stock of goods in bulk, and both require notice of such sale and make void as to creditors a sale without notice. The differences between the two statutes are pointed out by counsel in a summary which we excerpt in the margin.[1]

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[1] 1. The Connecticut law relates only to retail merchants; the Michigan law relates to wholesale and retail merchants.

2. The Connecticut law requires notice to be filed in the town clerk's office; the Michigan law requires notice either personally or by registered mail to the creditors, and to this end requires that the seller, transferor, or assignor shall, under oath, certify to a full, accurate and complete list of his creditors and of his indebtedness, and that the purchaser shall notify, personally or by registered mail, every creditor so certified, of the proposed sale and the conditions thereof.

3. The Connecticut law requires notice to be filed seven days prior to the sale, and the Michigan law requires five days before completion of sale, the purchaser shall notify, personally or by registered mail, every creditor, etc.

4. The Connecticut law requires a description in general terms of the property to be sold; the Michigan law requires a full and detailed inventory showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller, transferor, and assignor of each article to be included in the sale.

5. The Michigan law provides that any purchaser not conforming to the provisions of the act shall, on application of any creditor of the seller, become a receiver and be held accountable to such creditors for all the goods, etc.; the Connecticut law simply states that failure to comply with the act shall make the sale void as against the creditors.

6. The Michigan law provides that upon compliance with the provisions of the act a purchaser shall not in any way be held accountable to any creditor of the seller or to the seller for any of the goods so purchased; the Connecticut law is without any such provision.

It is apparent, we think, from this summary that the statutes are alike fundamentally, and differ only in minor and incidental provisions. In some respects the Michigan law is more comprehensive than the Connecticut law, as the latter law was limited to retail merchants, while the Michigan law affects wholesalers as well as retailers. The requirements of the Michigan law, that a full and detailed inventory shall be made, does not seem to us to be oppressive and arbitrary, as in *bona fide* purchases of stocks of goods in bulk a careful purchaser is solicitous to demand such an inventory, and in the purchase in question an inventory was in fact made. Nor can we say, in view of the ruling in the *Lemieux case*, to the effect that a State may, without violating the Constitution of the United States, require that creditors be constructively notified of the proposed sale of a stock of goods in bulk, that a requirement for what is in effect actual notice to each creditor is so unreasonable as to be a mere arbitrary exertion of power beyond the authority of the legislature to exert. We do not deem it necessary to further pursue the subject, as we think it clearly results, from the ruling in *Lemieux* v. *Young*, that the Michigan statute in no way offends against the Constitution of the United States, and therefore that the court below was right in so deciding.

Affirmed.

SOUFFRONT, WIDOW OF FLEURIAN, *v.* LA COMPAGNIE DES SUCRERIES DE PORTO RICO.

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

No. 155. Argued April 15, 1910.—Decided May 16, 1910.

Where the vendors bring an action in their own name but to protect their vendees, such vendees, although having acquired title prior to the institution of the action are privies thereto and may plead the judgment in such action as *res judicata;* in such a case the general rule that no one whose interest was acquired prior to the institution of the action is privy to the judgment rendered therein does not apply.

Under Spanish law it was competent for vendors after parting with title to conduct a litigation in their own names for the benefit of their vendees, and therefore a judgment in such a case inures to the benefit of the vendees as between them and the defendants against whom it was rendered and their respective privies.

One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. *Lovejoy* v. *Murray,* 3 Wall. 1.

Assertions that parties are not privies to a judgment and cannot plead it as *res judicata* and that a judgment can be collaterally attacked as rendered against one insane at the time, raise questions of law, and where, as in this case, such questions are to be determined on the facts appearing in such judgments and in the pleadings the court does not usurp the functions of the jury by determining that the contentions raised by such assertions are without merit.

THE facts are stated in the opinion.

Mr. Hannis Taylor, with whom *Mr. Charles M. Boerman* was on the brief, for plaintiffs in error:

Those who acquire a title before any suit brought by the

vendors or former owners are not to be considered as privies to such suit or a judgment thereon. Freeman on Judgments, 1st ed., § 162; *Dull* v. *Blackman*, 169 U. S. 248; *Kerr* v. *Watts*, 6 Wheat. 560; *Canon River Mfg. Assn.* v. *Rogers*, 43 N. W. Rep. 792; *Sessions* v. *Johnson*, 95 U. S. 347; *Graham* v. *La Crosse M. R. Company*, 3 Wall. 704.

A party not concluded or bound by a judgment cannot invoke such judgment as estoppel against others. *Keokuk Railroad* v. *Scotland County*, 152 U. S. 326; *Bedon* v. *Devie*, 144 U. S. 143.

The judgment of a foreign court, and especially a French court, upon the rights or title to real estate, situated in this country, has not the effect of *res judicata*. *Dull* v. *Blackman*, 169 U. S. 246; *Carpenter* v. *Strange*, 141 U. S. 105. The court has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title. *Hart* v. *Sansom*, 110 U. S. 151, 155; *Massie* v. *Watts*, 6 Cranch, 148, citing Story, Confl. Laws, § 543; Whart., Confl. Laws, §§ 228, 289; *Watkins* v. *Holman*, 16 Pet. 25; *Northern Indiana Railroad* v. *Mich. Cent. Railroad*, 15 How. 233; *Davis* v. *Headly*, 22 N. J. Eq. (7 C. E. Green) 115; *Miller* v. *Birdsong*, 7 Baxter, 531; *Cooley* v. *Scarlett*, 38 Illinois, 316; *Gardner* v. *Ogden*, 22 N. Y. 327.

A decree in equity rendered upon a demurrer to the bill without considering the merits of the case has not the effect of *res judicata*. *Walden* v. *Bodley*, 14 Pet. 156; 1 Greenleaf's Ev., §§ 529, 530, and authorities there cited; *Hickey* v. *Stewart*, 3 How. 758; *Smith* v. *Sherwood*, 4 Connecticut, 276; *Stevens* v. *Hughes*, 31 Pa. St. 381; and see Freeman on Judgments, § 270.

As the action in the case at bar is in the nature of the trial of the title it is not barred even by a former judgment in ejectment. *Mallet* v. *Foxcroft*, 1 Story, 477; *Foxcroft* v. *Mallet*, 4 How. 378; *Strother* v. *Lucas*, 12 Pet. 434; *Merryman* v. *Bourne*, 9 Wall. 599.

A United States court in an action at law cannot render judgment without a jury upon the pleadings, where the facts alleged by one party are controverted by the other party.

Amendment VII to the Constitution of the United States; *United States* v. *La Vengeance*, 3 Dall. 297; *Bank of Columbia* v. *Oakly*, 4 Wheat. 235; *Edwards* v. *Elliot et al.*, 21 Wall. 532.

This article of the Constitution is in force in all the organized Territories of the United States. *Cannon* v. *Gilmer*, 131 U. S. 28; *Tompson* v. *Utah*, 170 U. S. 346.

Section 34 of the act temporarily to provide revenues and a civil government for Porto Rico, of April 12, 1900, provides, that the United States District Court for Porto Rico shall proceed in the same manner as a Circuit Court.

The single question which this court need consider is whether the District Court erred in substituting itself for the jury, and in passing upon the contested issues of fact presented by the replication, without a waiver of the right of trial by jury by consent of parties. The trial of issues of fact in civil cases by the courts of the United States without the intervention of a jury, can be had only when the parties waive their right to a jury by a stipulation in writing. *Baylis* v. *Travelers' Ins. Co.*, 113 U. S. 316; *Elmore* v. *Grymes*, 1 Pet. 469; *D'Wolf* v. *Rabaud*, 1 Pet. 476; *Castle* v. *Ballard*, 23 How. 172; *Hodges* v. *Easton*, 106 U. S. 408; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 515; *Morgan* v. *Gay*, 19 Wall. 81; *Royal Ins. Co.* v. *Martin*, 192 U. S. 149. Trial by jury is a part of the machinery of the District Court of the United States in Porto Rico.

Mr. Charles Hartzell, with whom *Mr. Manuel Rodriguez-Serra* was on the brief, for defendants in error.

Mr. Justice White delivered the opinion of the court.

In July, 1906, plaintiffs in error commenced this action in the District Court of the United States for the District of Porto Rico, to recover, from the defendants in error, the possession of certain described real estate and damages from April 12, 1904, for unlawfully withholding possession thereof.

The right to the relief sought was based upon the averment that one Clemente de Fleurian, at his death, on February 24, 1892, was seized in fee and entitled to the possession of the premises, and that he died intestate, leaving the plaintiffs—his widow and two children—"as his legal succession." A demurrer to the complaint was overruled, except as to the necessity of furnishing certain information in regard to rents and profits, which was afterwards done through the medium of a bill of particulars. The defendants filed a joint answer. In addition to a general denial, they pleaded title by adverse possession of twenty years, and that plaintiffs' right to recover was barred by reason of certain judgments obtained by the predecessors in title of defendants in actions prosecuted by them in the courts of France and in the courts of Porto Rico during the Spanish regime, and by reason of a judgment of dismissal entered in favor of predecessors in title of defendants and against the plaintiffs, in a suit in equity brought by the latter in the trial court below in the year 1904 to quiet the title to the premises in controversy. A motion was filed to strike out portions of the answer as alleging mere evidentiary matter, and a demurrer was also filed to the special defenses of *res judicata*. The motion and demurrer were overruled, the court filing an opinion, in which it detailed the substance of the matters set up in the answer, and, in effect, held that the decrees or judgments of the French and Porto Rican courts prior to the cession from Spain were *res judicata* as to the claims of the plaintiffs, unless their rights had subsequently arisen. After setting forth its reasons for such conclusion the court called upon the plaintiffs "to file a replication within ten days or such longer period as they may, if at all, be entitled to, setting up the fact whether or not the answer is true in so far as it sets out the source of plaintiffs' title and describes or recites these proceedings in other courts regarding this property." This requirement was followed by the statement that "If it shall transpire that the answer has set up the real facts in the case, then, on the application of

defendants, the action will be immediately dismissed at the cost of the plaintiffs." Thereafter a replication was filed on the part of the plaintiffs, which, omitting the title and the signatures of the attorneys, is as follows:

"Replication.

"Now come the plaintiffs herein, in conformity with the order of the court entered herein and make reply to the answer of the defendants as follows:

"First. They deny that the defendants have ever had any just title to the premises or that those from whom they derived title have possessed the premises in good faith or with just title.

"Second. The plaintiffs impugn the alleged prescription either of ten years or of twenty years.

"Third. The plaintiffs deny the allegations in the answer that the ancestor Clemente de Fleurian has obtained the deed to the properties described in the complaint through fraud and they allege that he purchased the said properties in good faith and for valuable consideration, and always was ready and the plaintiffs are ready to comply with all the conditions of the said deed of sale, and that said deed was delivered to him by the vendors and their agents.

"Fourth. The plaintiffs admit that the judgments mentioned in the answer as a third defense to the complaint have been rendered but the suits in which said judgments were rendered have been instituted against Clemente de Fleurian while he was insane and out of his mind and without any curator or guardian or committee of his person being named by the court; and that the defendants herein were neither parties nor privies to the said judgments and suits and appeals, and therefore said judgments cannot bar this action.

"Fifth. The plaintiffs admit that the judgment mentioned in the answer as a fourth defense to the complaint has been rendered, but the plaintiffs state that the court which rendered said judgment had no jurisdiction in the subject matter,

and said judgment being of a foreign court without jurisdiction is not binding; and the plaintiffs further allege that the defendants herein were neither parties nor privies to the said judgment and suit, and therefore said judgment is not a bar to this action.

"Sixth. The plaintiffs further replying say that the judgment or decree mentioned in the answer as a fifth defense to the complaint was rendered not upon the merits of the case and without any proof being taken, but only upon a demurrer to the complaint for want of equity and for laches, both purely equitable defenses available only in suits in equity, and the plaintiffs state that this decree is not a bar to this action.

"Wherefore the plaintiffs pray judgment thereon."

Thereupon the following entry of dismissal was made:

"Now come the plaintiffs by their attorneys, Boerman & Llorens, and file a replication to the answer in this cause, and upon consideration thereof it appears to come within the rule laid down in the court's opinion on the demurrer to the answer of the defendants filed June 1st. Now, upon application by Hartzell and Rodriguez, the attorneys of said defendants, the cause is dismissed at the cost of the plaintiffs, to be taxed by the clerk, for which execution may issue.

"Plaintiffs except to the dismissal hereof."

From this judgment of dismissal the appeal now before us was taken. In addition to assigning as error the overruling of the demurrers to the respective defenses of *res judicata*, it is set up that "The court erred in rendering judgment against the plaintiffs in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and facts as stated in the pleadings in said court."

As upon the overruling of the demurrer, the court in substance made it a condition for granting leave to reply to the answer that such reply should disclose that the answer had not set up the real facts in the case, which condition was manifestly not complied with in the replication, we shall review the

action of the court upon the hypothesis that the order overruling the demurrer had also absolutely decreed a dismissal of the complaint. On this assumption we proceed to examine the defense setting up as *res judicata* the judgments of the Porto Rican courts rendered during the Spanish regime to determine whether the court properly held that they barred recovery.

The defense in question covers twenty-six pages of the printed record, the judgment of the court of first instance embracing seventeen and that of the Supreme Court of Porto Rico seven pages. The judgments establish the following, among other, facts: The real estate, the subject of controversy, was a sugar plantation known by the name of Serrano. The plantation was owned in 1879 and prior thereto by David Laporte and others, and Clemente de Fleurian, through whom plaintiffs claim title, was the manager of the plantation. On October 9, 1879, what is termed a "private contract of sale" of the plantation to de Fleurian was executed in France. In November following the owners of the property brought suit in the civil court of Nimes, France, to annul the contract. On February 18, 1880—the day after the return of de Fleurian to Porto Rico—although the contract of sale was not of record in Porto Rico, de Fleurian mortgaged the plantation to one Labastide to secure the payment of 36,811 pesos. The civil court of Nimes on May 10, 1880, entered a decree of nullity in the suit brought by the Laportes, and this decree, upon the appeal of de Fleurian, was affirmed by the Court of Appeals of Nimes on March 24, 1885, and by the Court of Cassation on May 17, 1886.

Pending the litigation just referred to, the Laportes, in the proper district in Porto Rico, "instituted possessory proceedings for the said property," in which Labastide and his wife were summoned "as abutting owners," and, they not making opposition, the title of the Laportes was duly registered. Thereafter, the Laportes, by public instrument of October 16, 1883, "sold the property to Don Juan Forgas and

to Don Jose Gallart, free of all incumbrances, the vendors binding themselves to guarantee the title to the same as well as to answer for all obligations for which the said property might be liable."

In the defense we are considering it was averred that title to the premises came to the defendants through Forgas and Gallart. It is also averred as follows:

"That these defendants are the successors and privies in the ownership of said property to said original owners and to the said Gallart, and Forgas and the succession of Gallart by virtue of the said sale to the said Forgas and Gallart. That in the deed selling and conveying said premises by the said owner to the said Forgas and Gallart, it was expressly contracted and agreed that the said owners should conduct the litigation necessary to free the title of said premises from any lien, cloud or incumbrance whatsoever, and the same was made the express condition of the payment of a large portion of the purchase price of said premises. And that in pursuance of said obligation resting upon the said owners of said property, in addition to the proceedings in the courts of France hereinbefore referred to, the said owners of the said property commenced their action in the court of first instance in the judicial district of Ponce, Porto Rico, the district where the said lands were located, the said court having full jurisdiction over the said property and over the said defendants. The object of said suit being to cancel and to have declared null and void or for the rescission, as the case might be, of the private contract of sale of the said plantation described in plaintiff's complaint and known as 'Serrano,' and also to have declared null and void and for the rescission and cancellation of the said mortgage executed by the said Fleurian in favor of the said Labastide."

As above mentioned, the litigation in France was commenced by the Laportes before the sale to Forgas and Gallart, and continued after such sale, terminating in May, 1886. The action against de Fleurian and Labastide in the Porto

Rican courts, referred to in the excerpt just made, was commenced on May 9, 1887, and the final judgment of the trial court relied upon as *res judicata* was entered therein on October 26, 1889. In that judgment, after referring to the proceedings had in the litigation in France, as shown by the records of the judgments of the French courts which were in evidence, the court of first instance, after making certain statements as to the effect as *res judicata* of the French judgments, which statements are copied in the margin,[1] pro-

[1] 9. Whereas there is not any treaty between France and Spain providing special rules as to the force and efficacy of the contracts executed and of judgments rendered in civil matters in any one of said nations as regards the other, and therefore, the general principles of international law are applicable to the case, among which of said principles there is the principle of reciprocity, specially expressed as to the execution of judgments rendered by foreign courts in articles 951 and 952 of the law of Civil Procedure.

10. Whereas, according to the French legislation, real property, even if possessed by foreigners, is governed by the French law (article 3d of the Civil Code) "A judicial mortgage does not ensue from a judgment rendered in a foreign country except when such judgment has been declared executory by a French court" (paragraph 4 of article 2123); "contracts entered into in a foreign country and acts executed before foreign officers cannot produce mortgage on property in France" (article 2128); "the said acts and judgments are not subject to execution in France except in the manner and in the cases provided by articles 2123 and 2128 of the Civil Code" (article 546 of the Code of Procedure).

11. Whereas, according to the general interpretation in France as to the aforesaid provisions of its legislation, as well as to article 14 of the Civil Code, the acts and judgments rendered by foreign courts are subject to revision and new discussion before the French courts, and that in that respect and on the principle of reciprocity the final judgment rendered by the French courts, to which reference has been made in this action by the plaintiff, cannot produce the force and effect of *res judicata* as to a decision of the questions which are being ventilated in the same, especially when the same have not had the execuatur of the Supreme Court of Justice in the form provided by article 954 and subsequent articles of the said law of Civil Procedure.

12. Whereas, according to the principle of private international

ceeded to reinvestigate the merits of the controversy and determine the questions arising as matters of first impression, concluding by giving to the plaintiffs the full relief demanded, the judgment reading as follows:

"I adjudge that Don Clemente de Fleurian is held to have confessed to the questions propounded at folios 340 and 341 of the second record of the roll of evidence of the plaintiffs. I should declare and do declare also the nullity of the instrument of sale and of the instrument of mortgage of the sugar cane plantation, called 'El Serrano,' the first of which was executed in the private contract in Anduze, France, dated October ninth, eighteen hundred and seventy-nine, between the plaintiffs and Don Clemente de Fleurian, and the second named at Juana Diaz, before the notary Don Ramon Rodriguez, on the eighteenth day of February, eighteen hundred and eighty, by Don Clemente de Fleurian and Don Fernando Labastide, in consequence of which it is ordered that after this decision shall have been final, the annotation of the said instrument of mortgage in the registry of property be cancelled, for which purpose the proper orders shall issue with the necessary excerpts addressed to the registrar of property for the district, taxing all costs against the defendants, Don Clemente Fleurian and Don Fernando Labastide. Thus, finally adjudging, was pronounced, ordered and signed by the judge."

On an appeal, taken by Labastide, the Supreme Court of Porto Rico on January 28, 1891, affirmed the judgment of the court of first instance. Thereafter an appeal, also taken by

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law, sanctioned by the Supreme Court of Justice in several opinions, the efficacy of the acts or contracts affecting directly real property, are governed by the royal statute or namely, by the laws of the country where the real property is situated, and therefore, as the question in this suit is in regard to a property situated in a Spanish territory, the questions relating to the nullity or validity of the title to the said property, and of the mortgage put on the same, should be ventilated or decided in accordance with the Spanish laws. *Locus regit actum.*

Labastide, to the Supreme Court of Spain was dismissed, and it is averred in the answer that "the said decision of the Supreme Court of Porto Rico became firm and fixed, and is still in full force and effect;" and that pursuant to the decisions of the Porto Rican courts above referred to "the proper orders were issued and the registration of the said mortgage from the said Clemente de Fleurian to the said Labastide was duly cancelled and annulled in the registry of property of Ponce, and the said decision of the court of first instance of Ponce and the said decision of the Supreme Court of Porto Rico, confirming the same, have been carried out as to all matters and things which were ordered and directed therein and thereby."

The question then is whether these judgments of the courts of Porto Rico, entered in litigation prosecuted in the names of the former owners for the benefit of their vendees, through whom the defendants in this action deraign title, is, as contended by the defendants in error, "a full, complete and final determination of all the matters and things relating to the alleged title of the said Clemente de Fleurian in or to the said premises described in the plaintiff's complaint herein," operative as *res judicata* in favor of the defendants, and constituting a bar to the further prosecution of the proceedings under the complaint herein. We proceed to consider this question.

It is recited in the judgment entered on October 26, 1889, by the court of first instance of Porto Rico, that the then pending action was commenced on May 9, 1887, by the Laporte heirs, and it also expressly found that the property had been sold prior to the institution of the action, viz., on October 16, 1883, by the Laportes to Forgas and Gallart, from whom mediately or immediately the present defendants acquired title, "the vendors binding themselves to guarantee the title to the same as well as to answer for all obligations for which the said property might be liable." It is also apparent from the findings of the court that the action referred

to was intended to make effective the result of the proceedings instituted in France, which had been commenced in order to remove the cloud upon the title of the Laportes resulting from the contract of sale made to de Fleurian and the mortgage made by him to Labastide. As the judgment of the court of first instance reciting the facts referred to was affirmed by the Supreme Court of Porto Rico, we may properly assume that the Porto Rican courts did not consider that they were passing upon a merely moot question, but were of opinion that the adjudication made inured to the benefit of the vendees of the nominal complainants, such vendees being the real owners. It being then competent, under the Spanish law, for the vendors of property, after parting with title, to conduct in their own names for the benefit of their vendees a litigation having for its object ultimate relief such as was sought in the action so instituted by the Laporte heirs in 1887, we are of opinion that there is no merit in the contention upon which plaintiffs in error rely in assailing the sufficiency of the defense set up in the third paragraph of the answer. In effect, that contention simply was that as the original owners had sold the property before the institution of the action commenced in 1887 the defendants herein, as claimants under purchasers who had bought from the Laportes before the commencement of that action, are not in privity with the complainants in that suit, as they were mere strangers to the litigation and not entitled to enjoy the benefit of the adjudication. Let it be conceded, for the sake of argument, that ordinarily no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit (*Dull* v. *Blackman*, 169 U. S. 248; Freeman on Judgments, 1st ed., § 162), nevertheless the rule has no application to a case like this where the nominal plaintiffs or complainants were in legal intendment conducting the litigation under the direction and for the benefit of the real owners of the property. The persons for whose benefit, to the knowledge of the court and of all the parties

to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1.

There is no merit in the contention that in rendering judgment upon the pleadings the court usurped the province of the jury. In the view we have taken of the case it becomes necessary, for the purpose of testing that contention, to consider only the fourth paragraph of the replication, heretofore quoted. In asserting, as was done in that paragraph, "that the defendants herein were neither parties nor prives to the said judgments, suit and appeals (referred to in the third defense), and therefore said judgments cannot bar this action," there was presented merely a question of law as to whether, upon the facts appearing in the judgments or averred in the third defense, the defendants in this action were, as a matter of law, in privity with the complainants in the cause in which the judgments pleaded as *res judicata* were rendered. And this is true also as to the charge made in the fourth paragraph of the replication that de Fleurian was insane when the judgments relied upon as *res judicata* were entered. We say this because clearly whether the judgments on such mere averment were subject to be collaterally attacked was a matter of law for the court, even if the assumption be indulged in that the right to plead the asserted insanity, which we do not intimate to be the case, was within the condition as to replying imposed by the court when it overruled the demurrer.

Affirmed.

OWEN *v.* DUDLEY & MICHENER.

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

No. 142. Argued April 7, 8, 1910.—Decided May 16, 1910.

In this case a contract made by the attorney of record with associate counsel for professional services to be paid out of fees in an Indian litigation in the Court of Claims construed; and, although the contract provided that in case the fees were not provided for by legislation but had to be proved each party should prove his fee independently, *held*, that as the attorney of record had collected without legislation the entire fee originally contemplated and allowable he must account for the amount so collected by him and pay the associate counsel the amount agreed under the contract.

31 App. D. C. 177, affirmed.

THE facts, which involve the construction of a contract for legal fees, are stated in the opinion.

Mr. William H. Robeson for plaintiff in error.

Mr. Samuel A. Putman and *Mr. Charles Poe* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought in the Supreme Court of the District of Columbia by defendants in error against plaintiff in error to recover the sum of ten thousand dollars ($10,000), alleged to be due on account of the following contract entered into by the parties:

"This memorandum of agreement witnesses: That John Vaile, Esq., of Fort Smith, Ark., having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by that council of September 4, 1901;

"And whereas, the said John Vaile has employed the services of Robert L. Owen, of Muscogee, Indian Territory, under his aforesaid contracts:

"Now, therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners of the firm of Dudley & Michener, the sum of ten thousand dollars ($10,000) out of the fee so pledged to the said Owen, immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected, out of fees collected for his personal service, to pay the fee to the said Dudley & Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

"The said Dudley & Michener, on their part, agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

"Witness our hands and seals in duplicate on this 28th day of May, 1902.

"(Signed)	ROBERT L. OWEN.	[SEAL]
"(Signed)	DUDLEY & MICHENER.	[SEAL]"

The question in the case turns upon the construction of the following provision of the contract: "And in the contingency of the fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his

personal service to pay the fees to the said Dudley and Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley and Michener to collect the fees hereby contracted by them." Certain facts were found by the trial court as helping to clear up, with the statute law then existing, the ambiguity of the provision. That court deduced from them a meaning favorable to plaintiff in error. The Court of Appeals found in them evidence of a different meaning and reversed the judgment of the trial court. The facts found, in addition to the agreement, are as follows:

"On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

'The Southern,
'St. Louis, April 17, 1905.

'Dudley & Michener, Washington, D. C.

'Gentlemen: I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28, '02, as I am preparing decree and wish to protect your fee.

'Yours truly, R. L. Owen.'

"A few days thereafter the plaintiff Michener met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims the defendant Owen, who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an applica-

tion to the Court of Claims for the allowance of 15 per cent of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the court apportioned the fee of 15 per cent among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

"Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the court, and the court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the said attorneys of record.

"Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

"The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905."

The trial court also found that defendants in error gave plaintiff in error "their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contract provided they should do," and that they have not been paid anything therefor.

The contentions of the parties are in sharp opposition. Plaintiff in error contends that the "contingency" provided for in the passage which we have quoted was direct and positive legislation, fixing his fee, and cites instances of such legislation as examples in the minds and intention of the parties.

Defendants in error contend that the legislation contemplated was that which would exempt plaintiff in error from making proof of service to the Commissioner of Indian Affairs and to the Secretary of the Interior under §§ 2103 to 2106, both inclusive, of the Revised Statutes of the United States. And that the acts of Congress which we shall presently refer to constitute such legislation.

That some legislation there might be is conceded by both parties. That some proof of service might become necessary is also conceded by both parties. The disagreement is as to what tribunal, whether the Secretary of the Interior and the Commissioner of Indian Affairs or the Court of Claims. There was some legislation, and this is urged by defendants in error as proof of their contention; there was in a sense a proof of services required, and this is urged by plaintiff in error as a support of his contention. It must therefore be conceded that each contention has plausible support, and the different meanings which the lower courts assigned to the agreement show its ambiguity. The trial court, as we have seen, taking the view contended for by plaintiff in error, the Court of Appeals that urged by defendants in error, and decided that the contract referred to the proof of services required by §§ 2103 to 2106.

Those sections provide that no agreement shall be made by any person with any tribe of Indians or individual Indians *not citizens of the United States* (italics ours) unless the agreement be in writing and in duplicate and (§ 2103, 2d par.) "be executed before a judge of a court, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it." Many other formalities are prescribed, and it is provided that contracts and agreements made in violation of the section "shall be null and void, and all money or other thing of value . . . in excess of the amount approved by the Commissioner and Secretary for such services may be recovered by suit in the name of the United States, . . . regardless of the amount in controversy."

By § 2104 it is provided that no money shall be paid under such contract except for fees due thereunder and by the United States through its officers or agents, and not until a sworn statement be filed with the Commissioner of Indian Affairs, showing each particular act of service, giving date and facts in detail, "and the Secretary of the Interior and the Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and if not, it shall be paid in proportion to the services rendered under the contract." It is provided in § 2105 that if any person receives money contrary to the provisions of the preceding section he shall forfeit the sum paid, and be punished by fine and imprisonment.

It will be observed that these provisions apply to Indians *not citizens of the United States*, and it is pointed out that the Eastern Cherokees became citizens March 3, 1901, c. 868, 31 Stat., pt. 1, p. 1447. That may be true, but the foundation of Owen's right to the fee was under an agreement with John Vaile, and the latter's right to engage Owen depended upon a contract with the Indians made in February and April, 1900, that is, a contract which was made before citizenship had been conferred upon the Indians. It certainly can be contended that when the Vaile contract was made it was subject to the provision of §§ 2103 *et seq.*, and that the approval of the Commissioner of Indian Affairs and the Secretary of the Interior was necessary to give it validity. It is true that it was ratified by the Indians September the 4th, 1901, that is, after they had been made citizens, but the effect of that might be disputed, and there being elements of doubt about it plaintiff in error and defendants in error well might have supposed the contract would be subject to the provisions of the Revised Statutes quoted above. The fact that legislation was sought confirms such view. If the Indians after March 3, 1901, had the same power to contract and the same extent of responsibility as white citizens, their contract would

need no confirmation by legislation. But such freedom of contract was certainly not supposed to exist. It is not without importance that the first act passed contained a limitation of it, and adopted the proof of services required by the Revised Statutes. That act conferred jurisdiction on the Court of Claims to hear and determine the claim of the Indians and provided that any suit brought under it should "be through attorneys employed and to be compensated in the manner prescribed in sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States."

It must therefore have been a proof of services by sworn statement, as provided in the sections referred to, that the parties contemplated. There were no other provisions in existence and there is not a circumstance to show that in the legislation that was looked forward to there would be provision for a proof of services which should supersede the contract of Vaile with the Indians and be the means through which Owen would be compensated. The legislation which was finally secured cannot be said to have required or provided for a proof of services in the sense that those words are used in the contract of plaintiff in error and defendants in error.

The final act was passed March 3, 1903. It made the Eastern Cherokees, so called, including those in the Cherokee Nation, a band or bands for all purposes of § 68 of the act of July 1, 1902, and provided that the prosecution of the suit in the Court of Claims on the part of the Eastern Cherokees should "be through attorneys employed by their proper authorities, their compensation for expense and services rendered in relation to such claim to be fixed by the Court of Claims upon the determination of such suit." March 3, 1903, c. 994, 32 Stat. pt. 1, p. 996. In other words, it recognized whatever contract of employment that should be made by the Indians with their attorneys, and it gave the Court of Claims power over the amount of compensation. But that such power might be given, or rather that there might be a limitation of the amount agreed upon, and therefore a re-

duction of the amount to be received by the plaintiff in error under the Vaile contract, was contemplated. The agreement recites that he (plaintiff in error) had been employed by Vaile, and that he agrees "to convey" to defendants in error "the sum of ten thousand dollars ($10,000.00) out of the fees so placed" to him "immediately upon the collection, *or in the exact proportion as the said fees may be collected*" (italics ours). It seems to us, therefore, that the contract contemplated two contingencies and provided for them. (1) That the fee of plaintiff in error might receive reduction, even if it should be specifically provided for by legislation. In such case the amount to be paid to defendants in error would be proportionately reduced. (2) That if the fee as fixed by the Vaile contract should be subject to supervision by the Commissioner of Indian Affairs and the proof of services required as provided by § 2104, then the parties should make such proof independently.

It is contended by plaintiff in error that "the Vaile contract was confessedly invalid and was not enforced and Owen (plaintiff in error) was not paid by virtue of its validity, but upon 'proof of service.'" The contention as to the invalidity of that contract is made for the first time in a supplemental brief filed by plaintiff in error after the oral argument. The contract had no validity, it is said, "for the simple reason that there were thirty-two thousand Eastern Cherokees, citizens of the United States, who obviously could not be bound by a few of their numbers." The purpose of the contention, no doubt, is to show that the contract was not, and that proof of services was, the ground of the action of the Court of Claims. And yet it is conceded that to Vaile was assigned three per cent of the fee allowed by the court. Why? It may be asked, and what other evidence is there in the record that plaintiff in error had any authority to appear for the Indians except through his engagement by Vaile? He was one of the attorneys of record—how did he become such? May we assume that it was in some other way than the record shows?

The contention, however, has not much relevancy. The agreement sued on states the authority of plaintiff to be the Vaile contract and the foundation of his power to engage defendants in error. His services and their services get their sanction from that contract, and according to the findings of the trial court he "was paid the full amount of the fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener."

Our construction of the contract is fortified by that finding. It is also fortified by the letter which plaintiff in error addressed to the defendants in error April 17, 1905, which is set out in the bill of exceptions, and the subsequent conversation he had with them. It is also fortified by the finding of the trial court that the attorneys of record had absolute control of the distribution of the fees. The latter finding is attacked by plaintiff in error, and it is asserted that it has no justification in the rules of the Court of Claims, and is contradicted by the fact that fees were allowed others for services. We must take the record as we find it, and under what circumstances fees were allowed others does not appear. But the fact does appear, and we repeat it because we regard it as especially pertinent, that the plaintiff in error received the fees and the exact fees that he expected to receive by his contract with Vaile with aid of legislation, upon which event he promised to pay defendants in error ten thousand dollars ($10,000) for their services. And there is no denial that they rendered them, and no question is made of their value and efficiency.

Judgment affirmed.

H. C. COOK COMPANY *v.* BEECHER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

No. 659. Submitted March 14, 1910.—Decided May 16, 1910.

An action on a judgment obtained in a patent case is not itself a suit upon a patent, and the Circuit Court, in the absence of diverse citizenship, does not have jurisdiction thereof; and so held in regard to an action against directors of an insolvent corporation to make them personally responsible for a judgment recovered in the United States Circuit Court for damages for infringing Letters Patent; nor in this case can the complaint be construed as making such defendants joint tort-feasors with the corporation in infringing the patent so as to confer jurisdiction on the court.

THE facts are stated in the opinion.

Mr. Verenice Munger for plaintiff in error.

Mr. Talcott H. Russell for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here on the single question of the jurisdiction of the Circuit Court, certified from the court below. 172 Fed. Rep. 166. The judge dismissed the complaint of his own motion, and the defendants in error confine themselves to the suggestion that for that reason the judgment should be reversed at the cost of the plaintiff in error, concurring in the argument that the judgment was wrong. As we are of opinion that the judgment was right it will be unnecessary to consider that point.

The suit is brought by a Connecticut corporation against residents of Connecticut. We give an abridgment of the com-

plaint. The plaintiff is the owner of a patent for fingernail clippers. The defendants during the time of the acts complained of were directors in control of another Connecticut corporation, The Little River Manufacturing Company. This company infringed the patent, and the plaintiff brought a suit in equity against it in the same Circuit Court, which ended in a decree for an injunction, $12,871 damages and $496.35 costs. The defendants voted to continue the sale of the infringing clipper pending the suit, and also voted and caused to be executed a bond of indemnity from their company to the selling agent against liability for the sale. As directors and as individuals they authorized and brought about such sales, and they directed the defense of the equity suit. In consequence of the expenditures to the foregoing ends their company became and is insolvent, and the defendants knew that that would be the result of a judgment against it, but did the acts alleged for the purpose of increasing the value of their stock in the company, and of receiving the profits and dividends that might be received from the sale.

The plaintiff's argument is that the defendants and their corporation were joint tort-feasors, and that this is a suit against the defendants for their part in infringing its patent, the judgment against their co-trespasser not having been satisfied. It is unnecessary to speculate whether this is an afterthought or whether the complaint was framed with intentional ambiguity, so that if one cause of action failed another might be extracted from the allegations, or what the explanation may be. But the present interpretation is not the natural interpretation of the complaint. The natural interpretation is that which was given to it by the court below; that it is an attempt to make the defendants answerable for the judgment already obtained. There was no other reason for alleging that judgment with such detail, while on the other hand the patent now supposed to be the foundation of the claim is not set forth. The judge was fully warranted in taking this not to be a suit upon a patent. Indeed it would seem

from his opinion that one of the grounds of jurisdiction urged before him was that this is an action ancillary to the judgment in the former suit, which of course it is not, any more than *Stillman* v. *Combe,* 197 U. S. 436; but the argument recognized that the former judgment was the foundation of the present case. Apart from that contention, there can be no question that, as the judge below said, if the directors are under obligations by Connecticut law to pay a judgment against their corporation, that is not a matter that can be litigated between citizens of the same State in the Circuit Court of the United States. The only argument attempted here is that which we have stated and have decided not to be open on the complaint.

Judgment affirmed.

STOFFELA *v.* NUGENT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 179. Argued April 28, 1910.—Decided May 16, 1910.

One committing a fraud does not become an outlaw and *caput lupinum.*

Although one by reason of fraud may have no standing to rescind his transaction, if it is rescinded by one having the right to do so the court should do such justice as is consistent with adherence to law.

Although one holding a mortgage may have fraudulently endeavored to prevent another from acquiring the fee of the property, he may still be entitled to have his mortgage paid if the other finally gets the property.

Deeds and discharges of mortgages although different instruments may be parts of one transaction; and one setting aside the deed may also be required to give up the discharge so as to restore other parties to the condition in which they stood prior to the transaction.

18 Arizona, 151, reversed

THE facts are stated in the opinion.

Mr. J. J. Darlington, with whom *Mr. John J. Hawkins* and *Mr. Thomas Armstrong, Jr.*, were on the brief, for appellants.

Mr. Eugene S. Ives for appellee submitted.

Mr. Justice Holmes delivered the opinion of the court.

This is a complaint in the nature of a bill in equity brought by the appellee, Nugent, to set aside a deed and mortgage as a cloud upon his title to certain land. The defendant denied the allegations of the complaint and filed a cross-complaint to set aside the deed to the plaintiff. The case was tried before a judge without a jury and he made findings of fact of which the following is an abridged statement. The land was subject to two mortgages held by the defendant, upon which a judgment of foreclosure had been rendered, the sum due being $15,700 and interest. Mrs. Heyl, the mortgagor and owner of the equity, sold and conveyed the land to Nugent on January 4, 1905, he agreeing to procure the payment of the mortgage and judgment liens. On January 9, the day before that fixed for the mortgage sale, the defendant, having knowledge of the conveyance to Nugent, and having evaded Nugent's efforts to pay the mortgage debt, induced Mrs. Heyl to convey a part of the premises to him absolutely in satisfaction of $10,000, and to mortgage the residue for $5,700, and recorded the deeds before Nugent had recorded the deed to him. He also, with fraudulent intent to defeat Nugent's title, it is said, although the possibility is hard to conceive, satisfied of record the former mortgages and judgment liens, the only consideration for his act being the later deed and mortgage given by Mrs. Heyl. On these facts judgment was given for the plaintiff, conditioned upon his paying to the defendant $15,700 without interest, less $600 counsel fees and costs. The plaintiff appealed and the Supreme Court of the Territory gave the plaintiff an unconditional judgment; on the ground that

the defendant's conduct was voluntary, in pursuance of his fraudulent scheme, and that he had no claim as against Nugent to be relieved from the consequences of a collateral act. It was thought that the debt from Mrs. Heyl to Stoffela was a matter with which Nugent, in spite of his covenant to pay it, had no concern, the only question being the relative validity of the plaintiff's and defendant's titles. The defendant appealed to this court.

We are of opinion that the judgment appealed from was wrong, and that the judgment of the court of first instance should be affirmed. It is true that the defendant acted fraudulently and knew what he was about. But a man by committing a fraud does not become an outlaw and *caput lupinum*. *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425. He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law. See *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 150. If Nugent is allowed to have the land free of all charge and the defendant's claim is extinguished, Nugent gets much more than he bargained for and the defendant is deprived of his equitable interest in Nugent's covenant to pay the mortgage debt (*Johns* v. *Wilson*, 180 U. S. 440), and is made to lose a large sum rightly due to him, not from any necessity of justice, but simply because he has acted badly and therefore any treatment is good enough for him. It is said that the discharge of the old mortgages was a collateral matter with which Nugent had no concern. If that were true, still justice might forbid Nugent to rely upon it. But it is not correct. The discharge and the new deeds, although different instruments, were parts of one transaction. Each was consideration for the other. As the plaintiff elects to do away with the consideration for the discharge, he must be taken to elect also to give up the discharge, or, to put it in another way, he must restore the defendant to the condition in which he stood before the re-

scinded deeds were made. The defendant's rights were cut down at least sufficiently by the trial court.

Judgment reversed, with directions to affirm the judgment of the District Court.

JAVIERRE *v.* CENTRAL ALTAGRACIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 171. Argued April 26, 1910.—Decided May 16, 1910.

Where a proviso carves an exception, dependent on a condition subsequent, out of the body of a statute or contract, the party setting up the exception must prove, and has the burden, that the condition subsequent has actually come to pass.

A contract for delivery for a term of years, of sugar, terminable meanwhile only in case a specified new Central was built, could not, in this case, be terminated unless the particular Central contemplated was built; it was not enough that a Central called by the same name had been built.

Damages in a suit at law for failure to comply with the terms of a contract for delivery of crops is an adequate remedy and specific performance and an injunction against delivery to others should have been refused in this case.

THE facts are stated in the opinion.

Mr. Charles Hartzell, with whom *Mr. Manuel Rodriguez Serra* was on the brief, for appellants:

The burden of showing that the Central Eureka referred to in the contract was not the project known as the Swift Eureka Central was not on the defendants below but such burden as to the identity of the projected Central Eureka referred to was on the plaintiffs below.

There was not, nor is there now, any presumption that the Central Eureka referred to was the Swift project. The burden of proof of a fact is upon him who asserts it. Complainants

(defendants in error here) allege, and to recover must prove, that defendants entered into a combination or conspiracy to enable them to violate a contract; that this violation was to be committed by pretending that a certain proposed sugar mill known by the name of "Eureka" was not, in fact, the Eureka project which the complainants alleged it to be, and in order to make proof to justify a decree in its favor it must prove by a preponderance of the testimony, in view of defendants' denial, that the Swift Eureka was the project actually intended and referred to in the said contract. *Mutual Reserve Fund* v. *Powell*, 79 Ill. App. 364; *Piper* v. *Watkins*, 8 Kan. App. 215; *Rupp* v. *Sarpy County*, 71 Nebraska, 382; *Vertrees* v. *Gage County*, 75 Nebraska, 332; *Simonton* v. *Winter*, 5 Pet. 141; *Adams* v. *Adams*, 21 Wall. 185; *Knox* v. *Smith*, 4 How. 298; *Lewis* v. *Cocks*, 23 Wall. 470.

Fraud and conspiracy, when alleged as the basis of action, must be clearly proven in order to warrant a recovery. *Farrar* v. *Churchill*, 135 U. S. 609; *Gaines* v. *Nicholson*, 9 How. 356; *United States* v. *Arredondo*, 6 Pet. 691; *Jones* v. *Simpson*, 116 U. S. 609; *Jacobs* v. *Van Sickel*, 123 Fed. Rep. 341; *Cheesman* v. *Hart*, 42 Fed. Rep. 98, distinguished.

This case does not present in any event, any ground for equitable relief, or the issuance of an injunction. The only consistent relief which could be applied for would be in the nature of specific performance. *Grape Creek Company* v. *Spellman*, 39 Ill. App. 630.

Equity should not intervene. An action at law for damages is equally, or even more, effective for complainant. There is no allegation in the complaint of defendants' insolvency.

The court erred in granting any relief to appellee, because the contract was wholly unilateral and incapable of enforcement by a court of equity, either by way of specific performance or by injunction.

Appellee's mill was neither constructed nor enlarged upon any consideration moving from this contract. There was no consideration.

Appellants were not in anywise dependent upon appellee for a market for their sugar cane, for they were dealing with other mills before appellee's factory was started, and the bill of complaint shows that there are more mills in the vicinity than the supply of sugar cane would justify. The remedy must be mutual. *Ross* v. *U. P. R. R. Co.*, Fed. Cas. 12,080; *Pullman Pal. Car Co.* v. *Texas & Pac. R. R. Co.*, 11 Fed. Rep. 625.

Where a contract is harsh the court will leave the parties to their remedy at law. *King* v. *Hamilton*, 4 Pet. 311; *Redman* v. *Zilley*, 1 N. J. Eq. 320; *Appeal of Weise*, 72 Pa. St. 351. Even though the contract be valid at law, if it be harsh or unjust, equity will not relieve. *Leigh* v. *Crump*, 36 N. C. 299; *Friend* v. *Lamb*, 152 Pa. St. 529.

Mr. Hugo Kohlman, with whom *Mr. F. L. Cornwell* and *Mr. N. B. K. Pettingill* were on the brief, for appellee:

Relief was properly given by injunction instead of by specific performance.

The bill of complaint prayed for an injunction and not for specific performance. Defendants in a suit cannot complain that only partial relief has been granted. The bill is not strictly to decree a performance of a contract, but, by injunction, to prevent the destruction of contractual obligations. *Hendricks* v. *Hughes*, 117 Alabama, 591.

This doctrine seems to be an extension of that maintaining the right to enjoin the violation of contracts for personal services so well established and often applied since *Lumley* v. *Wagner*, 1 De G., M. & G. 604.

The fundamental basis of jurisdiction to enjoin the violation of the contract instead of leaving a complainant to his action at law for damages is the impracticability of ascertaining with any definiteness the real extent of such damage; hence the inadequacy of the remedy. Where performance is to continue through a series of years in the future, that fact alone renders definite ascertainment of damages impossible. See the following English cases more or less analogous in their

reasoning to the case at bar: *Jones* v. *North*, 44 L. J. Ch. 388; *Donnell* v. *Bennett*, 22 Ch. Div. 835; *Whitwood Chem. Co.* v. *Hardman*, L. R. [1891] 2 Ch. 416; *Catt* v. *Tourle*, L. R. 4 App. Ch. 654; and also see the following American cases: *W. U. Tel. Co.* v. *U. P. Ry. Co.*, 3 Fed. Rep. 423, 429; *C. & A. Ry. Co.* v. *N. Y., L. E. & W. R. R. Co.*, 24 Fed. Rep. 516, 521; *Alpers* v. *City of San Francisco*, 32 Fed. Rep. 503; *General Elec. Co.* v. *Westinghouse Co.*, 151 Fed. Rep. 664, 672, 677; *Manhattan &c.* v. *N. J. &c.*, 23 N. J. Eq. 161; *St. Regis Co.* v. *Lumber Co.*, 173 N. Y. 149, 161.

The same principles have been applied in cases involving contracts wherein public interests were involved. *Walla Walla* v. *Water Co.*, 172 U. S. 1, 11; *Joy* v. *St. Louis*, 138 U. S. 1, 46.

Defense of appellants upon question of meaning of disputed clause of contract is affirmative. The burden of proof under such a proviso is clear. *United States* v. *Cook*, 17 Wall. 168, 176; and see *Steel* v. *Smith*, 1 B. & A. 99, in which a proviso, exactly as in the case at bar, was construed.

In equity where an answer which is put in issue admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved. *Clements* v. *Moore*, 6 Wall. 299, 315; and see to the same effect, *Bour* v. *Kimball*, 40 Ill. App. 327; *Nelson* v. *United States*, 30 Fed. Rep. 116; *Lake Shore Co.* v. *Felton*, 43 C. C. A. 189, 193; *Miller* v. *Shields*, 124 Indiana, 170; *Rowell* v. *Janvrin*, 151 N. Y. 60, 67.

Even had the proviso allowing the cancellation of the contract been absolute, and self-operative in its terms, thus importing a condition, it would still have been a condition subsequent, of which the burden of proof would still be upon the party to be relieved by its fulfillment. *Den* v. *Steelman*, 10 N. J. L. 193, 204; *Hotham* v. *East India Co.*, 1 Term Rep. 638, 645.

The unilateral character of the contract is not open for consideration in this court, but even could the court consider that question, the mutuality of consideration and obligation is plainly apparent on its face.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree enjoining the appellants from delivering sugar cane grown on the haciendas Florentina and Estero to the Central Eureka for the term of five crops, beginning with the crop of the year 1906–7, or so long within that term as the appellee is ready to grind and pay for the same; and also from 'selling, donating, renting or mortgaging said haciendas' without stipulating for the carrying out of a contract made with the appellee. The contract referred to bound the appellants to have the cane grown on the two haciendas ground at the sugar factory of the appellee for the term just stated, at a certain price, with mutual agreements not necessary to set forth, but, so far as appears, fair and made upon equal terms. It was subject to a proviso, however, that if on January 15, 1908, the projected Eureka Central should have been erected or should be in course of construction, the appellants might cancel the contract, giving notice on October 1, 1907. The notice was given, but the appellee contended that the Eureka Central referred to was abandoned and that the Central relied upon as the ground for the notice was one got up by the appellants and named Eureka with a view to getting out of their contract with the appellee.

The findings of fact are not entirely satisfactory upon the point in issue. They set out evidence and avoid a conclusion more definite than that which we shall state. It appears, however, that for some years one Swift had been negotiating for the construction of a Central Eureka, and was continuing his efforts on December 10, 1906, when the contract was made. But in October 1906, Javierre had telegraphed to him that negotiations with him were at an end, and there was evidence that Javierre and others had met and made an agreement on October 20 to form a corporation to set up the 'said Central,' to be called the Central Eureka, 'it being almost sure' that Swift had failed. The parties were to sell their cane to this

Central for ten years. The court studiously avoids finding that this agreement was made, but does find that if Javierre signed it he did not consider himself bound by it, and, as has been seen, the contract with the appellee was of later date. The court also finds that it was not generally known that the planters had held the alleged meeting or were contemplating the erection of the Central, and, after stating other details, finds that the appellants have not proved, by a preponderance of evidence, that the contract referred to the Central Eureka started by them, or that the Central Eureka mentioned was other than the one projected by Swift. It ruled that the burden of proof was on the appellants, and thereupon made the decree.

There is some preliminary argument that the finding concerning the continuance of Swift's efforts is not warranted by the pleadings. If this were true, no objection seems to have been made in the court below, where no doubt an amendment would have been allowed if necessary. But it is a mistake. The bill merely alleges that Swift's arrangement failed 'during the latter part' of 1906, and qualifies even this by the further allegation that in the beginning of December Javierre stated to the officers of the complainant (appellee) that he was still bound to Swift, but that the thing had failed, and that he was disposed to make a contract with them if he could have a clause providing for the case of Swift's success. The only real questions concern the ruling on the burden of proof and the propriety of the relief in such a case as this.

As to the burden of proof, if that really in any way determined the result, the ruling was correct. The appellants were seeking to escape from the contract made by them on the ground of a condition subsequent embodied in a proviso. It was for them to show that the facts of the condition had come to pass. It is said that the bill alleges affirmatively a conspiracy to evade the undertaking, but that is merely by way of replication to the answer setting up the condition, and is nothing but a specific mode of denying that the condition had

been fulfilled. An allegation of fact that is material only as an indirect negative of something to be proved by the other party does not shift the burden of proof. *Starratt* v. *Mullen*, 148 Massachusetts, 570. So there is nothing but the general question to be considered and that is answered by the statement of it and by repeated decisions of this court. When a proviso like this carves an exception out of the body of a statute or contract those who set up such exception must prove it. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 10. *Ryan* v. *Carter*, 93 U. S. 78. *United States* v. *Cook*, 17 Wall. 168. *United States* v. *Dickson*, 15 Pet. 141, 165. Therefore it was for the appellants to prove that the Central referred to by the contract had been built or started. It was not enough to prove that a Central had been built and called by the same name.

The doubt as to the relief granted below is more serious and in the opinion of the majority of the court must prevail. According to that opinion a suit for damages would have given adequate relief and therefore the appellee should have been confined to its remedy at law. Again, the court would not undertake to decree specific performance and to require and to supervise the raising of the crop and the grinding of the sugar for even the now remaining period of the decree. There is a certain anomaly in granting the half way relief of an injunction against disposing of the crops elsewhere when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree. There is too a want of mutuality in the remedy, whatever that objection may amount to, as it is hard to see how an injunction could have been granted against the appellee had the case been reversed. *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339. Notwithstanding these considerations I should have preferred to affirm the decree, but as my reasons have been stated to my brethren and have not prevailed it is unnecessary to repeat them now.

Decree reversed.

HOLMGREN *v.* UNITED STATES.

CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 132. Argued March 9, 1910.—Decided May 16, 1910.

The validity, under Art. I, § 8, cl. 4, of the Constitution, of the acts of Congress regulating naturalization of aliens and authorizing naturalization proceedings in state as well as Federal courts, has never been questioned.

Although Congress may not create courts for the States, it may authorize a state court to enforce in a prescribed manner a Federal statute relating to a matter within Federal control, and may punish the offense of perjury if committed in such a proceeding in a state court, as well as in a Federal court.

One falsely swearing in a naturalization proceeding, whether in a state or in a Federal court, is punishable under § 5395, Rev. Stat.

The Revised Statutes were compiled under authority of the act of Congress of June 27, 1866, c. 140, 14 Stat. 75, the purpose of which was revision and codification and not the creation of a new system of laws; and the courts will not infer, in the absence of clearly expressed intent, that Congress in adopting the Revised Statutes intended to change the policy of the laws, *United States* v. *Rider*, 110 U. S. 729; and so held that §§ 5395 and 5429, adopted from the act of July 14, 1870, c. 254, 16 Stat. 254, in regard to naturalization, should be construed so as to continue to include the penalties for perjury in all naturalization proceedings notwithstanding that, owing to rearrangement, § 5395 was not one of the five preceding sections to § 5429, as was its corresponding section in the act of 1870 to the corresponding section in that act from which § 5429 was taken.

An objection to the jury taking an indictment with indorsement of prior conviction thereon into the jury-room should be taken at the trial. If not taken until the motion for new trial, it cannot be reviewed on error.

Although this court may, under Rule 35, notice a plain error not assigned, it will not exercise the authority, if the error did not prejudice plaintiff in error; and so held in this case in regard to the objection that the jury had taken into the jury-room an indictment

with indorsement thereon of former conviction, it also having the indorsement thereon of the granting of a new trial.

An objection that a count in the indictment does not charge a crime because the wrong name was written in at one point by mistake must be taken in the demurrer or on the trial; unless it substantially affected the rights of the accused it comes too late in this court for the first time.

While the court should caution the jury against relying on uncorroborated testimony of an accomplice, it cannot assume as a fact, when controverted, that a witness was an accomplice and that his testimony required corroboration.

156 Fed. Rep. 439, affirmed.

THE facts, which involve the validity of a conviction for perjury under § 5395, Rev. Stat., for false swearing in a naturalization proceeding in a state court, are stated in the opinion.

Mr. Marshall B. Woodworth for petitioner, submitted:

The offense, if any, was committed in a state court. Federal courts have no jurisdiction of the crime of perjury committed in state courts. *United States* v. *Babcock*, 4 McLean, 113; and see cases and statutes cited in dissenting opinion of Ross, J., in *Schmidt* v. *United States*, 133 Fed. Rep. 257.

Criminal statutes should not be extended by implication. *Todd* v. *United States*, 158 U. S. 292; *Bolles* v. *Outing Co.*, 175 U. S. 262; *United States* v. *Harris*, 177 U. S. 305; *Ex parte McNulty*, 77 California, 164; *United States* v. *Wiltberger*, 5 Wheat. 76; *In re Loney*, 134 U. S. 272.

Upon the enactment of the Revised Statutes, § 1 of the act of July 14, 1870, became § 5395, but it was severed from the other three sections of the act of July 14, 1870.

Section 5429, Rev. Stat., which makes the five preceding sections apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced does not refer to § 5395, Rev. Stat.

The reënactment of a statute, leaving out a part of the

former act, amounts to a repeal of all not so reënacted. Sutherland on Stat. Const., § 154.

Congress evidently, *ex industria*, evolved a different scheme and plan of denouncing offenses against the naturalization laws from that first contained in the act of July 14, 1870, in view of the rule that perjury is properly punishable only by the court of jurisdiction where committed. *State* v. *Pike*, 15 N. H. 33 (4 N. H. 83); *Ex parte Bridges*, 2 Woods, 428; *State* v. *Shelley*, 11 Lea (Tenn.), 594; *Ross* v. *State*, 55 Georgia, 192; *State* v. *Adams*, 4 Black, 146; *People* v. *Kelly*, 38 California, 145; *State* v. *Kirkpatrick*, 32 Kansas, 117; *Rump* v. *Commonwealth*, 30 Pa. St. 475; *State* v. *Whittemore*, 50 N. H. 245; *Spratt* v. *Spratt*, 4 Pet. 393, 408. See subject discussed in *United States* v. *Severino*, 125 Fed. Rep. 949.

There was no Federal statute when the petitioner was charged and convicted in the Federal court, which, in plain terms, conferred jurisdiction upon the Federal courts to punish perjuries and false oaths committed in naturalization proceedings in state courts. If there was such a Federal statute, it would be unconstitutional and void.

Congress cannot endow state courts with any jurisdiction. The California courts get jurisdiction to naturalize aliens from the constitution and laws of the State. *Ex parte Knowles*, 5 California, 300; see *Martin* v. *Hunter*, 1 Wheat. 304; *Maryland* v. *Butler*, reported in 12 Niles' Register, 115; *United States* v. *Lathrop*, 17 Johnson's Ch. Rep. 4; *State* v. *McBride*, Rice's Ch. Rep. 400.

While Congress cannot confer on state courts jurisdiction to naturalize, it can, in naturalization proceedings, limit the state court in its mode of proceeding, and can prohibit the state courts from acting, and it actually has done so as to any state court which is not a "Court of Record" and does not have "common law jurisdiction, and a Seal and Clerk." *Ex parte Knowles, supra; State* v. *Whittemore, supra; Rump* v. *Commonwealth, supra; In re Loney, supra.*

State tribunals cannot punish breaches of the United States

laws, even though an act of Congress undertakes to give them the authority. Neither can perjury against the United States be punished in the States as an offense against the States. 2 Bishop's Comm. Crim. Law, § 866.

Federal tribunals cannot punish breaches of the state laws in Federal courts, such as perjury committed in the state courts. This is well-settled law, and the converse is equally true. See *People* v. *Kelly*, 38 California, 145.

It was misconduct on the part of the court to give to the jury indictments, containing information of the adverse result of a previous trial, and it would be presumed that prejudice had been generated by such misconduct. *Ogden* v. *United States*, 112 Fed. Rep. 523, citing *Dana* v. *Tucker*, 4 Johns. 487; *Cluggage's Lessee* v. *Swan*, 4 Bin. 150; *Stull* v. *Stull*, 197 Pa. St. 243; *La Bonty* v. *Lundgren*, 41 Nebraska, 312; *State* v. *Snyder*, 20 Kansas, 306; *People* v. *Knapp*, 42 Michigan, 267; *Moss* v. *Commonwealth*, 107 Pa. St. 267; *Meyer* v. *Cadwalder*, 49 Fed. Rep. 32.

Although an appellate court will not consider objections first raised on appeal, errors apparent on the face of the record may be considered by the court, though not objected to below. 2 Cyc. 678, 717, and cases there cited; 2 Cent. Dig., title "Appeal and Error," §§ 1145 *et seq.*; *Fuller* v. *Ferguson*, 26 California, 546; *Bennett* v. *Butterworth*, 11 How. 669; *Garland* v. *Davis*, 4 How. 131; *Kentucky L. Ins. Co.* v. *Hamilton*, 63 Fed. Rep. 93; *Macker* v. *Thomas*, 7 Wheat. 530; *Ringgold* v. *Haven*, 1 California, 108; *Suydam* v. *Williamson*, 20 How. 427; *United States* v. *Pena*, 175 U. S. 500; *Stevenson* v. *Barbour*, 140 U. S. 48; *Rowe* v. *Phelps*, 152 U. S. 87. No presumption can be made in favor of the judgment of a lower court where error is apparent in the record. *United States* v. *Wilkinson*, 12 How. 246; *Reynolds* v. *United States*, 98 U. S. 145. The error was substantial. *Ogden* v. *United States*, *supra*.

The trial court erred in failing to warn the jury of the danger in convicting a defendant on the testimony of an ac-

complice. Greenleaf on Evidence, 6th ed., 493, § 380; 12 Cyc. 453; *United States* v. *Ybanez*, 53 Fed. Rep. 536; *United States* v. *Flemming*, 18 Fed. Rep. 907; *United States* v. *Harries*, 26 Fed. Cas. No. 15,309; *S. C.*, 2 Bond Rep. 311; *United States* v. *Lancaster*, 26 Fed. Cas. No. 15,556; *United States* v. *Reeves*, 38 Fed. Rep. 404; *United States* v. *Van Leuven*, 65 Fed. Rep. 78; *United States* v. *Sykes*, 58 Fed. Rep. 1004; *United States* v. *Kessler*, Bald. Rep. 22; *United States* v. *Sacia*, 2 Fed. Rep. 708; *People* v. *Bonney*, 98 California, 278.

The trial court not only declined to instruct as requested by counsel for petitioner, but failed to give the jury any instructions as to being cautious in convicting upon such testimony, and the weight to be accorded it.

Although an accomplice is a competent witness for the prosecution, his testimony should be received with great care and caution and a refusal to so instruct is ground for reversal. *United States* v. *Smith*, Fed. Cas. No. 16,322; *United States* v. *Babcock*, Fed. Cas. No. 14,487; *United States* v. *Goldberg*, Fed. Cas. No. 15,223; *United States* v. *McKee*, Fed. Cas. No. 15,686; *Solander* v. *People*, 2 Colorado, 48; *Cheatham* v. *State*, 67 Mississippi, 335; *People* v. *Sternberg*, 111 California, 11; *People* v. *Strybe*, 36 Pac. Rep. 3; *People* v. *Bonney*, 98 California, 278; *United States* v. *Neverson*, 1 Mackey, 152; *United States* v. *Bicksler*, 1 Mackey, 341; *State* v. *Hyer*, 39 N. J. Law, 598; *State* v. *Honey*, 19 N. C. 390; *State* v. *Miller*, 97 N. C. 484; *Hanley et al.* v. *United States*, 123 Fed. Rep. 849.

Mr. Assistant Attorney General Fowler for the United States:

Federal courts have jurisdiction to inflict punishment for the offense of perjury committed in naturalization proceedings had in state courts. Section 5392, Rev. Stat.; Art. I, § 1, cl. 4, Constitution; Title 30, §§ 2165–2174 of the Rev. Stat.; *In re Loney*, 134 U. S. 372, 374; § 5395, Rev. Stat. And see *Schmidt* v. *United States*, 133 Fed. Rep. 257, 264, holding that § 5395, Rev. Stat., is as broad in its application as the first section of the act of 1870. A change of phraseology

in revision of statutes will not be regarded as altering the law where it has been settled by plain language in the statutes, unless it is clear that such was the intent. *McDonald* v. *Hovey*, 110 U. S. 619, 629; *United States* v. *Ryder*, 110 U. S. 729, 740; *Logan* v. *United States*, 144 U. S. 263, 302; *Doyle* v. *Wisconsin*, 94 U. S. 50.

In finding the meaning of an ambiguous statute in the revision, the courts may refer to the original statute from which the section was taken to ascertain from its language and context to what class of cases the provision was intended to apply. *The Conqueror*, 166 U. S. 122; *United States* v. *Bowen*, 100 U. S. 508; *Myer* v. *Car Company*, 102 U. S. 11; *United States* v. *Lacher*, 134 U. S. 626.

The validity of such proceedings in state courts, when had under acts of Congress, has been recognized from the early history of the Government. *Campbell* v. *Gordon*, 6 Cranch, 176, 182; *Stark* v. *Chesapeake Ins. Co.*, 7 Cranch, 420; 2 Cyc. Law & Proc. 111, 112; Constitution of California, § 5, Art. VI; § 76, Code of Civil Procedure of that State.

A new trial should not be awarded on the ground that the jury had in their possession, while considering their verdict, the indictment upon which had been written the finding of a former jury that petitioner was guilty on the third count of the indictment.

The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error. *Henderson* v. *Moore*, 5 Cranch, 11, 12; *Marine Insurance Co.* v. *Young*, 5 Cranch, 187, 191; *McLanahan* v. *Insurance Company*, 1 Pet. 170, 183; *United States* v. *Buford*, 3 Pet. 12, 32; *Indianapolis &c. R. R. Co.* v. *Horst*, 93 U. S. 291, 301; *Kerr* v. *Clampitt*, 95 U. S. 188; *Newcomb* v. *Wood*, 97 U. S. 581; *Mattox* v. *United States*, 146 U. S. 140, 147; *Haws* v. *Victoria Mining Company*, 160 U. S. 303, 313; *Ogden* v. *United States*, 112 Fed. Rep. 523.

The trial court's attention was not called to the fact that

the indictment with the indorsement complained of thereon was handed to the jury when the same was done, but it was first mentioned in the motion for a new trial. *Cook* v. *The State*, 4 Tex. App. 265, 268; *Anschicks* v. *The State*, 6 Tex. App. 525, 536; *State* v. *Tucker*, 75 Connecticut, 201, *Forbes* v. *Commonwealth*, 90 Virginia, 550; *Cargill* v. *Commonwealth*, 93 Kentucky, 578, 581; *Railway* v. *Higgins*, 53 Arkansas, 458, 467; cited and followed in *Railway Company* v. *Sweet*, 60 Arkansas, 550, 556; *State* v. *Shores*, 31 W. Va. 491, 499; *Smalls* v. *The State*, 105 Georgia, 669, 675; *Maynard* v. *Fellows*, 43 N. H. 255, 259; *Gardner* v. *King*, 58 N. H. 203; *Clapp* v. *Clapp*, 137 Massachusetts, 183.

Plaintiff in error was not prejudiced by the fact that the indictment with the indorsement complained of thereon was in possession of the jury. 12 Enc. of Pl. & Prac. 599; *Hardy* v. *State*, 35 Tex. Crim. Rep. 545, 561; *State* v. *Shores*, *supra*; *Green* v. *The State*, 38 Arkansas, 304, 314; *Harold* v. *Commonwealth*, 8 S. W. Rep. 194, 196. It had no bearing on the facts presented in this case. *Ogden* v. *United States*, *supra*, and *La Bonty* v. *Lundgren*, 41 Nebraska, 312, can be distinguished.

It was not error for the trial court to refuse to charge that the witness Werta was an accomplice and that his testimony should be corroborated. There is no evidence showing that Werta was an accomplice either as the principal or as an accessory before the fact. *Insurance Co.* v. *Foley*, 105 U. S. 347, 353; *Bank* v. *Hunt*, 11 Wall. 391, 394; *Railroad* v. *Gladmon*, 15 Wall. 409; *Insurance Co.* v. *Baring*, 20 Wall. 159, 161; *Katz* v. *Phalen*, 2 How. 375, 381.

Mr. Justice Day delivered the opinion of the court.

The petitioner, Gustav Holmgren, was convicted and sentenced in the District Court of the United States for the Northern District of California of the crime of false swearing in naturalization proceedings, in violation of § 5395 of the

Revised Statutes of the United States. The judgment was affirmed by the Circuit Court of Appeals. 156 Fed. Rep. 439. The conviction was upon the third count of the indictment, which charged that in a naturalization proceeding, upon the application of one Frank Werta for admission to citizenship in the United States, pending September 21, 1903, in the Superior Court of the city and county of San Francisco, California, a court of record of the State of California, with common law jurisdiction, a seal, and a clerk, the petitioner swore falsely in making the material statement, under oath, that he, the said Gustav Holmgren, had been acquainted with the said Frank Werta in the United States during the five years immediately preceding the application for naturalization, whereas in truth and in fact, as he then well knew, the said Werta had not resided continuously in the United States for a period of five years, and the said Holmgren had not known the said Werta for more than four years prior to said application.

The principal question in the case is whether, under § 5395, United States Revised Statutes, a conviction can be had in a Federal court for a false oath in naturalization proceedings had in a state court.

Preliminarily to a consideration of the proper construction of this section we may notice the contention of the petitioner that there is no constitutional power in Congress to confer jurisdiction upon the courts of a State in naturalization proceedings, involving admission to citizenship in the United States.

Article I, § 8, clause 4, of the Constitution of the United States vests in Congress the power to establish an uniform rule of naturalization. Acting under this constitutional authority from the earliest history of the Government, Congress has passed acts regulating the naturalization of aliens, admitting them to citizenship in the United States, and has authorized such proceedings in the state, as well as Federal, courts. The validity of such proceedings by virtue of the power conferred

by acts of Congress has been recognized from an early day. *Campbell* v. *Gordon*, 6 Cranch, 176, 182; *Stark* v. *Chesapeake Ins. Co.*, 7 Cranch, 420. The naturalization acts of the United States from the first one in 1790 have conferred authority upon state courts to admit aliens to citizenship. Van Dyne on Naturalization, p. 11, and the following.

It is undoubtedly true that the right to create courts for the States does not exist in Congress. The Constitution provides (Art. III, § 1) that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. But it does not follow that Congress may not constitutionally authorize the magistrates or courts of a State to enforce a statute providing for a uniform system of naturalization, and defining certain proceedings which, when complied with, shall make the applicant a citizen of the United States. This Congress had undertaken to do in making provision for the naturalization of aliens to become citizens of the United States in a certain class of state courts—those of record having common law jurisdiction, a clerk and a seal. Rev. Stat. U. S., § 2165 (since superseded by the act of June 29, 1906, c. 3592, 34 Stat. 596).

The question is not here presented whether the States can be required to enforce such naturalization laws against their consent, for it appears that the constitution of the State of California, in § 5, article 6, and the statutes in § 76 of the Code of Civil Procedure of that State, grant to the courts the power of naturalization and the right to issue papers therefor. Unless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by Congress under such laws. *Stephens, Petitioner*, 4 Gray, 559. The indictment charges that Werta made application as an alien to be admitted to citizenship in the United States; the proceeding was had and false oath charged was taken under authority of the statutes of the United States. The present proceeding was to prosecute the petitioner for alleged false swearing un-

der an oath administered under authority of a law of the United States. Where such is the case we think the Congress of the United States may constitutionally provide for the punishment of such offenses, whether the oath is taken before a Federal court or officer, or before a state court or officer acting under authority derived from the act of Congress. See *In re Loney*, 134 U. S. 372, 374.

We come, then, to the question whether the section under which the proceeding was had authorizes a prosecution for perjury when committed in naturalization proceedings in other than Federal courts. As we have seen, the statutes of the United States confer jurisdiction to admit aliens to citizenship in the United States, not only on Federal courts, but also upon certain state courts, and § 5395 of the Revised Statutes provides:

"In all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit, who knowingly swears falsely, shall be punished by imprisonment for not more than five years nor less than one year, and by a fine of not more than one thousand dollars."

The terms of this section are certainly broad enough to include an oath or affidavit, whether taken in a Federal court or a state court, for the requirement of the statute is that such oath or affidavit be made or taken under or by virtue of any law relating to naturalization of aliens or in any proceedings under any such laws. The false oath in question was taken under and by virtue of the Federal statutes regulating naturalization, and in a proceeding authorized under such laws, although in a state court.

It is contended, however, that the history of this section (5395) and the effect of the revision of the laws embodied in the Revised Statutes of 1873 makes it applicable only to false swearing in the courts of the United States in such naturalization proceedings as may be therein instituted. As car-

ried into the Revised Statutes, this section was taken from § 1 of the act of July 14, 1870, being an act to amend the naturalization laws and to punish crimes against the same, etc. July 14, 1870, c. 254, 16 Stat. 254. Section 4 of that act was as follows:

"And be it further enacted, That the provisions of this act shall apply to all proceedings had or taken or attempted to be had or taken before any court in which any proceeding for naturalization shall be commenced, had, or taken, or attempted to be commenced; and the courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed."

In codifying the statutes, the first section of the act of July 14, 1870, was made § 5395 of the Revised Statutes, and is part of Title LXX, chapter 4, "Crimes against Justice." Sections 2 and 3 of the act were made §§ 5424 to 5428 of the Revised Statutes, and part of chapter 5, entitled "Crimes against the Operations of the Government." Section 4 of the act of July 14, 1870, was made § 5429 of the Revised Statutes, and reads as follows:

"The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced."

The argument is that, inasmuch as § 5395 is not one of the "five preceding sections," it is to be inferred that Congress intended to give jurisdiction to the Federal courts for violation of that section only in naturalization proceedings in the Federal courts, and not to include false swearing in naturalization proceedings before any court, which would include a state court. But we cannot agree to this contention. The Revised Statutes are the result of the revision and codification of the laws under authority of an act of Congress, whose purpose it was, not to create a new system of laws, but to codify and arrange former laws, omitting redundant or ob-

solete enactments, and making such amendments and changes as were necessary to correct contradictions, supply omissions and amend imperfections in the original text. June 27, 1866, c. 141, 14 Stat. 75.

The courts will not infer that Congress in revising and consolidating the laws intended to change their policy in the absence of a clear expression of such purpose. *United States* v. *Ryder*, 110 U. S. 729, 740. No reason is suggested for a change of the purposes of the law in the separation of the sections according to the codification in the manner we have stated. The purpose of the laws was still the same, and when we interpret this section of the statutes, in view of its origin, we think there can be no doubt of its meaning. The act of July 14, 1870, made its provision applicable to all proceedings had before any court in which naturalization proceedings might be commenced, and gave to the courts of the United States jurisdiction of all such offenses committed before any tribunal, state or Federal. The language of § 5395 is broad enough to include proceedings in any court, and, considered in the light of its adoption from laws of the same purport, we have no doubt of the intention of Congress to continue to include all such proceedings.

It is next contended that the court erred in permitting the indictment to go to the jury, and be taken with them into the jury-room, which indictment contained an indorsement thereon showing the conviction of the accused on the third count thereof at a former trial. The proceedings in this respect are thus set out in the record:

"Thereupon and before the jury retired to deliberate upon their verdict the clerk of the court handed to the jury the forms of ballot with the indictment in the case. That said indictment was taken by them to the jury room and retained by them during their entire deliberations in the cause. That the jury retired at 12.30 o'clock and later returned to the court with a verdict of guilty on the third count of said indictment. That at the time said indictment was handed to

the jury by the officials of the court and was taken by said jury to the jury room, there were the following endorsements upon said indictment: 'Form No. 168. Back of cover of indictment with plea and judgment. Arraigned Nov. 2, 1905, Mch. 14, 1906. Pleads not guilty. Tried April 5, 6, 7, 1906. Verdict not guilty on the 1st and 2nd Counts of the Indictment and Guilty on the 3rd Count of the Indictment. April 13, 1906. New Trial is granted.' "

It would be sufficient to say of this objection that it was not taken until a motion was made for a new trial, which motion, with the accompanying affidavits to the effect that the jury had read and considered the indorsements upon the indictment, was considered and the motion overruled by the trial court. It has been frequently decided that the allowance or refusal of a new trial rests in the sound discretion of the trial court and its action in that respect cannot be made the basis of review by writ of error to this court. *Indianapolis &c. R. R. Co.* v. *Horst*, 93 U. S. 291, 301; *Kerr* v. *Clampitt*, 95 U. S. 188; *Newcomb* v. *Wood*, 97 U. S. 581, 583.

It is contended by the petitioner that a contrary view to that taken by the Circuit Court of Appeals in this case was taken in *Ogden* v. *United States*, 112 Fed. Rep. 523, Circuit Court of Appeals of the Third Circuit. In that case, however, it appeared that the court below refused to consider the motion and affidavit showing that the indictment, with an indorsement of a former conviction thereon, had been taken to and kept in the jury-room during their deliberations. The court recognized the rule that the overruling of a motion for a new trial is not a subject of review in an appellate court, but found that the court below had refused to consider the motion and affidavits, and declined to exercise its discretion, as it was its duty to do. It is true the court, after finding that reversible error had been committed by the failure to entertain the motion for a new trial, deemed it was its duty not merely to remand so that the motion might be considered by the court below, but itself passed upon the motion for a new

trial. The primary basis, however, upon which the court acted was the failure of the court below to consider the motion for a new trial, a circumstance which does not exist here. To the like effect is *Mattox* v. *United States*, 146 U. S. 140, where the court below refused to entertain affidavits showing the reading of a newspaper, containing an unfavorable article, during the deliberations of the jury, and also damaging remarks of an officer in charge of the jury during the progress of the trial. In both cases the basis of the action of the reviewing court was the refusal of the courts below to exercise the discretion vested in them by law.

But, it is urged, that notwithstanding the objection was first taken in this case upon the motion for a new trial, this court may notice a plain error not properly reserved in the record. Undoubtedly the court has this authority and does sometimes exercise it.

But an examination of the record in this case does not satisfy us that we should exercise this right to review an error not properly reserved, and require the granting of a new trial, because of the indorsements upon the indictment sent to the jury, together with the forms of verdict. The record contains all the testimony, and is ample to sustain the conviction of the defendant without giving weight to the effect of this indorsement. The indorsement itself shows that a new trial was granted upon the former conviction on the third count. This action of the court in setting aside what the jury had formerly done is quite as likely to influence the jury favorably to the accused, as was the fact of former conviction by the jury to work to his prejudice.

We do not mean to indicate that such indorsements should be permitted to go to a jury, or that the fact of former conviction should be urged or referred to in the progress of the trial. It is undoubtedly the correct rule that the jury should be kept free from all such extraneous and improper influences. But, in this case we do not find in the record any reason for the exercise of the authority granted to us under

the thirty-fifth rule to notice a plain error not properly reserved.

It is further urged that the indictment in the third count thereof does not properly charge an offense against Holmgren. It is true that in the third count it appears that the name of Frank Werta, the alien, was written by mistake for that of Gustav Holmgren, in averring that the witness was duly and properly sworn, but this count also contains the averment that "the said Gustav Holmgren having taken such oath to testify, as aforesaid, did then and there willfully," etc., and "contrary to the said oath testify in substance and to the effect," etc. This objection does not appear to have been specifically pointed out in the demurrer or otherwise taken advantage of upon the trial. In this proceeding it is too late to urge such objections to a matter of form unless it is apparent that it affected the substantial rights of the accused. Revised Stat., § 1025; *Conners* v. *United States*, 158 U. S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84.

It is further alleged that the court erred in refusing to give the following request to charge concerning the testimony of Frank Werta, the alien seeking to be naturalized in the proceeding:

"I charge you that if you believe the testimony of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant; and I instruct you that before you can convict said defendant the testimony of the witness, Frank Werta should be corroborated by the testimony of at least one witness or strong corroborative circumstances."

It may be doubtful whether Werta can be regarded as an accomplice, as the record tends to show that he had no part in procuring the testimony of Holmgren, and in nowise induced him to make the oath which was the basis for the proceedings. Be that as it may, the request did not properly state the law, as it assumed that Werta was an accomplice, a conclusion which was controverted, and against which the jury might have found in the light of the testimony. It is

undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error.

Other questions are raised in the case as to the admissibility of certain testimony; we have examined them and find nothing prejudicial to the rights of the petitioner.

The judgment of the Circuit Court of Appeals is, therefore, affirmed.

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* JOSEPHINE KING. SAME *v.* INEZ KING.

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

Nos. 140, 141. Argued April 6, 7, 1910.—Decided May 16, 1910.

The right to regulate interstate commerce is exclusively vested in Congress, and the States cannot pass any law directly regulating such commerce; but the States may, in the exercise of the police power, pass laws in the interest of public safety which do not interfere directly with the operations of interstate commerce.

The constitutionality of a state statute regulating operation of railroad trains depends upon its effect on interstate commerce; and, in the absence of congressional regulation on the subject, States may make reasonable regulations as to the manner in which trains shall approach, and give notice of their approach to, dangerous crossings, so long as they are not a direct burden upon interstate commerce.

One who would strike down a statute as unconstitutional must show that it affects him injuriously and actually deprives him of a constitutional right.

Proof must conform to the allegations and without proper allegations testimony cannot be admitted.

A pleading must state facts and not mere conclusions; and the want of

essential definite allegations renders a pleading subject to demurrer. This general rule is also the practice in Georgia.

General statements that a statute is in violation of the commerce clause of the Federal Constitution, is a direct burden on interstate commerce, and impairs the usefulness of the pleader's facilities for that purpose, are mere conclusions and not statements of the facts which make the operation of the statute unconstitutional, and do not raise any defense to a cause of action based on a violation of such statute.

160 Fed. Rep. 332, affirmed.

THE facts, which involve the constitutionality of a statute of Georgia regulating the crossing of highways by railroad trains, are stated in the opinion.

Mr. John J. Strickland, with whom *Mr. A. P. Thom* and *Mr. Hamilton McWhorter* were on the brief, for plaintiffs in error:

The amendment alleging that the Blow Post statute is void because a burden upon interstate commerce was in proper form and conformed to the laws of Georgia and properly raised the constitutional question. *S. F. & W. Ry.* v. *Hardin,* 110 Georgia, 433; *Brown* v. *State,* 114 Georgia, 60; *Sayor* v. *Brown,* 119 Georgia, 542.

When a constitutional question is not made or passed upon in the lower court, the court of review will not consider it, though afterward argued there. The reverse of the proposition is likewise true. *Butler* v. *Merritt,* 113 Georgia, 241; *Lafitte* v. *Burke,* 113 Georgia, 1000; *State* v. *Henderson,* 120 Georgia, 781; *Newkirk* v. *Sou. Ry. Co.,* 120 Georgia, 1048; *Parham* v. *Potts-Thompson Liquor Co.,* 127 Georgia, 303.

The evidence, offered and rejected by the court, properly raised the constitutional question. All that is required by the laws of Georgia is that the question shall be raised below, and be passed on directly or indirectly and appear in the record either in the pleadings, or the evidence, or other parts of the record. Cases cited *supra. Parham* v. *Potts-Thompson Liquor Co.,* 127 Georgia, 303; *S. F. & W. Ry. Co.* v. *Hardin,*

110 Georgia, 433; *Newman* v. *State*, 101 Georgia, 534; *Lafitte* v. *Burke*, 113 Georgia, 1000. Under the law of Georgia all objections to evidence not made are waived. *Jackson* v. *State*, 88 Georgia, 784; *Steed* v. *Cruise*, 70 Georgia, 168; *Christian* v. *State*, 86 Georgia, 430; *Rhinehart* v. *Blackshear*, 105 Georgia, 799; *Summers* v. *State*, 116 Georgia, 535.

Commerce among the States consists, among other things, in intercourse and traffic, including in these terms the transportation and transit of persons and property and the instrumentalities thereof. *Mobile County* v. *Kimball*, 102 U. S. 691; *McCall* v. *California*, 136 U. S. 104; *Williams* v. *Fears*, 179 U. S. 270; *Champion* v. *Ames*, 188 U. S. 321.

There is no reserved power in the States to, in any way, regulate interstate commerce. Where the apparent exercise of power has been upheld by the courts, the power was either the mere declaration of a common law duty as applied to the instrumentalities of interstate commerce or the exercise of some other reserved power not pertaining to commerce. Cooke's Commerce Clause of Fed. Const. 111, 124; *Western Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92; 3 Elliott on Railroads, 1156.

If the authority to regulate an interstate railroad train at a public crossing is embraced in the police power of a State, that authority must be so exercised as not to burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for the traffic. The police power of a State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the Constitution. *Illinois Cent. R. R.* v. *Illinois*, 163 U. S. 154; *L. S. & M. S. R. R.* v. *State of Ohio*, 173 U. S. 285; see pp. 309 and 335; *Cleveland & Chicago R. R.* v. *St. Louis R. R.*, 177 U. S. 514; *Miss. R. R. Commission* v. *Ill. Cent.*, 203 U. S. 335; *Atlantic Coast Line* v. *N. C. Commission*, 206 U. S. 1; *Morgan Steamship Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455; *Jacobson* v. *Massachusetts*, 197 U. S. 25; *Lawler* v. *Steele*,

152 U. S. 133; *Henderson* v. *New York*, 92 U. S. 259; *Lochner* v. *New York*, 198 U. S. 45; *Holden* v. *Hardy*, 164 U. S. 366; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227; *Mo. Ry. Co.* v. *Harber*, 169 U. S. 613; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *McLean* v. *Arkansas*, 211 U. S. 547.

Congress, alone, can deal with such interstate transportation and its non-action is a declaration that it shall remain free from burdens imposed by state legislation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

Although it is expressly provided that the power of Congress to regulate shall be exclusive, it is obvious that in order to be effective, the exercise thereof must exclude the exercise of any conflicting power under authority of the State; inconsistent state legislation being to that extent superseded. Cooke's Commerce Clause of Fed. Constitution, 109; *Mobile County* v. *Kimball*, 102 U. S. 691; *Leisy* v. *Hardin*, 135 U. S. 100. Police power cannot control in a case like this. *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259; *Jacobson* v. *Massachusetts*, 197 U. S. 25.

Federal control of commerce begins as soon as the subjects or operations of commerce are subjected to burdensome state legislation. Prentice & Eagan, p. 61; *Walling* v. *Michigan*, 110 U. S. 446; *Robinson* v. *Taxing District*, 124 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *McCall* v. *California*, 139 U. S. 104; *Brennan* v. *City of Titusville*, 153 U. S. 289.

The statute under review is unconstitutional and void as to interstate railroads. There is no common-law duty on a carrier to check its trains at a crossing, so as to stop if any person or thing should be thereon, and there is no reserved power in a State to impose such burden on an interstate carrier.

The act as applied to through trains is unreasonable. *L. S. & M. S. R. R. Co.* v. *State of Ohio*, 173 U. S. 301.

The act in effect is to regulate an interstate carrier, and thus interstate commerce. *Brown* v. *Houston*, 114 U. S. 622; *Welling* v. *Missouri*, 91 U. S. 275; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691.

To regulate is to adjust by rule, method, or established mode; to direct by rule, or restriction; to subject to governing principles or laws. Webster's Int. Dict.

The effect of the statute is to burden, impede, and to impair the usefulness of the facilities of interstate carriers for such traffic. *Ill. Cent. R. R. Co.* v. *Illinois*, 163 U. S. 154; *Miss. R. R. Comm.* v. *Ill. Cent.*, 203 U. S. 346.

The statute is not observed, and the engineers are not prosecuted for its violation, though the statute so requires. Penal Code of Ga., § 517, provides he shall be punished as for a misdemeanor by § 2222 of the Civil Code.

The statute was passed before the days of interstate railroads; it was enacted by the State for the railroads of the State as they were then operated. Interstate carriers operate by virtue of an act of Congress passed since the day of the Georgia statute, and which had the effect to supersede the Blow Post statute of Georgia. Rev. Stat., § 5258.

The evolution of the business world has rendered obsolete the statute under review.

Mr. Reuben R. Arnold for defendant in error:

Plaintiff in error has not made its questions in such a way that this court can consider them.

The court is not bound by a conclusion of a pleader that the statute is a burden on interstate commerce. The rule in pleading here is analogous to the pleading in cases of fraud. A general charge of fraud in a pleading always counts for nothing; the particulars constituting the fraud must be set forth. *Parham & Co.* v. *Potts-Thompson Liquor Co.*, 127 Georgia, 303; *Newkirk* v. *Southern Railway Co.*, 120 Georgia, 1048.

The defendant may, by proper pleadings, raise issues of law, or of fact, legal or equitable, or both. All issues of law shall be raised by demurrer. All issues of fact shall be raised by plea or answer, which may be of a dilatory nature, or to the merits.

Inasmuch as written pleadings are required, the defendant had no basis for any evidence on this alleged constitutional objection, after its plea had been stricken out.

Incidental or remote effect on interstate commerce does not vitiate legislation. *Sherlock* v. *Alling*, 93 U. S. 99; *Chicago R. R.* v. *Solan*, 169 U. S. 133.

Decisions on state legislation directly seeking to control commerce, are not in point here. Legislation in case at bar is an aid to interstate commerce. Legislation by a State, which directly undertakes to regulate commerce, is void; while other legislation, which incidentally affects it equally as much as a direct regulation of it, has been held valid. The acts and orders construed in *Atlantic &c. R. R.* v. *Wharton*, 207 U. S. 334; *Miss. R. R. Comm.* v. *Ill. Cent. R. R. Co.*, 203 U. S. 335; *Cleveland R. R.* v. *Illinois*, 177 U. S. 514; *Illinois* v. *Illinois &c. R. R. Co.*, 163 U. S. 141, involved unreasonable burdens upon interstate commerce and are easily distinguished.

The case at bar belongs to an entirely different class, such as *Smith* v. *Alabama*, 124 U. S. 465; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Lake Shore R. R.* v. *Ohio*, 173 U. S. 286; *Gladson* v. *Minnesota*, 166 U. S. 427, 430; *Hennington* v. *Georgia*, 163 U. S. 300; and see *Erb* v. *Morasch*, 177 U. S. 584, holding that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least until Congress takes action in the matter."

The Blow Post law was passed in 1852, and every railroad company in Georgia takes its franchise and its right to operate subject to the provision of this law, which

has been sustained and applied by the Supreme Court of Georgia in many cases. A full history of this statute will be found in *Southern Railway* v. *Combs*, 124 Georgia, 1004; *Railroad* v. *Davis*, 18 Georgia, 679; *Railroad* v. *Wynn*, 19 Georgia, 440, and *Railroad* v. *Wynn*, 26 Georgia, 250.

It is entirely consistent with the terms of this statute, that trains can run at full speed over crossings in the great majority of instances.

It is within the power of the State to require certain measures of diligence on the part of those operating trains when passing over dangerous places like grade crossings. If this law works a hardship upon the railroads, they can construct underground or overhead crossings.

To maintain grade crossings is dangerous and is so recognized everywhere; some States have abolished grade crossings altogether. See *Railroad* v. *Braddock R. R.*, 152 Pa. St. 116; *Westbrook's Appeal*, 57 Connecticut, 95.

If the State can abolish grade crossings altogether it can impose upon the railroads using such dangerous places almost any conceivable condition before allowing their use. The power to altogether prohibit certainly includes the power to regulate.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were tried together in the Circuit Court and were so considered in the Circuit Court of Appeals, and will be so disposed of here. In No. 140, Josephine King brought her suit in the Superior Court of Habersham County, Georgia, to recover $10,000 against the Southern Railway Company for the wrongful death of her husband, killed while riding in a buggy at a crossing of the defendant's railway. The alleged negligence was the violation of a certain statute of the State of Georgia, in that the company failed to check and to keep checking

the speed of its train while approaching the crossing at which her husband was killed.

In case No. 141, the action was brought by Inez King by her next friend, Josephine King, in the same court, because of injuries received at the same time and place, and in alleged violation of the same statute. Both cases were removed to the United States Circuit Court for the Eastern Division of the Northern District of Georgia. Upon trial verdicts and judgments were rendered against the railroad company. These judgments were affirmed in the Circuit Court of Appeals for the Fifth Circuit. 160 Fed. Rep. 332; 87 C. C. A. 284. The cases were then brought here by writs of certiorari.

The Federal question presented concerns the validity of the statute of the State of Georgia for violation of which a recovery was had, it being the contention of the petitioner that the statute is in violation of the interstate commerce clause of the Federal Constitution, in that it is an illegal burden upon and a regulation of interstate commerce. This statute is found in § 2222 of the Civil Code of Georgia, and reads as follows:

"There must be fixed on the line of said road, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road."

It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The States cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances,

and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the rights of the States to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the State in the interest of the public health and safety, have been maintained by the decisions of this court. We may instance some of the cases of this nature in which statutes have been held not to be a regulation of interstate commerce, although they may affect the transaction of such commerce among the States. In *Smith* v. *Alabama*, 124 U. S. 465, it was held to be within the police power of the State to require locomotive engineers to be examined and licensed. In *N. Y., N. H. & H. Railroad Co.* v. *New York*, 165 U. S. 628, a law regulating the heating of passenger cars and requiring guard posts on bridges was sustained. In *Lake Shore R. R. Co.* v. *Ohio*, 173 U. S. 286, it was held to be a valid enactment to require railway companies operating within the State of Ohio to cause three of its regular passenger trains to stop each way daily at every village containing over three thousand inhabitants. In *Erb* v. *Morasch*, 177 U. S. 584, it was held that a municipal ordinance of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to six miles an hour, was a valid exertion of the police power of the State. In the case of *Crutcher* v. *Kentucky*, 141 U. S. 47, this court said:

"It is also within the undoubted province of the State legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the

operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of Congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

On the other hand, it has been held to be an illegal attempt to regulate interstate commerce to require interstate passenger trains to stop at county seats when adequate train service had already been provided for local traffic. *C. C. C. & St. L. R. R. Co.* v. *Illinois,* 177 U. S. 514. In *Mississippi Railroad Commission* v. *Illinois Central Railroad Company,* 203 U. S. 335, it was held that orders of a state railroad commission which directed the stopping of interstate trains at certain local stations, where adequate transportation facilities had already been provided, was an unlawful attempt to regulate interstate commerce and repugnant to the Federal Constitution.

Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court and with a proper interpretation of constitutional rights, at least in the absence of Congressional action upon the same subject-matter, for the State to regulate, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such

crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact.

It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution. *Tyler* v. *The Judges*, 179 U. S. 405; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Hooker* v. *Burr*, 194 U. S. 415; *Hatch* v. *Reardon*, 204 U. S. 152, 160.

In the case at bar the Federal question was sought to be raised by an amendment to the answer. The answer originally filed was general in its nature, and did not set up the defense of violation of the Federal Constitution. The amendment filed set up that the railroad company was engaged in interstate commerce, and at the time of the injury complained of was operating an interstate train, and, after setting up the statute of the State of Georgia for a violation of which the company was sued, averred that it was inoperative as to the defendant's train, because in violation of § 8, Article I, of the Federal Constitution, giving Congress the power to regulate commerce, and further stated:

"Your defendant further shows that the statute of Georgia is not a reasonable regulation under the police power of the State to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

"Defendant further shows that it is impossible to ob-

serve said statute and carry the mails as defendant is required to carry them under the contract it has with the Government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

"Wherefore it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

"All which it stands ready to verify, and prays that it be hence discharged with its reasonable cost."

On oral demurrer to this amendment to the answer the same was held insufficient and it was dismissed. Petitioner's counsel further sought to raise the Federal question by an offer of proof at the trial by an engineer of the company, as follows:

"I expect to prove that between the South Carolina line and Atlanta there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the city of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one State to another, also carrying an express car with freight on it, from one State to another. We wish and expect to show that obedience

to that crossing act would hinder, and practically prevent, interstate business being done by the defendant railroad. We wish to show the conditions I have just stated all existed at the time this accident occurred, on the 11th of October, 1903."

This testimony was excluded and an exception was taken. It is apparent from this outline of the state of the record that when this testimony was offered there was no answer on file in the case under which it would be competent. A demurrer had been sustained to the amendment to the answer, and the case stood upon the complaint and the general issue filed by the defendant. It is elementary that the proof must conform to the allegations, and that without proper allegations testimony cannot be admitted. We are then remitted to the question, Did the court err in sustaining the demurrer to the amended answer? The Circuit Court of Appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts, which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and, therefore, deprive the railway company of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears

as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained.

The learned counsel for the plaintiff in error insists that under the decisions in Georgia, in the absence of a special demurrer requiring a more particular statement, the answer was sufficient. It is enough to say that we have examined those decisions and think that they do not indicate a departure from the general rule that a pleading must state facts and not mere conclusions, and that the want of definite allegations essential to a cause of action or defense renders a pleading subject to demurrer.

We find no error in the judgment of the Circuit Court of Appeals, and the same is affirmed in both cases.

Affirmed.

MR. JUSTICE HOLMES, dissenting.

The petitioner set up as a defense to these actions that the statute under which it was sued was such a burden on commerce among the States as to violate § 8, Art. I, of the Constitution of the United States—a pure issue of law. If in order to try this issue intelligently it was necessary to take evidence of facts, I think the court was bound to hear such evidence, even without any specific allegation of the facts that would maintain it, as it is the court's duty to know and to declare the law. But I

leave that question on one side because the petitioners did not stop with the naked proposition, but alleged further that "it is impossible to observe said statute and carry the mails as the defendant is required to carry them under the contract it has with the Government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute." These are pure allegations of fact. They mean on their face that the requirement that the engineer at every grade crossing should have his train under such control as to be able to stop if necessary to avoid running down a man or wagon crossing the track requires such delays as to prevent or seriously to interfere with commerce among the States. They refer to physical conditions and to physical facts; they can refer to nothing else. I think it obvious that they mean that the crossings are so numerous as to make the requirement impracticable, since I can think of nothing but the number of them that would have that effect.

The statement may be called a conclusion, but it is a conclusion of fact, just as the statement that a certain liquid was beer is a conclusion of fact from certain impressions of taste, smell and sight. If the objection to the pleading had been that more particulars were wanted, although, for my part, I think it would have been unnecessarily detailed and prolix pleading to set forth what and where the crossings were, the pleading should not have been rejected, but the details should have been required. The petitioner showed that it was ready to give them by its offer of proof. But evidently the answer was not held bad on that ground. Presumably at least, as stated by the counsel for the petitioner, it was held bad on the ground taken by the Supreme Court of that State, that although the requirement was impracticable it was the law. *Central of Georgia Ry. Co.* v. *Hall*, 109 Georgia, 367, 369. See 160 Fed. Rep. 332, 337; *S. C.*, 87 C. C. A.

284, 289. For it is to be observed further that the facts involved were public facts, and that although the court might not take notice of the precise situation of particular crossings it well might take notice, as the Supreme Court of Georgia seems to have taken notice in the case just mentioned, that they were numerous. See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 638, and for many cases Wigmore, Ev., §§ 2575, 2580. 16 Cyc. 862. 17 Am. & Eng. Ency. of Law, 2d ed., 904. Again, if any merely technical objection had been thought fatal to the defense, the petitioner undoubtedly would have met it by a further amendment to its plea.

It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove. I think that the judgment should be reversed.

I am authorized to say that Mr. Justice WHITE concurs in this dissent.

FREEMAN *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 156. Submitted April 11, 1910.—Decided May 16, 1910.

Provisions carried into the Philippine bill of rights by the statute of July 1, 1902, c. 1369, 32 Stat. 691, such as "that no person shall be imprisoned for debt," are to be interpreted and enforced according to their well-known meaning at the time. *Kepner* v. *United States*, 195 U. S. 100.

Statutes relieving from imprisonment for debt, as generally interpreted, relate to commitment of debtors for liability on contracts, and not to enforcement of penal statutes providing for payment of money

as a penalty for commission of an offense and the provision against imprisonment for debt in the Philippine bill of rights as contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691.

The fact that a money penalty imposed for embezzlement goes to the creditor and not into the public treasury does not make imprisonment for non-payment of the penalty imprisonment for debt; and so held as to § 5, Art. 535, of the Penal Code of the Philippine Islands.

Where the statute provides a penalty for embezzlement to the amount proved, to go to the creditor, and a subsidiary sentence of imprisonment in case of non-payment, the court may, without violating fundamental principles of justice, find the amount wrongfully converted for the purpose of fixing sentence in the criminal action, leaving the creditor his remedy in a civil action for any excess due him over the amount of the sentence; and so held as to a conviction for embezzlement under Article 535 of the Penal Code of the Philippine Islands.

THE facts, which involve the validity of a conviction for embezzlement under § 535 of the Philippine Code, are stated in the opinion.

Mr. Aldis B. Browne, Mr. W. A. Kincaid, Mr. Alexander Britton and *Mr. Evans Browne* for plaintiff in error.

Mr. Assistant Attorney General Fowler for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Philippine Islands, seeking to reverse a judgment of that court affirming a conviction of the plaintiff in error of the crime of *estafa* (embezzlement) growing out of the alleged misappropriation of some 3,500 pesos received by him as manager of the steamship department of Castle Brothers, Wolf & Sons. The sentence of the court of first instance was as follows:

"The court therefore finds the defendant, Otis G. Freeman, guilty of embezzlement of the sum of p3,500 Phil-

ippines currency, as charged in the complaint, the property of Castle Bros., Wolf & Sons, and does sentence him to imprisonment, *presidio correccional*, in the insular prison of Bilibid, for the period of one year and nine months, and to restore to said Castle Bros., Wolf & Sons the sum of p3,500 Philippines currency, or in lieu thereof to suffer subsidiary imprisonment for the period of seven months and to pay the costs of prosecution."

Upon appeal to the Supreme Court of the Philippine Islands that court, after reviewing the testimony, said:

"This finding, of course, will in no way estop the said firm of Castle Bros., Wolf & Sons from recovering in a civil action from the defendant any sum or sums in excess of this amount which are found to be due to the said firm. The only charge (change) which this finding makes in the conclusion of the lower court is in the amount of money which must be returned to the firm of Castle Bros., Wolf & Sons by virtue of this sentence.

"It is the judgment of this court that the sentence of the lower court be affirmed with this modification, and that the defendant be sentenced to be imprisoned for a period of one year and nine months of *presidio correccional*, and to restore to Castle Bros., Wolf & Sons the sum of p2,078.50, or in lieu thereof to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs."

The statute of the Philippine Islands defining the crime is article 535 of the Philippine Code:

"(1) Philippine Penal Code, article 535:

" 'The following shall incur the penalties of the preceding articles:

* * * * * * * *

" '5. Those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or in any other

character producing the obligation to deliver or return the same, or who shall deny having received it.' "

Other pertinent articles of the Philippine Code are as follows:

"(2) Philippine Penal Code, article 534:

" 'A person who shall defraud another in the substance, quantity, or quality of things he may deliver to him, by virtue of an obligation, shall be punished—

* * * * * * * *

" '2. With that (the penalty) of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree if it should exceed 250 pesetas and not be more than 6,250 pesetas.'

"(3) Philippine Penal Code, article 28:

* * * * * * * *

" 'Those [penalties] of *presidio correccional* and *prision correccional* shall last from six months and one day to six years.

* * * * * * * *

" 'That of *arresto mayor* shall last from one month and one day to six months.'

"(4) Philippine Penal Code, article 49:

" 'In case the property of the person punished should not be sufficient to cover all the pecuniary liabilities they shall be satisfied in the following order:

" '1. Reparation of the injury caused and indemnification of damages.

" '2. Indemnification to the State for the amount of stamped paper and other expenses which may have been incurred on his account in the cause.

" '3. The costs of the private accuser.

" '4. Other costs of procedure, including those of the defense of the person prosecuted, without preference among the persons interested.

" '5. The fine.

" 'Should the crime have been of those which can be

prosecuted only at the instance of a party, the cost of the private accuser shall be satisfied in preference to the indemnification to the State.'

"(5) Philippine Penal Code, article 50:

" 'If the person sentenced should not have property to satisfy the pecuniary liabilities included in Nos. 1, 3 and 5 of the preceding article, he shall be subject to a subsidiary personal liability at the rate of one day for every 12½ pesetas, according to the following rule:

" '1. If the principal penalty imposed is to be undergone by the criminal confined in a penal institution, he shall continue therein, although said detention cannot exceed one-third of the term of the sentence, and in no case can it exceed one year.

* * * * * * * *

" '(6) Philippine Penal Code, article 52:

" 'The personal liability which the criminal may have incurred by reason of insolvency shall not exempt him from the reparation of the injury caused and the indemnification of damages if his pecuniary circumstances should improve; but it shall exempt him from the other pecuniary liabilities included in Nos. 3 and 5 of article 49.' "

It is the contention of the plaintiff in error that the judgment of the Supreme Court of the Philippine Islands should be reversed for two reasons, first, because the judgment was in substance and effect an imprisonment for debt; second, because the court should have dismissed the case without prejudice to the right to institute a civil action for the rendition of accounts.

As to the first contention, that the judgment and sentence amounted to imprisonment for debt:—The act of July 1, 1902, providing for the administration of the affairs of the civil government of the Philippine Islands, 32 Stat. 691, provides among other things in § 5 thereof: "That no person shall be imprisoned for debt." This provision was carried to the Philippine Islands in the

statute quoted with a well-known meaning, as understood when thus adopted into the bill of rights for the government of the Philippines and must be so interpreted and enforced. *Kepner* v. *United States*, 195 U. S. 100, 124.

Statutes relieving from imprisonment for debt were not intended to take away the right to enforce criminal statutes and punish wrongful embezzlements or conversions of money. It was not the purpose of this class of legislation to interfere with the enforcement of such penal statutes, although it provides for the payment of money as a penalty for the commission of an offense. Such laws are rather intended to prevent the commitment of debtors to prison for liabilities arising upon their contracts. *McCool* v. *State*, 23 Indiana, 129; *Musser* v. *Stewart*, 21 Oh. St. 353; *Ex parte Cottrell*, 13 Nebraska, 193; *In re Ebenhack*, 17 Kansas, 618, 622.

This general principle does not seem to be controverted by the learned counsel for the plaintiff in error, and the argument is, that inasmuch as the money adjudged is to go to the creditor, and not into the public treasury, imprisonment for the non-payment of such sum is an imprisonment for debt. But we think that an examination of the statutes of the Philippines and the judgment of the Supreme Court shows that the imposition of the money penalty was by way of punishment for the offense committed, and not a requirement to satisfy a debt contractual in its nature or be imprisoned in default of payment.

Section 5, article 535, of the Penal Code provides that those who, to the prejudice of another, shall appropriate or misapply any money, goods or any kind of personal property which they may have received as a deposit on commission for administration, or in any other character, producing the obligation to deliver or return the same, or who shall deny having received it, shall incur certain

penalties. As a further means of punishing the act done in violation of the statute he may, under the Philippine Code, be made to suffer a subsidiary imprisonment for a term not to exceed one-third of the principal penalty in lieu of the restoration of the sum found to be embezzled. The sentence of the Supreme Court of the Philippine Islands, including the imprisonment in lieu of the payment of the sum found due, was because of the conviction for the violation of this statute—in other words, the money payment was part of the punishment and was not imposed as an imprisonment for non-payment of the debt, regardless of the criminal offense committed. The sentence and each part of it was imposed because of the conviction of the defendant of the criminal offense charged.

This situation is not changed because the sentence provides for a release from the subsidiary imprisonment upon payment of the money wrongfully converted. The sentence imposed, nevertheless, includes the requirement to pay money because of the conviction of the offense. The requirement that there shall be no imprisonment for debt was intended to prevent the resort to that remedy for the collection of contract debts, and not to prevent the State from imposing a sentence for crime which should require the restoration of the sum of money wrongfully converted in violation of a criminal statute. The non-payment of the money is a condition upon which the punishment is imposed. *State of Maryland* v. *Nicholson*, 67 Maryland, 1.

We do not think that the sentence and judgment violated the statute providing that no person shall be imprisoned for debt.

As to the second objection, that the court should have dismissed the cause without prejudice to the right of instituting a civil action, the argument seems to be that this should be so because the payment of the money adjudged or suffering the "subsidiary imprisonment" im-

posed would not, as the Supreme Court adjudged, bar the creditor from a civil action to recover any sum which he might prove to be due in excess of the judgment rendered in the present case. "In other words," says the learned counsel, "imprisonment will satisfy (and therefore discharge) the judgment here rendered, leaving another and wholly civil action open to the complainants to recover any additional sum arising out of the same cause of action." This possibility is said to be so wholly unjust that it ought not to be permitted to exist in any country subject to American jurisdiction. But we fail to appreciate the weight of this argument. We see no reason why the court may not, for the purpose of the criminal proceedings, find the amount wrongfully converted by the defendant for the purpose of fixing the sentence in this case, leaving the firm defrauded to recover in a civil action any sum or sums in excess of that amount which may be found due and remain unpaid to them. We are unable to perceive in this action such violation of the fundamental principles of justice as required the dismissal of the criminal action, leaving the parties complaining to the remedies of a civil suit.

We find no error in the judgment of the court below, and the same is affirmed.

Affirmed.

COLUMBIA HEIGHTS REALTY CO. *v.* RUDOLPH ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.[1]

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

No. 157. Argued April 12, 13, 1910.—Decided May 16, 1910.

Under the act of February 9, 1893, c. 74, § 8, 27 Stat. 436, appeals from and writs of error to the Court of Appeals of the District of Columbia are governed by § 705, Rev. Stat., as to procedure, and by §§ 997 and 1012, Rev. Stat., as to filing the transcript and assignment of error as from a Circuit Court.

Rule 35 refers in terms only to writs of error and appeals under § 5 of the Court of Appeals Act of March 3, 1891, but by Rule 21, it is in effect extended to every writ of error and appeal; and, although errors may not be assigned on a writ of error to the Court of Appeals of the District of Columbia, the court is not under obligation to dismiss the writ in case the assignment of errors is not filed as required by §§ 997 and 1012, Rev. Stat., having by its rules reserved the option to notice plain error whether assigned or not.

In this case the court exercises the option reserved under Rules 35 and 21 to examine the record to ascertain if there are errors not assigned as required by §§ 997, 1012, Rev. Stat., but so plain as to demand correction.

Under the complete jurisdiction which the United States exercises over the District of Columbia it is within the power of Congress to arbitrarily fix a minimum amount to be assessed for benefits on property within the assessment district of a street opening proceeding, and so held as to act of June 6, 1900, c. 810, 31 Stat. 668, as to the opening of extension of Eleventh Street.

Where Congress passes an act superseding a former act in regard to condemnation proceedings and providing for a reassessment of benefits, the reassessment is a continuance of the proceeding under the former act and not a new proceeding; and the assessment for

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[1] Original Docket Title: Columbia Heights Realty Company *v.* Henry B. F. Macfarland and others, Commissioners of the District of Columbia.

benefits is not barred by the statute of limitations if the proceeding was commenced in time under the original act.

Objections to qualifications of jurors and their examination and oath in condemnation proceedings must be taken at the time.

That counsel was not present when they were accepted and sworn does not invalidate the impaneling of the jury if the statute does not so provide.

On condemnation proceedings where the statute directs the court to follow the procedure prescribed for other proceedings, the court will properly vary the oath so as to relate to the property involved, and not to the property in the other proceedings; and if the bill of exceptions does not show that the essential matters were omitted from the oath, the presumption is that the statutory oath was complied with as far as applicable to the proceeding in which it was administered.

Where a verdict of damages and benefits is set aside as to benefits and a reassessment ordered, the remainder of the verdict as to damages alone does not stand as *res judicata* that the property is damaged and there are no benefits that can be assessed under a subsequent act as to procedure for reassessment of benefits.

Where doubt as to meaning of one part of the charge is eliminated by other parts of the charge, there is no reversible error.

Where the jury in a condemnation proceeding exercises its own judgment derived from personal knowledge from viewing the premises and from expert opinion evidence not taken in presence of the court, the power of the court to review the award is limited to plain errors of law, misconduct or grave error of fact indicating partiality or corruption, and the court is not required to review all the evidence taken before the jury in order to determine whether the award is unreasonable or unjust where no specific wrong or injustice is pointed out.

Where the evidence in a condemnation proceeding is not before this court and there is no agreed statement of facts this court cannot determine that the trial court erred in holding the award of the jury made on viewing the premises and expert evidence not so unreasonable or unjust as to require a new trial before another jury.

31 App. D. C. 112, affirmed.

THE facts are stated in the opinion.

Mr. Leo Simmons and *Mr. Arthur A. Birney* for plaintiff in error.

Mr. James Francis Smith, with whom *Mr. Edward H. Thomas* was on the brief, for defendants in error.

Mr. Justice Lurton delivered the opinion of the court.

In 1899, the then Commissioners for the District of Columbia filed a petition in the Supreme Court of the District for the condemnation of land necessary for the extension of Eleventh street northwest. In due course the statutory jury of seven filed an award of damages and of benefits. The verdict was confirmed so far as it awarded damages for the property, but was disaffirmed and vacated as to the amount of benefits. The award so far as it assessed the damages was accepted and the money has long since been paid; but from the order setting aside or vacating the assessment of benefits the Commissioners appealed to the Court of Appeals of the District, where that order was reversed and the proceeding remanded to the lower court with direction to vacate the order setting aside the amount of benefits, "and for such further proceedings in the case according to law as may be just and right." The Supreme Court of the District on March 4, 1904, in obedience to the mandate of the Court of Appeals, set aside its former order vacating the assessment of benefits by the jury, and thereupon heard the matter upon exceptions of the defendants to the award, and upon the motion of the petitioners for a confirmation of the award of benefits. Whereupon an order was made denying confirmation, and ordering that "in case the petitioners desire to proceed further in the premises, they shall within a reasonable time make application to this court for directions to the marshal to summon a jury of twelve, as provided by law." From this order refusing confirmation the petitioners prayed an appeal, but did not perfect same. The next step in the case was taken on June 17, 1904, when the land owners moved the court

to dismiss the proceeding, assigning as reason therefor that "the law under which such proceeding must be had has been repealed," and, second, "for failure of petitioners to proceed as required by the order of this court of March 4, 1904." Upon this motion the court, on June 17, 1904, made an order in these words:

"Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th, A. D. 1904, it is by the court, this 17th day of June, A. D. 1904, ordered: That the petitioners in the above-entitled cause, within sixty days from the date hereof proceed in the matter of the reassessment of benefits herein, in accordance with the terms and provisions of the act of Congress approved June 6, 1900, entitled 'An Act for the Extension of Columbia Road east of Thirteenth Street, and for other purposes.' "

Thereupon the then Commissioners, in continuance of the old proceeding under the act of March 3, 1899, c. 430, 30 Stat. at Large, page 1343, filed an amended and supplementary proceeding according to the terms of the later act of June 6, 1900, c. 810, 31 Stat. at Large, page 668, in which, after setting out all of the proceedings under the pending petition, they prayed for a reassessment of benefits against abutting and adjacent owners whose lands had not been assessed for benefits as required both under the former and latter acts of Congress in respect to the extension of Eleventh street northwest. Under this amended petition a jury of seven was impaneled, who returned an assessment of benefits against the plaintiffs. This, after exceptions had been overruled, was confirmed. A writ of error was taken by the plaintiffs in error to the Court of Appeals for the District of Columbia, where the judgment of the Supreme Court was affirmed. Thereupon this writ of error was sued out.

This protracted litigation is now before us, unaccompanied by an assignment of errors.

The act of February 9, 1893, ch. 74, § 8, 27 Stat. at Large, 436, concerning writs of error and appeals from the Court of Appeals of the District of Columbia, provides that they shall be allowed in the "same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia." The procedure referred to is that found in § 705, Rev. Stat., which provides that such writs or appeals shall be allowed in the "same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a Circuit Court."

Sections 997 and 1012, Rev. Stat., require the transcript from the Circuit Court to be filed with an assignment of errors, and the thirty-fifth rule of this court prescribes the character of such assignments, and "that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed, . . ." and that "errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." This rule refers in terms only to writs of error and appeals under § 5 of the act of March 3, 1891, but it is, in effect, extended to every writ of error or appeal to or from any court by rule 21, which requires that the brief shall set out "a specification of the errors involved." This "specification of error" must conform to rule 35 in particularity. Thus the fourth paragraph of rule 21 provides: "When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified."

The court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or ap-

peal because of the non-assignment of errors as required §§ 997 and 1012, Rev. Stat., having, by its rules, reserved the option to notice a plain error whether assigned or not. *Ackley School District* v. *Hall*, 106 U. S. 428; *Farrar* v. *Churchill*, 135 U. S. 609, 614; *United States* v. *Pena*, 175 U. S. 500, 502.

In the present case the brief of counsel for the plaintiffs in error specifies ten alleged errors. The defendants in error have made no objection for failure to assign error under §§ 997 and 1012, Rev. Stat., but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. For these reasons we shall exercise the option reserved under both rules 21 and 35 of examining the transcript that we may be advised as to whether there has occurred any "plain error" which obviously demands correction.

1. Did the court err in allowing an assessment of benefits under the act of June 6, 1900? We think not. Under the proceedings had theretofore under the act of March 3, 1899, c. 431, 30 Stat. 1344, there had resulted a condemnation of the land needed for the extension of Eleventh street northwest, and an assessment of damages sustained by the land owners, which award had been confirmed and the money paid. But that act provided "that of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided." Objection to this arbitrary fixing of the minimum amount to be assessed for benefits upon lots benefited by the opening of the street was considered, and the act sustained as within the complete jurisdiction which

the United States possesses over the District of Columbia, in the case of *Wight* v. *Davidson*, 181 U. S. 371. The benefits assessable under that act were separately found as against each parcel of property supposed to be benefited, but that part of the award of the jury was vacated upon the erroneous supposition that the rule for assessment of benefits in the act was void. This action of the District Court, as we have already seen, was reversed. Thereupon the District Court denied the motion of the Commissioners to affirm the verdict of the jury assessing benefits. In this situation it was open to the Commissioners to apply for another jury. Before they did so the special act of June 6, 1900, was passed. The effect of the action of the court in refusing to confirm the first assessment of benefits was to make void the award and verdict of the jury, in so far as that verdict had separately found the benefits accruing to the property by the extension of the street. The Commissioners were therefore complying with the direction to them found in the twelfth section of the act of Congress of June 6, 1900. That act provided that the Commissioners should make application to the Supreme Court of the District of Columbia "for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street," etc. And "in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners . . . are authorized and directed to make application to said court for a reassessment for such benefits under and in accordance with the provisions of this act." The procedure under this act differs in many particulars from that under the act of 1899. In view of this the property owners, on June 17, 1904, moved the court to dismiss the old proceeding, basing the motion, as shown by the entry upon the journal of the court upon the contention that

"the law under which such proceeding must be had has been repealed," and, "for failure of the petitioners to proceed as required by the order of this court," of March 4, 1904. Thereupon the court made the order heretofore set out, requiring a reassessment of benefits under the later act.

There is no possible doubt as to the correctness of this order. The new act superseded the former act in so far as the reassessment of benefits was concerned. Both parties seemingly concurred in assuming that this was the case, and that the refusal of the court to confirm the original assessment of benefits was an annulment of the award of benefits by the first jury. The order was in part based upon the motion of the plaintiffs in error, and was made without protest or objection, and none was suggested for more than a year. Such a reassessment was but a continuance of the original proceeding, which might well be done by an amended or supplementary petition by virtue of the authority of the new act. This disposes also of the contention that the proceeding for reassessment of benefits was barred by the statute of limitations of three years. The proceeding for reassessment was not a new action, but a continuance of the old one, and therefore not subject to the operation of the statute.

2. Coming now to the errors assigned upon the procedure under this petition for a reassessment of benefits. The first objection is that the court did not examine the jurors as to whether they possessed the qualifications required by § 4 of the new act, nor administer to them the oath required by the statute under which the court was proceeding.

These objections come too late. The statute made it the duty of the court to hear objections to jurors "before accepting them." None was made. So with the oath; if that administered departed in any particular from

the terms of the statute, objection should have been made at the time. None was made, and only after the verdict was any made. The journal entry, moreover, recites that the jurors summoned by the marshal, under the order theretofore made, were "accepted as qualified," and that the oath was administered to them "in accordance with the provisions of the act of Congress of June 6, 1900." It is now sought to contradict the record by a statement contained in a bill of exceptions allowed after final judgment, that counsel for the plaintiff in error was not present when the order of record was made and the jury accepted and sworn, and that after they had been so accepted and sworn, counsel was denied the right to examine the jurors as to their qualifications. In respect to the oath administered the bill of exceptions contains the meagre statement that the jurors were sworn to "assess the benefits accruing to the property, abutting or adjacent to Eleventh street extended, according to the statute."

The oath which is required to be administered by § 4 of the act of June 6, 1900, under which the court was proceeding, was an oath applicable only to the condemnation of land for an extension of the Columbia road, and the jury were to be sworn to *assess the damages and benefits resulting from the extension of that road.* Such an oath in the present case, when only benefits were to be assessed for property already taken and paid for, *upon another street altogether,* was of course not applicable. The court, in such circumstances, required as it was to follow the procedure of the Columbia road statute, was perfectly justified in swearing the jury to assess benefits to the property concerned in this proceeding. True, the oath prescribed by § 4 includes an affirmation that the jury was disinterested and unrelated and would act without favor or partiality, but the statement in the bill of exceptions does not show that these matters were omitted from the oath, and the presumption remains that the

statutory oath was followed as far as applicable, which is the implication from the journal entry.

As to the qualifications of the jurors: Primarily, they had been summoned, as shown by the order to the marshal and his return, as men having the statutory qualifications. The journal recites that the court "accepted them as qualified." No hint is found in this transcript that they were not qualified, or that they were guilty of any misconduct. Not having asked the court to examine them before accepting them, or to be then permitted to qualify them, it was not reversible error to deny the privilege after they had been sworn and accepted. That counsel was not present when they were accepted and sworn does not invalidate the impaneling of the jury. Under the statute and the warning order, the parties interested were required to be present and "continue in attendance" until the matter was ended.

3. It is assigned as error that the court erred in overruling the plea of *res judicata* as to lots 1 and 30 in block 27, and lots 1 to 16 in block 28. The plea was not good.

The first jury, that which under the act of March, 1899, assessed both damages and benefits, was, under that act, required to award damages not only for land taken for the extension of the street, but also damages to the remainder of the land by being left high above or below the grade. The then owners of these lots were awarded such grade damages to land not taken, which award has been confirmed and paid. But the same jury, as they were instructed to do, assessed the benefits sustained to the remainder, not taken, separately. This part of the verdict was set aside; so that, as it stands, the plaintiffs have been paid the damages sustained to the property not taken by reason of the grade resulting, but have never been assessed for the benefits accruing to the same untaken remainder. It is now said that the confirmation of the amount of damages is an adjudication

that the lots not taken were damaged and not benefited. But that is not the legal construction of the judgment, for the real damages have never been reduced by the benefits which the statute says shall not be less than fifty per cent of the damages sustained. The former judgment was conclusive only as to the damages, and that has not and could not be reopened. The benefits having been separately stated in that verdict remained to be determined and were properly reassessed under the later act of Congress.

4. Alleged error in instructions given or refused.

The sixth assignment noticed in the brief is error in giving the first instruction asked by the Commissioners. This request was in these words:

"It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street northwest, as extended from Florida avenue to Lydecker avenue, and the benefits which have resulted to any and all other pieces or parcels of land from the extension; and in determining the amounts to be so assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of the said pieces or parcels of land, and the benefits that they have severally received from said extension of said Eleventh street. By extension of the street the jury are to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare, or highway."

The objection to this seems to be that the jury was not limited to the benefits resulting immediately from the opening of the street, but might consider all enhancement which might come from subsequent improvement of or upon the street. But this was not the whole of the instruction of the court upon that subject, and any doubt as to what the court did mean was eliminated by other parts of the charge. Thus the court said that to lay an

assessment for benefits against any piece of land abutting upon said street or adjacent thereto the jury must find that the benefits upon which such assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by the extension of car lines in said street. Again, the court said that such benefits must accrue "immediately from the extension of the street in question." This was repeated, when it was said that "the benefit assessable must be an enhancement in value immediately upon the opening and extension of said street," and that they had "no right to consider any enhancement or increase in value that is the result of any special improvements made on the street after it was opened and established as previously stated." There is no reason for doubting the meaning of the court.

The several requests made by the plaintiffs in error were sufficiently covered by the charge as given.

5. The next specification of error in the brief is in these words: "The court erred in refusing to review the evidence taken before the jury and to determine if the verdict was unjust and unreasonable." The act of June 6, 1900, under which the court was proceeding, required the jury to go upon and view the premises, and then to hear and receive such evidence as might be offered, in the presence of the court, or otherwise, as the court might direct, and to then return the majority verdict as to the amount of benefits against the property involved. In this case the evidence was not heard by the jury in the presence of the court, that being according to the order of the court.

The act further provides that "the court shall have power to hear and determine any objection which may be filed to said verdict or award and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in such event a new jury

shall be summoned, who shall proceed to assess the damages and the benefits as the case may be," etc.

This specification of error has for its foundation the concluding paragraph of the bill of exceptions, as follows:

"The foregoing substance of the testimony taken before the said jury was abstracted by the appellant from the testimony filed as an affidavit in the case by order of the court. After the counsel had argued the case upon the propositions of the law raised by the exceptions, counsel for the appellant, in support of its motions and exceptions, offered to read to the court the said testimony, but the court declined to hear the same or consider it at the time in full, counsel saying that it would be his purpose to consider the same if the court found, after consideration, the propositions of the law were against the appellant. But counsel had no further opportunity to argue said case on the evidence, and without reading the evidence, or hearing it fully read, the court passed an order overruling all the exceptions, and confirming said verdict, and refused to consider said testimony any further, and the appellant excepted.

"And thereupon the appellant presented to the court, the justice who presided at the hearing in this case and made the rulings herein referred to, this its bill of exceptions containing the proceedings before the court and before the jury or commission with the substance of the evidence taken before the said jury, and the affidavits filed in the case subsequent thereto, as herein referred to, with the exceptions as therein noted, which were duly taken by the appellants separately, in the order in which they appear, and allowed by the court at the time."

The certificate was in these words:

"And the said appellant by its counsel prays the court to sign and seal this its bill of exceptions and make the same a part of the record in this case, which is now accordingly done, and the said bill of exceptions is here

now signed and sealed in due form and made a part of the record in this case this 14th day of August, 1907, *nunc pro tunc.*"

Why the court should be required to read, or hear read, "in full," a paper which was confessedly but the substance of the testimony taken before the jury, as "abstracted by appellants from the testimony filed as an affidavit in the case," we are at a loss to know. The power of the court to review the award by such a jury must in the very nature of the matter be limited to plain errors of law, misconduct or grave error of fact indicating plain partiality or corruption. The jury saw and heard the witnesses; the court did not. The jury went upon and viewed the premises; the court did not. The duty to review did not involve mere error in judgment as to the extent of enhancement in value, for the judgment of the jury manifestly rested upon much which could not be brought before the court. The jury was expected to exercise its own judgment, derived from personal knowledge from a view of the premises, as well as from the opinion evidence which might be brought before them. *Shoemaker* v. *United States*, 147 U. S. 282. No specific wrong, injustice or error is pointed out. Even if we had all of the evidence before us, it would not be within our province to weigh it. But we have not, nor is there any agreed statement of facts. It is impossible for us to say, therefore, whether the trial court erred in holding the award not unreasonable, or so unjust as to require a new trial before another jury. Other matters complained of in argument need not be specifically referred to.

We find no error and the judgment is

Affirmed.

WALLACH *v.* RUDOLPH ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.[1]

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

No. 148. Argued April 12, 13, 1910.—Decided May 16, 1910.

Jurisdiction to review, when dependent on amount, is determined by the amount directly and not contingently involved in the decree sought to be reviewed.

A writ of error will not lie to review a judgment of the Court of Appeals of the District of Columbia confirming assessments for less than $5,000, even though plaintiff in error may be contingently liable in case the judgment stands for other assessments exceeding $5,000, in the same proceeding on other lots disposed of pending the proceeding.

Writ of error to review 31 App. D. C. 130, dismissed.

THE facts, which involve the validity of certain assessments in the District of Columbia, and the jurisdiction of this court to review judgments of the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Samuel Maddox, with whom *Mr. H. Prescott Gatley* was on the brief, for plaintiff in error.

Mr. James Francis Smith, with whom *Mr. Edward H. Thomas* was on the brief, for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This case was argued with the case of *Columbia Heights Realty Company* v. *The Commissioners of the District of Columbia*, and the questions presented are substantially the same. The plaintiffs in error were interested as owners of certain lots or parts of lots involved in the gen-

[1] Original Docket Title: Rosa Wallach *v.* Henry B. F. Macfarland and others, Commissioners of the District of Columbia.

eral proceeding for the condemnation of property for the extension of Eleventh street, and an assessment for benefits was confirmed as to the property owned by them. They were allowed to prosecute a separate writ of error to the Court of Appeals of the District of Columbia from so much of the award as affected them, where the judgment was affirmed, and from that affirmation this writ of error has been sued out. The aggregate of the amounts which affect these plaintiffs in error and in respect of which they have assigned error is only $2,450.

Jurisdictional limit upon writs of error and appeals to or from the Court of Appeals of the District of Columbia is $5,000, exclusive of interest and costs. See act of February 9, 1893, c. 74, 27 Stat. 434, 436.

To sustain the jurisdiction an affidavit has been filed to show that plaintiffs in error are contingently liable for an amount in excess of $5,000, if this judgment is sustained, by reason of like assessments in the same proceeding upon certain other lots or parts of lots, under other subdivision numbers and standing in the name of different owners, being lots disposed of pending the proceeding under an undertaking to remove the lien of any assessment for benefits which might be made herein. It does not follow as matter of law that such assessments against such other lots to other parties will be determined by this review. But, however this may be, "jurisdiction is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained by either one of the parties through the probative effect of the decree, however direct its bearing upon such contingency." *Hollander* v. *Fechheimer*, 162 U. S. 326, 328.

The motion to dismiss for want of jurisdiction must be granted, and the writ is accordingly

Dismissed.

BROWN-FORMAN CO. *v.* COMMONWEALTH OF KENTUCKY.

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

No. 6. Argued April 11, 12, 1910.—Decided May 16, 1910.

This court accepts the construction by the highest court of the State that the tax imposed by the state statute in this case is not a property tax, but a license tax, imposed on the doing of a business which is subject to the regulating power of the State.

The function of taxation is fundamental to the existence of the governmental power of the States, and the restriction against denial of equal protection of the law does not compel an iron rule of equal taxation, prevent variety in methods, or the exercise of a wide discretion in classification.

A classification which is not capricious or arbitrary and rests upon reasonable consideration of difference or policy does not deny equal protection of the law, and so held that the classification in the Kentucky act of 1906, imposing a license tax on persons compounding, rectifying, adulterating, or blending distilled spirits, is not a denial of equal protection of the law because it discriminates in favor of the distillers and rectifiers of straight distilled spirits.

A State cannot impose an occupation tax on a business conducted outside of the State, and a license tax imposed on those doing a specified business within the State is not unconstitutional as denying equal protection of the law or violating the commerce clause because not imposed on those who carry on the same business beyond the jurisdiction of the State and who ship goods into the State.

While taxation discriminating in favor of residents and domestic products, and against non-residents and foreign products, might be invalid under the commerce clause, that objection does not apply to uniform taxation on a business which does not discriminate in favor of residents or domestic products.

While a state tax on goods which discriminates arbitrarily against the products of that State and in favor of other States denies equal protection of the law, as both classes of goods are within the taxing power of the State, where the license tax for the business of pro-

ducing the product cannot be imposed on the business beyond the State, it is not discriminatory. *State* v. *Hoyt*, 71 Vermont, 59, distinguished.

125 Kentucky, 402, affirmed.

THE facts are stated in the opinion.

Mr. Levi Cooke and *Mr. A. B. Hayes*, with whom *Mr. W. M. Hough* was on the brief, for plaintiff in error:

The act is unconstitutional under the Fourteenth Amendment; under the commerce clause, and under prohibition against imposts upon exports and imports.

On writ of error to review the judgment of the highest court of a State, as against a right claimed under the Federal Constitution, this court is not bound by the state court's construction of the statute. *Scott* v. *McNeal*, 154 U. S. 34; *Huntington* v. *Attrill*, 146 U. S. 657, 683; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558.

A State may not, by an arbitrary exercise of its taxing function, single out for oppression a particular person or class of persons within its domain, in violation of the Constitution. *McCullough* v. *Maryland*, 4 Wheat. 316; *Santa Clara County* v. *The Southern Pacific R. R. Co.*, 18 Fed. Rep. 385, 398.

While the Fourteenth Amendment was not intended to compel a State to adopt an iron rule of equal taxation, *Adams Express Co.* v. *Ohio*, 165 U. S. 194; it does prevent singling out and subjecting to taxation a class, and in this case the act discriminates against Kentucky rectifiers and blenders included within its provisions, in favor of other classes engaged in similar business.

The tax is a property tax. *Thierman* v. *Commonwealth*, 123 Kentucky, 740. Its prime purpose is revenue, and as a revenue measure, it must, to afford equal protection of the laws, apply equally to all of the general class engaged in the same business.

A license tax upon a sale of goods is in effect a tax upon the goods. *Brown* v. *Maryland*, 12 Wheat. 425; *Welton* v. *Missouri*, 91 U. S. 275; *Brennan* v. *Titusville*, 153 U. S. 289; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Tiernan* v. *Rinker*, 102 U. S. 123; *United States* v. *Mayo*, 26 Fed. Cas. 1231; *United States* v. *James*, 14 Blatchf. 207; *Perry County* v. *Railroad*, 58 Alabama, 546. The act cannot be reasonably construed as a policing of the business, and the only purpose it effects is to secure accurate returns upon the goods handled, similar to what is effected by §§ 3259, 3260, Rev. Stat. U. S., and see *State* v. *Bengsch*, 170 Missouri, 81; *City of Brookfield* v. *Tooey*, 141 Missouri, 619; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171; *Levi* v. *Louisville*, 97 Kentucky, 394, 408.

The tax is discriminatory. There is no inherent distinction between blended and unblended distilled spirits sufficient to justify the classification. The tax discriminates against the distilled spirits attempted to be subjected thereto in favor of the exempted spirits produced in the State as well as similar exempted spirits coming from other States and countries.

As to similar statutes held unconstitutional see *Hinson* v. *Lott*, 8 Wall. 148; *State* v. *Bengsch*, 170 Missouri, 81; *State* v. *Hoyt*, 71 Vermont, 59; *State* v. *Pratt*, 59 Vermont, 590; *State* v. *Montgomery*, 94 Maine, 192.

State measures have been sustained on the ground that they operated with equality both upon domestic goods and goods from other States, in *Kehrer* v. *Stewart*, 197 U. S. 60; *Phillips* v. *Mobile*, 208 U. S. 472; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17; *Howe Machine Co.* v. *Gage*, 100 U. S. 676, and see *Darnell* v. *Memphis*, 208 U. S. 113, holding a tax levied upon logs brought into the State of Tennessee from elsewhere invalid, so long as logs cut from lands within the State of Tennessee were exempt as products of the State. The converse of this rule must be equally true, *i. e.*, a tax levied upon the product of a State

is invalid so long as the similar product of other States is exempt within the State.

A State cannot impose burdens in the way of taxation upon goods from other States or countries not imposed upon those produced within its borders, nor can a State impose burdens upon domestic goods not imposed upon those coming within its borders from other States and countries.

In this connection intoxicating liquors, where authorized as legitimate articles of commerce by the public policy of a State, are upon exactly the same plane as any other legitimate articles of commerce, in their relation to the commerce clause of the Constitution. *License Cases*, 5 How. 577; *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Reid* v. *Colorado*, 187 U. S. 137, 150.

Under the Wilson Act foreign liquors upon their arrival in a State must be subjected to its law the same as though they had been produced within the State.

The act to be valid, should require the placing of the same burden upon spirits brought into the State as upon those produced within its borders. *Scott* v. *Donald*, 165 U. S. 58, 94; *Guy* v. *Baltimore*, 100 U. S. 434; *Welton* v. *Missouri*, 91 U. S. 275.

A State cannot, under the guise of inspection laws, make discriminations against the products of other States in favor of its own, *Voight* v. *Wright*, 141 U. S. 62, and the converse of this proposition must also be true.

While a State may validly, in the exercise of its police power, regulate the manufacture of goods that eventually will go into interstate commerce, and conversely Congress, in its regulation of interstate commerce, cannot control the manufacture of, as distinct from the commerce in, goods that may eventually go into interstate commerce, when a State singles out a particular article on which it places a tax burden as a distinct impost, so

that when that article goes into commerce among the States it inevitably bears such impost as distinct from the general property tax requirements of the State, such impost must be considered as a regulation of commerce. *Kidd* v. *Pearson*, 128 U. S. 1.

The act makes no attempt to prohibit the manufacture of liquors, and as to at least one of the classes of liquors involved, *i. e.*, blended liquors, no act of manufacture is committed. The mere mixing for sale of two whiskies, for instance, cannot be regarded as an act of manufacture. *Hartranft* v. *Wiegmann*, 121 U. S. 609.

The vicious tendency of the tax is that one State takes tribute from a particular article of its production to the manifest injury of interstate commerce in that article.

The prohibition upon the States against placing imposts upon exports is, as to imports, confined to a restriction of the state power as regards imports from foreign countries. *Woodruff* v. *Parham*, 8 Wall. 123. The prohibition as to exports does apply only to exports from a State to a foreign country.

A charge upon passengers leaving the State by stage coach, imposed by a Nevada act, was held unconstitutional under the commerce clause, and as violating the prohibition against state imposts, and on the ground that it imposed a charge upon the passing of stage-coach passengers through the State, and thereby abridged the privileges and immunities of citizens of the United States. *Crandall* v. *Nevada*, 6 Wall. 35; *Cook* v. *Pennsylvania*, 97 U. S. 566.

Mr. James S. Morris, with whom *Mr. James Breathitt*, Attorney General of the State of Kentucky, was on the brief, for defendant in error:

This act does not affect, nor is interstate commerce involved. *Castillo* v. *McConnico*, 168 U. S. 674; *People* v. *Rennsalaer & Saratoga R. Co.*, 15 Wend. (N. Y.) 113; *Clark* v. *Kansas City*, 176 U. S. 114; *Co. Supervisors* v. *Stanly*,

105 U. S. 305; *Stickrod* v. *Commonwealth*, 86 Kentucky, 285; *Jones* v. *Black*, 48 Alabama, 540; *State* v. *McNulty*, 7 N. D. 169; *Board of Comrs.* v. *Reeves*, 148 Indiana, 467; *Schmidtt* v. *Indianapolis*, 168 Indiana, 631.

It does not violate the constitutional prohibition against imposts on imports. *Am. Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Maryland*, 12 Wheat. 419.

It does not deny due process of law. 3 Am. & Eng. Ency. of Law, 717. Part may be invalid. Cooley, Const. Lim., 6th ed., 213; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; 105 U. S. 305.

Nor does it deny equal protection of law. *Mo., Kansas & C. R.* v. *McCann*, 174 U. S. 580–586; Acts, 1906, pp. 204–205; Act of Congress June 30, 1906, "Pure Food Law;" *Welton* v. *Missouri*, 91 U. S. 278; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Bell's Gap Rd.* v. *Pennsylvania*, 134 U. S. 232; *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Fraser* v. *McConway & T. Co.*, 82 Fed. Rep. 257; *In re Grice*, 79 Fed. Rep. 627; *State* v. *Garbroski*, 11 Iowa, 496; *Webber* v. *Virginia*, 103 U. S. 344; *Slaughter House Cases*, 16 Wall. 504; *Am. Sugar Refinery Co.* v. *L. A. An.*, 179 U. S. 89; *Mo. P. R. Co.* v. *Mackay*, 127 U. S. 205; *Erb* v. *Morasch*, 177 U. S. 584; *Fidelity Mut. Life Ins. Co.* v. *Metler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney*, 189 U. S. 301; *Tullis* v. *Lake E. & Western R. R.*, 175 U. S. 348; *Mo., Kansas & T. P. R. Co.* v. *May*, 194 U. S. 267.

Mr. Justice Lurton delivered the opinion of the court.

The Commonwealth of Kentucky instituted this proceeding to collect an occupation tax imposed by an act of the general assembly of that State of March 26, 1906,

whereby every corporation or person engaged in the State, "in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits," is required to pay "a license tax of one and one-fourth cent upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits." The defenses presented were, first, that the plaintiff in error had paid the tax due for the rectification of "single stamp spirits," and that the act does not cover "double stamp spirits," used as a basis for its operations; second, that the act was repugnant to the constitution of the State; and, third, that the act is repugnant to the Constitution of the United States, in that it is a regulation of interstate commerce, and operates as a denial of the equal protection of the law. The questions concerning the validity of the act under the state constitution and as to the liability of the plaintiff in error under the act as construed and enforced by the highest court of Kentucky, may be laid on one side, for the only contentions which concern us under this writ of error to the state court are those which arise under the Constitution of the United States.

The two sections of the act which need be examined are the first and seventh, which are set out in the margin.[1]

[1] SEC. 1. Every corporation, association, company, copartnership or individual engaged in this State in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits, shall pay to the Commonwealth of Kentucky a license tax of one and one-fourth cent upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits.

SEC. 7. Any corporation, association, company, copartnership or individual who shall ship any compounded, rectified, blended or adulterated distilled spirits, known and designated as single stamp spirits, into this State for the purpose of labeling, branding, marking or stamping the same as Kentucky whiskey, product or spirits or which, before shipment into this State, shall have been, or may thereafter be,

The other sections provide for reports and impose penalties for delinquencies in reporting or paying.

It is said that the seventh section of the act imposes a license tax upon the business of shipping into the State of goods like those made by the plaintiff in error, when deceptively marked or labelled "as Kentucky whiskey," or intended to be so deceptively branded or labelled when received in the State; and that such a burden is illegal as a regulation of interstate commerce. But as plaintiff in error concedes that it is not engaged in bringing into the State spirits deceptively marked as a Kentucky product nor intended to be so branded and has not been proceeded against under that section, it is clear, the section being a separable provision, that we need not deal with either of these objections, save only as the presence of that section in the act may have a bearing upon the question of discrimination between the domestic and foreign product, which is the real question in the case.

The question upon which the case must turn comes to this: Has the State denied to the plaintiff in error the equal protection of the law, guaranteed by the Fourteenth Amendment, by the imposition of the tax provided under the first section of the act? It is urged that that section falls under the condemnation of the provision of the Federal Constitution, because, to quote from the brief of counsel, it "creates an unjust discrimination against

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labeled, branded, marked or stamped as Kentucky whiskey, product or spirits, shall be deemed compounders, rectifiers, blenders or adulterators under the provisions of this act, and shall pay the license tax imposed herein on compounders, rectifiers, blenders or adulterators of such spirits in this State, and shall make the report required herein to the auditor of public accounts. Any corporation, association, company, copartnership or individual who shall violate this section of this act shall be deemed guilty of a misdemeanor, and fined in any sum not less than five hundred nor more than one thousand dollars. Each shipment shall be deemed a separate offense. The Franklin Circuit Court shall have jurisdiction of all offenses committed under this act.

Kentucky rectifiers and blenders included within the provisions of the act, in favor of the three other classes engaged in the same business, to wit: (1) Kentucky distillers who vend unrectified and unblended spirits; (2) distillers of other States, or countries, who vend in Kentucky unrectified and unblended spirits; and (3) rectifiers and blenders of other States, or countries, who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the spirits of Kentucky rectifiers, or blenders, subject to the tax."

It has been urged that the tax is not imposed as a license upon the doing of business, but is laid upon the goods produced, and is therefore arbitrary and discriminatory as one not imposed upon all other like kinds of liquor, whether produced in or out of the State. This contention, if good, would only carry the case back to the underlying objection that the classification is arbitrary and unreasonable, and therefore void, as denying the equal protection of the law, a question which at last must be answered, whether the tax be an occupation or a property tax. But the Kentucky Court of Appeals has construed the act as not a property tax, but as one imposing a license or occupation tax upon the business. Speaking by Judge Hobson, the Kentucky Court of Appeals said: "A license tax is imposed. The amount of the license tax is determined by the amount of the spirits produced. The tax is not upon the spirits. It is a license tax upon the business. To hold it as a tax upon the property, we must disregard the word 'license' in both the title and the body of the act. That a license tax was contemplated is also shown by § 3, which requires that notice shall be given to the auditor, stating certain facts, before the business shall be engaged in; by § 4, that upon such notice the auditor shall thereupon issue to each applicant a certificate showing that he has complied with the act, and by § 5, that upon the payment of the license tax to the

treasurer the auditor shall issue to such persons authority to continue in the business, if such authority is desired. Under the statute a man may not legally engage in the business without giving notice and having the certificate from the auditor. The payment of the tax at the times required by the statute is the condition upon which authority to continue in the business is made to depend. This is manifestly a tax on the business and not upon the property. The amount of the tax is simply regulated by the amount of the product, but it is a license tax upon the business. To hold otherwise would be to say that the legislature cannot impose a graduated license tax based upon the amount of product manufactured." Such a construction and interpretation of the statute here involved, by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the State.

We come then to the question as to whether this act makes an arbitrary and illegal discrimination in favor of other persons or corporations engaged in the same business. The question is at last one of classification of subjects, trades or pursuits for the purpose of taxation, and concerns the power of the States to exercise discretion in the methods, subjects and rates of taxation. Fundamental to the very existence of the governmental power of the States as is this function of taxation, it is nevertheless subject to the beneficent restriction that it shall not be so exercised as to deny to any the equal protection of the law. But this restriction does not compel the adoption of "an iron rule of equal taxation," nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings or occupations. This much has been over and over announced by this court.

Bell's Gap Rd. v. *Pennsylvania*, 134 U. S. 232; *Cargill Co.* v. *Minnesota*, 180 U. S. 452; *Missouri, Kansas and Texas Railway Co.* v. *May*, 194 U. S. 267; *Cook* v. *Marshall County*, 196 U. S. 268; *Williams* v. *Arkansas*, 217 U. S. 79; *Southwestern Oil Co.* v. *State of Texas*, 217 U. S. 114.

The answer of the plaintiff in error concedes that it is "doing business in this State and engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits." Plaintiff in error now says that it has been arbitrarily singled out and its business or occupation taxed, thereby discriminating in favor of "three other classes engaged in the same business." The first class which is named as favored are distillers who neither rectify, compound, adulterate nor blend their products. Manifestly there is nothing capricious in putting the occupation carried on by the plaintiff in error in a class distinct from that of the whiskey distillers whose straight product is the basis for the manipulated product of those engaged in the taxed business. A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. The reasons for discriminating between distillers and rectifiers is not obscure, and a classification which includes one and omits the other is by no means arbitrary or unreasonable. In *American Sugar Ref. Co.* v. *Louisiana*, cited above, a license tax imposed upon the business of refining sugar and molasses was sustained, although planters grinding and refining their own sugar were excluded. In *Cargill Co.* v. *Minnesota*, 180 U. S. 452, 469, a state statute requiring elevator com-

panies operating elevators situated upon railway rights of way to take out a license, without requiring those not so situated to do so, was held not to be an illegal discrimination. This court there said, in reference to the insistence that the discrimination was a denial of the equal protection of the law, that "No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements which are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute." In *Williams* v. *State of Arkansas*, cited above, a classification in a state statute which prohibited drumming on trains for business for any hotel, lodging house, bath house, physicians, etc., was sustained as not a capricious classification, although it did not apply to drumming for other business not mentioned, but distinguishable by reason of local conditions. In *Southwestern Oil Co.* v. *State of Texas*, 217 U. S. 114, it was held that an occupation tax on all wholesale dealers in certain articles did not deny to the class taxed the equal protection of the law because a similar occupation tax was not imposed on wholesale dealers in other articles.

It is next said that "distillers of other States and countries, who vend in Kentucky unrectified and unblended spirits," are untouched by the law. This is answered by what we have said as to such distillers manufacturing within the State, as well as by the obviousness of the fact that the State of Kentucky had no more right to impose an occupation tax upon a business conducted outside of the State than it had to lay a property tax upon property outside of the State.

Finally, it is said that "rectifiers and blenders of other States or countries who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the

spirits of Kentucky rectifiers, or blenders, are not subject to the tax."

The contention comes to this: A State may not impose a tax upon the privilege of carrying on a particular business or occupation in the State, unless it can impose a similar tax upon the same business or occupation carried on outside of the State, if the latter may, through interstate commerce, compete by shipments into the State with the product of the taxed resident. A system of taxation discriminating in favor of residents and domestic products and against non-residents and foreign products might result in commercial non-intercourse between the States, and as a regulation of interstate commerce would clearly be invalid. The objection, however, would not apply to a uniform tax upon goods which does not discriminate in favor of residents or products of the State. *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, 8 Wall. 148; *Emert* v. *Missouri*, 156 U. S. 296.

There is no pretense here that there has been any discrimination in favor of either the residents or the products of Kentucky, but the reverse, in that the resident rectifier is discriminated against because the product of the untaxed non-resident rectifier meets those of the taxed rectifier in competition for the trade of Kentucky. But counsel say that discrimination against residents or products of the State is as much a denial of the equal protection of the law as any other method of unequal taxation, and cite *State* v. *Hoyt*, 71 Vermont, 59, 64. That was a case involving the validity of a license tax by the State of Vermont upon peddlers of goods, "*the manufacture of this State.*" The Vermont court held that when a business consists in selling goods the exaction of a license for its pursuit was in effect a tax upon the goods themselves, and that as this tax discriminated arbitrarily against the products of the State, it was void as denying the equal protection of the law. But the ground of

the decision was that the discrimination against the goods of the State and in favor of the products of other States, both classes of goods being within and subject to the taxing power of the State, was an illegal discrimination, as arbitrary and capricious. The court said:

"The question, therefore, is one of classification. If, in the case supposed, the resident and the non-resident manufacturer or their goods can be differently classed, the statute can be sustained; otherwise not. The rule on this subject is, that the mere fact of classification is not enough to exempt a statute from the operation of the equality clause of said amendment, but that in all cases it must appear, not only that a classification has been made, but that it is one based on some reasonable ground, some difference that bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis*, 165 U. S. 150."

The case has no bearing upon the present case. In that case the license might have been exacted from one peddling in Vermont, whether he peddled domestic or foreign goods. Here the exaction is not upon the product at all, but upon the business of producing the product in the State. The same business carried on beyond the State could not have been subjected to a like tax. There has therefore been no arbitrary or capricious discrimination against the resident rectifier.

There is no error in the judgment, and it is

Affirmed.

STATE OF MARYLAND *v.* STATE OF WEST VIRGINIA.

ON SETTLEMENT OF DECREE.

No. 1, Original. Forms of decree and briefs submitted April 20, 1910.—Decree settled May 31, 1910.

Length of time that raises a right by prescription in private parties, likewise raises such a presumption in favor of States.

Consistently with the continued previous exercise of political jurisdiction by the respective States, Maryland has a uniform southern boundary along Virginia and West Virginia at low-water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia.

The division of costs between States in a boundary dispute is one governmental in character in which each party has not a litigious, but a real, interest, for the promotion of the peace and good of the communities, and all expenses including those connected with making the surveys should be borne in common and included in the costs equally divided between the States.

Decree in 217 U. S. 1, settled.

THE facts involved in this case are stated in the opinion of the court delivered February 21, 1909, *ante*, p. 1; the particular facts involved in the settlement of the decree are stated in the opinion following.

Mr. Isaac Lobe Straus, Attorney General of the State of Maryland, for Maryland.

Mr. William G. Conley, Attorney General of the State of West Virginia, and *Mr. George E. Price* for West Virginia.

MR. JUSTICE DAY delivered the opinion of the court.

In accordance with the opinion of this court handed

down February 21, 1910, *ante*, p. 1, the learned counsel for the States of Maryland and West Virginia have submitted drafts of a decree to be entered in the case in accordance with the conclusions announced by this court.

The differences in the proposed decrees are: first, concerning the boundary of Maryland along the south bank of the Potomac River from a point at or near Harper's Ferry, westwardly to the point where the north and south line from the Fairfax Stone crosses the North Branch of the Potomac River, should that boundary line be located at high-water mark as contended by counsel for the State of Maryland, or at low-water mark as contended by counsel for the State of West Virginia? In the opinion heretofore delivered in this case it was declared that the claim of the State of West Virginia for a location of her boundary line along the north bank of the Potomac River should be denied. This conclusion was reached upon the authority of the case of *Morris* v. *United States*, 174 U. S. 196. In the *Morris case* it was held in a contention between a title holder whose rights originated with the grant of 1632 to Lord Baltimore, and one whose rights originated under the grant of James II to Lord Culpeper, that the grant to Lord Baltimore included the Potomac River to high-water mark on the southern or Virginia shore. As West Virginia is but the successor of Virginia in title, the conclusion thus announced in the *Morris case* necessarily denied her claim to the Potomac River to the north bank thereof, and a decree was directed dismissing the cross bill of West Virginia in which such a claim was made.

In the former hearing, however, and in the decision rendered, the attention of the court was not directed to the question whether the boundary of Maryland should be at high-water mark or at low-water mark along the southern bank of the Potomac River.

As stated in the former opinion, after the State of West Virginia was created, an arbitration was had between the States of Virginia and Maryland, and the Virginia boundary was fixed at low-water mark on the south shore of the Potomac. See Code of Virginia, v. 1, title 3, ch. 3, § 13, p. 18. This location of the boundary between Maryland and Virginia was accepted by the State of Maryland and definitely fixed as the line between herself and the State of Virginia. The arbitration of 1877 was before eminent lawyers and an elaborate opinion was rendered by them. They reached the conclusion that following the description in the charter of Charles I to Lord Baltimore, the right or south bank of the Potomac River, at high-water mark, was the boundary between Maryland and Virginia. This conclusion is in accordance with the one reached by this court in the *Morris case*, in which case it was declared that the province of Maryland under the charter of Lord Baltimore embraced the Potomac River to high-water mark on the southern, or Virginia shore, and the court then declared that this title had not been divested by any valid proceedings prior to the Revolution, nor was it affected by the subsequent grant to Lord Culpeper, and therefore, as between the claimants under the old grant to Lord Baltimore and the one to Lord Culpeper, that the title of the claimants under the Baltimore grant embraced the Potomac River to high-water mark on the Virginia shore. But the arbitrators proceeding to establish the boundary between the States in the light of subsequent events, after referring to the effect of long occupation upon the rights of States and nations, and declaring that the length of time that raises a right by prescription in private parties likewise raises such a presumption in favor of States as well as private parties, took up the location of the boundary between the States along the Potomac River, and said:

"The evidence is sufficient to show that Virginia, from

the earliest period of her history, used the South bank of the Potomac as if the soil to low water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers, (Potomac or Pocomoke) and all improvements which have or will be made thereon.' By the compact of 1785, Maryland assented to this, and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'

* * * * * * * *

"Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

"To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, § 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges

reserved to the citizens of the respective States in the compact of 1785 and its subsequent ratifications indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia at low-water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the States respectively.

The decree will therefore provide for the south bank of the Potomac River at low-water mark on the West Virginia shore as the true southern boundary line of the State of Maryland.

The other contention in the case concerns the costs of the surveys made by the surveyors of the respective States. It is the contention of Maryland that they should be equally divided, while West Virginia contends that each State should bear its own expense in this respect. An examination of the record shows that early in the proceedings in this case, on the twenty-sixth day of May, 1894, an order was entered by consent of parties, which authorized a survey to be made by surveyors to be agreed upon in writing by counsel for the respective States, said surveyor or surveyors to return to this court a report and map or maps made by him or them under the order, together with copies of such report, map or maps. The order provided for notice to be given attorneys for both parties of the time and place of commencing such surveys. Subsequently surveyors were designated, surveys were made and elaborate reports were filed in this court. Under these circumstances we are of opinion that the order heretofore made concerning the division of the costs should include the costs of such surveys. As was said by this court in *Nebraska* v. *Iowa*, 143 U. S. 359, 370,

in making an order for a division of costs between the two States in a boundary dispute, the matter involved is governmental in character, in which each party has a real and yet not a litigious interest. The object to be obtained is the settlement of a boundary line between sovereign States in the interest, not only of property rights, but also in promotion of the peace and good order of the communities, and is one which the States have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, and we therefore adopt so much of the decree proposed by the State of Maryland as makes provision for the costs of the surveys made under the order of this court.

We append the decree to be entered:

DECREE

This cause came on to be heard at this term and was argued by counsel; and thereupon, on consideration thereof, it was adjudged and decreed as follows:

First. That the true boundary line between the States of Maryland and West Virginia is ascertained and established as follows:

Beginning at the common corner of the States of Maryland and Virginia on the southern bank of the Potomac River at low-water mark at or near the mouth of the Shenandoah River, (near Harper's Ferry,) and running thence with the southern bank of the said Potomac River, at low-water mark, and with the southern bank of the North Branch of the Potomac River at low-water mark, to the point where the north and south line from the Fairfax Stone crosses the said North Branch of the Potomac, and thence running northerly, as near as may be, with the Deakins or Old State line to the line of the State of Pennsylvania.

Second. That Julius K. Monroe, William McCulloch

Brown and Samuel S. Gannett be, and they are hereby, appointed commissioners to run, locate and establish and permanently mark with suitable monuments the said Deakins or Old State line as the boundary line between the States of Maryland and West Virginia from said point on the southern bank of the North Branch of the Potomac River to the said Pennsylvania line, in accordance with the opinion of this court heretofore filed in this case and with this decree, the said line to be run and located as far as practicable as it has been generally recognized and adopted by the people residing about or near the same as the boundary line between the said States, and not as conforming, except to a limited extent, to the western boundary of the Maryland Military Lots as said lots are now located and held. Said commissioners shall mark said line as run, located and established by them with suitable stone monuments, at reasonable and proper intervals, according to the topography of the country.

It is further ordered that before entering upon the discharge of their duties each of said commissioners shall be duly sworn to perform faithfully, impartially and without prejudice or bias the duties herein imposed; said oath to be taken before the clerk of this court, or before either of the clerks of the Circuit Courts of the United States for the District of Maryland or for the Northern District of West Virginia, or before an officer authorized by law to administer an oath in the State of Maryland or of West Virginia, and returned with their report; that said commissioners may arrange for their organization, their meetings and the particular manner of the performance of their duties, and are authorized to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line, including the taking of evidence under oath and calling for papers and documents, but in the event evidence is taken the parties shall be notified and permitted to be present and cross-examine

the witnesses; and all evidence taken by the commissioners and all exceptions thereto and action thereon shall be preserved and certified and returned with their report.

Said commissioners are also at liberty to refer to and consult the printed record in the cause so far as they may think proper to enable them to discharge their duties under this decree.

It is further ordered that the clerk of this court shall at once forward to the governor of each of said States of Maryland and West Virginia, and to each of the commissioners appointed by this decree, a copy of this decree duly authenticated. And said commissioners are authorized, if they deem it necessary, to request the cooperation and assistance of the State authorities in the performance of the duties imposed on them by this decree.

It is further ordered that said commissioners do proceed, with all convenient dispatch, to discharge their duties in running, locating, establishing and marking said line as herein directed, and make their report thereof and of their proceedings in the premises to this court on or before the first day of January, 1911, together with a complete bill of costs and charges annexed.

It is further ordered that should vacancies occur in said board of commissioners by reason of death, the refusal to act or inability to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint other commissioners to supply such vacancies, and said Chief Justice is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all the costs of the proceedings by said commissioners under this decree, including a remuneration of not exceeding fifteen dollars ($15.00) per day and his reasonable expenses for each commissioner whilst actually engaged in the performance of his duties

hereunder, and the other costs incident to the running, locating, establishing and marking said line, shall be paid by the States of Maryland and West Virginia equally.

Third. That the cross bill of the State of West Virginia, in so far as it asks for a decree fixing the north bank of the Potomac River as the boundary line between said States, be, and the same is, hereby dismissed.

Fourth. That this decree shall not be construed as abrogating or setting aside the compact made between commissioners of the State of Maryland and the State of Virginia at Mount Vernon on the 28th day of March, 1785, and which was confirmed by the general assembly of Maryland and afterwards by act of the general assembly of Virginia passed on the 3rd day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the United States, or may be inconsistent with this decree, shall remain obligatory upon and between the States of Maryland and West Virginia, so far as it is applicable to that part of the Potomac River which extends along the border of said States, as ascertained and established by this decree.

Fifth. That all the costs in this case and the proceedings therein as the same shall be taxed by the clerk of this court, and including also the costs of the surveys made by the two States under the order or orders of this court, said costs for said surveys to be ascertained and taxed by the clerk of this court upon vouchers sworn to and exhibited to him, shall be equally divided between the said two States.

EX PARTE: MATTER OF GRUETTER, PETITIONER.

MANDAMUS.

No. 9, Original. Submitted April 11, 1910.—Decided May 31, 1910.

Where the Circuit Court has jurisdiction to determine questions presented on a motion to remand a case to the state court and denies the motion mandamus will not lie to compel it to remand the case. *In re Pollitz*, 206 U. S. 323.

In this case diverse citizenship existed but plaintiff moved to remand because the suit was not of a civil nature but for a penalty, because the record did not show that plaintiff or defendant resided in the District to which removal was sought, and because defendant did not specifically pray for removal of cause; *held* that the Circuit Court had jurisdiction to determine whether the case was removable and that mandamus would not lie to compel the Circuit Judge to remand the cause.

THE facts are stated in the opinion.

Mr. Arthur Crownover, Mr. Isaac W. Crabtree and *Mr. William L. Myers* for petitioner.

Mr. William L. Granbery for respondent.

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

Gruetter brought an action in the Circuit Court of Franklin County, Tennessee, against the Cumberland Telephone and Telegraph Company to recover $20,000 for violation of § 2 of chap. 66 of the Acts of 1885, which is § 1842 of Shannon's Code of Tennessee, for the unjust discrimination by defendant against plaintiff set up in the declaration. The section is as follows:

"Every telephone company doing business within this

State, and engaged in a general telephone business, shall supply all applicants for telephone connection and facilities, without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regulation of the company; and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company in lawful business by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise, under penalty of $100.00 for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, a time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

Defendant filed a petition to remove the case to the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, to which plaintiff demurred on the ground that it was an action to recover a penalty, and therefore was not removable. The demurrer was heard by the Circuit Judge of Franklin County, who sustained it, dismissed the petition, and refused to remove the case. Defendant obtained a certified copy of the record and filed the same in the Circuit Court of the United States for the Sixth Circuit, and plaintiff moved to remand the case because it was a suit to recover a penalty and the action was not of a civil nature; because the petition and record did not show that the suit was sought to be removed to the Circuit Court of the United States for the district in which either the plaintiff or the defendant resided; and because the defendant did not specifically pray for the removal of the cause.

The Circuit Court upon hearing filed a memorandum opinion considering and overruling all of the grounds

presented to sustain the motion and denied the motion to remand, whereupon Gruetter filed a petition for writ of mandamus directing the District Judge of the United States for the Middle Division of the Middle District of Tennessee, holding the Circuit Court for that division, to remand the suit to the Circuit Court of Franklin County, State of Tennessee. Leave to file this petition was granted and a rule to show cause was thereon entered, to which the judge filed his return, stating that the motion of plaintiff to remand was denied for the reason that in respondent's opinion the several grounds of the petitioner's motion were not well founded in law, and that under the facts and pleadings presented by the record the Circuit Court of the United States for the Middle District of Tennessee, sitting at Nashville, had jurisdiction of said cause.

There was no controversy as to there being diversity of citizenship. The defendant was a corporation of Kentucky and plaintiff was a citizen of Tennessee. Inasmuch as we are of opinion that the Circuit Court of the United States had jurisdiction to determine the questions presented, we hold that mandamus will not lie. The final order of the Circuit Court cannot be reviewed on this writ. *In re Pollitz*, 206 U. S. 323.

Rule discharged and petition dismissed.

ROGERS *v.* CLARK IRON COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 244. Motion to dismiss submitted April 4, 1910.—Decided April 11, 1910.

Where the state court only decides who is entitled to lands under a patent no Federal question is necessarily involved and this court does not have jurisdiction to review under § 709, Rev. Stat., and in this case no Federal question was decided directly or by implication.

An attempt to raise a Federal question in this court for the first time is too late.

104 Minnesota, 198, affirmed.

THE facts involve the claim of title to property in the State of Minnesota based on a patent of the United States. The state court found the facts as contended by the defendants, and also that the patent itself was not attacked, but that the question was: Who was the person entitled to the lands under the patent?

Mr. John B. Richards and *Mr. Daniel G. Cash* for plaintiffs in error.

Mr. John G. Williams, Mr. Oscar Mitchell, Mr. Joseph B. Cotton, Mr. Frank D. Adams, Mr. William R. Begg and *Mr. C. O. Baldwin* for defendants in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. The case is reported below in 104 Minnesota, 198, where the facts are set forth at length. We hold that no Federal question was decided either in express terms or by necessary implication, and that the attempt to raise a Federal question was made in this court for the first time, which was too late.

EX PARTE W. G. COYLE & CO., PETITIONERS.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS.

No. —, Original. Submitted April 4, 1910.—Decided April 11, 1910.

Motion for leave to file petition for a writ of mandamus to a Circuit Judge to remand a case removed from the state to the Federal court denied.

THIS was a motion for leave to file a petition for a writ of mandamus to require the Circuit Judge to remand a case which had been removed from the state court and which involved the validity of a sale of a vessel by a United States marshal under execution.

Mr. Charles Louque for the petitioners.

Mr. Edwin T. Merrick and *Mr. John D. Grace* for respondent.

Per Curiam. Motion for leave to file petition for a writ of mandamus denied.

VOUGHT, IMPLEADED WITH COLLINS, *v.* STATE OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 153. Argued for plaintiff in error April 15, 1910.—Decided April 18, 1910.

A writ of error to review a judgment of the Supreme Court of Wisconsin on the ground that ch. 90, Laws of 1903 and §§ 2524, 2530, 2533, Wisconsin statutes, are unconstitutional, as denying due process of law and equal protection of the law, dismissed for want of juris-

diction as the Federal question attempted to be raised is without merit.

Writ of error to review 136 Wisconsin, 6, dismissed for want of jurisdiction.

PLAINTIFF in error, having been convicted and sentenced, asserted that the law under which the jury was drawn was unconstitutional under the Fourteenth Amendment. Ch. 90, Laws of Wisconsin for 1903 and §§ 2524, 2530, 2533, Wisconsin statutes. The trial court sustained the demurrer of the State to this plea. The plea of plaintiffs in error was that it is a denial of equal protection of the law and of due process of law to be put on trial under an indictment found by persons selected by jury commissioners who are required by statute to be freeholders.

Mr. A. W. Sanborn, Mr. Frank B. Lamoreaux, Mr. Allan T. Pray, Mr. Horace B. Walmsley and *Mr. W. F. Bailey* for plaintiffs in error.

Mr. Frank L. Gilbert, Attorney General of the State of Wisconsin, *Mr. Victor T. Pierrelee, Mr. A. C. Titus* and *Mr. J. E. Messerschmidt* for defendant in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. The Federal question attempted to be raised is without merit.

NOLLMAN & CO. *v.* WENTWORTH LUNCH COMPANY.

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

No. 154. Argued April 15, 1910.—Decided April 18, 1910.

On the authority of *Toxaway Hotel Company* v. *Smathers & Co.*, 216 U. S. 439, *held* that a corporation engaged in a general restaurant

business is not subject to the provisions of the Bankruptcy Act of 1898, as engaged in manufacturing, printing, publishing, trading and mercantile pursuits.

THIS case involved the question whether a corporation principally or solely engaged in carrying on a general restaurant business comes within those classes of corporations which are subject to the provisions of the Bankruptcy Act of 1898 as engaged in manufacturing, printing, publishing, trading or mercantile pursuits.

Mr. Maurice P. Davidson for appellants and petitioners.

Mr. Reno R. Billington for appellee and respondent.

Mr. William C. Rosenberg, by permission of the court, filed a brief as *amicus curiæ*.

Per Curiam. Judgment affirmed on the authority of *Toxaway Hotel Company* v. *Smathers & Co.*, decided February 21, 1910 (216 U. S. 439).[1]

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[1] The pertinent part of the headnote in this case is as follows:

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.

WENAR *v.* JONES, BISHOP OF PORTO RICO.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 143. Submitted April 8, 1910.—Decided April 25, 1910.

In this case the decision appealed from, being merely an order to dismiss and not a determination on the merits, is not reviewable here and the appeal is dismissed for want of jurisdiction.

APPELLEE contended that the decision appealed from is not in itself of a reviewable character being merely an order dismissing an appeal and not a determination on the merits.

Mr. Willis Sweet for appellant.

Mr. Paul Fuller and *Mr. Howard Thayer Kingsbury* for appellee.

Per Curiam. Appeal dismissed for want of jurisdiction. *Harrington* v. *Holler*,[1] 111 U. S. 796, and cases cited.

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[1] The headnote in this case is as follows:

A decision of the Supreme Court of a Territory dismissing a writ of error to a District Court because of failure to docket the cause in time is not a final judgment or decision within the meaning of the statutes regarding writs of error and appeals to this court. Mandamus is the proper remedy in such case.

SCHULTZ *v.* DIEHL.

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

No. 166. Submitted by appellants April 22, 1910.—Decided April 25, 1910.

Under the act of March 3, 1875, c. 137, 18 Stat. 470, the Circuit Court may have jurisdiction of an action brought by a resident of one State against a corporation organized under the laws of another State and stockholders of that corporation for the purpose of removing encumbrances from the property of the corporation in the District in which the suit is brought, even if some of the stockholders are not residents of the District in which they are sued. *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1.

THE plaintiffs and appellants brought this case as minority stockholders of the Highland Gold Mines Company, a private corporation organized and existing under the laws of the State of Oregon, against the Highland Gold Mines Company, said corporation, and its officers and directors.

It is charged in the bill of complaint that the defendant Crawford, who was the attorney and legal advisor of the company, conspired with defendants Diehl, Grabill and Sorrensen, officers and directors of the company, to fabricate false and fictitious claims against the company on which judgment was obtained; that the object and purpose of said defendants was to use the judgment as a means of obtaining title in themselves to the company's property.

Other fraudulent acts were also charged.

Upon the trial defendants Diehl and Grabill moved to dismiss as to them because the court did not have jurisdiction over them for the reason that they had not been sued in the district in which either of them resided or of

which they were residents or inhabitants, it appearing from the bill that they were citizens of Pennsylvania. The court sustained the motion.

Mr. Charles W. Fulton and *Mr. Douglas W. Bailey* for appellants.

No appearance for appellees.

Per Curiam. Decree reversed with costs and cause remanded to be proceeded in according to law. *Jellenik* v. *Huron Copper Mining Company*, 177 U. S. 1; 18 Stat. 470, c. 137, § 8; Code of Oregon, §§ 5064, 300, 301.

BRADY *v.* BERNARD & KITTINGER.

APPEAL FROM, AND PETITION FOR CERTIORARI TO, THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 501. Petition for certiorari and motion to dismiss submitted April 26, 1910.—Decided May 2, 1910.

An appeal from an adjudication in bankruptcy taken under § 25*a* of the Bankruptcy Act of 1898 dismissed because taken too late.

APPEAL from an adjudication in bankruptcy taken under § 25*a* of the Bankruptcy Act.

Appellee contended in this case that the appeal came too late as it was taken more than ten days after the order. Appellant contended that as he had filed a petition to set aside the order the time ran from denial of that order. The petition to set aside was not filed until more than ten days after the adjudication.

Mr. Norman Farrell, Jr., and *Mr. Hill McAlister* for appellants.

Mr. Edwin C. Brandenburg, Mr. Clarence A. Brandenburg, Mr. F. Walter Brandenburg, Mr. A. E. Wilson and *Mr. James R. Duffin* for appellees.

Per Curiam. Appeal dismissed for want of jurisdiction and petition for writ of certiorari denied.

EX PARTE MORSE, PETITIONER.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF HABEAS CORPUS.

No. —, Original. Submitted May 2, 1910.—Decided May 16, 1910.

Motion for leave to file a petition for writ of *habeas corpus* on the ground that petitioner was restrained under a judgment of sentence of imprisonment entered by a court without jurisdiction and in disregard of petitioner's constitutional rights, denied without opinion.

PETITIONER was tried, convicted and sentenced. He filed this petition alleging that his trial was not impartial, that special government agents were in charge of the jury, that one juror was mentally disqualified, that the court submitted the question of intent to deceive which was not in the indictment, and that the sentence was in excess of the term prescribed by the statute.

Mr. Martin W. Littleton for petitioner.

Per Curiam. Motion for leave to file petition denied.

SHEDD *v.* PEOPLE OF THE STATE OF ILLINOIS EX REL. HEALY, STATE'S ATTORNEY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 708. Motion to dismiss or affirm submitted May 16, 1910.—Decided May 31, 1910.

A judgment of ouster rendered in *quo warranto* proceeding, 241 Illinois, 155, affirmed without opinion.

THE facts involved the validity of a judgment of ouster rendered by the Supreme Court of Illinois in a *quo warranto* proceeding.

Mr. Harry S. Mecartney for plaintiffs in error.

Mr. James Hamilton Lewis for defendant in error.

Per Curiam. Judgment affirmed with costs.

THOMAS RHODUS *v.* MANNING. SAME *v.* SAME. BIRCH F. RHODUS *v.* SAME. SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Nos. 739, 740, 741, 742. Motions to dismiss or affirm submitted May 16, 1910.—Decided May 31, 1910.

Judgments of the state court committing plaintiffs in error for failure to comply with orders of the court directing them to turn over property to receiver of a corporation, affirmed without opinion

notwithstanding contention that the orders amounted to unreasonable searches, required plaintiffs in error to incriminate themselves and denied them due process of law.

THE state court entered orders requiring plaintiffs in error to turn over property to defendant in error received of a corporation and adjudging them in and committing them for contempt for failure to comply.

Plaintiffs in error sued out writs of error assigning as error that they were denied rights secured by the Fourth, Fifth and Fourteenth Amendments to the Federal Constitution.

Defendant in error moved to dismiss:

Because the provisions of the Fourth, Fifth and Fourteenth Amendments do not apply to the compulsory production of evidence in a court of a State.

Because the record does not present a case of either a search or seizure, or of the production of evidence; but shows, on the contrary, non-compliance with a decree for relief upon an undisputed title to possession.

Because it is manifest that the writs of error herein were taken for delay only, and that the contention on which the jurisdiction depends is so frivolous as not to require further argument.

Mr. Benjamin C. Bachrach and *Mr. Joseph B. David* for plaintiffs in error.

Mr. Samuel Alschuler, Mr. Charles R. Holden and *Mr. Joseph Weissenbach* for defendants in error.

Per Curiam. Judgments affirmed with costs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY *v.* STREET.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 813. Motion to dismiss or affirm submitted May 16, 1910.—Decided May 31, 1910.

A judgment of the state court for damages for personal injuries affirmed without opinion.

JUDGMENT against plaintiff in error for damages for personal injuries sustained by defendant in error by reason of plaintiff in error's negligence. Plaintiff in error sued out this writ of error on ground that it had been denied the right to remove the case to the Federal Court. Defendant in error moved to dismiss or affirm.

Mr. Maxwell Evarts and *Mr. H. M. Garwood* for plaintiffs in error.

Mr. John W. Parker for defendant in error.

Per Curiam. Judgment affirmed with costs.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* SHEEGOG, ADMINISTRATOR.

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

No. 879. Motion to dismiss or affirm submitted May 16, 1910.—Decided May 31, 1910.

Held, without opinion, that the Circuit Court of the United States had no jurisdiction of this action to enjoin the collection of a judgment entered against appellant in the state court.

THE railroad company removed a suit brought against it and some of its employés for damages for personal injuries from the state court into the Federal court; the state court declined to surrender jurisdiction and the plaintiff in that suit (appellee here) recovered judgment which was affirmed. In the Federal court motions to remand were overruled and judgment entered in favor of the railroad company. Thereupon the railroad company brought this suit in equity in the Circuit Court of the United States to enjoin the enforcement of the judgment entered in the state court in favor of the appellee in this case. The Circuit Court dismissed the case for want of jurisdiction.

Mr. Plewett Lee and *Mr. Edmund F. Trabue* for appellant.

Mr. John G. Miller for appellee.

Per Curiam. Judgment affirmed with costs.

AMERICAN NATIONAL BANK OF WASHINGTON *v.* TAPPAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 837. Submitted May 16, 1910.—Decided May 31, 1910.

Judgment of the Circuit Court dismissing a case for want of jurisdiction affirmed without opinion.

THIS case was dismissed for want of jurisdiction. In its brief plaintiff in error contended that this suit was properly brought in the Circuit Court upon the ground

that it is one arising under the laws of the United States, there being two reasons for so classifying it. The first reason being that this cause of action is given by the law of the District of Columbia, and that, as expressly decided by this court in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, when a right given by the acts of Congress passed for the District of Columbia is asserted the case is one arising under the laws of the United States within the meaning of the Constitution and of the Judiciary Act.

The second reason is that a national bank having its habitat in the District of Columbia is entitled to sue in the Circuit and District Courts as a Federal corporation, its location exempting it from the operation of those acts which deny to national banks located in States the right to sue in the Circuit and District Courts on the ground of their Federal origin.

Mr. Benjamin S. Minor, *Mr. Horace B. Stanton*, *Mr. Edward A. Adler*, *Mr. B. Devereux Barker*, and *Mr. Chandler M. Wood* for plaintiff in error.

Mr. Alexander Wolf and *Mr. Edward S. Goulston* for defendant in error.

Per Curiam. Judgment affirmed with costs without opinion.

UNITED STATES *v.* SEWELL.

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

No. 181. Argued April 29, 1910.—Decided May 31, 1910.

United States v. *Welch*, 217 U. S. 333, followed.

Before the Government is required to pay for land held to have been taken by it, the owners should furnish a survey definitely ascertaining the land by metes and bounds.

Mr. Assistant Attorney General John Q. Thompson for plaintiff in error.

Mr. Edward S. Jouett for defendant in error.

Per Curiam. The judgment is affirmed on the authority of *United States* v. *Welch*, decided April 25, 1910, *ante*, p. 333; but it is ordered that before the Government is required to pay for the land held to have been taken plaintiffs below shall furnish a survey definitely ascertaining the land by metes and bounds.

Affirmed.

Decisions on Petitions for Writs of Certiorari from April 11 to May 31, 1910.

No. 843. GERMAN ALLIANCE INSURANCE COMPANY, PETITIONER, *v.* HOME WATER SUPPLY COMPANY. April 11, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Hartwell Cabell* for the petitioner. No appearance for the respondent.

No. 838. E. G. COFFIN ET AL., ETC., PETITIONERS, *v.* CHAS. R. FLINT. April 11, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. C. Strudwick* and *Mr. E. J. Justice* for the petitioners. *Mr. J. H. Merrimon* and *Mr. J. Frank Snyder* for the respondent.

No. 840. THE SOUTHERN PAVING & CONSTRUCTION COMPANY, PETITIONER, *v.* THE CITY OF GREENSBORO.

April 11, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alfred S. Barnard* for the petitioner. *Mr. E. J. Justice* for the respondent.

No. 841. S. GRAEME HARRISON, PETITIONER, *v.* THE PHILADELPHIA CONTRIBUTIONSHIP FOR THE INSURANCE OF HOUSES FROM LOSS BY FIRE. April 11, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. R. Mason Lisle* for the petitioner. No appearance for the respondent.

No. 846. LILLIAN F. SLOCUM, EXECUTRIX, ETC., PETITIONER, *v.* NEW YORK LIFE INSURANCE COMPANY. April 18, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Daniel B. Henderson* for the petitioner. No appearance for the respondent.

No. 855. GEORGE M. NOWELL ET AL., PETITIONERS, *v.* THE INTERNATIONAL TRUST COMPANY ET AL. April 18, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George M. Nowell* and *Mr. Joseph B. Church* for the petitioners. *Mr. E. S. Pillsbury* and *Mr. Lewis P. Shackleford* for the respondents.

No. 861. HUBERT HOPKINS, PETITIONER, *v.* HEBER C. PETERS ET AL. April 18, 1910. Petition for a writ of

certiorari to the Court of Appeals of the District of Columbia denied. *Mr. F. R. Cornwall* and *Mr. L. S. Bacon* for the petitioner. No appearance for the respondents.

No. 866. ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER, *v.* MARY O'NEILL ET AL. April 18, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hunter C. Leake, Mr. Gustave Lemle,* and *Mr. Blewett Lee* for the petitioner. No appearance for the respondents.

No. 878. THE UNITED STATES, PETITIONER, *v.* THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. April 25, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *The Attorney General, The Solicitor General, Mr. Edward A. Moseley* and *Mr. Philip J. Doherty* for the petitioner. *Mr. Robert Dunlap* for the respondent.

No. 856. FRANK D. ZELL ET AL., PETITIONERS, *v.* NORFOLK & SOUTHERN RAILWAY COMPANY ET AL. April 25, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas Leaming, Mr. John G. Johnson* and *Mr. Tazewell Taylor* for the petitioners. *Mr. Edward R. Baird, Jr., Mr. Thomas L. Chadbourne, Jr.,* and *Mr. Frederick Hoff* for the respondents.

No. 884. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER, *v.* MARK B. HAMBLE.

April 25, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert Dunlap, Mr. T. J. Norton, Mr. Edward W. Camp* and *Mr. Gardiner Lathrop* for the petitioner. *Mr. Paul Sleman* for the respondent.

No. 873. WHITIN MACHINE WORKS, PETITIONER, *v.* LEWIS T. HOUGHTON. May 2, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William A. Jenner* and *Mr. Edmund Wetmore* for the petitioner. *Mr. Louis W. Southgate* and *Mr. W. K. Richardson* for the respondent.

No. 887. ROY VERMONT ET AL., PETITIONERS, *v.* THE UNITED STATES. May 16, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Shepard Barclay* and *Mr. Thomas T. Fauntleroy* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 902. O. M. CARTER, PETITIONER, *v.* CHARLES A. GOSS. May 16, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. Charles Hume* and *Mr. Leigh Robinson* for the petitioner. *Mr. Maurice E. Locke, Mr. Eugene P. Locke, Mr. James H. McIntosh, Mr. John Charles Harris* and *Mr. Edward F. Harris* for the respondent.

No. 896. THE UNITED STATES EX REL. ANNIE KELLEY, PETITIONER, *v.* J. M. PETERS, SHERIFF, ETC. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. H. Winship Wheatley* for the petitioner. *Mr. William M. Acton* for the respondent.

No. 898. THE SOUTHERN PACIFIC COMPANY, PETITIONER, *v.* VISCOUNT DE VALLE DA COSTA, ADMINISTRATOR, ETC. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Moses Williams* and *Mr. William D. Turner* for the petitioner. No appearance for the respondent.

No. 924. UNITED SURETY COMPANY OF BALTIMORE, PETITIONER, *v.* IOWA MANUFACTURING COMPANY ET AL. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph H. Zumbalen* for the petitioner. *Mr. Herbert R. Marlatt* for the respondents.

No. 927. WILLIAM W. WILMERTON, PETITIONER, *v.* FRANK WILMERTON ET AL. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James M. Spear* for the petitioner. *Mr. S. S. Gregory* and *Mr. C. H. Poppenhusen* for the respondents.

No. 928. F. MORSE ARCHER, SUBSTITUTED RECEIVER, ETC., PETITIONER, *v.* FIDELITY TRUST & SAFE DEPOSIT

COMPANY ET AL., EXECUTORS, ETC. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Reynolds D. Brown, Mr. Malcolm Lloyd, Jr., Mr. Charles H. Burr* and *Mr. J. Arthur Lynham* for the petitioner. *Mr. Ira Jewell Williams* for the respondents.

No. 929. GLOBE ASPHALT COMPANY, PETITIONER, *v.* UNION CONSTRUCTION & DEVELOPMENT COMPANY ET AL. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. V. Brookshire* and *Mr. Joseph H. Call* for the petitioner. *Mr. William Grant, Mr. Harry H. Hall* and *Mr. J. Blanc Monroe* for the respondents.

No. 930. RANSOME CONCRETE MACHINERY COMPANY, PETITIONER, *v.* UNITED CONCRETE MACHINERY COMPANY. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles L. Sturtevant* for the petitioner. *Mr. Stephen J. Cox* for the respondent.

No. 938. THE GENERAL FIREPROOFING COMPANY, PETITIONER, *v.* L. WALLACE & SON; and No. 939. THE TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PA., PETITIONER, *v.* L. WALLACE & SON. May 31, 1910. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. H. Atwood, Mr. Frank Hagerman* and *Mr. Amor H.*

Sargent for the petitioners. *Mr. John N. Hughes* for the respondents.

No. 940. LEHIGH VALLEY TRANSPORTATION COMPANY, CLAIMANT, ETC., PETITIONER, *v.* THOMAS MONK, JR., ET AL. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald G. Thacher* for the petitioner. *Mr. Herbert Green*, *Mr. James J. Macklin* and *Mr. de Lagnel Berier* for the respondents.

No. 945. PITTSBURGH MANUFACTURING COMPANY, PETITIONER, *v.* LUDLOW VALVE MANUFACTURING COMPANY. May 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. James I. Kay* for the petitioner. *Mr. Samuel Untermyer* and *Mr. Louis Marshall* for the respondent.

No. 950. THE WESTERN ASSURANCE COMPANY OF TORONTO, PETITIONER, *v.* THE TWEEDIE TRADING COMPANY; and No. 951. A. FOSTER HIGGINS ET AL., PETITIONERS, *v.* THE TWEEDIE TRADING COMPANY. May 31, 1910. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles C. Burlingham* and *Mr. A. Leo Everett* for the petitioners. *Mr. Frederick M. Brown* for the respondent.

No. 949. ELLIS BARTHOLOMEW, PETITIONER, *v.* THE UNITED STATES. May 31, 1910. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. P. H. Kaiser* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM APRIL 11, TO MAY 31, 1910.

No. 152. THOMAS D. WILCOXON, PLAINTIFF IN ERROR, *v.* MITCHELL H. WILCOXON. MARTHA E. LEMON AND MARY D. PROCTOR. In error to the Supreme Court of the State of Illinois. April 11, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. H. T. Wilcoxon* for the plaintiff in error. *Mr. J. A. Crain* for the defendants in error.

No. 163. C. R. SMITH, PLAINTIFF IN ERROR, *v.* ARMOUR PACKING COMPANY. In error to the United States Circuit Court of Appeals for the Eighth Circuit. April 15, 1910. Dismissed with costs pursuant to the tenth rule. *Mr. S. T. Bledsoe* for the plaintiff in error. No appearance for the defendant in error.

No. 885. SECUNDINO MENDEZONA, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. April 18, 1910. Docketed and dismissed on motion of *Mr. Solicitor General Bowers* for the defendant in error. *The Attorney General* for the defendant in error. No one opposing.

No. 169. FERNANDO VASQUEZ MORALES ET AL., APPELLANTS, *v.* JUAN VICENTY RAMOS. Appeal from the Supreme Court of Porto Rico. April 19, 1910. Dismissed with costs pursuant to the tenth rule. *Mr. Herbert E. Smith* for the appellants. No appearance for the appellee.

No. 483. S. DAVIES WARFIELD ET AL., RECEIVERS, ETC., PLAINTIFFS IN ERROR, *v.* JOHN B. GASTON. In error to the Supreme Court of the State of Alabama. April 25, 1910. Judgment reversed with costs and cause remanded for further proceedings, per stipulation of counsel. *Mr. John P. Tillman* and *Mr. Robert E. Steiner* for the plaintiffs in error. *Mr. Alexander M. Garber* and *Mr. Samuel D. Weakley* for the defendant in error.

No. 901. THE NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* FITZ H. MCMASTER, AS INSURANCE COMMISSIONER, ETC. In error to the Supreme Court of the State of South Carolina. April 28, 1910. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. T. Moultrie Mordecai* for the plaintiff in error. No appearance for the defendant in error.

No. 629. FOURTH STREET NATIONAL BANK, PETITIONER, *v.* A. MERRITT TAYLOR ET AL., TRUSTEES, ETC. On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. May 31, 1910. Dismissed with costs, on motion of counsel for the petitioner. *Mr. Samuel Dickson* for the petitioner. No appearance for the respondents.

No. 910. OLIVE ELLA MARILLA HARDING, PLAINTIFF IN ERROR, *v.* MYRTLE GILLETT ET AL. In error to the Supreme Court of the State of Oklahoma. May 31, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. J. C. Robberts* and *Mr. George W. Buckner* for the plaintiff in error. *Mr. Arthur A. Birney* and *Mr. Henry F. Woodard* for the defendants in error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

May 31st, 1910.

Order: In pursuance of § 29 of the act of Congress approved August 5, 1909.[1]

It is now here ordered by this court that the following

[1] SEC. 29. That a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the advice and consent of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with jurisdiction as hereinafter established and limited.

Said court shall prescribe the form and style of its seal and the form of its writs and other process and procedure and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal at a salary of three thousand dollars per annum, to be appointed by and hold office during the pleasure of said court; said services outside the District of Columbia to be performed by the United States marshals

table of fees to be charged in the United States Court of Customs Appeals be, and the same is hereby, adopted and approved, viz.:

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in and for the districts where sessions of said court may be held, and to this end said marshals shall be the marshals of said Court of Customs Appeals. The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be four thousand dollars per annum, which sum shall be in full payment for all service rendered by such clerk, and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided*, That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. The court shall have power to establish all rules and regulations for the conduct of the business of the court and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law.

The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held by the said court, in the several judicial circuits, and at such places as said court may from time to time designate.

The presiding judge of said court shall be so designated in order of appointment and in the commission issued him by the President, and the associate judges shall have precedence according to the date of their commissions. Any three of the members of said court shall constitute a quorum, and the concurrence of three members of said court shall be necessary to any decision thereof.

The said court shall organize and open for the transaction of business in the city of Washington, District of Columbia, within ninety days after the judges, or a majority of them, shall have qualified.

After the organization of said court no appeal shall be taken or allowed from any Board of United States General Appraisers to any

The fees of the clerk of the court shall be six dollars in each case. No fee shall be exacted in cases on appeal to other Federal courts and transferred to this court for

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other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this Act: *Provided*, That nothing in this Act shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after the passage of this Act: *And provided further*, That all customs cases heretofore decided by a circuit or district court of the United States or a court of a Territory of the United States and which have not been removed from said courts by appeal or writ of error, and all such cases heretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed.

The Court of Customs Appeals established by this Act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases.

Any judge who, in pursuance of the provisions of this Act, shall attend a session of the Court of Customs Appeals held at any place other than the city of Washington, District of Columbia, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and neces-

final determination. There shall be paid for each certificate of admission of an attorney to practice one dollar, and for making or copying any record or other paper and

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sary expenses of one stenographic clerk who may accompany him, and such payments shall be allowed the marshal in the statement of his accounts with the United States.

The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney-General of the United States and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided, however*, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts; and in no case shall said marshals secure other rooms than those regularly occupied by existing circuit courts of appeals, circuit courts, or district courts, or other public officers, except where such can not, by reason of actual occupancy or use, be occupied or used by said Court of Customs Appeals.

If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided*, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their

certifying the same fifteen cents per folio of one hundred words. An amount sufficient to cover the cost of printing the record shall be deposited with the clerk on his

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decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

Immediately upon the organization of the Court of Customs Appeals all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: *Provided*, That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification.

That in case of a vacancy or the temporary inability or disqualification for any reason of one or two judges of said Court of Customs Appeals, the President of the United States may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place, and such United States judge or judges shall be duly qualified to so act.

Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days.

In addition to the clerk of said court the court may appoint an assistant clerk at a salary of two thousand five hundred dollars per annum, five stenographic clerks at a salary of two thousand four hundred dollars per annum each, and one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of nine hundred dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned

demand, provided that when an appeal is taken by the United States no payment of fees shall be required. In all other cases fees shall be paid in advance.

It is further ordered that the fees and costs to be allowed to the marshal shall be, and hereby are, fixed the same as those allowed to the marshal of the Supreme Court of the United States.

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them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct. The marshal of said court for the District of Columbia is hereby authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery as may be necessary for the use of said court, and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge.

INDEX.

CAUTIONARY NOTICE.

See LOCAL LAW (PORTO RICO, 1–3).

CERTIORARI.

1. *Power to issue writ.*

The power of this court to issue writs of certiorari to the Circuit Court of Appeals is not limited to the provisions of the Court of Appeals Act. It may issue them under § 716, Rev. Stat. (*In re Chetwood*,

COMBINATIONS IN RESTRAINT OF TRADE.

1. *When legality under common law immaterial.*

Whether a combination is or is not illegal at common law is immaterial if it is illegal under a state statute which does not infringe the Fourteenth Amendment. *Grenada Lumber Co.* v. *Mississippi*, 433.

2. *Motive and necessity immaterial.*

A combination that is actually in restraint of trade under a statute which is constitutional, is illegal whatever may be the motive or necessity inducing it. *Ib.*

See CONSTITUTIONAL LAW, 7, 8.

COMMERCE.

1. *Term defined.*

Commerce is more than traffic; it is intercourse, and the transmission of intelligence among the States cannot be obstructed or unnecessarily encumbered by state legislation. (*Gibbons* v. *Ogden*, 9 Wheat. 1; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1.) *International Textbook Co.* v. *Pigg*, 91.

2. *What constitutes commerce between States. Instruction through medium of mails constitutes.*

Intercourse or communication between persons in different States through the mails and otherwise, and relating to matters of regular continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the States within the commerce clause of the Federal Constitution. *Ib.*

See CONSTITUTIONAL LAW, 1–6, 24;
INTERSTATE COMMERCE.

COMMON LAW.

See COMBINATIONS IN RESTRAINT OF TRADE, 1.

COMPETITION.

See CONSTITUTIONAL LAW, 29.

CONDEMNATION OF LAND.

1. *Assessment of benefits; power of Congress over District of Columbia.*

Under the complete jurisdiction which the United States exercises over the District of Columbia it is within the power of Congress to arbitrarily fix a minimum amount to be assessed for benefits on

CONVERSION.

CONVEYANCES.

CORPORATIONS.

CRIMINAL LAW.

EVIDENCE.

LOS ANGELES RIVER.

See Riparian Rights, 1.

MAILS.

PENALTIES AND FORFEITURES.

1. *Imprisonment for debt; construction of provision in Philippine bill of rights.*

Provisions carried into the Philippine bill of rights by the statute of July 1, 1902, c. 1369, 32 Stat. 691, such as "that no person shall be imprisoned for debt," are to be interpreted and enforced according to their well-known meaning at the time. (*Kepner* v. *United States*, 195 U. S. 100.) *Freeman* v. *United States*, 539.

2. *Same.*

Statutes relieving from imprisonment for debt, as generally interpreted, relate to commitment of debtors for liability on contracts, and not to enforcement of penal statutes providing for payment of money as a penalty for commission of an offense and the provision against imprisonment for debt in the Philippine bill of rights as contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691. *Ib.*

3. *Imprisonment for debt; alternative of payment to creditor of penalty for embezzlement is not.*

The fact that a money penalty imposed for embezzlement goes to the creditor and not into the public treasury does not make imprisonment for non-payment of the penalty imprisonment for debt; and so held as to § 5, Art. 535, of the Penal Code of the Philippine Islands. *Ib.*

4. *For embezzlement under Philippine Penal Code.*

Where the statute provides a penalty for embezzlement to the amount proved, to go to the creditor, and a subsidiary sentence of imprisonment in case of non-payment, the court may, without violating fundamental principles of justice, find the amount wrongfully converted for the purpose of fixing sentence in the criminal action, leaving the creditor his remedy in a civil action for any excess due him over the amount of the sentence; and so held as to a conviction for embezzlement under Article 535 of the Penal Code of the Philippine Islands. *Ib.*

See CONSTITUTIONAL LAW, 10–13, 19; PHILIPPINE ISLANDS; CRUEL AND UNUSUAL PUNISHMENTS; STATUTES, A 7.

PERJURY.

See CONGRESS, POWERS OF; CRIMINAL LAW, 4, 5.

PERSONAL INJURIES.

See DAMAGES.

PHILIPPINE ISLANDS.

1. *Bill of rights; interpretation of provision against cruel and unusual punishments.*

A provision of the Philippine bill of rights taken from the Constitution of the United States must have the same meaning, and so held that the provision prohibiting cruel and unusual punishments must be interpreted as the Eighth Amendment has been. *Weems* v. *United States*, 349.

2. *Bill of rights; invalidity of § 56 of Penal Code under provision against cruel and unusual punishments.*

In this case the court declared § 56 of the Penal Code of the Philippine Islands and a sentence pronounced thereunder, void as violating the provision in the Philippine bill of rights contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691, against the imposition of excessive fines and the infliction of cruel and unusual punishment in so far as being prescribed for an offense by an officer of the Government of making false entries as to payments of 616 pesos in public records, the punishment being a fine of 4,000 pesos, and *cadena temporal* of over twelve years with accessories, such accessories including the carrying of chains, deprivation of civil rights during imprisonment and thereafter perpetual disqualification to enjoy political rights, hold office, etc., and subjection besides to surveillance. *Ib.*

See CONSTITUTIONAL LAW, 12; CRIMINAL LAW, 2, 3; CRUEL AND UNUSUAL PUNISHMENTS; GOVERNMENTAL POWERS, 1, 3; PENALTIES AND FORFEITURES.

PLEADING.

1. *Sufficiency; facts and not conclusions must be stated.*

A pleading must state facts and not mere conclusions; and the want of essential definite allegations renders a pleading subject to demurrer. This general rule is also the practice in Georgia. *Southern Ry. Co.* v. *King*, 524.

2. *Sufficiency to raise question of constitutionality of state statute.*

General statements that a statute is in violation of the commerce clause of the Federal Constitution, is a direct burden on interstate commerce, and impairs the usefulness of the pleader's facilities for that purpose, are mere conclusions and not statements of the facts which make the operation of the statute unconstitutional, and do not raise any defense to a cause of action based on a violation of such statute. *Ib.*

See CRIMINAL LAW, 2, 3; JUDGMENTS AND DECREES, 1.

PRIVITY.

See JUDGMENTS AND DECREES, 1, 2, 3.

PROCESS.

See JURISDICTION, H;
MANDAMUS;
WRIT AND PROCESS.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW, 36;
FORGED INSTRUMENTS, 1.

PUBLIC LANDS.

1. *State patents; setting aside.*

Whether a patent is wrongfully issued or can be set aside is a matter to be settled between the State and the patentee, but no individual is authorized to act for the State. *Frellsen & Co.* v. *Crandell*, 71.

2. *State patents; effect of tender of statutory price to create contract under Federal Constitution.*

Even if the State could set aside a patent for having been issued on illegal or inadequate consideration the matter is between it and the patentee; and, until set aside, one tendering the statutory price does not thereby become entitled to receive such land from the State, nor does the tender create a contract with the State within the protection of the contract clause of the Federal Constitution. *Ib.*

3. *State patents; when land subject to reëntry or purchase.*

Where the state court so holds, public land of a State, as is the case of public land of the United States, held under patent or certificate of location, is not, until such patent or certificate be set aside at the instance of the State, subject to other entry or purchase. *Ib.*

4. *State lands; power of State in administering.*

In the matter of sale and conveyance each State may administer its public lands as it sees fit so long as it does not conflict with rights guaranteed by the Federal Constitution; nor is any State obliged to follow the legislation or decisions of the Federal Government or of any other State. *Ib.*

See MAILS.

PUBLIC OFFICERS.

1. *Accountability as agent.*

A public official may not retain any profit or advantage realized

RIPARIAN RIGHTS.

1. *Effect of act of March 3, 1851, in respect of rights acquired under Spanish and Mexican titles—Right to waters of Los Angeles River.*

In this case both parties claim under Spanish or Mexican titles, confirmed by proceedings under the act of March 3, 1851, c. 41, 9 Stat. 631. The Federal rights alleged by plaintiff in error to have been violated by the decision of the state court, so far as concerns this act, relate to the extent of the right and ownership of the parties in the use of the Los Angeles River. Plaintiff in error contended that by its grant it became the owner of riparian rights without limitations by any right of the city of Los Angeles to use the water of the river, and that the city by failing to present its claim for the use of such water to the commission under the act of 1851 is foreclosed from now asserting them. The state court held that the city of Los Angeles had the exclusive right to the water of the Los Angeles River from its source to the most southern part of the city. In dismissing a writ of error to review the judgment of the state court, *held* that the act of 1851 was a confirmatory act and not one granting titles; that by its terms it did not originate titles nor make the patents to be issued in pursuance of decisions of the commission conclusive except upon the United States. *Los Angeles Milling Co.* v. *Los Angeles*, 217.

2. *Law governing rights of patentees under act of March 3, 1851.*

The extent of riparian rights belonging to pueblos or persons receiving patents of the United States in pursuance of the decisions of the commission under the act of March 3, 1851, are matters of local or general law. *Ib.*

RIVERS.

See RIPARIAN RIGHTS;
STATES, 4, 6.

RULES OF COURT.

Rule 21. See APPEAL AND ERROR, 2.
Rule 35. See APPEAL AND ERROR, 2;
PRACTICE AND PROCEDURE, 1–4.

SALES.

See CONSTITUTIONAL LAW, 4;
CONTRACTS, 9–12;
LOCAL LAW (PORTO RICO, 1).

SALES IN BULK.

See CONSTITUTIONAL LAW, 21, 34.

STATES.

STATUTES.

A. CONSTRUCTION OF.