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UNITED STATES REPORTS

VOLUME 218

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1909

AND

OCTOBER TERM, 1910

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1911

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

MELVILLE WESTON FULLER,[2] Chief Justice.
JOHN MARSHALL HARLAN,[3] Associate Justice.
EDWARD DOUGLASS WHITE,[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, Associate Justice.
CHARLES EVANS HUGHES,[6] Associate Justice.

GEORGE WOODWARD WICKERSHAM, Attorney General.
LLOYD WHEATON BOWERS,[7] 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 page v, *post*.

[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 Vol. 219, United States Reports. On December 12, 1910, President Taft appointed Edward Douglass White, Associate Justice of this court, Chief Justice of the United States, to succeed Mr. Chief Justice Fuller. He was confirmed by the Senate on the same day and on December 19 took the oath as Chief Justice.

[3] Mr. Associate Justice Harlan presided from the opening of October Term, 1910, until December 19, 1910.

[4] Appointed and confirmed Chief Justice of the United States December 12, 1910, and took the oath as such December 19, 1910. On December 12, 1910, President Taft appointed Mr. Joseph Rucker Lamar, of Georgia, Associate Justice to succeed Mr. Justice White as such. He

(Notes Continued on Next Page.)

was confirmed by the Senate on December 15, 1910, and qualified and took his seat upon the bench on January 3, 1911.

[5] MR. JUSTICE MOODY was absent from the court on account of illness during the whole of October Term, 1909, and did not participate in any of the decisions reported in this volume. On June 23, 1910, Congress passed the following act (chap. 377), entitled, "An Act to permit William H. Moody, an Associate Justice of the Supreme Court of the United States, to retire. *Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,* That the provisions of section seven hundred and fourteen of the Revised Statutes be and they are hereby, extended and made applicable to WILLIAM H. MOODY, an Associate Justice of the Supreme Court of the United States, in consequence of his physical inability, notwithstanding he has not served the full term of ten years or attained the age of seventy years as required by the aforesaid section: *Provided,* that the said WILLIAM H. MOODY shall resign the said office of Associate Justice of the Supreme Court of the United States within five months after the passage of this act. Approved June 23, 1910." MR. JUSTICE MOODY'S illness continued and he did not take his seat upon the bench during October Term, 1910, or participate in any of the decisions of the court during such term. He retired pursuant to the provisions of said act of Congress on November 20, 1910. See Proceedings, p. xvii, *post.* On December 12 President Taft appointed Willis Van DeVanter, of Wyoming, Circuit Judge of the United States for the Second Circuit, to succeed MR. JUSTICE MOODY. He was confirmed by the Senate on December 15, 1910, and qualified and took his seat upon the bench on January 3, 1911.

[6] MR. JUSTICE HUGHES of New York, and Governor of that State, was appointed by President Taft on April 25, 1910, to succeed MR. JUSTICE BREWER, deceased. See 217 U. S. iii. He was confirmed by the Senate on May 2, 1910, and qualified and took his seat upon the bench on October 10, 1910. He did not take part in any of the decisions reported in this volume which were argued or submitted prior to that date.

[7] MR. SOLICITOR GENERAL BOWERS died during vacation of the court, at Boston, Massachusetts, on September 9, 1910. On December 12 President Taft appointed Mr. Frederick William Lehmann of Missouri, Solicitor General to succeed Mr. Bowers. His commission was filed with the court December 19, 1910.

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. A new allotment, made January 9, 1911, will appear in Volume 219 U. S.

PROCEEDINGS ON THE DEATH OF MR. JUSTICE BREWER.

DAVID JOSIAH BREWER, Associate Justice of the Supreme Court of the United States, died at his residence, 1923 16th Street, Washington, D. C., on Monday, March 28, 1910, while the court was in recess. He was buried in Leavenworth, Kansas.

A meeting of the Bar of the Supreme Court of the United States was held in the Court Room on Saturday, April 30, 1910. On motion of Mr. William F. Mattingly, Mr. Charles Curtis, Senior Senator of the United States from the State of Kansas, presided, and the Clerk of the Court acted as Secretary. Addresses were made by Mr. Curtis, Mr. William E. Borah, Mr. Henry E. Davis, Mr. Frank W. Hackett, Mr. Gardiner Lathrop, Mr. Aldis B. Browne, Mr. Hannis Taylor, Mr. R. Ross Perry, Mr. Frank C. Allis and Mr. Justin Morrill Chamberlin. Mr. George Grafton Wilson presented a resolution adopted by the American Society of International Law.

A committee consisting of Mr. William E. Borah, chairman, Mr. William Warner, Mr. J. P. Dolliver, Mr. C. D. Clark, Mr. R. Wayne Parker, Mr. Henry M. Teller, Mr. George R. Peck, Mr. John S. Runnells, Mr. Charles Blood Smith, Mr. Charles W. Bunn, Mr. Gardiner Lathrop, Mr. R. Ross Perry, Mr. Henry E. Davis, Mr. A. S. Worthington, Mr. Aldis B. Browne and Mr. J. J. Darlington, prepared and presented resolutions which were adopted, and The Attorney General was requested to present them to the court.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, MAY 31, 1910.

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

The Attorney General addressed the court as follows:

May it please the court, at the request of the Bar of this court I present the following resolutions adopted at a meeting held in this court room:

"*Resolved*, That the Bar of the Supreme Court of the United States deeply deplores the death of the late David J. Brewer, Associate Justice of the Supreme Court, and desires to place upon record an expression of the respect and esteem in which JUSTICE BREWER was held and of regret for the loss which the Court, the Bar, and the country have suffered in his untimely death.

"His judicial career was one of exceptional length and of marked distinction and success. Elected judge of the District Court of the First Judicial District of the State of Kansas in 1864; three times elected a justice of the Supreme Court of the State of Kansas; appointed in 1884 judge of the Circuit Court of the United States for the Eighth Circuit; appointed a justice of the Supreme Court of the United States in December, 1889, it will be observed that for nearly fifty years he discharged the high and sacred duties of a judge. In this long service, in the vast number of opinions which he wrote, the infinite variety of legal principles considered and treated, the learning and wisdom displayed, the consecration and fidelity ever and always evidenced, will be found his only fitting eulogy.

His remarkable grasp of the underlying principles upon which our whole structure of government rests, his unswerving fidelity to the fixed rules of order and stability so essential and so often sorely tested, his strong, positive, upright, fearless character, his power of sustained intellectual effort, place him easily among the great judges of his day and time. No one ever doubted his purity of life, his integrity of purpose, and all who read and consider his legal opinions pay homage to his profound intellect. Those who knew him are quick to testify to his tender and considerate nature, and those who must be content to find his character in his opinions scattered through many State, Circuit, and Supreme Court decisions will never doubt his probity or his power as a jurist.

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

JUSTICE BREWER'S period of service in this court covered twenty years. These two decades brought before this court some of the most important and far-reaching questions which have ever been submitted for its decision, and in the solution of these great problems JUSTICE BREWER took a leading part. In the reports of this period there are to be found 719 opinions written by JUSTICE BREWER, in 157 of which he dissented from the conclusions of the majority of the court. The limitations of this occasion will permit only a brief reference to a few decisions which illustrate the characteristics of his mind and the lucidity of his exposition.

One of the earliest of his recorded opinions was that in the case of the *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, where the court was called upon to decide

whether or not the act prohibiting the importation of foreigners and aliens under contract to perform labor in the United States applied to an English Christian minister who had come to the United States pursuant to an agreement with a Protestant Episcopal Church in the city of New York. The opinion is of especial interest, not merely as a fine discriminating construction of the statute, and the application of the principle that laws must receive a sensible construction, and that where a literal construction leads to an absurd conclusion the letter of the law must give way to the presumed intention of the legislature; but because of the enunciation of the principle that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."

"If we examine the constitutions of the various States," said the learned justice, "we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community.

* * * * * * * *

"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people.

* * * * * * * *

"These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor

for a church of this country to contract for the services of a Christian minister residing in another nation?"

In the case of *Kansas* v. *Colorado*, 206 U. S. 46, perhaps one of the most important decisions in which MR. JUSTICE BREWER wrote the opinion of the court, he was called upon to deal with riparian rights and to determine whether or not one State has the right to the continuous flow of the waters of a river flowing to it through an adjoining State, or whether the latter State has the right to so appropriate its waters as to prevent such continuous flow; and whether the amount of the flow is subject to the superior authority and supervisory control of the United States.

In considering at the outset the foundations of the jurisdiction of this court over controversies between States, JUSTICE BREWER laid down the proposition that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto.

"These considerations," he said, "lead to the proposition that when a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power."

One of the ablest opinions of MR. JUSTICE BREWER is

that in the case of *In re Debs, Petitioner*, 158 U. S. 564, in which he expressed the unanimous views of the court in affirming that the relations of the general government to interstate commerce and the transportation of the mails are such as to authorize a direct interference to prevent an obstruction thereto, and that a court of equity has jurisdiction to issue an injunction in aid of the performance of such duty.

Perhaps in no other opinion of this court is there a better summary of the principles upon which rests the power of the Federal Government to maintain its sovereignty than that with which JUSTICE BREWER concludes his opinion in this case:

". . . We hold that the Government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the National Government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the Government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one

recognized from ancient times and by indubitable authority."

JUSTICE BREWER was always noted as a man of deep religious conviction. We have seen that one of the first questions which he was called upon to deal with after his elevation to the Supreme Court involved the relation between religion and the National Government. He was keenly interested in the position of woman in our modern society, and one of the latest of his decisions (*Muller* v. *State of Oregon*, 208 U. S. 412) involved the right of a State to regulate the working hours of women. After reviewing the laws of Oregon, he observed:

"It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers."

Yet he held, and in so doing voiced the unanimous opinion of this court—

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating that from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

"Still, again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and

this control, in various forms, with diminishing intensity, has continued to the present. . . . Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right."

Your honors know better than any but his immediate family the personal qualities which endeared JUSTICE BREWER alike to his associates on the Bench, to his friends, and to the Bar. Nothing better can be said of any man, however high his place or great his deeds, than that throughout his life he was not only esteemed, but beloved of all who knew him, and, indeed, that praise is greater in proportion as exalted station and high career tend to isolate from one's fellows. JUSTICE BREWER everywhere and always won affection. It was so in his life at the university. His activities as a judge of his adopted State, Kansas, and then as judge of the United States for the largest circuit in the country, were made easier and more effective by the warm and lasting regard of his Bar; and when advancement to this court widened his contact from the lawyers of the West to the lawyers and, indeed, to the people, of the nation, he soon gained the love of his countrymen generally, and it remained with him to the end. Reasons need not be sought. They would not be difficult to find or to declare, but such continued and ever extending hold upon the hearts of men proves, without analysis, the worth and beauty of the personality that gains it.

JUSTICE BREWER was a son of a Christian missionary, and the son's life, like the father's, was one of service. For six and forty years he served the people, hearing causes and judging "righteously between every man and his brother and the stranger that is with him." And in the discharge of his great office he did ever obey the injunction laid upon the judges of Israel by their great lawgiver:

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man, for the judgment is God's." (1 Deut. 17.)

THE CHIEF JUSTICE responded as follows: [1]

During the years of my occupancy of a seat upon this Bench it has been my sad duty to accept for the court tributes of the Bar in memory of many members of this tribunal who have passed to their reward. As our BROTHER BREWER joins the great procession, there pass before me the forms of Matthews and Miller, of Field and Bradley and Lamar and Blatchford, of Jackson and Gray and of Peckham, whose works follow them now that they rest from their labors. They were all men of marked ability, of untiring industry, and of intense devotion to duty, but they were not alike. They differed as "one star differeth from another star in glory." Their names will remain illustrious in the annals of jurisprudence. And now we are called on to deplore the departure of one of the most lovable of them all.

He died suddenly, but not the unprepared death from which we pray to be delivered. When the unexpected intelligence was conveyed to me I could not but think of Mrs. Barbauld's poem on "Life," and seemed to hear our dear friend exclaim—

[1] These remarks were delivered on the last day that MR. CHIEF JUSTICE FULLER presided over the court. October Term, 1909, adjourned the same day, and during vacation the Chief Justice died at his summer home in Sorrento, Maine, on July 4, 1910.

"Life! we've been long together,
Through pleasant and through cloudy weather;
'Tis hard to part when friends are dear;
Perhaps 'twill cost a sigh, a tear;
Then steal away, give little warning,
Choose thine own time;
Say not, Good night, but in some brighter clime
Bid me, Good morning."

The resolutions of our Bar and the discriminating remarks of the Attorney General adequately cover the magnificent judicial labors of MR. JUSTICE BREWER, but it is the ineffable sweetness of his disposition that chiefly impresses itself upon me and is indicated by the serenity of the verse I have quoted.

He was a truly eloquent man. The fountain of tears and the fountain of laughter ran close together and carried the hearer away upon the mingled current of their waters. And like Mr. Lincoln, he evidently found great comfort from the inevitable trials and tribulations of the world in the humorous anecdotes which brought the relief of merriment.

But I cannot prolong these remarks. The resolutions and the observations of the Attorney General will be spread upon our records.

PROCEEDINGS ON THE RETIREMENT OF MR. JUSTICE MOODY.[1]

SUPREME COURT OF THE UNITED STATES.

THURSDAY, DECEMBER 8, 1910.

Present: MR. JUSTICE HARLAN, MR. JUSTICE WHITE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY, MR. JUSTICE LURTON and MR. JUSTICE HUGHES.

Order: It is ordered by the court that the following correspondence be spread upon the minutes and journal of the court:

"SUPREME COURT OF THE UNITED STATES,
"*Washington, D. C., November 23, 1910.*

"DEAR BROTHER MOODY: We can not let you leave us without an expression of our deep regret. The too few years during which we sat together on the bench already had confirmed the prophecy of your arguments at the bar. They had proved that your unusual powers would be applied as faithfully and impartially to dispassionate decision as, when you were Attorney General, they had been devoted to an always lofty presentation of a side. We grieve that the country so soon should lose services that it ill can spare and we companionship in which affection was joined to respect. But you have left a sample of your work in the reports, and, we believe, have earned the

[1] See *ante*, p. v.

great reward—that the wise and good of the future, as well of the present, will say it was well and nobly done.

"JOHN M. HARLAN.
"E. D. WHITE.
"JOSEPH MCKENNA.
"OLIVER WENDELL HOLMES.
"WILLIAM R. DAY."

"We came to the bench of the Supreme Court after BROTHER MOODY was compelled by sickness to lay aside active public work. But we have knowledge of his course of life, and of his judicial opinions, and concur most cordially in what is said in the above letter by those of his associates who served with him on the bench.

"HORACE H. LURTON.
"CHARLES E. HUGHES."

"1525 EIGHTEENTH STREET NW.,
"*Washington, D. C., December 5, 1910.*

"MY DEAR BRETHREN: I can not let your letter go unanswered, but at this time I am unable fittingly to say more than that your words reach deep in my heart and mind and awaken there an intense gratitude to you all. With the expression of this and of my respect and affection for each individual member of the court, I must be content.

"Most sincerely, yours,
"WILLIAM H. MOODY."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1909.

SISTARE *v.* SISTARE.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 7. Argued November 1, 1909.—Decided May 31, 1910.

Past due installments of a judgment for future alimony rendered in one State are within the protection of the full faith and credit clause of the Federal Constitution unless the right to receive the alimony is so discretionary with the court rendering the decree that, even in the absence of application to modify the decree, no vested right exists.

Unless a decision of this court in terms overrules a former decision, it will, if possible, be so construed as to harmonize with, and not overrule such prior decision; and so *held* that *Barber* v. *Barber*, 21 How. 582, establishing the general rule that a judgment for alimony as to past installments was within the full faith and credit clause was not overruled by *Lynde* v. *Lynde*, 181 U. S. 187, but the latter case established the exception as to such judgments where the alimony is so discretionary with the court that a vested right to receive the same does not exist.

The settled doctrine in New York in 1899 was that no power existed to modify a judgment for alimony absolute in terms unless conferred by statute, and a judgment for future alimony entered in 1899 under §§ 1762–1773, Code of Civil Procedure, is absolute until modified by the court rendering it; such a judgment, therefore, as to past due

installments, falls under the general rule that it is entitled to full faith and credit in the courts of another State. *Barber* v. *Barber*, 21 How. 582, followed; *Lynde* v. *Lynde*, 181 U. S. 187, distinguished.

Although the full faith and credit clause may not extend to mere modes of procedure, a judgment absolute in terms and enforcible in the State where rendered must, under the full faith and credit clause of the Federal Constitution, be enforced by the courts of another State, even though the modes of procedure to enforce its collection may not be the same in both States.

80 Connecticut, 1, reversed.

THE facts which involve the extent to which, under the full faith and credit clause of the Constitution of the United States, effect must be given, in the courts of another State, to a judgment for alimony, on which arrears are due, are stated in the opinion.

Mr. Robert Goeller and *Mr. Benjamin Slade*, for plaintiff in error:

The judgment rendered by the New York court related to a court proceeding, and from the language employed in the decree it is clear that the plaintiff is forever separated from the defendant, and that the defendant's obligation to contribute to the support of the plaintiff and the maintenance and education of the plaintiff's and defendant's child to the extent indicated by the decree commenced with the date of the entry of the final decree of separation.

The decree finds its support under §§ 1769–1771 of the New York Code of Civil Procedure. *Barber* v. *Barber*, 21 How. 582, is decisive of this case upon that proposition. It held that a judgment of alimony becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree. Alimony decreed to a wife in a divorce of separation from bed and board, is as much a debt of record, until the decree has been recalled, as any other judgment for money is.

Howard v. *Howard*, 15 Massachusetts, 196; *Clark* v. *Clark*, 6 Watts & Serg. 85; *Wheeler* v. *Wheeler*, 2 Dana, 310; *Knapp* v. *Knapp*, 59 Fed. Rep. 641; *Trowbridge* v. *Spinning*, 54 L. R. A. 204; *Arrington* v. *Arrington*, 127 N. Car. 190.

The court below based its conclusions on *Lynde* v. *Lynde*, 181 U. S. 187, and undertakes to distinguish that case from *Barber* v. *Barber*, *supra*, but the opinion in *Lynde* v. *Lynde*, 162 N. Y. 412, shows that the want of jurisdiction was considered a vital point on the question of sustaining the validity of the decree affecting future payments.

The distinction that exists between the *Lynde case* and the *Barber case* is that in the former case so much of the decree providing for the future payment of alimony was invalid as against the defendant for want of jurisdiction; but in the *Barber case* the decree having been rendered with jurisdiction over the defendant, such decree was sustained in its entirety.

If that distinction is well founded, both opinions are in accord; if no such distinction exists, the decision in the *Lynde case* seems inconsistent with the doctrine laid down in the *Barber case*.

The learned court of Connecticut erred in its construction of § 1771, N. Y. Code of Civ. Pro., in holding that under that section the trial court has power to annul, vary or modify its decree affecting the question of alimony.

Unless new facts occur, there can be no alteration of such decree even affecting the care, custody and maintenance of children. The court's power to modify a decree in respect to alimony does not destroy its finality. *Dow* v. *Blake*, 148 Illinois, 76.

Any modification made by the court that rendered the decree before the present suit was instituted could be pleaded by way of defense, but in the absence of a modification, the courts of other States should be required to

give to that decree the same binding force and effect that it has in the State where rendered. *Barber* v. *Barber*, *supra; Kunze* v. *Kunze*, 94 Wisconsin, 54; *Trowbridge* v. *Spinning*, 54 L. R. A. 204; *Dobson* v. *Pierce*, 12 N. Y. 156; *Fletcher* v. *Farrel*, 9 Dana, 372; *Cheever* v. *Wilson*, 9 Wall. 108; *Shield* v. *Thomas*, 18 How. 353; *Younge* v. *Carter*, 10 Hun, 194; *Harris* v. *Balk*, 198 U. S. 214.

Under the construction given by the court below to these statutes, no distinction can be made between the sum decreed as payable at once, and any sum decreed payable in the future. The statutes in question contain no language differentiating between the sums adjudged at the rendition of the decree and the sums adjudged to become payable in the future. Yet a part of the decree in the *Lynde* v. *Lynde case* was enforced. The decree in question, until reversed, annulled or modified, is a valid, subsisting obligation on the part of the defendant and is definite in its character. *Knapp* v. *Knapp*, 59 Fed. Rep. 641. See also *McCracken* v. *Swartz*, 5 Oregon, 63; *Dubois* v. *Dubois*, 6 Cowen, 494; *Allen* v. *Allen*, 100 Massachusetts, 374; *Horsford* v. *Van Ankes*, 79 Indiana, 302; *Brislowe* v. *Dobson*, 50 Mo. App. 176.

An action of debt will lie on a judgment as soon as it is recovered. In the majority of the States of this Union the owner of a judgment may bring suit thereon in the same court that rendered it or in any other court of competent jurisdiction, and prosecute it to final judgment, notwithstanding the collection of the original judgment may still have been enforced by execution in the State of its rendition. Freeman on Judgments, § 432; *Mills* v. *Duryea*, 7 Cr. 481; *Blake* v. *People*, 80 Illinois, 14; *Coughlin* v. *Ehlert*, 39 Missouri, 287; *Bullock* v. *Bullock*, 57 N. J. L. 508; *Bennett* v. *Bennett*, 3 Fed. Cas. 1318.

The defendant in error is precluded from attacking the dignity and effect of the judgment in question until it has been actually reversed or set aside.

The court below erred in holding that the courts of Connecticut by rendering a money judgment in the case at bar would be giving greater effect to the decree in question than such decree has in the State of New York. A decree of divorce, valid and effectual by the law of the State in which it is obtained, is valid and effectual in all other States. *Cheever* v. *Wilson*, 9 Wall. 108.

In all cases a judgment of one State does not carry the efficacy of a judgment in another State capable of enforcement by execution until such judgment is reduced to a new judgment in the place where it is sought to enforce it. After obtaining a judgment in the place of enforcement it can only be executed in the latter State as its laws may permit. *Buchanan County Bank* v. *Hull County*, 74 Fed. Rep. 373; *Lamberton* v. *Grant*, 94 Maine, 508; *Carter* v. *Bennett*, 6 Florida, 214; *Thompson* v. *Wattman*, 18 Wall. 457, 463; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292; *Banlock* v. *Banlock*, 51 N. J. Eq. 444.

A judgment recovered in one State is not executory in any other State in the sense that final process for its enforcement can issue on merely filing or docketing the judgment, as in the case of a domestic judgment. *Carter* v. *Bennett*, 6 Florida, 214; *Leathe* v. *Thomas*, 109 Ill. App. 434; *Dunham* v. *Dunham*, 57 Ill. App. 475; *Joice* v. *Scales*, 18 Georgia, 725.

The constitutional provision for giving "full faith and credit" to such judgments relates only to their effect as evidence or a bar to further litigation. *Claflin* v. *McDermot*, 12 Fed. Rep. 375; *Chicago &c. R. Co.* v. *Wiggins Ferry Co.*, 108 U. S. 18.

In an action on a foreign judgment awarding alimony to the plaintiff, no other relief can be had than a recovery for past due alimony. *Wood* v. *Wood*, 28 N. Y. Supp. 154.

A bill in equity by a woman against her former husband to enforce a provision of a foreign decree of divorce awarding her a definite and ascertained sum as alimony, is de-

murrable on the ground that she has an adequate remedy at law by an action of debt on the decree. *Davis* v. *Davis*, 39 L. R. A. 403.

The only remedy the plaintiff seeks is to obtain the money claimed to be due under the decree. The plaintiff under the decree in question acquired a vested property right of which she could not be deprived without due process of law.

The allowance in the decree of alimony created a judicial debt of record and formed a proper foundation for the recovery of said debt in the present action. *Wetmore* v. *Wetmore*, 149 N. Y. 520; *France* v. *France*, 79 App. Div. (N. Y.) 291; *Barber* v. *Barber*, *supra*.

The decree in question ought to be enforced as any other judgment out of any property of the husband wherever found. *Broslough* v. *Broslough*, 68 Pa. St. 495; *Brislowe* v. *Dobson*, *supra*; *Barber* v. *Barber*, *supra*.

Mr. William J. Brennan for defendant in error:

The statutes of New York show that the order requiring the payment of $22.50 per week was temporary in its nature and enforceable only in the manner provided in such statutes. See §§ 1766–1773, N. Y. Code of Civ. Pro.

It is apparent from these statutes that the judgment in question here was rendered in a proceeding entirely foreign to the statutes or practice of Connecticut. The order with respect to the weekly payments was subject to modification or annulment by the court which granted it at any time, and was enforceable in the peculiar method prescribed by the statute.

The New York courts hold that an order of this character is subject to modification at any time by the court which granted it independent of statute, and is enforceable only in the method provided by the statute. *Tonjes* v. *Tonjes*, 14 Hun (N. Y.), 542. The order in question is not only subject to modification at any time, but, under

the New York decisions, can only be enforced by the sequestration and contempt proceedings provided in the statutes. *Weber* v. *Weber*, 93 Hun (N. Y.), 149; *Branth* v. *Branth*, 20 Civ. Pro. (N. Y.) 33.

The judgment sought to be enforced in this action is an order which is subject to modification at any time by the court which granted it, and it can be enforced in New York only in the method provided by the statutes of that State.

The courts of one State will not enforce the judgments of the courts of another State which are subject to modification and are not final judgments for fixed sums of money. *Lynde* v. *Lynde*, 162 N. Y. 405; *S. C.*, 181 U. S. 183. In the *Lynde case* the Court of Appeals distinguished *Barber* v. *Barber*, 21 How. (U. S.) 582; and see also *Audubon* v. *Shufeldt*, 181 U. S. 577; *Wetmore* v. *Wetmore*, 196 U. S. 68. As to *Arrington* v. *Arrington*, 127 N. Car. 190, see 131 N. Car. 143, where the court admitted that its earlier decision was wrong.

The courts of one State will not enforce the judgments of courts of another State which are subject to modification. The more clearly will they not enforce such orders by judgment and execution where the courts of the State where the judgment was obtained, decline to enforce them in any such way.

Mr. Justice White delivered the opinion of the court.

In 1899, by a judgment of the Supreme Court of the State of New York the plaintiff in error was granted a separation from bed and board from her husband, the defendant in error, and he was ordered to pay her weekly the sum of $22.50 for the support of herself and the maintenance and education of a minor child. The judgment, omitting title, is copied in the margin.[1]

[1] This action having been begun by the service of the summons herein

In July, 1904, at which time none of the installments of alimony had been paid, the wife commenced this action in the Superior Court of New London County, Connecticut, to recover the amount then in arrears of the decreed alimony. The cause was put at issue and was heard by the court. As stated by the trial judge, in a "Finding" by him made: "The defendant made the following claims of law as to the judgment to be rendered in this action:

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on the defendant personally, . . . now on motion of . . . attorneys for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff be, and she hereby is, forever separated from the defendant, and from the bed and board of said defendant, on the ground of non-support and cruel and inhuman treatment by the defendant. And it is

Further ordered, adjudged and decreed that from and after the entry of this decree the defendant Horace Randall Sistare pay to the plaintiff Matilda Von Ellert Sistare, for her maintenance and support and the maintenance and education of Horace Von Ellert Sistare, the minor child of the plaintiff and defendant, the sum of twenty-two and 50–100 dollars ($22.50) per week, such sum to be paid into the hands of her attorneys of record in this action on each and every Monday. And it is further

Ordered, adjudged and decreed that the sole care, custody, control and education of said minor child Horace Von Ellert Sistare is hereby awarded to the plaintiff, and the defendant, upon complying fully with each and all of the directions of the decree herein, and not otherwise, and during his good behavior, shall, until the further order of this court, be permitted to see said child for the space of two hours, between the hours of ten and twelve o'clock in the forenoon on Wednesdays and Saturdays, excepting Wednesdays and Saturdays during the months of July, August and September of each year. And it is further

Ordered, adjudged and decreed that costs are hereby awarded to the plaintiff against the defendant, taxed at the sum of one hundred and seventeen and 67–100 dollars ($117.67), and that the plaintiff do recover said costs from the defendant and have execution therefor. And it is further

Ordered, adjudged and decreed that the plaintiff have leave to apply from time to time for such orders at the foot of this judgment as may be necessary for its enforcement and for the protection and enforcement of her rights in the premises.

"(*a*) That the judgment rendered by the Supreme Court of the State of New York in requiring the future payment of $22.50 per week did not constitute a final judgment for a fixed sum of money which is enforcible and collectible in this action.

"(*b*) That said judgment being subject to modification by the court which granted it, is not a judgment which the courts of this State will enforce.

"(*c*) That the requirement that said sums of money should be paid as aforesaid does not constitute a debt or obligation from the defendant to the plaintiff which can be enforced in this action.

"(*d*) That said judgment requiring the said weekly payments cannot be enforced in any other way than according to the procedure prescribed in the statutes of the State of New York, and cannot be enforced in this action.

"(*e*) That the judgment which is sought to be enforced in this action is not a final judgment entitled to full faith and credit in this State by virtue of the provisions of the Constitution of the United States.

"(*f*) That the judgment which is sought to be enforced in this action will not be enforced by the courts of this State through comity.

"(*g*) That the facts will not support a judgment for the plaintiff."

The court, however, adjudged in favor of the plaintiff and awarded her the sum of $5,805, the arrears of alimony at the commencement of the action.

On appeal, the Supreme Court of Errors (80 Connecticut, 1) reversed the judgment and remanded the cause "for the rendition of judgment in favor of the defendant;" and such a judgment, the record discloses, was subsequently entered by the trial court. This writ of error was prosecuted.

The Supreme Court of Errors of Connecticut reached the conclusion that the power conferred upon a New York

court to modify a decree for alimony by it rendered extended to overdue and unsatisfied installments as well as to those to accrue in the future, that hence decrees for future alimony, even as to installments after they had become past due, did not constitute debts of record, and were not subject to be collected by execution, but could only be enforced by the special remedies provided in the law, and were not susceptible of being made the basis of judgments in the State of New York in another court than the one in which the decree for alimony had been made. Guided by the interpretation thus given to the New York law and the character of the decree for future alimony which was based thereon, it was decided that the New York judgment for alimony which was sought to be enforced, even although the installments sued for were all past due, was not a final judgment which it was the duty of the courts of Connecticut to enforce in and by virtue of the full faith and credit clause of the Constitution of the United States. While the ruling of the court was, of course, primarily based upon the interpretation of the New York law, the ultimate ruling as to the inapplicability of the full faith and credit clause of the Constitution was expressly rested upon the decision of this court in *Lynde* v. *Lynde*, 181 U. S. 187.

To sustain her contention that the action of the court below was in conflict with the duty imposed upon it by the full faith and credit clause, the plaintiff in error, by her assignments, in effect challenges the correctness of all the propositions upon which the court below rested its action, and virtually the defendant in error takes issue in argument as to these contentions. In disposing of the controversy, however, we shall not follow the sequence of the various assignments of error or consider all the forms of statement in which the contentions of the parties are pressed in argument, but come at once to two fundamental questions which, being determined, will dispose of all the

issues in the case. Those inquiries are: 1st. Where a court of one State has decreed the future payment of alimony, and when an installment or installments of the alimony so decreed have become due and payable and are unpaid, is such a judgment as to accrued and past due alimony ordinarily embraced within the scope of the full faith and credit clause of the Constitution of the United States so as to impose the constitutional duty upon the court of another State to give effect to such judgment? 2d. If, as a general rule, the full faith and credit clause does apply to such judgments, is the particular judgment under review exceptionally taken out of that rule by virtue of the nature and character of the judgment as determined by the law of the State of New York, in and by virtue of which it was rendered? We shall separately consider the questions.

First. *The application as a general rule of the full faith and credit clause to judgments for alimony as to past due installments.*

An extended analysis of the principles involved in the solution of this proposition is not called for, since substantially the contentions of the parties are based upon their divergent conceptions of two prior decisions of this court, (*Barber* v. *Barber*, 21 How. 582, and *Lynde* v. *Lynde*, 181 U. S. 183, 187), and an analysis of those cases will therefore suffice. For the plaintiff in error it is insisted that the case of *Barber* v. *Barber* conclusively determines that past due installments of a judgment for future alimony rendered in one State are within the protection of the full faith and credit clause, while the defendant in error urges that the contrary is established by the ruling in *Lynde* v. *Lynde*, and that if the *Barber case* has the meaning attributed to it by the plaintiff in error, that case must be considered as having been overruled by *Lynde* v. *Lynde*.

Substantially the controversy in *Barber* v. *Barber* was

this: In the year 1847 the Court of Chancery of New York granted Huldah B. Barber a separation from Hiram Barber and directed the payment of alimony in quarterly installments. Although the separation was decreed to be forever, the power to modify was reserved by a provision that the parties might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged. It was provided that unpaid installments of alimony should bear interest, "and that execution might issue therefor *toties quoties*." The husband failed to pay any of the alimony, and removed to Wisconsin, where he procured an absolute divorce. Subsequently an action was brought by Mrs. Barber upon the common law side of the District Court of the United States in the Territory of Wisconsin to recover the arrears of alimony, but relief was denied "for the reason that the remedy for the recovery of alimony was in a court of chancery, and not at law." A suit in equity to recover the overdue alimony was then commenced by Mrs. Barber, Wisconsin having been admitted into the Union, in the District Court of the United States for the District of Wisconsin. Among other things it was urged in a demurrer by the respondent, as a reason why the relief should be denied, "that the relief sought could only be had in the court of chancery for the State of New York, and that it did not appear that the complainants had exhausted the remedy which they had in New York." The proceedings culminated in a decree in favor of the complainant for the amount of alimony in arrears at the commencement of the suit, and the case was then brought to this court and the questions arising were disposed of in a careful and elaborate opinion. The decree was affirmed. In the course of the opinion it was declared, among other things, that courts of equity possessed jurisdiction to interfere to prevent the decree of the court of another State from being defeated by fraud, and reference was made to English decisions

asserting the power of chancery to compel the payment of overdue alimony. Considering the nature and character of a decree of separation and for alimony and the operation and effect upon such a decree as to past due installments of the full faith and credit clause, it was said (p. 591):

"The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given."

And, again, determining the effect of a decree for future alimony, the court expressly declared (p. 9): "Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." And it is, we think, clear from the context of the opinion that the court held that the decree in favor of Mrs. Barber operated to cause an indebtedness to arise in her favor as each installment of alimony fell due and that a power to modify, if exerted, could only operate prospectively.

The facts in *Lynde* v. *Lynde* which are pertinent to this controversy are these: A decree of the Court of Chancery of New Jersey in favor of Mrs. Lynde was rendered in 1897 for the sum of $7,840 as alimony due at the date of the decree, with $1,000 for counsel fees, and payment was directed to be made of $80 weekly from the date of the decree. An action on this New Jersey decree was brought in May, 1898, in the Supreme Court of New York, and

recovery was allowed by the trial court for the alimony due at the date of the New Jersey decree, with interest, counsel fee and costs, and for an additional amount representing future alimony, which had accrued from the date of the decree to the commencement of the action in New York. The judgment also directed the payment of future alimony as fixed by the New Jersey decree, and awarded certain remedies for the enforcement of the decree in accordance with the relief which had been awarded in the New Jersey decree in conformity to the law of that State. The judgment thus rendered by the trial court in New York was ultimately modified by the Court of Appeals of New York by allowing the recovery only of the alimony which had been fixed in the New Jersey decree as due at its date with interest and the counsel fee, and disallowing recovery of the installments of future alimony which had accrued when the action was commenced in New York, as well as the allowance in respect to alimony thereafter to accrue. In this court three questions were presented: 1. Whether the decree of the New Jersey court was wanting in due process because of the absence of notice to the defendant; 2, whether the duty to enforce the decree for alimony was imposed upon the courts of New York by the full faith and credit clause of the Constitution; and, 3, upon the hypothesis that the full faith and credit clause was applicable, whether that clause required that the remedies afforded by the laws of New Jersey should be made available in the State of New York. Deciding that the New Jersey decree was not wanting in due process, the court came to consider the second and third questions, and held that in so far as the New Jersey decree related to alimony accrued at the time it was rendered and fixed by the decree and the counsel fee, it was entitled to be enforced in the courts of New York, but that in so far as it related to future alimony its enforcement was not commanded by the full faith and credit clause. No reference

was made to the case of *Barber* v. *Barber*, the opinion briefly disposing of the issue as follows (p. 187): "The decree for the payment of $8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum." These sentences were followed by a brief adverse disposition of the claim that there was a right to avail for the enforcement of the New Jersey decree in the courts of New York of the remedies peculiar to the New Jersey law.

When these two cases are considered together we think there is no inevitable and necessary conflict between them, and in any event if there be that *Lynde* v. *Lynde* must be restricted or qualified so as to cause it not to overrule the decision in the *Barber case*. In the first place, in the *Lynde case* no reference whatever was made to the prior decision, and it cannot be said that such decision was overlooked, because it was referred to in the opinion of the court below and was expressly cited and commented upon in the briefs of counsel submitted in the *Lynde case*. In the second place, in view of the elaborate and careful nature of the opinion in *Barber* v. *Barber*, of the long period of time which had intervened between that decision and the decision in *Lynde* v. *Lynde*, and the fact which is made manifest by decisions of the courts of last resort of the several States that the rule laid down in the *Barber case* had been accepted and acted upon by the courts of the States generally as a final and decisive exposition of the operation and scope of the full faith and credit clause as applied to the subject with which the case dealt, it is not to be conceived that it was intended by the brief statement in the opinion in *Lynde* v. *Lynde* to announce a new and radical departure from the settled rule of con-

stitutional construction which had prevailed for so long a time. And nothing in the mere language used in the *Lynde case* would justify such a conclusion, because the reasoning expressed in that case was based solely and exclusively on the ground that the portions of the decree for alimony which were held to be not within the purview of the full faith and credit clause were not so embraced, because their enforcement "was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, . . ." In other words, the ruling was expressly based upon the latitude of discretion which the courts of New Jersey were assumed to possess over a decree for the payment of future alimony. But it is said although this be true the decision in the *Lynde case* must be here controlling and treated as overruling the *Barber case*, since it will be found, upon examination of the New Jersey law which governed the New Jersey decree considered in the *Lynde case*, that such law conferred no greater discretion upon the New Jersey Court of Chancery as to the enforcement of past due installments of future alimony than will be found to be possessed by the New York courts as to the decree here in question. But this is aside from the issue for decision, since the question here is not whether the doctrine expounded in the *Lynde case* was there misapplied as a result of a misconception of the New Jersey law, but what was the doctrine which the case announced. And, answering that question, not only by the light of reason, but by the authoritative force of the ruling in the *Barber case*, which had prevailed for so many years, and by the reasoning expressed in the *Lynde case*, we think the conclusion is inevitable that the *Lynde case* cannot be held to have overruled the *Barber case*, and therefore that the two cases must be interpreted in harmony, one with the other, and that on so doing it results: First, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments

the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber case*, "alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." Second, That this general rule, however, does not obtain where by the law of the State in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due.

It follows, therefore, from the statement which we have made of the case that the New York judgment which was relied upon came within the general rule, and, therefore, that the action of the Supreme Court of Errors of Connecticut in refusing to enforce it was in conflict with the full faith and credit clause, unless it be as a result of the law of the State of New York the judgment for future alimony in that State, even as to past due installments, was so completely within the discretion of the courts of that State as to bring it within the exceptional rule embodied in the second proposition. A consideration of this subject brings us to an investigation of the second question, which we have previously stated.

Second. *The finality of the New York judgment as to past due installments for future alimony under the law of the State of New York.*

The conception of the statute law of the State of New York and of the decisions of the courts of that State inter-

preting that law which led the Supreme Court of Errors of Connecticut to conclude that the enforcement of the judgment before it was so completely subject to the discretion of the court which had rendered it as not to entitle it to enforcement in virtue of the full faith and credit clause, was thus stated in its opinion:

"The nature, operation and effect within the State of New York of orders like that in question directing payments *in futuro* to a wife by a husband living in judicial separation, and passed in 1899 pursuant to the then provisions of statute, have been well settled by the repeated decisions of the courts of that jurisdiction. They have been declared to be tentative provisions which remain at all times within the control of the court issuing them and subject to being at any time modified or annulled. *Tonjes* v. *Tonjes*, 14 App. Div. 542. The right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future. *Sibley* v. *Sibley*, 66 App. Div. 552; *Goodsell* v. *Goodsell*, 94 App. Div. 443; *Kiralfy* v. *Kiralfy*, 36 Misc. 407; *Wetmore* v. *Wetmore*, 34 Misc. 640. 'The amount awarded does not exist as a debt in favor of the wife against the husband in the sense of indebtedness as generally understood.' *Tonjes* v. *Tonjes*, 14 App. Div. 542. The order is not one 'which simply directs the payment of a sum of money,' and not such an one as can have enforcement by execution. *Weber* v. *Weber*, 93 App. Div. 149. The special remedies provided in §§ 1772 and 1773 for the enforcement of the orders are exclusive. *Weber* v. *Weber*, *supra; Branth* v. *Branth*, 20 Civ. Pro. 33. No judgment in another court can be entered upon them. *Branth* v. *Branth*, *supra.*"

But we are unable to assent to the view thus taken of the statute law of New York or to concede the correctness of the effect attributed by the court to the New York decisions which were referred to.

The provisions of the Code of Civil Procedure of New York pertinent to be considered in determining the scope and effect of judgments for separation and alimony rendered by the courts of New York are copied in the margin.[1]

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[1] Provisions of N. Y. Code of Civil Procedure in force in 1899:

SEC. 1762. For what causes action may be maintained.—In either of the cases specified in the next section, an action may be maintained by a husband or wife against the other party to the marriage, to procure a judgment, separating the parties from bed and board forever, or for a limited time for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.

2. Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the former to cohabit with the latter.

3. The abandonment of the plaintiff by the defendant.

4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

SEC. 1763. Id.; in what cases.—Such an action may be maintained in either of the following cases:

1. Where both parties are residents of the State when the action is commenced.

2. Where the parties were married within the State and the plaintiff is a resident thereof when the action is commenced.

3. Where the parties having been married without the State have become residents of the State, and have continued to be residents thereof at least one year, and the plaintiff is such a resident when the action is commenced.

SEC. 1766. Support, maintenance, etc., of wife and children.—Where the action is brought by the wife the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties, and the court may, in such an action, render a judgment compelling the defendant to make the provision specified in this section where, under the circumstances of the case, such a judgment is proper without rendering a judgment for separation.

SEC. 1767. Judgment for separation may be revoked.—Upon the

In considering the meaning of these provisions it must be borne in mind that the settled rule in New York is that the courts of that State have only the jurisdiction over the subject of divorce, separation and alimony conferred by statute, and that the authority to modify or amend a judgment awarding divorce and alimony must be found in the statute or it does not exist. *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456, 463; *Livingston* v. *Livingston*, 173 N. Y. 377.

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joint application of the parties, accompanied with satisfactory evidence of their reconciliation a judgment for a separation forever, or for a limited period, rendered as prescribed in this article, may be revoked at any time by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

SEC. 1769. Alimony, expenses of action, and costs; how awarded.—Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof from time to time make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or to defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court may, in the judgment, or by an order made at any time direct the costs to be paid out of any property sequestered or otherwise in the power of the court.

SEC. 1771. Custody and maintenance of children and support of plaintiff.—Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment or by one or more orders made from time to time before final judgment, such directions as justice requires between the parties for the custody, care, education and maintenance of any of the children of the marriage, and, where the action is brought by the wife, for the support of the plaintiff. The court may, by order upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions. But no such appli-

Other than the provision in § 1767, authorizing the revocation of a judgment for separation upon the joint application of the parties, the power of the court to vary or modify a judgment for alimony if it existed in 1899 was to be found in § 1771. It is certain that authority is

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cation shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice, as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

SEC. 1772. Support, maintenance, etc., of wife and children. Sequestration.—Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner and within such a time as it thinks proper, for the payment from time to time of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor, or to pay any sum of money which he is required to pay by an order, made as prescribed in § 1769 of this act, the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

SEC. 1773. Id.; when enforced by punishment for contempt.—Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its decretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in title third of chapter seventeenth of this act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

there given to the courts of New York to modify or vary a decree for alimony by the following:

"The court may, by order upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice, as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires such an application should be entertained."

But it is equally certain that nothing in this language expressly gives power to revoke or modify an installment of alimony which had accrued prior to the making of an application to vary or modify, and every reasonable implication must be resorted to against the existence of such power in the absence of clear language manifesting an intention to confer it. The implication, however, which arises from the failure to expressly confer authority to retroactively modify an allowance of alimony is fortified by the provisions which are expressed. Thus the methods of enforcing payment of the future alimony awarded provided by the statute, all contemplate the collection and paying over as a matter of right of the installments as they accrue as long as the judgment remains unmodified, or at least until application has been made or permission to make one in pursuance to the statute has been accorded. And the force of this suggestion is accentuated when it is considered that it was not unusual in New York to resort to executions as upon a judgment at law to enforce the collection of unpaid installments of alimony. *Wetmore* v. *Wetmore*, 149 N. Y. 520, 527. Indeed, as in principle, if it be that the power to vary or modify operates retroactively and may affect past due installments so as to relieve of the obligation to pay such installments,

it would follow in the nature of things that the power would exist to increase the amount allowed, it is additionally impossible to imply such authority in the absence of provisions plainly compelling to such conclusion. Beyond all this, when it is considered that no provision is found looking to the repayment by the wife of any installments which had been collected from the husband, in the event of a retroactive reduction of the allowance, it would seem that no power to retroactively modify was intended.

A brief consideration of the state of the law of New York concerning the power to modify allowances for alimony prior to the enactment of the provisions as to modification in question and the rulings of the court of last resort of New York on the subject of such power we think will serve to further establish the impossibility, in reason, of supposing that the statutory provisions in question conferred the broad and absolute power of retroaction as to past due installments of alimony which the court below assumed to exist. Prior to 1894 the courts of New York did not possess the power to modify a judgment in the case either of an absolute divorce or of a judicial separation, except in respect to the custody, etc., of the children of the marriage. *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456. In the year 1894 the statute was amended to permit the court to vary or modify the provision for the support of the wife upon her application alone, on notice to the husband. Chap. 728, Laws of 1894. Subsequently, § 1771, which, by the amendment of 1894, conferred power upon the application of the wife to vary or modify the allowance, was enlarged to read as it stood in 1899, when the action was brought in which the judgment in question was rendered, that is, so as to confer authority upon the court to vary or modify an allowance of alimony on the application of either party. Chap. 891, Laws of 1895.

But in view of the well-settled doctrine prevailing in

New York, that no power exists to modify a judgment for alimony absolute in terms, unless conferred by statute, and the practice of treating the right to collect accrued installments of alimony as vested and subject to be enforced by execution, and in view of the further fact that decrees for alimony in New York, where authority to modify was not expressly conferred by statute or was not reserved in the decree at the time of rendition, created vested rights not subject to either judicial or legislative control (*Livingston* v. *Livingston*, 173 N. Y. 377), we think it becomes quite clear that the mere enlargement of the power of the court so as to permit modification of the allowance for alimony upon the application of the husband did not confer the authority to change or set aside the rights of the wife in respect to installments which were overdue at the time application was made by the husband to modify the decree. And although we have been referred to and can find no decision of the court of last resort of New York dealing with the subject, the view we have taken as an original question of the code provision in question accords with that of the First Department of the Appellate Division of the Supreme Court of the State of New York, announced in a decision rendered in 1903. *Goodsell* v. *Goodsell*, 82 App. Div. 65. Nor do we find that the New York decisions relied upon by the lower court and cited by it to sustain its conclusion that "the right of modification or annullment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future," have even a tendency to that effect. The cases cited and relied on are *Sibley* v. *Sibley*, 66 App. Div. 552; *Goodsell* v. *Goodsell*, 94 App. Div. 443; *Kiralfy* v. *Kiralfy*, 36 Misc. 407, and *Wetmore* v. *Wetmore*, 34 Misc. 640.

The *Sibley case* was decided in 1901 by the Appellate Division of the Supreme Court of New York, First Department. The case was not concerned with a decree

for the payment of permanent alimony. It related to the failure, during the pendency of an action for separation, to comply with an order for the payment of temporary alimony and counsel fees. Whether such order was made *ex parte* or upon notice does not appear. Among other things the appeal presented the question of the propriety of the denial of a motion to modify the order directing the payment of alimony and counsel fees by reducing the amount directed to be paid. The order appealed from was affirmed, without prejudice, however, to the right of the appellant "to renew his application when he returns to this State and subjects himself to the jurisdiction of the court." No intimation is given in the opinion as to whether the power to reduce the amount of alimony and counsel fees could be exerted so as to have a retroactive effect. The decision in the *Goodsell case* was made in 1904 by the Appellate Division, First Department, and concerned a denial at special term of a motion to punish the defendant for contempt in not paying the difference between certain payments made as alimony by agreement between the parties and the amount ordered to be paid in the final judgment awarding an absolute divorce. The Appellate Court declined to consider the question of whether the defendant was in contempt until a report had been made by the referee who had been appointed to determine the financial ability of the defendant to pay. There was no intimation as to the extent of the power to modify an allowance of alimony. A year prior, however, in the same litigation (82 App. Div. 65) the same court, as we have already stated, decided that the provisions of the New York code giving power to modify an allowance of alimony could only have a prospective operation. It was said (p. 70):

"It may, we think, be given full force and effect by ascribing to the legislature the intention of authorizing the courts to vary or modify the allowance of alimony from

the time of the adjudication that such variation or modification is proper without making the same retroactive."

The *Kiralfy case* was a decision of the New York special term rendered in December, 1901. The matter acted upon was a motion to amend a final decree of divorce by reducing the amount of alimony to a sum not merely less than that awarded by the decree, but less than the sum which the defendant had been paying under agreement with the wife. The motion was granted, but it was clearly given a prospective operation only. *Wetmore* v. *Wetmore* was also decided in 1901 by the New York special term. What was held was merely that the court would not relieve the defendant, who had persistently evaded a decree of absolute divorce, in which there had been awarded future alimony for the support of the wife and children. There is no discussion as to the extent of the power to modify decrees of divorce in respect to alimony, and a modification of a decree as to the amount of alimony to be paid which is referred to in the course of the proceedings plainly had only a prospective operation.

Contenting ourselves in conclusion with saying that, as pointed out in *Lynde* v. *Lynde*, although mere modes of execution provided by the laws of a State in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another State in which the judgment is sought to be enforced, nevertheless if the judgment be an enforcible judgment in the State where rendered the duty to give effect to it in another State clearly results from the full faith and credit clause, although the modes of procedure to enforce the collection may not be the same in both States.

It follows that the judgment of the Supreme Court of Errors of Connecticut must be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

And it is so ordered.

RANKIN, RECEIVER OF THE BERLIN NATIONAL BANK, v. EMIGH.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 144. Argued April 15, 18, 1910.—Decided May 31, 1910.

On error to a state court of last resort in a case involving the liability of a national bank under a contract, the findings of fact of the state court are binding on this court, and only the Federal question as to the effect of the facts found can be passed on.

Although restitution of property obtained under a contract which is illegal because *ultra vires*, cannot be adjudged by force of the illegal contract, the courts will compel restitution of property of another obtained without authority of law; and, although the contract under which a national bank obtains money from an innocent third party may be *ultra vires* under Rev. Stat., §§ 5133–5136, the bank may be required to return the money so received to the party entitled thereto. *Citizens' Central National Bank* v. *Appleton, Receiver*, 216 U. S. 196.

In this case, even if the purchase and carrying on of a mercantile company by a national bank was illegal, the persons dealing with the mercantile company were entitled to receive the money paid into the bank for their account.

134 Wisconsin, 565, affirmed.

THE facts, which involve the liability of a national bank under a contract claimed by the receiver to be *ultra vires*, are stated in the opinion.

Mr. Rufus S. Simmons, with whom *Mr. Frank J. R. Mitchell* and *Mr. S. C. Irving* were on the brief, for plaintiffs in error.

Mr. J. C. Thompson, with whom *Mr. E. F. Kileen* was on the brief, for defendants in error.

[1] Original docket title Earling, Receiver, &c. *v.* Emigh.

MR. JUSTICE WHITE delivered the opinion of the court.

To reverse a judgment of the Supreme Court of Wisconsin (134 Wisconsin, 565), affirming a judgment of the Circuit Court of Green Lake County, this writ of error is prosecuted.

The Berlin National Bank, doing business in the city of Berlin, Green Lake County, Wisconsin, being insolvent, its doors were closed by the Comptroller of the Currency on November 17, 1904. P. R. Earling was subsequently appointed and qualified as receiver. On November 27, 1906, John Emigh and O. L. Atkins, as assignees of a large number of persons, commenced this action in the state court against the receiver and the bank. It was, in substance, averred that large quantities of milk had been furnished by the assignors of the plaintiffs to a creamery known as the Jenne Creamery Company, under agreements that all the milk supplied should be converted into butter, the butter sold, and the proceeds, less a sum agreed upon as a compensation for the services rendered, should be divided *pro rata* among those furnishing the milk. It was alleged that the creamery, during the period covered by the claim, was, in fact, owned by and had been operated by the bank, and that when the doors of the bank were closed there were outstanding unpaid checks for about $400, for collections made for account of those who had supplied milk between April and September, 1904, and that a large amount had been collected and not paid over for the proceeds of butter made from milk furnished during October and the first half of November, 1904. The prayer was that plaintiffs recover from the receiver such portion of the collections as had come into the hands of the receiver, and as to the proceeds which had been diverted by the bank, that plaintiffs be recognized as general creditors, entitled to participate *pro rata* in the

distribution of the assets of the bank. The defendants separately answered, and, except as to the allegations regarding the incorporation of the bank, its insolvency and the appointment of a receiver, took issue upon the averments of the complaint.

The cause was tried by the court. The facts, as found, are thus summarized:

For some time prior to October 1, 1902, the Jenne Creamery Company, a Wisconsin corporation, having its principal place of business in the city of Berlin, carried on the business of making butter and other dairy products with milk furnished by patrons in Green Lake and other counties. The corporation for these purposes, besides operating its plant at Berlin, leased various other creamery plants in the vicinity. At one time the business was carried on by a firm known as D. J. Jenne & Company, and after the organization of the Jenne Creamery Company the creamery business was solely carried on by that corporation, the members of the firm of Jenne & Company, however, owning all the stock of the creamery company. The milk which the company separated was furnished by numerous producers under agreements by which, for a stated compensation, the creamery company agreed to make all the milk it received into butter, to sell the same, collect the proceeds, and to divide them *pro rata* among the milk owners less the compensation agreed upon. The business did not prosper. On October 1, 1902, there were outstanding unpaid checks of the company, drawn on the Berlin bank in favor of milk producers, to the extent of about $8,000, there being no funds on hand to the credit of the creamery company in the bank available to pay the checks. On the same date one of the firm of D. J. Jenne & Company owed the bank $2,200, which was unsecured, and besides was indebted to other creditors for at least $2,600. The firm of D. J. Jenne & Company also owed the bank $5,000. Evidently in contemplation

of securing the payment of these various debts and to prevent the loss which would be occasioned by the bankruptcy of the creamery company, and upon the expectation that the situation might be relieved by carrying on the business under a new management, an arrangement was made between the Jennes and the Berlin bank. By this arrangement the entire stock of the creamery was assigned to Brown, the cashier of the bank, and two other officers of the bank, who, while thus becoming in form the owners of the stock, really held it for account of the bank. The property of the partnership of Jenne & Company and the property of the individual members of the firm was transferred to Brown. In order to bring about these transfers the bank agreed to pay the outstanding checks drawn against it by the creamery company in favor of milk producers. Under the arrangement the business continued to be carried on in the name of the Jenne Creamery Company, although from the facts which we have just stated it is apparent, as said by the Supreme Court of Wisconsin, "that the use of Brown's name was only formal, and that the continuance in form of the corporation was only for convenience of bookkeeping and dealing with the patrons." Brown acted as manager of the business apparently for the creamery company, signing and endorsing checks in the name of that corporation as such manager, etc.

The producers of milk were not parties to the transfer made by the Jennes to the bank. No formal notification to them was given of the fact that the bank in effect owned the stock of the corporation and was virtually carrying on the business, no new contracts were made with them in the name of the bank as the owner of the creamery, but, so far as they were concerned, the affairs of the creamery company were, in form, conducted as they had been previously carried on, the producers continuing without interruption to furnish their milk as they

had been in the habit of doing under the agreements previously made.

The operation of the business after the transfer was not profitable. The bank realized a few thousand dollars from the sale of the individual property of Jenne, but when the bank ceased to do business, in November, 1904, the account of the creamery company was apparently exhausted, and the bank had not recouped itself for the payments made of the $8,000 of checks outstanding in October, 1902. Besides, when the bank failed there was outstanding checks for $406.97, issued between April and October, 1904, and no settlement had been made with those who had supplied milk during the month of October and part of November, 1904, prior to the suspension of the bank. Referring to the proceeds of the butter made from the milk delivered by the patrons of the creamery during October and November, 1904, the trial court, as stated by the Supreme Court of Wisconsin, found "that bank drafts had been received into the bank for such butter. Such drafts ran to the Jenne Creamery Company, and were endorsed by Brown, the cashier, and mingled with other moneys of the bank. The total amount was $2,520.46. It was found by the court, upon careful analysis of the accounts, that at all times after the receipt of any of said drafts the bank had on hand an amount of money and cash items exceeding said total, and such an amount was turned over to the receiver upon his taking possession. It also traced a considerable share of said drafts into the hands of the bank's correspondents at other cities, by which they had been collected and credited to the bank, and in each case it was found that there remained a credit account with that correspondent larger than the amount of such drafts sent to and collected by it, which credit balance was turned over to the receiver after his appointment."

Upon the facts by it found the trial court adjudged that

$2,520.46 should be paid to the plaintiffs out of the funds in the hands of the receiver, and that as to the sum of the outstanding checks given for the proceeds of butter sold prior to October, 1904, the plaintiffs were entitled to participate *pro rata* with the other general creditors in the distribution of the assets of the bank. As already stated, the Supreme Court of Wisconsin affirmed the judgment.

The Federal question relied on is in substance that the Berlin bank, as a national bank, had no power to operate a creamery, and could not, therefore, lawfully incur liability on account of such operation, and hence the judgment of the state court is repugnant to the following sections of the Revised Statutes: 5133 and 5136, which prohibit a national banking association from doing other than a banking business; 5134 and 5190, which prohibit such an association from transacting the business of a bank in any other place than where its banking house is located and that specified in its organization certificate; 5145, which requires the affairs of such association to be managed by not less than five directors; and 5236 and 5242, which require ratable dividends and prohibit all transfers with a view to preference. It is true that there are other assignments of alleged error, but we put them at once out of view, as they in substance but assert that the court below erred in affirming the judgment of the trial court because certain of the facts found were not sustained by the evidence, contentions which are not open to our inquiry, as it is elementary that on error to a state court of last resort in a case of this character the findings of fact of the state court are binding on us.

The trial court found, as a fact, that after the transfer of the creamery property in October, 1902, some of the patrons were informed that the officers and directors of the bank were individually interested in the creamery, but that they were acting for the bank was not made

known, and it was also represented to such patrons that the creamery was in better condition than ever before, and such was generally believed by the patrons to be a true statement of the condition of affairs until after the failure of the defendant bank. The Supreme Court, however, evidently, did not consider these circumstances material. It held that whatever the form of the transaction, the Berlin bank acquired the creamery property from the Jenne Creamery Company in October, 1902, that it operated the same thereafter until the bank ceased doing business, that it "took the milk furnished by the patrons, made the same into butter and sold it and collected the proceeds;" and that by virtue of the agreements under which the milk was furnished the proceeds of the sale of butter "belonged to the patrons and was received by the bank for them and under a duty to pay it to them." It also decided that when the bank failed on demand to pay over the collections for the butter sold prior to October, 1904, represented by outstanding checks, an indebtedness to the owners of the money arose. From the facts as found by the trial court the Supreme Court concluded that the receiver had received, in actual money, or in credits with correspondents, the $2,520.46 belonging to the patrons collected for the butter made from the milk supplied in October and November, 1904, and that the receiver did not receive such sum as moneys of the bank upon any trust to distribute to the creditors of the bank, but held it as trustee for the owners. In declining to consider whether, as contended, it was beyond the power of the bank to engage in the creamery business, the court said:

"No authority has been cited, and we think none can be, to deny the power of a banking corporation, or any other corporation, to disgorge property of another which it had got into its possession by any means whatever under a duty to disgorge. It may have had no legal

power to take the steps by which the money of these plaintiffs' assignors came to its hands; but having taken such steps and obtained their money no such absurdity exists as a legal obstacle to its surrendering it. It would be a reproach to the law to hold any such doctrine of inequity. *Beloit* v. *Heineman*, 128 Wisconsin, 398, 401."

As we are bound by the findings of fact made below, and as the construction which the court gave to the contracts under which the milk was furnished is also binding, since such construction presents no question of a Federal nature, it follows that all the contentions relied upon to procure a reversal of the judgment must rest upon the assumption that, although the milk was received under contracts of bailment and the proceeds arising were the property of the milk producers, and were held by the bank for them, nevertheless the judgment was wrong, because the bank, under the national banking law, exceeded its powers when it virtually acquired the stock of the creamery and operated the same through its officers. But when the contentions thus come to be considered in their ultimate aspect their unsoundness is demonstrated by the decision rendered at this term in *Citizens' Central National Bank of New York* v. *Appleton, Receiver of the Cooper Exchange Bank*, 216 U. S. 196. We say this, even conceding, for the sake of the argument, the *ultra vires* nature of the transaction as contended for. Although it would suffice to refer to that case as decisive here, in view of the importance of the subject we briefly advert to the facts of the case to make apparent how absolutely conclusive the ruling there made is upon the contention here presented. One Samuel owed to the Central National Bank $10,000. Evidently the bank was not only unwilling to lend Samuel more money, but called upon him to pay off his existing indebtedness. Under these circumstances it was arranged that if Samuel could borrow $12,000 from the Cooper

Exchange Bank and would use $10,000 of the amount to pay his debt to the Central National Bank, that bank would guarantee the repayment of the loan if made by the Cooper Exchange Bank, thus giving Samuel some further accommodation, and at the same time placing the Central National Bank in funds to the extent of its outstanding loan to Samuel. The loan upon the guarantee was made. Upon the bankruptcy of Samuel and the failure to pay the loan made by the Cooper Exchange Bank, the latter bank sued the Central National Bank to recover under the guarantee. In the state courts, while ultimately the *ultra vires* nature of the guarantee was not denied, recovery was allowed to the extent of the $10,000, the amount actually received by the Central National Bank of the moneys of the Cooper Exchange Bank. This court, without in any respect questioning that the state court was correct in holding that the contract of guarantee was *ultra vires* of the National Bank Act, nevertheless affirmed the judgment below. Reviewing and commenting upon the rulings in *Logan County National Bank* v. *Townsend*, 139 U. S. 67; *Aldrich* v. *Chemical National Bank*, 176 U. S. 618; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, and *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, it was held although restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation. That this ruling is here applicable is plainly manifested by the fact which we have previously pointed out that the relief afforded by the court below simply gave to the producers so much of their property as was actually in the hands of the receiver, and awarded them a right to recover as

general creditors of the bank to the extent only that their property had been received and appropriated by the bank.

Affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* MELTON.

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

No. 180. Argued April 28, 29, 1910.—Decided May 31, 1910.

When a Federal question does exist the writ of error will not be dismissed as frivolous or as foreclosed by former decisions when analysis of those decisions is necessary, where there has been division of opinion in the court below, as in this case, and conflict of opinion in prior decisions as to the point involved.

This court is not concerned with the construction given by a state court to the statute of another State unless such construction offends a properly asserted Federal right.

Whether a state court failed to give the full faith and credit required by the Federal Constitution to a statute of another State because it did not construe it as construed by the courts of the latter State is not open in this court unless the question is properly asserted in the state court.

The reiterated assertion in the lower court of Federal right based solely on one provision of the Federal Constitution is basis for the inference that no other provision was relied upon.

A question under the Federal Constitution does not necessarily arise in every case in which the courts of one State are called upon to construe the statute of another State; the general rule in the absence of statutory provision, is that a settled construction of a statute relied upon to control the court of another State must be pleaded and proved, and, if not pleaded and proved, the court construing the statute is not deprived of its independent judgment in regard thereto.

In determining on writ of error a Federal question, this court cannot predicate error as to matters which should be, and are not, pleaded or proved.

The equal protection provision of the Fourteenth Amendment did not deprive the States of the power to classify, but only of the abuse of such power; nor is the clause offended against because some inequality may be occasioned by a classification in legislation properly enacted under the police power.

A classification in a state police statute proper as to a general class is not unconstitutional under the equal protection clause of the Fourteenth Amendment because it ignores inequalities as to some persons embraced within the general class.

The Employers' Liability Statute of Indiana of 1893 is not unconstitutional under the equal protection clause of the Fourteenth Amendment because it subjects railroad employés to a special rule as to the doctrine of fellow servant, *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348; *Pittsburg Ry. Co.* v. *Martin*, 212 U. S. 560; nor is it unconstitutional under that clause as to such employés of railroads, such as bridge carpenters, as are not subject to the hazards peculiarly resulting from the operation of a railroad.

The fact that since the decision of a state court under review construing a police statute of another State as including certain elements of a class, the highest court of the enacting State has construed the statute as excluding such elements does not necessarily enlarge the duty of this court in determining the validity of the decision under review.

127 Kentucky, 276, affirmed.

THE facts, which involve the constitutionality of the Employers' Liability Act of Indiana as applied to employés of railroads engaged in work other than the direct operation of the railroad, are stated in the opinion.

Mr. Benjamin D. Warfield, with whom *Mr. Henry Lane Stone* was on the brief, for plaintiff in error:

While a State may abolish the common-law doctrine of fellow-servants and assumed risks as to every employé in the State it cannot do so as to a class unless there is a reasonable basis for the classification. *Akeson* v. *Railroad Co.*, 106 Iowa, 54.

Defendant in error, although employed by the railroad company, was not engaged in an extra-hazardous employment—one peculiar to railroads—such as to justify the application of the statute as to him.

Tullis v. *L. E. & W. Ry. Co.*, 175 U. S. 348, upheld the constitutionality of the statute involved in this case as applied to the facts in that case, but the question involved in this case was not then raised. See *S. C.*, 105 Fed. Rep. 554, and so also in *M. P. Ry. Co.* v. *Mackey*, 127 U. S. 205, and *P., C., C. & St. L. Ry. Co.* v. *Montgomery*, 152 Indiana, 1.

Unless the Indiana statute is construed as embracing only those employés of railroad companies who are engaged in the hazardous branches of railroad service and thus making a reasonable classification it contravenes the Fourteenth Amendment, as aimed against one class of persons and leaving other persons subject to the more favorable rules of the common law. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150.

The defendant in error was not engaged in an extra-hazardous employment. He was not injured in the operation of a railroad. The carpenter's work he was doing for plaintiff in error was no more hazardous because his employer was a railroad company than it would have been if his employer had been an individual, or a corporation other than a railroad company. *Cotting* v. *Stockyards Co.*, 183 U. S. 79; quoting approvingly Cooley's Const. Lim., 5th ed., 484; *Connolly* v. *Sewer Pipe Co.*, 184 U. S. 540; *State* v. *Loomis*, 115 Missouri, 807; *Adair* v. *United States*, 208 U. S. 161.

The power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Lottery Case*, 188 U. S. 321, 353.

Unless the statute is limited by construction so as to

exclude defendant in error from its operation it is unconstitutional and void.

The term "employés" in the Iowa statute is limited to those engaged in operating the railroad. *Déppe* v. *Chi., R. I. & P. R. R. Co.*, 36 Iowa, 52, and see *Ind. Tr. & Ter. Co.* v. *Kinney*, 171 Indiana, 612; *Akeson* v. *C., B. & Q. Ry. Co.*, 106 Iowa, 54.

The employment at the time of the injury must have exposed the complainant to the hazards of railroading, without reference to what he may be required to do at other times. *Butler* v. *Railroad Co.*, 87 Iowa, 206; *Keatley* v. *Railroad Co.*, 94 Iowa, 685; *Canon* v. *Railway Co.*, 101 Iowa, 613. See also construction of similar Minnesota and Kansas laws. *Lavallee* v. *Railway Co.*, 40 Minnesota, 249; *Railroad Co.* v. *Pontius*, 52 Kansas, 264; *Johnson* v. *Railway Co.*, 43 Minnesota, 222.

One working on a railroad does not necessarily come under such a statute. *Potter* v. *Railway Co.*, 46 Iowa, 399; *Smith* v. *Railroad Co.*, 59 Iowa, 73; *Schroeder* v. *Railway Co.*, 41 Iowa, 344; *S. C.*, 47 Iowa, 375.

The party injured must be exposed to the hazards of railroading. *Pyne* v. *Railway Co.*, 54 Iowa, 223; *Foley* v. *Railway Co.*, 64 Iowa, 644; *Larson* v. *Railway Co.*, 91 Iowa, 81; *Railroad Co.* v. *Artery*, 137 U. S. 507; *Malone* v. *Railroad Co.*, 65 Iowa, 417; *Reddington* v. *Railroad Co.*, 108 Iowa, 96; *Dunn* v. *C., R. I. & P. Ry. Co.*, 130 Iowa, 580.

In Minnesota the corresponding statute has been construed as applying only to employés engaged in operation of railroads. *Lavallee* v. *Railroad Co.*, 40 Minnesota, 249, citing *McAunich* v. *Railroad Co.*, 20 Iowa, 338; *Johnson* v. *Railroad Co.*, 43 Minnesota, 222; *Martyn* v. *Railroad Co.*, 92 Minnesota, 302. On this point see also *Givens* v. *Southern Railway Co.*, 49 So. Rep. 180; *Ballard* v. *Miss. Cotton Oil Co.*, 81 Mississippi, 507.

The Indiana statute as construed by the highest court

of that State was only upheld as to railroads because the classification was proper and that would not be the case if it related to men employed in non-hazardous branches. See *So. Ind. Ry.* v. *Harrell*, 161 Indiana, 262; *I. & G. R. R. Co.* v. *Foreman*, 62 Indiana, 85; *Bedford Quarries Co.* v. *Bough*, 168 Indiana, 671, and cases cited.

The opinion in this case below was not unanimous, 127 Kentucky, 276, 292; two judges dissented on the ground that, as construed by the Kentucky court, the Indiana statute was unconstitutional.

The Kentucky court refused to give full faith and credit to the Indiana statute as construed by the courts of that State.

The full faith and credit clause was designed to give to the public acts, records and judicial proceedings of one State the same force in other States as they have in the State of their origin; no more, no less. The Court of Appeals of Kentucky was bound to accept the construction of the Employers' Liability Act of Indiana, which the Supreme Court of that State has placed upon that statute, and, having failed to do so, this court must enforce the duty which the State of Kentucky owed in the premises. Although where the case turns upon the construction by a state court of a statute of another State, and not upon the validity of such statute, a decision on that question is not necessarily of a Federal character; yet the question depends upon the particular facts of each case and the manner in which they are presented, how far such questions can be regarded as coming under the full faith and credit clause of the Constitution. *Finney* v. *Guy*, 189 U. S. 335, and *C. & O. Ry. Co.* v. *McCabe*, 213 U. S. 207.

In such statutory actions the law of the place governs in enforcing the right in another jurisdiction. See *A., T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55; *Am. Exp. Co.* v. *Mullins*, 212 U. S. 311.

Mr. James W. Clay, with whom *Mr. William L. Gordon*, *Mr. William J. Cox*, *Mr. Maurice K. Gordon* and *Mr. J. F. Clay* were on the brief, for defendant in error:

The Court of Appeals of Kentucky determined the case on the record. The plaintiff in error did not plead the construction or application of the Indiana statute by the courts of Indiana. It did not prove or attempt to prove such construction and application.

The Court of Appeals was therefore left to construe the Indiana statute pleaded as it would local laws, and it is settled that under such circumstances, no Federal question arises.

The construction and application of the Indiana statute by the courts of that State was a question of fact to be proved, and the finding of the Court of Appeals of Kentucky upon the record as it stands in this case, is binding upon the United States Supreme Court. *Eastern B. & L. Assn.* v. *Ebaugh*, 185 U. S. 114; *Chicago &c. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615; *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 223; *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491; *Banholzer* v. *Same*, 178 U. S. 402; *Allen* v. *Allegheny Co.*, 196 U. S. 458; *Eastern B. & L. Assn.* v. *Williamson*, 189 U. S. 122; *Finney* v. *Guy*, 189 U. S. 335; *Martin* v. *Pittsburg &c. R. Co.*, 203 U. S. 284; *Adams Express Co.* v. *Walker*, 119 Kentucky, 127; *Root* v. *Meriwether*, 8 Bush (Ky.), 400.

The Indiana Employers' Liability Statute as construed by the Kentucky Court of Appeals and applied to the facts of this case, is not in conflict with the equal protection clause of the Fourteenth Amendment. *Pittsburg &c. R. Co.* v. *Montgomery*, 152 Indiana, 1; *Tullis* v. *Lake Erie &c. R. Co.*, 175 U. S. 348; *Pittsburg &c. R. Co.* v. *Leightheiser*, 78 N. E. Rep. 1033; *Bedford Quarries Co.* v. *Bough*, 80 N. E. Rep. 529; *Pittsburg &c. R. Co.* v. *Ross*, 80 N. E. Rep. 845; *Same* v. *Same*, 212 U. S. 560.

For the general principles to be applied in testing con-

stitutionality of such statutes see *Barbier* v. *Connolly*, 113 U. S. 27; *Railroad Co.* v. *Mackey*, 127 U. S. 205; *Magoun* v. *Bank*, 170 U. S. 283; *Railroad Co.* v. *Ellis*, 165 U. S. 150.

The nature of employment was hazardous; the work was necessary to and connected with the operation of the railroad; legislative power and constitutional sanction is not measured by a comparison of danger. *Chicago &c. R. Co.* v. *Stahley*, 62 Fed. Rep. 363; *Chicago &c. R. Co.* v. *Pontius*, 157 U. S. 209; *Callahan* v. *St. L. &c. Ry. Co.*, 170 Missouri, 473; *St. Louis &c. R. Co.* v. *Callahan*, 194 U. S. 628.

The Kentucky Court of Appeals having found as a fact that the work at which defendant in error was engaged was no less perilous than the work of an operative on one of its trains, and that the work at which he was engaged was "essential to the operation of a railroad," its findings are conclusive and not subject to review by the Supreme Court of the United States. *Dower* v. *Richards*, 151 U. S. 658; *Hedrick* v. *Santa Fe &c. R. R. Co.*, 167 U. S. 673; *Keokuk &c. R. Co.* v. *Illinois*, 175 U. S. 626; *Gardner* v. *Bonestell*, 180 U. S. 362.

For state decisions applying the Employers' Liability statutes of Georgia, Texas and North Carolina, to employments similar to that shown in the case at bar, and holding them constitutional as applied, see *Railroad Co.* v. *Ivey*, 73 Georgia, 504; *Railroad Co.* v. *Miller*, 90 Georgia, 571; *Railroad Co.* v. *Hicks*, 22 S. E. Rep. 613; *Campbell* v. *Cook*, 86 Texas, 630; *Railroad Co.* v. *Mohrmann*, 93 S. W. Rep. 1090; *Sherman* v. *Railroad Co.*, 91 S. W. Rep. 561; *Railroad Co.* v. *Carlin*, 111 Fed. Rep. 777; *S. C.*, 189 U. S. 354; *Hancock* v. *Norfolk R. Co.*, 32 S. E. Rep. 679; *Rutherford* v. *Southern R. Co.*, 35 S. E. Rep. 136; *Mott* v. *Southern R. Co.*, 42 S. E. Rep. 601; *Sigman* v. *Southern R. Co.*, 47 S. E. Rep. 420; *Nicholson* v. *Tran. R. Co.*, 51 S. E. Rep. 40.

And for other decisions with reference to other statutes,

see *Pierce* v. *Van Dusen*, 72 Fed. Rep. 693; *Railroad Co.* v. *Mackey*, 127 U. S. 205; *Minn. Iron Co.* v. *Kline*, 199 U. S. 593; *Railroad Co.* v. *Humes*, 115 U. S. 512; *Railroad Co.* v. *Beckwith*, 129 U. S. 26; *Cargill Co.* v. *Minn. &c.*, 180 U. S. 452; *Railroad Co.* v. *Herrick*, 127 U. S. 210; *Railroad Co.* v. *Emmons*, 149 U. S. 364; *Kane* v. *Erie R. Co.*, 133 Fed. Rep. 681.

As to the Federal Employers' Liability Act see *El Paso &c. R. Co.* v. *Gutierrez*, 215 U. S. 87.

The statute as construed does not deprive plaintiff in error of its property without due process of law.

MR. JUSTICE WHITE delivered the opinion of the court.

For personal injuries Spencer Melton recovered a judgment against the plaintiff in error in the Circuit Court of Hopkins County, Kentucky. The Court of Appeals affirmed the judgment (127 Kentucky, 276), whereupon this writ of error was prosecuted.

Melton, a carpenter, was injured on March 21, 1905, while in the employ of the railway company. He was one of a construction crew, composed of a foreman and six men, who usually did what is described as bridge carpentering. On the date mentioned the crew was engaged, alongside the track of the railway company at Howell, Indiana, in constructing the foundation of a coal tipple at which the engines might coal. A bent or frame of timber, composed of heavy pieces fastened together, and intended to be used as part of the foundation of the tipple, which was lying flat upon the ground, was being raised for the purpose of placing it in the foundation. The lifting was accomplished by means of a block and tackle. A pulley was fastened by an iron chain to an upright piece of timber, and through the pulley a rope passed, which was attached at one end to the bent, so that on hauling on the rope at the other end the bent or frame

was slowly lifted up. Most of the men were engaged in hauling on the rope, while the foreman and Melton under his orders were standing beneath the bent and were engaged in placing props under the bent to prevent its lowering, when the strain upon the rope passing through the pulley was relaxed. While Melton was in this position a link of the chain which held the pulley at the top of the upright post broke, and the bent fell to the ground with Melton underneath, inflicting upon him serious and permanent injuries. The chain which broke was furnished by the foreman of the gang and had been put in position under his directions.

Melton was a resident of Hopkins County, Kentucky, and he there commenced this action. The right to recover was based upon the charge that the injury was occasioned through the furnishing by the corporation of unsafe tools to do the work of raising the bent. Besides generally controverting the cause of the injuries, as alleged, the answer of the company set up the defenses of contributory negligence and assumption of the risk. Thereafter Melton was allowed to file an amendment to his petition. By the amendment it was substantially alleged that he was injured without any fault on his part, and solely owing to a defect in the condition of the works or tools connected with or in use in the business of the defendant, and that such defect was the result of negligence on the part of the foreman, who was the person entrusted with the duty of keeping such tools or works in a proper condition, and the accident was also charged to have been caused by the negligent orders of the foreman, to whose directions Melton was bound to conform. The sufficiency of the facts alleged to entitle to recovery was expressly based upon the provisions of the first and second subsections of § 1 of an act of the legislature of Indiana of March 4, 1893, known as the Employers' Liability Statute, reading as follows:

"SEC. 1. Be it enacted by the General Assembly of the State of Indiana, That every railroad . . . operating in this State shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases:

"First. When such injury is suffered by reason of any defect in the condition of ways, works, plants, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such ways, works, plant, tools or machinery in proper condition.

"Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform."

The court, on the motion of the railway company, having required Melton to determine whether to rely upon the common law or the statute, he elected to base his right to recover on the statute. Thereupon the railway company answered the amended petition, and therein stated as follows:

"Defendant says that the said Indiana statute pleaded cannot and does not apply to the facts of this case, and plaintiff cannot rely thereon, and that under the law of Indiana, as to the character of work then in hand, the plaintiff was a fellow servant with the said foreman of the construction crew for whose negligence the defendant is not liable."

Before trial, permission being granted, the railway company by an additional amendment defended on the ground that the Indiana statute relied upon, if held applicable to the facts alleged, was repugnant to the constitution of Indiana and to the equal protection clause of the Fourteenth Amendment. The averments on this subject were

lengthy, and concluded as follows: "Defendant distinctly raises the Federal question that the said statute, in so far as made to apply to the facts in this case, is violative of said provision of the Constitution of the United States and void." The provision referred to, as shown by the context, was the equal protection clause of the Fourteenth Amendment.

On the trial counsel for the railway company offered as evidence of the common law of the State of Indiana on the subject of fellow-servants the opinions of the Supreme Court of Indiana in the following cases: *New Pittsburg Coal & Coke Co.* v. *Peterson*, filed October 31, 1893, 136 Indiana, 398; *Southern Indiana R. R. Co.* v. *Harrell*, filed October 9, 1903, 161 Indiana, 689; *Indianapolis & G. Rapids Transit Co.* v. *Foreman*, filed January 29, 1904, 162 Indiana, 85.

At the close of the evidence for plaintiff, and also upon the conclusion of all the evidence, the railway company unsuccessfully moved the court to peremptorily instruct the jury to find in its favor for the following reasons:

"1. There is no evidence of actionable negligence proven.

"2. The Indiana statute upon which this action is based does not apply to the facts proven.

"3. In so far as the terms of the Indiana statute apply to the facts proven, they are unconstitutional and void. They are discriminatory against defendant and deny it the equal protection of the law. They are violative of the constitution of Indiana and of section 1, article 14, of the Constitution of the United States, being section 1 of the Fourteenth Amendment thereto.

"4. The said Indiana statutes were not intended to be enforced out of the State of Indiana, and are against the policy of the State of Kentucky and not enforcible in a Kentucky forum."

The railway company in its request for instructions, which were refused, and to which refusals it excepted,

substantially asked that the general principles of the common law of Indiana as to fellow-servant and assumption of the risk, as exemplified by the Indiana decisions which it had offered in evidence, be applied to the case. The court, on the contrary, in the instructions which it gave substantially applied the provisions of the Indiana statute, as by it construed. In the motion for a new trial fifteen reasons were stated, those which made reference to the statute or to the Constitution of the United States being the following:

"14. The court erred in applying the Indiana statute to the facts of this case. The court erred in enforcing the Indiana statute in a Kentucky forum.

"15. The court erred in upholding and applying the Indiana statute pleaded in this case, when same in so far as applicable to the facts proven in this case is unconstitutional and void. It is discriminatory against defendant, and denies it the equal protection of the law. It is violative of the constitution of the State of Indiana and of section 1 of article 14 of the Constitution of the United States, which guarantees to defendant the equal protection of the law."

The court below held that the Supreme Court of Indiana had construed the statute as applicable both to persons and corporations operating railroads. It further held that the statute embraced the case in hand because Melton came within the category of persons injured in the operation of a railroad, as "the construction of a coal tipple is . . . essential to the operation of a railroad." As thus construed the repugnancy of the statute to the equal protection clause of the Constitution of the United States was considered. It was decided that for the purpose of abrogating or modifying the common law doctrine of fellow-servant it was competent for the law-making power of a State, without offending against the equal protection clause, to classify railroad employés because of

the hazard attached to their vocation, and that a statute doing this need not be confined to employés who were engaged in and about the mere movement of trains, but could also validly include other employés doing work essential to be done to enable the carrying on of railroad operations. Thus, referring to the alleged distinction between railroad operatives engaged in train movement and those who were not, the court said:

"We are unable to see the force of this distinction. A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operation of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad. As has been well said, the legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail, and an act regulating railroads violates no constitutional provision because it is made to apply only to railroads. *Indianapolis &c. R. R. Co.* v. *Kane*, 80 N. E. Rep. 841; *Schoolcrafts, Adm.*, v. *L. & N. R. R. Co.*, 92 Kentucky, 233; *Chicago &c. R. R. Co.* v. *Stahley*, 62 Fed. Rep. 363; *Callahan* v. *R. R. Co.*, 170 Missouri, 473, 194 U. S. 628; *R. R. Co.* v. *Ivy*, 73 Georgia, 504."

The railway company asked a rehearing for the sole purpose of a reconsideration of what was referred to as the very important Federal question involved, viz., "the unconstitutionality of the Indiana statute, as applied to the facts of this case." The court permitted the question whether a rehearing should be granted to be orally argued, and, after such argument, in a brief opinion denied the request. Two members of the court, however, dissented, on the ground that the statute as construed was repugnant to the equal protection clause of the Fourteenth

Amendment. This writ of error was then prosecuted, and the only reference to the Constitution of the United States made in the assignment of error filed with the application for the writ was that embraced in the contention that the Indiana statute could not be constitutionally applied to the facts without causing the statute to be repugnant to the Fourteenth Amendment.

We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations, *a*, because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; *b*, because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the Fourteenth Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and, *c*, because while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power consistently with the equal protection of the law clause to classify railroad employés actually engaged in the hazardous work of moving trains,

such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review as construed below is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject.

Coming to the merits, we at once premise that we are not concerned with the construction affixed by the court below to the Indiana statute, unless it be that that construction offends against some Federal right properly asserted and open to our consideration. In the argument at bar on behalf of the railway company two rights of this character are insisted upon. First, it is said that the court below, in applying the statute, has caused it to embrace a class of employés which the statute did not include, and thereby gave it a wrongful construction, in violation of the full faith and credit clause of the Constitution of the United States. Second, that in any event the statute as construed is repugnant to the equal protection clause of the Fourteenth Amendment. We separately dispose of these propositions.

The full faith and credit clause. The contentions as to this proposition rest upon the assumption that it has been conclusively settled by the Supreme Court of Indiana that the statute only changed the general rule prevailing in that State in respect to the doctrine of fellow-servant as to railroad employés actually engaged in the hazard of train service, and therefore did not include an employé engaged in the character of work which Melton was performing when injured, and that to give the statute a contrary meaning was to violate the full faith and credit clause. If, however, the premise upon which the proposition rests, and the legal deduction based upon that premise be for the sake of the argument conceded, the contention is, nevertheless, without merit, because of the

failure of the railway company to plead or in any adequate way call the attention of the court below to the fact that, in connection with the proper construction of the statute, the benefit of the due faith and credit clause of the Constitution of the United States was relied on. We say this because the statement which we have previously made of the case fails to show from first to last, even up to and including the application for rehearing, the assertion of any claim to the protection of the full faith and credit clause. Indeed, that statement not only shows a failure to make such claim, but discloses such direct and express action on the part of the railway company as justly to give rise to the inference that a reliance upon any claim of Federal right resulting from the full faith and credit clause was not thought to be involved in the case. We say this, because the frequent and reiterated assertions of Federal right, based solely upon the equal protection clause of the Fourteenth Amendment, sustains such conclusion.

Further, even if, for the sake of the argument only, the failure to plead the full faith and credit clause, or to direct the attention of the court below to the fact that reliance was placed upon that clause, could be supplied upon the theory that as the cause of action was based upon an Indiana statute, by implication the due faith and credit clause was necessarily involved, nevertheless the contention would be without merit. This follows because, as pointed out in *Finney* v. *Guy*, 189 U. S. 335, 340, and *Allen* v. *Allegheny County*, 196 U. S. 458, 463, it is not true to say that necessarily in every case where the court of one State is called upon to determine the proper construction of a statute of another State, a question under the Constitution of the United States arises. Although the Indiana statute was at issue and its meaning was necessarily involved, the duty of construing it rested upon the court below. The general rule is that in the absence

of a statute to the contrary if a settled construction by the court of last resort of a State enacting a statute is relied upon to control the judgment of the court of another State in interpreting the statute, such settled construction must be pleaded and proved. *Eastern Bldg. & Loan Assn.* v. *Ebaugh*, 185 U. S. 114, and cases cited. As, however, it is not asserted that there was a statute of Kentucky controlling the courts of that State in construing the statutes of other States, and as there was no pleading or proof as to the existence of any such settled construction, it follows that there is nothing presented, which can be held to have deprived the court below of its power to exercise its independent judgment in interpreting the statute. Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved, and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal. *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491, 495.

The equal protection of the law clause. That the Fourteenth Amendment was not intended to and does not strip the States of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide

scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employés to a different rule as to the doctrine of fellow-servant from that which prevails as to other employments in that State. *Tullis* v. *Lake Erie & W. R. R. Co.*, 175 U. S. 348; *Pittsburg &c. Ry. Co.* v. *Ross*, 212 U. S. 560. But while conceding this the argument is that classification of railroad employés for the purpose of the doctrine of fellow-servant can only consistently with equality and uniformity embrace such employés when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from co-employés not subject to like hazards or employés engaged in other occupations. The argument is thus stated: "Plaintiff in error does not question the right of the legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employés incident to railroad hazards, but it does insist that to make this a constitutional exercise of legislative power the liability of the railroads must be made to depend upon the character of the employment and not upon the character of the employer." Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employés is justified, yet as in operating railroads some employés are subject to risks peculiar to such operation and others to risks which,

however serious they may be, are not in the proper sense risks arising from the fact that the employés are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employés collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this, that by the operation of the equal protection clause of the Fourteenth Amendment the States are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the States contrary to the doctrine maintained by this court without deviation. This follows since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases

dealing with the power of a State to classify will make the error of the contention apparent.

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 294, 296, while declaring that the power of a State to distinguish, select and classify objects of legislation was of course not without limitation, it was said, "necessarily this power must have a wide range of discretion." After referring to various decisions of this court, it was observed:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Again considering the subject in *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, it was reiterated that the legislature of a State has necessarily a wide range of discretion in distinguishing, selecting and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical and not palpably arbitrary.

In *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593, a statute of Minnesota, providing that the liability of railroad companies for damages to employés should not be diminished by reason of accident occurring through the negligence of fellow-servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employés engaged in construction of new and unopened railroads. In the course of the opinion the court said (p. 598): "The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the Fourteenth Amendment." These principles were again applied in *Martin* v. *Pittsburg &c. R. R. Co.*, 203 U. S. 284, and the doctrines were also fully

considered and reiterated at this term in *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114.

And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in States other than Indiana, we think when rightly analyzed it will appear that they are decisive against the contention now made. It is true that in the *Tullis case*, which came here on certificate, the nature and character of the work of the railroad employé who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employés engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification if not so restricted would be repugnant to the equal protection clause of the Fourteenth Amendment, will be made clear by observing that the previous case of *Chicago &c. R. Co.* v. *Pontius*, 157 U. S. 209, was cited approvingly, in which, under a statute of Kansas classifying railroad employés, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the *Pontius case* there was approvingly cited a decision of the Court of Appeals of the Eighth Circuit (*Chicago, R. I. & P. R. Co.* v. *Stahley*, 62 Fed. Rep. 362), wherein it was held that under the same statute an employé injured in a round-house while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in *St. Louis Merchants' Bridge Terminal Ry. Co.* v. *Callahan*, 194 U. S. 628, where, upon the authority of the *Tullis case*, the court affirmed a judgment of the Supreme Court of Missouri, which held that recovery might be had by a section hand upon a railroad who, while engaged in warning passersby in a street be-

neath an overhead bridge, was struck by a tie thrown from the structure.

While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employés sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because since the judgment below was rendered the court of last resort in Indiana (*Indianapolis &c. Co.* v. *Kinney*, 171 Indiana, 612, and *Cleveland, C. C. & St. L. Ry. Co.* v. *Foland*, decided April 20, 1910, and not yet reported) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state constitution and the Fourteenth Amendment, unequivocally held that the statute must be construed as restricted to employés engaged in train service.

Affirmed.

SHEVLIN-CARPENTER COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 139. Argued April 6, 1910.—Decided May 31, 1910.

Where the purpose of a state statute does not depend upon the inseparableness of its punishments the fact that a statute provides both double damages and fine and imprisonment does not necessarily prevent a construction that the provisions are independent.

There must be a first jeopardy before there can be a second and on the first the defense of second jeopardy cannot be raised in anticipation of deprivation of the constitutional immunity on a subsequent trial.

Quære, whether a state statute which inflicts two punishments in separate proceedings for the same act is unconstitutional under the Fourteenth Amendment.

The mere fact that a state police statute punishes an offense actually committed without regard to intent does not render the statute unconstitutional under the due process clause of the Fourteenth Amendment.

The Constitution declares the principle upon which the public welfare is to be promoted and opposing ones cannot be substituted. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558.

A State does not offend the equality clause of the Fourteenth Amendment by taking as a basis of classification the ways by which a law may be defeated. *St. John* v. *New York*, 201 U. S. 633.

Innocence cannot be asserted as to an action which violates existing law, and ignorance of law will not excuse.

Courts cannot set aside legislation simply because it is harsh.

The statute of Minnesota punishing the cutting and removal of timber on state lands and imposing double or triple damages and fine and imprisonment for violation, whether the offense be wilful or not, is not unconstitutional under the due process clause of the Fourteenth Amendment either as putting one violating it in second jeopardy or because inflicting the penalties upon him regardless of his intent.

102 Minnesota, 470, affirmed.

THE facts, which involve the constitutionality of a statute of Minnesota regulating cutting timber on the public lands of the State and fixing penalties therefor, are stated in the opinion.

Mr. Frank B. Kellogg, with whom *Mr. N. H. Clapp*, *Mr. R. J. Powell* and *Mr. George W. Morgan* were on the brief, for plaintiff in error:

Section 7 of chap. 163 must be considered in its entirety, if any provision is unconstitutional, the whole falling. The legislature would not have passed the statute without the clause making a trespass a felony, or the clause allowing double damages in case of a casual or involuntary trespass.

Where an invalid provision in a statute was the inducement to the act, or where the provisions of the act are so

intimately connected with each other as to warrant the belief that the legislature intended them as a whole, then the whole statute must fall. *Pollock* v. *Farmers' L. & T. Co.*, 158 U. S. 601, 635; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *Huber* v. *Martin*, 127 Wisconsin, 412; *Meyer* v. *Berlandi*, 39 Minnesota, 438; *Commonwealth* v. *Harra* (Mass.), 11 L. R. A., N. S., 799; *O. R. & N. Co.* v. *Smalley*, 23 Pac. Rep. 1008; *Texas & Pacific R. Co.* v. *Mahaffey*, 84 S. W. Rep. 646; Sutherland on Stat. Const., §§ 173–178. The Supreme Court of Minnesota treated the provisions of § 7 as inseparable, and considered the section as a whole, and this court is concluded by that construction of the statute. *Gatewood* v. *North Carolina*, 203 U. S. 531; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Smiley* v. *Kansas*, 196 U. S. 447.

In determining whether or not an action is civil or criminal in its nature the form of action is immaterial. The test is whether it is to punish a public offense or to redress a private injury. *United States* v. *McKee*, 4 Dill. 128; *S.C.*, Fed. Cas. No. 15, 688; *Coffey* v. *United States*, 116 U. S. 436; *Boyd* v. *United States*, 116 U. S. 616; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265; *Huntington* v. *Attril*, 146 U. S. 657; *Lees* v. *United States*, 150 U. S. 476; *United States* v. *One Distillery*, 43 Fed. Rep. 846, 852; *United States* v. *Shapleigh*, 54 Fed. Rep. 126; *A., T. & S. F. Railway* v. *United States*, 172 Fed. Rep. 194.

The double damages imposed by § 7 upon the trespasser are a punishment for an alleged public offense, and the provision is penal in its nature. *Mo. Pac. Ry.* v. *Humes*, 115 U. S. 512; *Fay* v. *Parker*, 53 N. H. 342, and see *State* v. *Buckman*, 95 Minnesota, 272.

This is a penal action, and is unconstitutional as to plaintiffs in error because they are also subject to a punishment for the same acts under the provisions of the statute imposing a fine or imprisonment, thereby being subject to be put twice in jeopardy for the same offense.

The plaintiffs in error may properly raise this objection.

In the following cases the defendant had not yet been proceeded against criminally, yet the court refused to allow the imposition of punitive damages: *Fay* v. *Parker*, 53 N. H. 342, 390; *Austin* v. *Wilson*, 4 Cush. 273; *Taber* v. *Hutson*, 5 Indiana, 322, 325; *Koerner* v. *Oberly*, 56 Indiana, 284, 287; *Shafer* v. *Smith*, 63 Indiana, 226, 228.

A statute which places persons twice in jeopardy for the same offense does not satisfy the requirements of due process of law and further deprives them of a privilege and immunity guaranteed under the Federal Constitution. *Ex parte Lang*, 18 Wall. 163; *Ex parte Ulrich*, 42 Fed. Rep. 587; *Moore* v. *People*, 14 How. 13.

Although the denial by the States of several of the rights secured by the first ten amendments has been held not to be a denial of due process of law the question whether the placing of a person twice in jeopardy for the same offense is a deprivation of a privilege and immunity under the Constitution has never been decided. Plaintiff in error maintains that it is such a deprivation. See cases cited *supra*.

Where for the same offense a person is subject to two punishments which may be inflicted in different proceedings he is put twice in jeopardy, and it is immaterial that one of the proceedings is civil in form. *Coffey* v. *United States*, 116 U. S. 436; *United States* v. *McKee*, Fed. Cas. No. 15,688; *United States* v. *Gates*, Fed. Cas. No. 15,191; *United States* v. *One Distillery*, 43 Fed. Rep. 846; *United States* v. *Shapleigh*, 54 Fed. Rep. 133.

Both the provision of § 7 making the casual and involuntary trespasser liable to the State in double damages, and that declaring his act a felony, violate the provision of the Fourteenth Amendment that no person shall be deprived of liberty or property without due process of law.

The effect of the statute is to eliminate altogether the question of intent and this is a denial of due process of law. *Calder* v. *Bull*, 3 Dall. 386; *Coffey* v. *Harlan County*, 204 U. S. 659.

That there are implied limitations upon the power of the legislature growing out of the essential nature of our Government—which are now embraced in the provisions of the Fourteenth Amendment—is declared by many courts. See *Bardwell* v. *Collins*, 44 Minnesota, 97; *State* v. *Billings*, 55 Minnesota, 467; *State* v. *Foley*, 30 Minnesota, 350; *Minnesota Sugar Co.* v. *Iverson*, 91 Minnesota, 30; *Wilkinson* v. *Leland*, 2 Pet. 627; *Regent* v. *Williams*, 9 Gill. & J. 365; *Powers* v. *Bergen*, 6 N. Y. 358; *Goshen* v. *Stonington*, 4 Connecticut, 209; *Young* v. *McKensie*, 3 Kelly (Ga.), 31; *Ex parte Martin*, 13 Arkansas, 198; *Henry* v. *Railway Co.*, 10 Iowa, 540, 543.

These provisions cannot be justified nor saved from the operation of the Fourteenth Amendment as a proper exercise of the police power of the State.

The object of the statute was not a proper one for the exercise of the police power. *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Colon* v. *Lisk*, 153 N. Y. 188; *Minn. Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Gulf, C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150.

Assuming that the object of the statute was one which might properly be effectuated by an exercise of the police power, nevertheless this statute cannot be upheld as a reasonable or appropriate exercise of the power. *Mugler* v. *Kansas*, 123 U. S. 623, 669; *Welch* v. *Swazey*, 214 U. S. 91; *Denver & R. G. R. Co.* v. *Outcalt*, 31 Pac. Rep. 177; *Cottrel* v. *Un. Pac. Ry. Co.*, 21 Pac. Rep. 416.

Mr. George T. Simpson, Attorney-General of the State of Minnesota, with whom *Mr. Charles S. Jelley* and *Mr. Lyndon A. Smith* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the consideration of the validity under the Constitution of the United States of the imposition of double damages under an act of the State of Minnesota for a "casual and involuntary trespass," made by cutting or assisting to cut timber upon the lands of the State. The act is set out in the margin.[1]

The action was brought to recover the sum of $51,324.42 for timber cut by plaintiffs in error from certain lands of

[1] SEC. 7. If any person, firm or corporation, without a valid and existing permit therefor, cuts or employs, or induces any other person, firm or corporation to cut, or assist in cutting any timber of whatsoever description, on State lands, or removes or carries away, or employs, or induces, or assists any other person, firm or corporation to remove or carry away any such timber or other property, he shall be liable to the State in treble damages, if such trespass is adjudged to have been wilful; but double damages only in case the trespass is adjudged to have been casual and involuntary, and shall have no right whatsoever to any remuneration or allowance for labor or expenses incurred in removing such other property, cutting such timber, preparing the same for market, or transporting the same to or towards market.

Whoever cuts or removes, or employs or induces any other person, firm or corporation to cut or remove any timber or other property from State lands, contrary to the provisions of this act, or without conforming in each and every respect thereto, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding one thousand (1,000) dollars, or by imprisonment in the State prison not exceeding two (2) years, or by both, in case the trespass is adjudged to have been wilful.

Whenever any timber so cut is intermingled with any other timber, or whenever other property taken from State lands is intermingled with other property, the State may seize and sell the whole quantity so intermingled, pursuant to the provisions of section forty (40) of this act, and such other timber or property shall be presumed to have been also cut from State lands.

Provided the intermingling of timber above referred to shall only apply to cases having been adjudged as wilful trespass.

the State "without a valid and existing permit." The question in the case revolves around this permit and the extensions of it alleged by plaintiffs in error to have been given.

The findings of the court show the following facts: The State sold at public auction, in accordance with the statute, the timber on the lands to John F. Irwin, one of the plaintiffs in error, acting for himself and as agent of the Shevlin-Carpenter Company, and a permit was issued by the auditor and land commissioners of the State, which contained the following clause: "That no extension of time of this permit shall be granted except as provided in section 24, chapter 163, General Laws, 1895." The section provides that no permit shall be issued to cover more than two seasons, and no permit shall be extended except by unanimous consent of the board of timber commissioners, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons. Irwin gave bond as required by law. On the seventh of May, 1902, the permit was extended until the first of June, 1903. At the time the permit was extended the sum of $1,307, as required by law, was paid by plaintiffs in error into the treasury of the State, that sum being twenty-five per cent of the appraised value of the timber. In the winter of the years 1903–1904 plaintiffs in error, knowing that there had been one extension of the permit, and that that extension had expired, entered upon the land and cut and removed therefrom 2,444,020 feet of timber, which it was agreed was worth six dollars per thousand feet, board measure. After the timber was cut the surveyor general of the lumber district scaled and returned the amount of the same to the auditor of the State, which officer erroneously computed the amount due from plaintiffs in error at the contract price of stumpage value thereof, as if the permit were still in force, finding the same to be $18,574.39.

This amount was paid to the State and no part of it has been returned.

From these facts the court deduced the conclusion that the permit expired on the first of June, 1902, and that the extension thereof expired on the first of June, 1903, and that after the latter date it was of no effect and absolutely void, and was known to be so to plaintiffs in error when they cut the timber in controversy, and that their entry upon the lands was in violation of the law. They were adjudged wilful violators of the law and damages were assessed against them at treble the value of the timber, to wit, $43,992.36. The court, however, decided that a deduction should be made from that sum of $16,997, money paid by plaintiffs in error to the State after the permit had expired. There were other sums of money, with the disposition of which we are not concerned. Judgment was entered against plaintiffs in error for the sum of $26,995.17. The Supreme Court affirmed the conclusion of the trial court, that the permit had expired, and that the cutting and removing of the timber were illegal, but disagreed with that court as to the character of the trespass. The Supreme Court said: "The finding of the trial court that appellant was guilty of wilful trespass is not sustained by the evidence. On the contrary, the record conclusively shows that appellant had reasonable ground for believing authority had been granted and honestly acted on such belief." The court hence decided that the judgment should only have been for double, not treble, damages, saying, "being of opinion that in this action the State is limited to a recovery of double damages and the timber cut having been paid for, the judgment is necessarily to the value found." The case was remanded with directions to reduce the judgment to $14,664.12. In all other respects it was affirmed.

On the question of the validity of the law under the Fourteenth Amendment of the Constitution of the United

States the court said: "On a former appeal upon demurrer to the complaint, *State* v. *Shevlin-Carpenter Company*, 99 Minnesota, 158, the constitutional questions were raised, and it was there held that the act was constitutional, and that in case of trespass the State might recover either double the value of the property taken or treble the value, according to whether the facts constituted a casual or involuntary, or a wilful or unlawful trespass. We adhere to that decision, and for the reasons set forth in the opinion then filed."

This statement of the facts and the rulings of the courts of Minnesota exhibit the controversy, the State contending that the penalties of the statute are incurred by a casual or involuntary trespass; the plaintiffs in error insisting that to attach that consequence to acts done in good faith violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Another contention is made by plaintiff in error. The statute makes one who cuts or removes timber contrary to the provisions of the act, or "without conforming in each and every respect thereto," guilty of a felony, and prescribes a fine or imprisonment, or both, in case the trespass is adjudged to have been wilful. To avail themselves of an objection to these provisions plaintiffs in error insist that they are not separable from the provision for double and treble damages and the statute becomes therefore unconstitutional, for under it the plaintiffs in error are subject to be put twice in jeopardy for the same offense.

The argument made to sustain the contention that the act must be considered single and that to treat its provisions as separable would destroy its integrity and defeat the purpose of the legislature, is somewhat elaborate. Its basic elements are that the statute is penal and its provisions for damages and for fine and imprisonment are punishments for the same act of wrongdoing, designed as

such and intended to be inseparable, and that the statute therefore subjects an offender to a double jeopardy. And this though the two punishments "may be inflicted in different proceedings," it being contended that "it is immaterial that one of the proceedings is civil in form." This being the consequence of the statute, it is insisted that it "does not satisfy the requirements of due process of law," and deprives plaintiffs in error "of a privilege and immunity guaranteed under the Federal Constitution."

The argument may be answered by denying its assumptions. The purpose of the act does not depend upon the inseparableness of its punishment. Its purpose, of course, was to protect the timber lands of the State, and some sanctions of the purpose there necessarily had to be. Double or treble damages and criminal punishment were selected, but they have no such dependence on each other, nor such relation to the purpose of the act as to demonstrate that both forms were necessary to it, or that one would not have been selected if the other could not have been. But, it is contended, this conclusion is not open to this court to make, for the "sufficient and compelling reason" that the Supreme Court of the State has decided to the contrary. To sustain this conclusion plaintiffs in error quote certain contentions of the Attorney-General of the State, made in the Supreme Court, and the reply of the court to the contentions. They do not support the conclusion deduced from them. It was urged by the Attorney-General that only wilful trespassers were subject to fine and imprisonment, but if such punishment could be held applicable to "casual and involuntary" trespassers, and the act be decided unconstitutional as to that class, nevertheless it could be adjudged constitutional as to wilful trespassers. The court replied that the provision for fines and imprisonment was applicable to both classes of trespassers. As to the punishments, the

court intimated that they were independent. Replying to the contention that to sustain this action would subject plaintiffs in error to the jeopardy of a second punishment, the court said that plaintiffs in error were "probably a little premature in raising the point." And further said, "it might come with some force if presented in a criminal prosecution after recovery in a civil action." In this we concur. In other words, plaintiffs in error cannot base a defense upon an anticipation of what may never occur. To permit this would discharge them from all liability, for the defense, if good at all, would be good against whatever action might be brought. Necessarily there must be a first jeopardy before there can be a second, and only when a second is sought is the constitutional immunity from double punishment threatened to be taken away. An occasion for the defense of double jeopardy may occur if the State of Minnesota should proceed criminally against plaintiffs in error. We do not mean to say, however, that it will be justified. We do not mean to say that the state law subjects an offender against is provisions to a double jeopardy. Nor do we mean to imply that even if it have such effect the Fourteenth Amendment of the Constitution of the United States may be invoked against it. Of that question we reserve opinion.

The next contention of plaintiffs in error is that "both the provisions of section 7 make a casual and involuntary trespasser liable to the State in double damages, and that declaring his act a felony violates the Fourteenth Amendment," because those provisions "eliminate altogether the question of intent," and that the "elimination of intent as an element of an offense is contrary to the requirements of due process of law." To support the contention plaintiffs in error attack the power of a legislature to make an innocent act a crime, and say that the "principle that the legislature cannot, by its mere fiat, make an act otherwise innocent a crime, and punishable as such, is one to

which this court will give effect, even though it be not expressly enunciated by the Constitution." The principle as thus expressed is very general, and takes no account of whether a law have prospective or retrospective operation. It would seem, therefore, to destroy the well-recognized distinction between *mala in se* and *mala prohibita*. The principle contended for is probably not intended to be taken so broadly, and its generality is further limited by concession that it may have exceptions "where so-called criminal negligence supplies a place of criminal intent, or where, in a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor's intent." A concession of exceptions would seem to destroy the principle. If the principle gets its life or its protection from the Fourteenth Amendment it cannot be destroyed by the legislature upon any conception of the public welfare. The Constitution declares the principle upon which the public welfare is to be promoted, and opposing ones cannot be substituted. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558.

It will be seen that the foundation of the arguments of plaintiffs in error is that their trespass was an innocent act. There is some ambiguity as to what is meant by "innocence." They quote Mr. Justice Chase in *Calder* v. *Bull*, 3 Dall. 386. It was there said that "a law that punished a citizen for an innocent action, or, in other words, for an act, which when done, was in violation of no existing law," could not "be considered a rightful exercise of legislative power." But it was said: "The legislature may enjoin, permit, forbid and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases." In other words, innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse. The law in controversy has no *ex post facto* element or effect in it. It was existing law when the trespass of plaintiffs in error

was committed, and a trespass is a legal wrong, not an innocent act. There is no element of deception or surprise in the law. When the permit was issued plaintiffs in error knew the limitations of it, and they took it at the risk and consequences of transgression. The State sought to guard against its wilful or accidental abuse. Permits had been abused and the lands of the State despoiled of their timber. The offenders were difficult to detect, or, if detected, the character of their acts, whether wilful, accidental or involuntary, equally difficult to establish, and the State, the Supreme Court said, had been "defrauded and robbed of large sums of money." Double and treble damages and a criminal prosecution were provided to meet the situation. It would be strange, indeed, if it were not within the competency of the legislature. To hold otherwise would take from the legislature the power to adjust legislation to evils as they arise and to the ways by which they may be effected. We held in *St. John* v. *New York*, 201 U. S. 633, that a State did not offend the equality clause of the Fourteenth Amendment by taking as a basis of classification the ways by which a law may be defeated. That case was applied in *District of Columbia* v. *Brooke*, 214 U. S. 138, to sustain a statute which provided a criminal proceeding against resident owners of property for neglecting to connect their property with sewers and civil proceedings against non-resident owners for a like neglect.

We do not understand the position of plaintiffs in error to be that a legislature may not prescribe a larger measure of damages than simple compensation, but that anything in excess of such compensation is punishment and cannot be constitutionally prescribed where there is no "conscious intent" to do wrong. And yet plaintiffs in error except from the principle "certain instances within the police power," overlooking that the principle, if it exist at all, must be universal. It is true that the police

power of a State is the least limitable of its powers, but even it may not transcend the prohibition of the Constitution of the United States. If, as contended, intent is an essential element of crime, or, more restrictively, if intent is essential to the legality of penalties, it must be so, no matter under what power of the State they are prescribed. Plaintiffs in error, while considering there may be exceptions to the principle contended for in the exercise of the police power, urge that the legislation in controversy is not of that character. The Supreme Court of the State, however, expressed a different view. It decided that the legislation was in effect an exercise of the police power, and cited a number of cases to sustain the proposition that public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance. Those cases are set forth in the opinion of the court, and some of them reviewed.

We will not repeat them. It was recognized that such legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh.

We have considered only the basic principle of the contention of plaintiffs in error, and have not attempted to follow the details of their argument by which they support it, or the cases which they cite to illustrate it. The cases are subject to the exceptions we have given.

Judgment affirmed.

MR. JUSTICE HARLAN concurs in the result.

CHILES *v.* CHESAPEAKE AND OHIO RAILWAY COMPANY.

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

No. 158. Argued April 18, 1910.—Decided May 31, 1910.

As held by the Court of Appeals of Kentucky, a railroad company has the right, in that State, to establish rules and regulations which require white and colored passengers, even though they be interstate, to occupy separate apartments upon the train provided there is no discrimination in the accommodations.

In this case *held* that an interstate colored passenger was not compelled to occupy a separate apartment on a train in Kentucky from that occupied by white passengers under a state statute but under rules and regulations of the railroad company.

Whether interstate passengers of different races must have different apartments or share the same apartment is a question of interstate commerce to be determined by Congress alone, *Louisville & Nashville R. R. Co.* v. *Mississippi*, 133 U. S. 587, and the inaction of Congress in that regard is equivalent to the declaration that carriers can by reasonable regulations separate colored and white passengers.

Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable.

125 Kentucky, 299, affirmed.

THE facts, which involve constitutional rights of colored passengers on interstate trains in Kentucky, are stated in the opinion.

Mr. J. Alexander Chiles, plaintiff in error *pro se*, with whom *Mr. B. E. Smith*, *Mr. W. L. Ricks* and *Mr. Albert S. White* were on the brief.

Mr. John T. Shelby, with whom *Mr. Henry T. Wickham* and *Mr. Henry Taylor, Jr.*, were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error is a colored man. He bought a first-class ticket from defendant in error, a corporation engaged in operating a line of railroad from the city of Louisville, State of Kentucky, and the city of Cincinnati, State of Ohio, to the city of Washington, District of Columbia. The ticket entitled him to ride from Washington to Lexington, Kentucky.

The train which he took at Washington did not run through to Lexington, and he changed to another train at Ashland, Kentucky, going into a car, which it is alleged, under the rules and regulations of defendant in error, was set apart exclusively for white persons. From this car he was required to remove to a car set apart exclusively for the transportation of colored persons.

He removed under protest and only after a police officer had been summoned by defendant in error. Subsequently he brought this action in the Circuit Court of Fayette County, Kentucky. The case was tried to a jury, which rendered a verdict against him. A motion for a new trial was overruled. He appealed to the Court of Appeals of the State and the action and judgment of the trial court were affirmed.

The assignments of error in this court depend upon the contention that plaintiff in error was an interstate passenger and was entitled to a first-class passage from Washington to Lexington, and that, therefore, the act of defendant in error in causing him to be removed from the car at Ashland was a violation of his rights and subjected the railroad company to damages.

The Court of Appeals of the State made the case turn on a narrow ground, to wit, the right which, it was decided, a railroad company had "to establish such rules and regulations as will require white and colored passen-

gers, although they may be interstate, to occupy separate compartments upon the train." The court, however, said that there could be no discrimination in the accommodations.

The court found the facts of the removal of plaintiff and the character of the car to which he was required to remove as follows:

"This Lexington train is made up of four coaches, the first, and the one nearest the engine, being a combined baggage, mail and express car; the second is a passenger coach divided by board partitions into three compartments; one of these compartments, located at the end of the car, is set apart for colored passengers, the middle compartment is for the use of colored passengers who smoke, and the end compartment is for the accommodation of white persons who smoke; the third car is a passenger coach intended for the use of white ladies and gentlemen; the fourth car is a sleeping car that runs through from Washington to Lexington. Appellant, when he attempted to get on the Lexington train was told by the brakeman to go in the colored apartment. This he declined to do, and walked in and took a seat in the third coach, set apart for the exclusive use of white passengers. In a few moments the conductor came in and asked the appellant, in obedience to a rule of the company, to go forward in the apartment set apart for colored passengers, but he refused to do so, stating that he had bought a through first-class ticket from Washington to Lexington, and was an interstate passenger who knew his rights, and that the separate coach law of Kentucky did not apply to him, and declared his intention of retaining the seat he occupied. Thereupon the conductor summoned a policeman, who also requested appellant to go in the other car, and, upon his refusal, he was informed that he would be compelled to leave the car in which he was seated. Appellant, yet insisting upon his right to remain in the

car in which he was, followed the policeman into the colored passenger coach."

The court further said:

"There is really no material issue of fact involved in the case. No force or violence, or rude or oppressive conduct, was employed by the agents of appellee in removing appellant from the car in which he was seated to the car set apart for colored persons. And except that the car into which he was removed is divided by partitions into three compartments, it was substantially equal in quality, convenience and accommodation to the car into which he first seated himself, and the compartment into which appellant was directed to go was cleanly and ample for his accommodation, and equipped with the same conveniences as the other passenger coaches on the train from which he was ejected."

In this the court came to the same conclusion as the jury. Plaintiff in error insists that this conclusion put out of view his rights as an interstate commerce passenger. Both courts ignored such rights, he contends, the trial court in refusing instructions that were requested and in its ruling on the trial, and the Court of Appeals in affirming the judgment which was based upon the verdict.

We need not set out the instructions nor the rulings. The complaint of the action of the court rests upon the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void. There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, but the Court of Appeals of the State put the statute out of consideration, declaring that it had no application to interstate trains, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations. Plaintiff in error makes some effort to keep the statute in the case, and says that the trial court, by its ruling upon

testimony and by its instructions, confined "the jury only to the lesser motive" of defendant's "wrongful act." In other words, as we understand plaintiff in error, confined the jury to the consideration of the regulations of the railroad company and withdrew from its consideration the effect of the statute under which, it is said, the conductor declared he acted. But by this we understand plaintiff in error to illustrate that his rights as an interstate passenger were denied. We are, therefore, brought back to the question what his rights as such passenger were.

The elements of that question have been considered and passed on in a number of cases. And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company, and the distinction between state and interstate commerce we think is unimportant.

In *Hall* v. *DeCuir*, 95 U. S. 485, the court passed on an act of the State of Louisiana, which required those engaged in the transportation of passengers among the States to give all passengers traveling within that State, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such vessel who excluded colored passengers on account of their color from the cabin set apart for whites during the passage. It was held that the act was a regulation of interstate commerce and was void. The court said, by Chief Justice Waite, after stating that the power of regulating interstate commerce was exclusively in Congress, "This power of regulation may be exercised without legislation as well as with it." And that, "by refraining from action, Congress, in effect, adopts as its own regulations those which the common

law or the civil law, where that prevails, for the government of such business." The court further said, quoting from *Welton* v. *The State of Missouri*, 91 U. S. 282, " 'that inaction [by Congress] is equivalent to a declaration that interstate commerce shall remain free and untrammeled.' " And added, "Applying that principle to the circumstances of this case, Congressional inaction left Beason [the ship owner] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seem to him most for the interest of all concerned." This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but on the contrary leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such cannot depend upon a passenger being state or interstate. This also is manifest from the cited case. There, as we have seen, an interstate colored passenger was excluded from the privileges of the cabin set apart for white persons by a regulation of the carrier and where the colored passenger's right to be was attempted to be provided by a state statute. The statute was declared invalid, because it attempted to force a carrier to do the very thing which plaintiff in error complains was not done in the case at bar, to wit, permit him to ride in the place set apart for white passengers. In other words, the statute was struck down, because it interfered with the regulations of the carrier as to interstate passengers. This court commented on the case subsequently in *Louisville &c. Railway Company* v. *Mississippi*, 133 U. S. 587, 590, and said: "Obviously, whether interstate passengers of one race should, in any portion

of their journey, be compelled to share their cabin accommodations with passengers of another race was a question of interstate commerce, and to be determined by Congress alone." We have seen that it was decided in *Hall* v. *DeCuir* that the inaction of Congress was equivalent to the declaration that a carrier could by regulations separate colored and white interstate passengers.

In *Plessy* v. *Ferguson*, 163 U. S. 540, a statute of Louisiana which required railroad companies to provide separate accommodations for the white and colored races was considered. The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the court, which was by Mr. Justice Brown, reviewed prior cases, and not only sustained the law but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, "the established usages, customs and traditions of the people" and the "promotion of their comfort and the preservation of the public peace and good order," this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable. See also *Chesapeake & Ohio Ry. Company* v. *Kentucky*, 179 U. S. 388.

The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall* v. *DeCuir* for a review

of the cases. They are also cited in *Plessy* v. *Ferguson* at page 550. We think the judgment should be affirmed.

It is so ordered.

MR. JUSTICE HARLAN dissents from the opinion and judgment.

STANDARD OIL COMPANY *v.* BROWN.

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

No. 168. Argued April 22, 25, 1910.—Decided May 31, 1910.

While the pleadings and proofs should correspond, a rigid exactitude is not required, and no variance should be regarded as material where the allegation and proof substantially correspond.

Even if there is a variance between declaration and proof, if, as in this case, defendant is not misled, makes no objection to plaintiff's proof but replies to it by testimony of like kind, is familiar with the facts, does not indicate the variance and does not move for continuance, the variance cannot be regarded as fatal.

The extent of the knowledge of a defendant employer as to the use made of appliances by an employé by whose act another employé is injured and the conclusions to be drawn therefrom are questions for the jury and cannot be reviewed here.

The substitution of "would" for "could" in an instruction to the jury in this case *held* not to have affected the minds of the jurors.

In this case there was no reversible error because the court did not impress upon the jurors the fact that interest may affect credibility of witnesses; and, *quære* whether a party testifying exercises a privilege which may be emphasized as affecting his credibility.

31 App. D. C. 371, affirmed.

THE facts are stated in the opinion.

Mr. A. Leftwich Sinclair and *Mr. Joseph J. Darlington*, for plaintiff in error:

To entitle a plaintiff to go to the jury, the evidence

offered in support of his pleadings must conform closely to the allegations thereof. 13 Ency. Pl. & Pr. 910, and cases cited; *Hetzel* v. *Railroad Co.*, 7 App. D. C. 524; *Arrick* v. *Fry*, 8 App. D. C. 125.

Where a plaintiff has charged particular negligence, proof of other and different acts or omissions as a ground of liability will constitute a fatal variance. *Shanke* v. *U. S. Heater Co.*, 125 Michigan, 346; *Brown* v. *Miller*, 62 S. W. Rep. 547; *Railroad Co.* v. *Shockman*, 52 Pac. Rep. 446; *Waldhier* v. *Railroad Co.*, 71 Missouri, 514; *Pennington* v. *Detroit &c. R. Co.*, 90 Michigan, 505; *Marquette R. R. Co.* v. *Marcott*, 41 Michigan, 433; *Batterson* v. *Railroad Co.*, 49 Michigan, 184; *Alford* v. *Dannenberg*, 177 Illinois, 331; *Railroad Co.* v. *Foss*, 88 Illinois, 551; *Railroad Co.* v. *Mock*, 72 Illinois, 141; *Railroad Co.* v. *Collins*, 118 Ill. App. 270; *Long* v. *Doxey*, 50 Indiana, 385; *Curren* v. *Railroad Co.*, 86 Missouri, 62; *Ischer* v. *Bridge Co.*, 95 Missouri, 261; *Sayward* v. *Carlson*, 1 Washington, 29; *Brown* v. *L. & L. Co.*, 65 Mo. App. 162; *Thomas* v. *Railroad Co.*, 35 S. W. Rep. 910; *Pryor* v. *Railroad Co.*, 90 Alabama, 32; *Railroad Co.* v. *Guyton*, 36 So. Rep. 84; *The Elton*, 142 Fed. Rep. 367; Labatt, M. & S., § 859, note 1 (*a*).

There is a fatal variance where the evidence, instead of proving the tort alleged, proves or tends to prove another tort. 14 Ency. Pl. & Pr. 336; 22 Ency. Pl. & Pr. 568.

Where there is no evidence sustaining counts in a declaration as to the defendant's negligence, he is entitled to an instruction that no recovery can be had under the counts. *Mining Co.* v. *Fulton*, 205 U. S. 60.

Persons standing in such a relation to one another, as did the plaintiff and Coleman, are fellow-servants. *Railway Co.* v. *Dixon*, 194 U. S. 338; *Railroad Co.* v. *Conroy*, 175 U. S. 323; *Railroad Co.* v. *Poirier*, 167 U. S. 49; *Oakes* v. *Mase*, 165 U. S. 363; *Railroad Co.* v. *Keegan*, 160 U. S. 259; *Railroad Co.* v. *Hambly*, 154 U. S. 349; *Railroad Co.* v. *Baugh*, 149 U. S. 368; *Tuttle* v. *Milwaukee Ry. Co.*, 122

U. S. 189; *Randall* v. *Railroad Co.*, 109 U. S. 478; *Elevator Co.* v. *Neal*, 65 Maryland, 438; *Wonder* v. *Railroad Co.*, 32 Maryland, 411; *Adams* v. *Iron Cliffs Co.*, 78 Michigan, 271; *Hogan* v. *Railroad Co.*, 49 California, 128.

One who enters into the employment of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. *Railway Co.* v. *Dixon*, *supra*; *Railroad Co.* v. *Conroy*, *supra*; *Railroad Co.* v. *Poirier*, *supra*; *Railroad Co.* v. *Keegan*, *supra*; *Railroad Co.* v. *Baugh*, *supra*; *Tuttle* v. *Milwaukee Ry. Co.*, *supra*; *Randall* v. *Railroad Co.*, *supra*; *Carter* v. *McDermott*, 29 App. D. C. 145; *Looney* v. *Railroad Co.*, 24 App. D. C. 510; *Wonder* v. *Railroad Co.*, *supra*; *Md. Clay Co.* v. *Goodnow*, 95 Maryland, 330; *Moret* v. *Car Works*, 99 Maryland, 461; *Railway Co.* v. *Conrad*, 62 Texas, 627; *Hogan* v. *Smith*, 125 N. Y. 774.

A man of mature age, offering himself to pursue a particular employment, who represents himself to have had the necessary experience, cannot after an injury be heard to say that he should have been instructed by his employer in the performance of his duties. *Hayzell* v. *Railroad Co.*, 19 App. D. C. 359, 369; *Railway Co.* v. *Clark*, 108 Illinois, 113; *Regan* v. *Palow*, 62 N. J. L. 30; *Sumey* v. *Holt*, 15 Fed. Rep. 880; *Railroad Co.* v. *Boland*, 96 Alabama, 626; *Railroad Co.* v. *Barry*, 56 U. S. App. 37; *Martin* v. *Railroad Co.*, 166 U. S. 403; *Randall* v. *Railroad Co.*, *supra*.

The duty to instruct and warn as to dangers arising from the execution of the general details of the work is generally held to pertain to the duties of the servants as between themselves, so that a failure or negligence in regard thereto is that of a fellow-servant, exempting the master from liability. 26 "Cyc." 1338, 1339; *Miller* v. *Railroad Co.* (N. J.), 31 Am. & Eng. R. R. Cases, N. S., 639; *Jenkins* v. *Railroad Co.*, 39 S. C. 507; *Moret* v. *Car Works*, 99 Maryland, 471; *Kemmerer* v. *Railroad Co.*, 81

Hun, 444; *Hussey* v. *Coger*, 112 N. Y. 614; *Cullen* v. *Norton*, 126 N. Y. 1; *Potter* v. *Railroad Co.*, 136 N. Y. 77; *Melchert* v. *Brewing Co.*, 140 Pa. St. 448; *Zurn* v. *Tetlow*, 134 Pa. St. 213; *Allison Mfg. Co.* v. *McCormick*, 118 Pa. St. 519; *Keats* v. *Nat. Heeling Mach. Co.*, 65 Fed. Rep. 940; *Railroad Co.* v. *Smithson*, 45 Michigan, 212; *Kohn* v. *McNulta*, 147 U. S. 238.

Mr. Creed M. Fulton and *Mr. W. Gwynn Gardiner*, with whom *Mr. A. E. L. Leckie* and *Mr. Joseph W. Cox* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

This action was brought in the Supreme Court of the District of Columbia for damages for injuries alleged to have been received by defendant in error while in the employment of plaintiff in error and through its negligence.

The case was tried to a jury, which rendered a verdict in favor of the defendant in error in the sum of $6,500, upon which judgment was duly entered. It was affirmed by the Court of Appeals.

The assignments of error are based on certain instructions asked by the company which the trial court refused to give, the chief of which requested the court to direct the jury to find a verdict for the company upon the following grounds: (1) There was a fatal variance between the pleadings and the proof. (2) The injury to defendant in error was not caused by the negligence of the company, but by the negligence of a fellow-servant or his own contributory negligence.

The first ground is the principal one discussed by counsel, and turns upon a consideration of the declaration and the proof.

An outline of the facts contained in the opinion of the Court of Appeals is as follows:

"The plaintiff entered the employ of the defendant in January, 1904, as an oil tank wagon driver. His duties required him to take a team and wagon from defendant's barn in the morning, and, after using it during the day in the delivery of oil, return it to the barn in the evening. The plaintiff was required to groom his team in addition to his duties of delivering oil. The barn in which the horses were kept was thirty feet wide and fifty feet long. It contained two rows of stalls, one on either side, with a space of twelve feet between, extending the full length of the barn. In the ceiling, above the space between the stalls and about the middle of the barn, there was an opening four feet square, surrounded on the floor of the loft above by a wooden enclosure or box about four feet high. In the loft was stored baled straw, which was used for bedding the horses.

"It further appears that for about nine years one Coleman had been employed by the defendant, and among his duties was that of bedding the horses; that, during the period of his employment, Coleman had been accustomed to throw bales of straw through the opening in the ceiling from the loft to the floor below. In doing so it was necessary to lift the bale up to the top of the box or enclosure in the loft and push it over, so that it would fall through the opening. Plaintiff received the injuries complained of February 2, 1904, by being struck by a bale of straw dropped by Coleman from the loft through said opening.

* * * * * * * *

"There was evidence adduced at the trial to show that plaintiff had never been advised by the defendant, or any of defendant's employés, either of the existence of the opening in the ceiling or the purpose for which it was used. Plaintiff testified to this effect, and further, that during the period of his employment—less than two weeks—he was required to leave the barn with his wagon

to deliver oil at 6 o'clock in the morning, and that he did not complete the delivery of the oil and return to the barn until 6 or 7 o'clock in the evening. At the time of year that he was employed—in January—he left the barn before daylight in the morning and returned after dark in the evening. It also appears that the barn was poorly lighted, there being but a small oil lamp at each end of the passageway between the stalls.

"The witness Coleman testified that he not only notified plaintiff of the use made of the opening in the ceiling, but warned him before throwing down the bale of straw that injured him."

Defendant in error denied "that Coleman either called his attention to the hole, or explained its use, or gave him any warning on the evening of the accident. Coleman is not corroborated by any of the employés, as to his custom of calling out to persons below before throwing straw through the opening."

The declaration contained four counts, in the first three of which, with some verbal variations, it is alleged that it was the company's duty to have the "hole or opening" in the ceiling of the stable so guarded that the bales of hay in the loft above would not fall or pass through and fall upon defendant in error or upon those engaged in the performance of their duties in the stable. This duty, it is alleged, was neglected, and a bale of hay was allowed to fall through the hole on the defendant in error.

Those counts may be dismissed from consideration, as defendant in error does not contend that the proof corresponds to them.

The fourth count, it is insisted, has such correspondence, and expresses the grounds upon which the case was tried. The following are the pertinent allegations of that count:

"It became and was also the duty of the said defendant not to permit the said hay and feed to be thus passed through the said hole or opening without proper warn-

ing or timely notice to those employed in the stable below . . . and to give its employés engaged in handling or placing the hay and feed as aforesaid, as well as to those who were employed in the stable below, such proper and necessary instructions with respect to the dangers of passing the hay and feed through the said hole or opening, and the performance of their respective duties as to prevent injury and danger to the lives and limbs of the employés engaged in the stable below, yet the defendant . . . did not . . . do any of the duties that it was called upon to discharge in the premises, but, wholly disregarding its said duties in the premises, did carelessly and negligently allow a bale of . . . hay to fall or pass, or be thrown through the said hole or opening, without any notice or warning or signal or instruction of any kind to plaintiff," etc.

The rule is familiar and elementary that the pleadings and proof must correspond, but a rigid exactitude is not required. In *Nash* v. *Towne*, 5 Wall. 689, 698, it is said that modern decisions in regard to the correspondence between the pleadings and the proof are more liberal and reasonable than former ones, and states the rule to be by statute in the Federal courts "to give judgment according to law and the right of the cause." It was observed that "it is the established general rule in the state tribunals that no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action on merits." The final comment of the court is that irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond. See also *Liverpool and London and the Globe Ins. Co.* v. *Gunther*, 116 U. S. 113; *B. & P. R. R. Co.* v. *Cumberland*, 176 U. S. 232, 238.

In the case at bar the company could not have been

misled. It made no objection to the testimony of the plaintiff (defendant in error here). It replied to it by testimony of like kind. It did not indicate in what way the proof varied from the pleadings nor move for a continuance. Moreover, we think the pleadings, though inartificially drawn, were sufficient to notify the company that one of the grounds of action was its omission of duty to inform those whose employment made it necessary to be in the stable of the danger to them of the use to which the hole was put. And that such use was dangerous is demonstrated. Indeed, it should not have needed the experience of the present case to make the danger clear to the company. The company was familiar with the stable, its construction and what that construction required. One just employed might not know either, and his time of service might keep both from his knowledge. And such is the contention in this case, which the verdict of the jury sustained. A dimly lighted stable before daylight and a dimly lighted stable after daylight, with a hole in its ceiling through which bales of hay could be tossed or dropped, seems to us as not to fulfill the duty of a master to those servants who have not been informed of the practice and the performance of whose duties subjected them to the danger which might result. Let it be granted that Coleman was a fellow-servant of defendant in error and was negligent, it was nevertheless for the jury to say whether the fault of the company contributed to the injury. *Kreigh* v. *Westinghouse, Church & Kerr Co.*, 214 U. S. 249. If the plaintiff had had knowledge of the situation and its dangers he might have needed no warning from Coleman, and might have been protected by the care which such knowledge would have induced.

The negligence of a fellow-servant was sought to excuse the master for his neglect in *Grace & Hyde* v. *Kennedy*, 99 Fed. Rep. 679, *S. C.*, 40 C. C. A. 69. In reply to it the court said, by Circuit Judge Shipman:

"The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employés, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger."

In the discussion so far we have assumed that the company had knowledge of the use to which Coleman had put the hole. Counsel, however, attacks the assumption, and meets it by saying that the company could not anticipate that Coleman would throw down an unopened bale of straw without giving warning to his co-employés, especially, as it is further urged, he had been throwing down straw through the opening without negligence for about six years. But what the facts were in such regard and what conclusions were to be drawn from them were for the jury and cannot be reviewed here.

Error is assigned upon the refusal of the court to give instructions, which presented the following propositions: (1) That the company was not an insurer of the safety of defendant while in its employment, "nor of the absolute or even reasonable safety of its stable." (2) That the presumption of law is that plaintiff contracted with reference to the risks, hazards and dangers ordinarily incident to the business of his employment as the company conducted it at the time he entered its services. And that (this was an independent instruction) the salary or compensation received by the defendant in error was the consideration for such risks. (3) There was no evidence that Coleman was incompetent and that his competency must be presumed.

It is not necessary to give a detailed attention to these instructions. The court in its charge to the jury expressed the legal principles of the case which were applicable to the testimony.

The company also asked another instruction, the sub-

stance of which was as follows: That defendant in error assumed the ordinary risks not only actually known to him, but so far as they *could* (italics ours) have been known to him by the exercise of ordinary care on his part, and that if he knew, or by the exercise of care and prudence *could* have known, of the existence of the hole then he could not recover. The court gave the instruction, but substituted the word "would" for "could."

The court was further requested to instruct the jury that they must look to the interest of the witnesses, and that where a witness is interested "the temptation is strong to color, pervert or withhold the facts." An application was made of this to defendant in error and it was requested that the jury be told that the law permitted him to testify in his own behalf, and that he having availed himself of the privilege, it was for them to determine how far his testimony was credible, and that his personal interest should be considered in weighing his evidence and in determining how far it was worthy of credit. The instruction was refused.

But little comment is needed on the contention that there is reversible error in the action of the court. It would be going very far to reverse the judgment on the supposition that the jury would have seen a different meaning in the word "could" than they saw in the word "would" and in consequence would have imputed a greater knowledge to defendant in error of the risks of his employment. And it would be going equally far to reverse the verdict because the jury did not have especially impressed on it, in the language counsel chose to employ, that interest may affect the credibility of witnesses. We are not prepared to say that a party to an action by testifying exercises a privilege which may be emphasized as affecting his credibility.

Judgment affirmed.

INTERSTATE COMMERCE COMMISSION *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 663, 664. Argued April 5, 6, 1910.—Decided May 31, 1910.

The Interstate Commerce Commision having made an order reducing rates between Mississippi River points and Missouri River cities, the railroad companies brought suit to enjoin the enforcement of the order, claiming that it was made not for the mere purpose of fixing just rates but for the purpose of artificially apportioning the country into zones tributary to trade centers, which was beyond the power of the Commission. The claim was made that the rates as reduced were confiscatory within the meaning of the Fifth Amendment. The Circuit Court so held and enjoined the rate. On appeal to this court *held:* that:

The Interstate Commerce Commission did not base its order on an effort to apportion the country into zones tributary to trade centers and to build up new trade centers.

The outlook of the Interstate Commerce Commission and its powers are greater than the interests of the railroads, and are as comprehensive as the interests of the entire country.

The Interstate Commerce Commission was instituted to prevent discrimination between persons and places. Rates may not only be investigated and pronounced unreasonable or discriminatory but other rates may be prescribed.

The power of the Interstate Commerce Commission extends to the regulation of rates whether the same be old or new, notwithstanding that interests attached to the rates may have to be changed in case the Commission exercises its power.

Railroad companies may complain of an order of the Commission reducing rates so far as it affects their revenue. They cannot complain of it simply because it affects shippers or places.

The primary jurisdiction as to fixing rates under the Interstate Commerce Act is with the Commission and the power of the court is confined to a review of questions of constitutional power exercised by the Commission.

In this case the only question being as to power and the rates not being confiscatory and the Commission having acted within its power, the case is remanded with instructions to dismiss the bill.

171 Fed. Rep. 680, reversed.

THE facts, which involve the validity of certain orders of the Interstate Commerce Commission affecting railroad freight rates to points known as Missouri River cities, are stated in the opinion.

Mr. Wade H. Ellis and *Mr. Luther M. Walter*, Special Assistants to the Attorney General, with whom *Mr. Edwin P. Grosvenor*, Special Assistant to the Attorney General, for the Interstate Commerce Commission, appellants in No. 663.

Mr. John H. Atwood and *Mr. John Lee Webster*, with whom *Mr. George T. Bell* was on the brief, for appellants in No. 664.

Mr. William D. McHugh and *Mr. Colin C. H. Fyffe* for appellees.

Mr. Frederick Manley Ives and *Mr. Everett M. Burdett* filed a brief as *amici curiæ* on behalf of the Boston Chamber of Commerce and certain other business organizations.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is the validity of an order of the Interstate Commerce Commission reducing the class rates charged by the appellee railroad companies on through freight shipped from the Atlantic seaboard to

Kansas City, and St. Joseph, Missouri, and Omaha, Nebraska, cities on the Missouri River and called throughout the record, and in this opinion, Missouri River cities.

The through class rates were reduced from $\frac{1}{147}\ \frac{2}{120}\ \frac{3}{93}\ \frac{4}{68}\ \frac{5}{57}$ in cents per 100 pounds to $\frac{1}{138}\ \frac{2}{113}\ \frac{3}{88}\ \frac{4}{64}\ \frac{5}{54}$. The numbers above the lines indicate the classes and the numbers below the lines the rates.

The reduction was made in that part of the through rate which applied to the haul between the Mississippi and Missouri Rivers. Explaining its order of reduction, the Commission said the through rates from Atlantic seaboard terminals to the Missouri River cities are made by adding together the rates from points of origin to the Mississippi River crossings, using proportional rates when such were available, and the local rates from the Mississippi crossings to the Missouri River cities. The through rates the Commission pronounced to be unreasonably high, "because those portions of the through rates which apply between the Mississippi River crossings and the Missouri River cities are too high. These are defendants' 'separately established rates,' which are 'applied to the through transportation,' and, therefore, the through rates should be adjusted by reduction of those factors or parts thereof which are found to be unreasonable."

The division of the rates as established by the railroad was as follows: From New York to the several Mississippi River crossings on traffic moving through them to points beyond, in cents per 100 pounds, $\frac{1}{87}\ \frac{2}{75}\ \frac{3}{58}\ \frac{4}{41}\ \frac{5}{35}$. From the Mississippi River crossings to the Missouri River cities, $\frac{1}{60}\ \frac{2}{45}\ \frac{3}{35}\ \frac{4}{27}\ \frac{5}{22}$. The latter are local class rates under the Western classification, and are those which the Commission adjudged too high, and which it reduced in cents per 100 pounds, to the following: $\frac{1}{57}\ \frac{2}{38}\ \frac{3}{30}\ \frac{4}{23}\ \frac{5}{19}$. The amount of reduction, it will be observed, is nine cents on first-class freight and a proportional reduction on the other four classes.

The order of the Commission required the railroad

companies to cease and desist on or before the twenty-fifth of August, 1908, from charging, demanding or collecting anything in excess of the rates last above set out, and the companies were required to put such rates in force before the twenty-fifth of August, 1908, and maintain them for a period of not less than two years.

The proceedings before the Commission were begun by a petition filed by appellants in case No. 664, who were doing business in Kansas City and St. Joseph, Missouri, and Omaha, Nebraska. They alleged that they were engaged in either the mercantile or manufacturing business, and in buying and selling various commodities shipped from the Atlantic seaboard to them, respectively, under the definite freight classifications maintained by the railroad companies. The rates, according to the classifications, from New York to St. Paul and Minneapolis and rates from New York to Chicago, and from the latter city to Kansas City, St. Joseph and Omaha, the petition alleged, "are arrived at by adding to the rates from Mississippi River points, as shown above, the following rates subject to official classification, to wit: 87c, 75c, 58c, 41c and 35c per hundred pounds for said five classes, respectively; that the aforesaid through rates, applying from New York to Kansas City, are observed by defendant carriers on traffic moving by way of Chicago; that in the division of said through rates from Atlantic seaboard to said three Missouri River cities, Kansas City, St. Joseph and Omaha, each of said defendant railroad companies allows and pays to said Eastern connections 72.3c, 62.4c, 48.4c, 34.3c and 29.4c per hundred pounds on the said five classes, respectively; and charges, accepts and retains as their respective shares of said through rates upon the several classes aforesaid 74.7c, 57.6c, 44.6c, 33.7c and 27.6c per hundred pounds."

A table showing the distance of the various roads from New York to St. Paul and Minneapolis, and the Missouri

River cities is given, which shows that the distances are not materially different, and also shows distances west of Chicago.

It is alleged that the rates charged and the classifications enforced by the company for the transportation of property from the Atlantic seaboard and other producing territory to the Missouri River cities "are in themselves unreasonable and relatively unjust, unfair and prejudicial as compared with rates from the same territory to St. Paul and Minneapolis," though the volume or tariff and the cost of handling it is not greater. Discrimination is alleged, with a detail of circumstances, against the Missouri River cities and the violation of the Interstate Commerce Act.

What are conceived to be reasonable rates are set out, and that the rates charged are alleged to be discriminatory against the complainants, and are excessive and unreasonable in and of themselves, because higher and greater than enough to pay the cost of transportation and maintenance and a fair profit on the valuation of the property employed.

The railroad companies filed separate answers, in which they admitted the charges and rates set out in the petition and the division thereof, but denied discrimination in favor of St. Paul and Minneapolis against the Missouri River cities and alleged competitive conditions, existing as to the first-named cities. They denied that the rates from the Atlantic seaboard to the last-named cities suggested by the petitioners would be reasonable or just, or that the rates charged are unduly high or excessive or discriminate against the Missouri River cities or the petitioners.

The Chicago and Northwestern Railway Company filed an amended answer, in which it alleged that the complaint related to the through rates from the Atlantic seaboard to the Missouri River cities, and that they were alleged to

be unfair and prejudicial compared to rates to St. Paul and Minneapolis, and "unreasonable and excessive in and of themselves." And, further, that the rates had been fixed and established by the railroad companies by virtue of joint traffic agreements, and had been duly filed, posted and published by the companies, and that all the companies to such agreements were necessary parties. Fifty or more companies were named.

The Eastern companies, (those operating east of Chicago), answering, denied that there was any agreement between them and the original respondents for the shipment and division of through rates between the Atlantic seaboard and St. Paul and Minneapolis, and alleged that in conjunction with their several connections they receive to Chicago the same rate in cents per hundred pounds as applied upon like tariff originating at the same points of origin and terminating at Chicago, and are not concerned with the rates or proportional rates charged or accepted by the different carriers from Chicago to St. Paul or Minneapolis. They also denied that they were parties to any joint tariff of class rates from the Atlantic seaboard to the Missouri River cities. They admitted participation in joint through class rates to Mississippi River points and denied that they, however, were unreasonable or unjust in or of themselves or as respectively applied to shipments destined to St. Paul or Minneapolis or shipments destined to points west of the Mississippi River.

They further alleged as follows:

"That the rates from New York city to East St. Louis, Illinois, are computed at 116 per cent of the rates from New York to Chicago according to relative distances, that the rates from New York to East St. Louis are part of a general structure of rates whereby all rates from New York and other Eastern points to points in the States of Ohio, Indiana, Illinois, Michigan, Pennsylvania, Kentucky and Wisconsin, and the Province of Ontario are made

upon the bases of percentages of the rates from the points of origin to Chicago; that the said rates for the first five classes governed by the official classification from New York to East St. Louis of 87c, 75c, 58c, 41c and 35c per hundred pounds, respectively, are applied as proportional rates to the various Mississippi River crossings north of East St. Louis, to and including East Dubuque, Illinois, and that from other Eastern points than New York city the rates to East St. Louis apply equally to said Mississippi River crossings, and all of such rates to said Mississippi River crossings apply uniformily upon all shipments destined to all points west of the Mississippi River and east of Pacific coast terminals and points taking the same rates. Respondents allege that all of the rates from Eastern points to said Mississippi River crossings are just and reasonable in and of themselves and as applied to shipments destined to any point west of the Mississippi River and east of Pacific coast terminals."

They alleged that the rates to the Mississippi River crossings are governed by the Official classification, and those from the latter crossings to the Missouri River points are governed by the Western classification, and that innumerable articles are differently classified in such classifications. That it would be impossible to establish joint through rates on the basis set out in the petition without simultaneously applying the official classification to all traffic from all Eastern points and all points intermediate between the rivers and establishing relative through class rates from all such Eastern points to all such intermediate points between the rivers, and that this would require a general revision and reduction of rates, which would cause great hardship and irreparable injury to the respondents and other interstate carriers not parties to the proceeding.

It is alleged that the reasonableness of the rates from Eastern points to Chicago and to the Mississippi River is

not questioned by petitioners, and that the grievance of the latter, if they have any, lies in the rates applied by the original respondents from Chicago and the Mississippi River crossings to the Missouri River cities on shipments originating at Eastern points. They hence prayed to be dismissed. They were subsequently dismissed.

The Sioux City Commerical Club intervened and supported the petition, and prayed that whatever should be done for the other Missouri River cities should be done for Sioux City. The St. Paul Jobbers and Manufacturers Association and the Minneapolis Commercial Club intervened and in substance coincided with the views and interest of the defendant carriers.

A great deal of testimony was taken and the order made which has been recited. The appellee companies then filed a bill in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, for a temporary and permanent injunction against the order, that it be annulled, and the Interstate Commerce Commission be enjoined from enforcing it. A temporary injunction was granted. It was made permanent on final hearing, the court dividing. 171 Fed. Rep. 680.

The pleadings in the case are very voluminous. They consist of the bill of the railroad companies, the answers to it by the Interstate Commerce Commission and the intervening petitions of certain other railroad companies, and mercantile and manufacturing concerns.

Even a summary of the pleadings would be very long and we shall, therefore, say but little more than that the allegations of the bill and those of the answer of the Commission and its denials are such as tend to the support of the respective contentions of the companies and the Commission, upon which we shall hereafter comment. We may, however, say further that emphasis is given to certain matters. The companies make prominent that two classifications of freight are in force upon which tariff rates

are based, the Official classification from the Atlantic seaboard to the Mississippi River and the Western classification, between the river and the Missouri River cities; that the classifications materially differ and constrain different rates; that those between the rivers are just and reasonable and apply to all merchandise, whatever be its point of origin. That business conditions have grown up and are dependent upon the rates established, which will be disturbed by their alteration; that their alteration as required by the order of the Commission will compel a discrimination between shippers and localities, to do which is in excess of the powers of the Commission.

It is alleged that the rates are fair compared to the cost of service, absolutely and relatively, and that the rates east of the Mississippi River are not changed, the order affecting alone the proportion of the through rates charged by the complainant carriers, and will compel new through rates, which will not affect the proportion thereof received by the Eastern carriers.

And it is alleged that the Commission only has power to establish, after hearing on complaint, through rates and joint rates and prescribe the just and reasonable proportions of such rates between the carriers only when they (the carriers) fail to agree upon the proportion or division thereof, and that there was no evidence that they had failed to agree upon such rates or the proportion and divisions thereof, and that, therefore, the order exceeds the power of the Commission and deprives the companies of their property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

It is further alleged that there was no evidence that the rates between the rivers are unjust or unreasonable, except by comparison with other rates; that no evidence was offered of cost of service or of the various elements proper to be considered in determining whether a rate is just and

reasonable in and of itself, and that "the whole and only reason and the whole and only conclusion" of the Commission upon which the reduction was ordered was because the Commission decided that merchandise shipped from the Atlantic seaboard should be transported by the companies at a lower charge than that exacted for the transportation of an equal amount of merchandise when the same was shipped from St. Louis, Chicago or other points west of the Atlantic seaboard. And this, it alleged, is in excess of the powers of the Commission, misapplies the law, and compels the companies to serve a certain class of shippers at an unreasonable rate, and to take a rate lower than is charged other shippers for a like service, which involves less expense to the companies.

A loss of revenue is alleged, which will result in a deprivation of their property without due process of law, and that the enforcement of the order, even if it be finally set aside, will cause great disturbance to the business of the companies.

The Commission meets those points with denials of the facts alleged and their consequences, and opposes them as well by other facts and considerations.

It asserts that the bill has no equity because all the matters and things set forth therein are cognizable before it (the Commission), and it has the power to suspend, modify or amend its order as upon a proper showing might be proper; that it has information for such action, for under the law the operation and operating results of each railroad is required to be filed with it, "and the subject is under constant investigation." And in such investigation, it was alleged, many elements must enter, and that the fixed charges of maintenance and operation and the cost of operation and handling of different classes of freight, state and interstate, hauled on the same train, widely different in character and value, cannot mathematically be determined so as to apportion to each class

of traffic its proper division of costs, and that no method of apportionment can be devised except that which involves the exercise of judgment, and the results vary according to the method used. The Commission, therefore, says that the statements and allegations of the bill are mere conclusions and opinions which necessarily involve consideration of all these complex and difficult problems and should not be accepted for the purpose of setting aside its order.

Supplementing this the Commission sets forth that on the hearing before it oral and documentary evidence was taken, to which it gave full consideration, and to the reports filed by the companies with it in accordance with the statute, and that its order was made in accordance with the statute, and that so far from exceeding its powers it might have made a greater reduction, but it left the companies on the Atlantic seaboard business destined to Missouri points to charge one hundred per cent more than the same railroads voluntarily charge on transcontinental business, and, it is alleged, that it appeared from the testimony of one witness that the latter business yielded some profit, and by another witness testified, as an expert, that a rate fifty per cent higher would be "too large, of course."

The Commission alleges the reasonableness of the rates ordered by it, and that they are less than the companies charge and accept for transcontinental freight originating at the Atlantic seaboard and destined to Pacific coast terminals, the expense of service being no greater. A comparison is made also with Montana points and Spokane points, showing the rates to be less than to the Missouri River cities carried on the same railroads. So also to Oklahoma common points. So also for traffic originating at Pittsburg and carried through Chicago to Missouri River points, and at Chicago destined to Texas common points.

The reason given by the Commission for not disturbing the rates of the Eastern roads is that neither the complainant before it nor the companies charged that these rates were excessive, nor was a reduction of them sought, but, on the contrary, it was conceded that such rates were just and reasonable. The Eastern carriers were, therefore, dismissed from the proceedings.

The other allegations but give further details and illustrations of the foregoing.

An order was made allowing the Illinois Central Railway Company, the Atchison, Topeka and Santa Fe Railway Company, the Chicago and Alton Railroad Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis and San Francisco Railroad Company to file petitions of intervention. The allegation of these petitions are substantially the same as those of the bill. The answer filed by the Interstate Commerce Commission to the bill was taken as filed to the intervening petition.

Leave to intervene was also given to certain business houses of Milwaukee, St. Louis, Chicago, Detroit and Cleveland. Their petition set forth with some detail the discrimination, as it was alleged, that would be worked against them in favor of merchants at the Atlantic seaboard and Missouri River cities by the order of the Commission, and also the disturbance of the commercial conditions which would result from the order. The Burnham, Hanna, Munger Dry Goods Company, one of the complainants before the Commission, and a number of other corporations and copartnerships, were allowed to file petitions in intervention. The petitions defended the order of the Commission, and again asserted that the rates between the Mississippi and the Missouri Rivers were unreasonable.

Evidence was taken and the court made the temporary injunction permanent.

The court carried into and made the foundation of its opinion the conception it had formed and expressed upon granting the preliminary injunction, that is, that the purpose of the Commission was not so much the reduction of unreasonable rates as protection of the Missouri River cities against competition. The court said: "Indeed, the contest in its larger aspect is a contest not so much between the shippers and the railroads as between the commercial and manufacturing interests of the Missouri River cities and of the Atlantic seaboard on the one part (their interests being identical) and the commercial and manufacturing interests of what is known as the Central Traffic territory (the territory west of Buffalo, Pittsburg and Parkersburg, and east of the Mississippi River) on the other part."

To support this view it was said that the differential of 9 cents on merchandise from the Atlantic seaboard to the Missouri River cities, whatever be the principle upon which the order was based, will be "to protect to a certain degree the Denver jobbers and manufacturers within a given zone of territory against the jobbers and manufacturers in the Central Traffic Association territory . . . as also to open up to the Atlantic seaboard," in its trade with the Missouri River, "zones of territory, the advantages contained in the differentials against the competition of both the intervening Central Traffic Association territory and the Missouri River territory." And this, it was asserted, was the exercise of a "power artificially to apportion out the country into zones tributary to given trade centers, to be predetermined by the Commission, and non-tributary to others." This, it was further said, was a "power essentially different in principle from the mere power of naming rates that are reasonable."

We make these quotations from the opinion of the court because they put, in a clear and condensed way, the ultimate contention of the companies and the evil, as they see

it, in the order of the Commission, and which is intended to be exhibited by their voluminous pleadings and arguments. And such, it is insisted, was the conscious purpose of the Commission, a view in which the Circuit Court concurred, deducing it from certain avowals of the Commission in its report.

Such purpose and the want of power in the Commission to execute it is the foundation of the court's opinion. No analysis of the facts were made which concerned any other proposition or issue. The question involved, the court said, was not one of fact, but one of power; it is not whether, by the application of correct principles, a given rate had been decided to be unreasonable, but whether the principles applied are those within the power of the Commission. If this be so, we may wonder at the voluminous pleadings and the equally voluminous evidence. The elements of it were on the face of the report of the Commission. The court certainly thought it could be discerned on the face of the pleadings when passing on the motion for preliminary injunction. This question then we must regard as paramount and to it we will address ourselves. It may be that no other question is necessary to be decided. What the court would have done, with all other questions, we are not able to say. It took occasion to remark:

"It must be understood, however, that these orders of the Commission are enjoined solely because, in our judgment, they lay upon the commerce and manufacturing of the localities affected an artificial hand that Congress never intended should be put forth, and therefore are outside the power conferred on the Commission by Congress; for with the question of a reduction in rates, or a readjustment of rates, from which such artificial results have been eliminated, we are not now dealing."

A member of the court dissented from its judgment, and declared the grievance that the companies asserted

against the order of the Commission was not sustained by the evidence.

Is it true that the Interstate Commerce Commission by its order exercised a power "artificially to apportion out the country into zones tributary to given trade centers," and intentionally exercised it to protect the Missouri River cities against the competition of other cities? If that be the necessary conclusion the judgment of the Circuit Court it may be contended was right. Such conclusion we should certainly be reluctant to adopt. From whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. They are expected to be exercised in the coldest neutrality. The Commission was instituted to prevent discrimination between persons and places. It would indeed be an abuse of its powers to exercise them so as to cause either. And the training that is required, the comprehensive knowledge which is possessed, guards or tends to guard against the accidental abuse of its powers, or, if such abuse occur, to correct it. The possession of such advantages is one of its defenses. It alleges that by § 12 of the Interstate Commerce Act it is given authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and is required to keep itself informed as to the manner and method in which the same is conducted, and is "authorized and required to execute and enforce the provisions of the act." Other sections are more specific in grants of power. Rates may not only be investigated and be pronounced unjust or unreasonable or discriminatory but other rates may be prescribed. These, we repeat, are great powers and means of their proper exercise are conferred. Investigation may be conducted, and as the Commission says in its answer, "that to enable it to perform its duties such information as shows the operations and operating results

of each railway is" required to be filed with it and the subject is under constant investigation.

The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this court has taken occasion to characterize. "They assail," it was said, "the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in the performance of the administrative functions vested in it, and upon such assumption invoke the exercise of an unwarranted judicial power to correct the assumed evils." *Interstate Commerce Commission* v. *Illinois Central Railway Company*, 215 U. S. 452, 478. It was, of course, recognized in that case that there must be power in the Commission to make the order which might be subject to attack, but want of power was distinguished from the mere expediency or wisdom of making it, which, it was declared, was not open to judicial review.

We return therefore to the question of the power of the Commission and its purpose. The complainant before that body presented two issues, the effect of the rates from the Atlantic seaboard as discriminating against the Missouri River cities in favor of St. Paul and Minneapolis, and their unreasonableness of and in themselves. The first we may immediately put out of view. It was decided adversely to the complainants before the Commission, and we may say at the outset that the contention of the railroad

companies that it was the only issue presented to the Commission is not justified.

The second issue was decided in favor of the complainants, the Commission finding that the through rates were unreasonable of and in themselves, and was caused by the charge from the Mississippi River crossings to the Missouri River cities. The grounds of its decision and principles upon which it proceeded the Commission set forth in its report, and to some extent all of the factors upon which the decision is based and supported. Indeed, the pleadings in the case and the argument of counsel are but fuller explanations of the elements set out in the report. The controversy, therefore, is not so much as to what these factors are as what they establish as to the power of the Commission to make the order. The effect of the order, it is contended as we have seen, is to create artificial zones tributary to certain trade centers, or, as it is expressed by the railroad companies, the effect of the order is to destroy the system of rates which has existed ever since the railroads were constructed and to "overturn the equality of opportunity in competition" which certain commercial centers possessed under that system and to substitute an artificial system, the feature of which is special advantages in rates to special sections. And it is said the order was entered for such purpose. The appellee intervenors, who are merchants and jobbers of the territory known as the Central Freight Association territory, attack the order on the ground (*a*) that it violates § 2 of the Interstate Commerce Act, in that it compels a charge to them for like kind of traffic under substantially similar circumstances and conditions greater than is charged to their competitors in seaboard territory and on the Missouri River; (*b*) the order is in contravention of § 3, in that it gives an unreasonable preference to merchants and jobbers in the seaboard territory and on the Missouri River over merchants and jobbers in Central

Freight Association territory; (*c*) that it arbitrarily attempts to change existing commercial conditions upon which the various distributing centers of the seaboard, Middle West and West have become established; (*d*) the power of the Commission is limited to the reduction of unreasonable rates, and that the rates reduced are not shown to be such in themselves; (*e*) the order is void, it being an attempt at legislation on the subject of general adjustment of rates.

These contentions present the full offending of the order, and the summary of them is that rates long established have been changed, commercial conditions are disturbed, and equal opportunities of competition of certain commercial centers which have grown up have been taken away, and undue protection given to others. This seems very formidable in the recitation. But it is met by counter charges of discrimination, and that the equal opportunities of competition contended for is a power which has grown up and is supported by the existence of unjust freight rates. It is certain that the subject has taken on more complexity than it had before the Interstate Commerce Commission, and the Commission has made this the basis of a motion to dismiss the suit as to the intervening railroads, and all the intervening merchants and manufacturers, on the ground as to the railroads, among others, that the order does not run against or operate upon them, and that no right of theirs can be determined by the decree. On the ground as to the intervenors, that over the matters herein the courts exercise only the jurisdiction conferred by the act to regulate commerce, and not general equity powers, and that the matter to be determined is not the respective rights of shippers or localities, but the validity of the order of the Commission, and that the intervenors have a complete remedy by application to the Commission. And we may say here, as adding to the complex effect and interest of the ques-

tions presented, that the chambers of commerce and boards of trade of certain Eastern cities have presented a brief in defense of the order, asserting a vital interest in its preservation, and exhibiting and illustrating the discrimination which, as they contend, exists against them by the breaking of rates at the Mississippi River crossings.

Let us see, therefore, upon what grounds the Commission proceeded. The Commission is accused by the railroad companies of attempting to substitute an artificial system of ratemaking for a long-established system, and to protect or foster particular localities of production and distribution. Certain remarks of the Commission are cited to support the charge. We think the charge puts out of view all else that was said by the Commission, puts out of view the comprehensive consideration the Commission took as exhibited in the explicit declaration made after quoting the local class rates between the rivers in cents per hundred pounds, that "these are the rates that are added to the rates up to the Mississippi River crossings to make up the through rates from the Atlantic seaboard to the Missouri River cities. Are these rates, as so used, and the through rates resulting therefrom, unwarrantably high or unduly discriminatory or unjustly prejudicial? Can they be changed without doing injustice elsewhere?"

We think the charge also puts out of view the disclaimers of such purpose in the answer of the Commission in its report to Congress, and its insistence that it is constrained by the law to act only on complaint to it and that it is open at all times to be appealed to to redress the grievances any shipper or locality may have. Nor did the Commission ignore or underestimate the manner in which the lines of railroads had been extended or the system of rates or ratemaking which had resulted. That is the system of making rates upon certain basing lines or points. Rates "break" at such points, it was proved as a result

of building independent lines westward. In other words, lines of railroads were built to certain cities from the East, seeking such cities, it may be, because of their natural situation and facilities, and other independent lines building westward, each line fixing its own rates or uniting according to circumstances in joint rates. It is the observance of such points that give and maintain, as we understand the contention of the railroads, to certain cities "the equal opportunity in the distribution of merchandise with the merchants in the East, and with the merchants to the West of said cities, so far as their business is affected by trade rates." That this was carefully considered is manifest, for the Commission resisted the argument which was made against basing rates on such points, saying:

"We are not impressed with the view that the system of making rates on certain basing lines should be abolished. No system of ratemaking has been suggested as a substitute for it, except one based upon the postage stamp theory, or one based strictly upon mileage. Either of these would create revolution in transportation affairs and chaos in commercial affairs that have been builded upon the system of ratemaking now in effect. It must not, however, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of, or hold upon, the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing or producing facilities, and increased traffic on railroads create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption."

It was the sense of the Commission, however, that such

points could not be immovable forever and fixed forever against power of changing, or that through rates based on such points must be exempt from regulation, no matter what their character, or be constituted at the will of the railroad of the sum of local rates or the sum of rates from one basing point to another, however unjust the rates might be. Indeed, as pointed out in the brief of the appellants in No. 664, the railway companies adhere to no such construction of rates. As there said, "the Pacific coast terminal rates, the Washington and Spokane common point rates, the Oklahoma rates and the El Paso and Texas common point rates are each and all a departure therefrom, and all are much less than the rates ordered by the Commission."

As we have said, the Commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them and, it may be, will be disturbed or disordered if they be changed. Such circumstance is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem. And it may be that there cannot be an accommodation of all interests in one proceeding. This the Commission has realized and expressed. The Commission, meeting a possible suggestion that if the part of the through haul, which consisted of the rate between the rivers, was too high, all rates between the rivers might be too high, said:

"If the local class rates of defendants between the Mississippi and Missouri Rivers were reduced, it would give the same degree of advantage to all the producing and distributing centers on and east of the Missouri River,

and their relative advantages or disadvantages would not be changed, while a very serious inroad upon the revenues of the carriers would inevitably result, and at a time of industrial depression when it could not well be borne. Such a change would necessitate corresponding changes in the rates to and from intermediate points, and would probably be reflected in changes in commodity rates as well. The local class rates between the rivers are high, but this is not the time to precipitate such a violent change as would follow an important reduction of them. The first class rate from Buffalo to Chicago, about 540 miles, and from Pittsburg to Chicago, about 465 miles, is 45 cents. From Cincinnati to Chicago, 306 miles, it is 40 cents."

We may say in passing that the passage thus quoted is one of those which is adduced to support the contention that the Commission's purpose was to introduce a new system of ratemaking and build up certain distributing centers. We do not think so. It only shows that the accusation that all rates between the rivers were too high might be justified, but that it would be unjust to the carriers to reduce them at that time. It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the Commission. It is very clear that by a voluntary reduction by them of such rates the equality of opportunity dependent upon them would be restored. We make this observation to bring out clearly the relation of the railroad companies to the grievance complained of. That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clark* v. *Kansas*, 176 U. S. 114, 118; *Smiley* v. *Kansas*, 196 U. S. 447.

But, it may be said, such limitations upon the com-

panies is not of consequence, for shippers and trade centers are here with complaints. It is doubtful if they are properly here, or rather were properly permitted to intervene. We have said that the act to regulate commerce was intended to be an effective means for redressing wrongs resulting from unjust discrimination and undue preference, and this must be so, whether persons or places be sufferers. *T. & P. Railway Co.* v. *Abilene Oil Co.*, 204 U. S. 426. We have also said that the primary jurisdiction is with the Commission, the power of the courts being that of review and is confined in that review to questions of constitutional power and all pertinent questions as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra.*

The order of the Commission besides is strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri River cities are too high. That order is alone open to review. Whether other persons, cities or areas of territory have grounds of complaint, the way is open by application to the Commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the Commission should first pass, and of which the courts should not be called upon in advance to intimate an opinion. The reasons for this we have indicated, and they will be found at length in the cases which we have cited.

One question remains for discussion, the finding of the Commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, "due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company* v. *Interstate Commerce*

Commission, 206 U. S. 454, and cases cited. The testimony in this case does not shake the strength of such presumptions. We have seen that the Circuit Court refrained from expressing an opinion upon anything but the power of the Commission. Circuit Judge Baker, dissenting from that view, went further and said:

"The complainants are common carriers whose rates on certain traffic are directed to be reduced by the order complained of. Two grounds for injunction are alleged. One is that the new rates are confiscatory. There is no proof whatever that the rates which the Commission prescribed as just and reasonable are not sufficient to pay the cost of handling that traffic, to cover that traffic's full proportion of maintenance and overhead expenses, and to return to the carriers an ample net profit. Furthermore, proof is lacking that, if the carriers should reduce other rates to correct what they claim is the maladjustment caused by the Commission's order, the reduction would not leave them abundant net returns. For the purpose of this hearing, therefore, it must stand as an agreed fact that the present reduction is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation."

We concur in these conclusions.

Decree reversed and the case remanded with directions to dismiss the bill and all proceedings in the Circuit Court.

MR. JUSTICE WHITE dissenting.

The court below enjoined the execution of the order of the Commission because it was of the opinion that that body had exceeded the powers conferred upon it by the act to regulate commerce, since it had based its order upon the assumption that it was its duty under the act to secure a relatively equal share of the volume of interstate commerce to communities and places, and therefore that it was its province to alter otherwise legal rates for the

purpose of correcting the inequalities which otherwise would arise from the competitive rivalry between sections and places. As, in my opinion, the court below was correct in the view which it took of the order of the Commission, and was right in holding that the power which the order manifested was not conferred by law, I dissent from the judgment of reversal now announced. It does not, however, seem to me necessary that I should do more than state the fact of my dissent for the following reasons: The judgment of reversal is based, not upon the ruling that the Commission possessed the authority to make the order if it was based upon the assertion of power upon which the court below found the order must necessarily rest, but exclusively upon the theory that the court below, while rightly holding that the Commission had not the power which it assumed that body had exerted in making the order, had nevertheless mistakenly enjoined the order because it did not exert, or attempt to exert, the power which the court conceived had been called into play in making it. In other words, although the opinion now announced excludes the authority which the lower court deemed the Commission had exerted by the order in question, it nevertheless maintains the order because of the conclusion that the order was but an exertion by the Commission of its authority on complaint that a rate was unreasonable of itself, to correct such rate by substituting a reasonable rate therefor. Although I am unable to agree with the reasoning by which the court now gives to the order of the Commission the narrow basis thus stated, as the solution of that question depends upon the idiosyncrasies of this particular case and involves no principle of general importance, it seems to me I am called upon to do no more than simply to state my inability to agree.

MR. JUSTICE HOLMES and MR. JUSTICE LURTON join in this dissent.

INTERSTATE COMMERCE COMMISSION *v.* CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

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

No. 641. Argued April 5, 6, 1910.—Decided May 31, 1910.

This case involves the same questions of law as were involved in the preceding case and is decided on authority thereof.
171 Fed. Rep. 680, reversed.

THE facts, which involve the validity of certain orders of the Interstate Commerce Commission reducing railroad freight rates, are stated in the opinion.

Mr. Wade H. Ellis and *Mr. Luther M. Walter*, Special Assistants to the Attorney General, with whom *Mr. Edwin P. Grosvenor*, Special Assistant to the Attorney General, was on the brief, for appellant.

Mr. William D. McHugh and *Mr. Samuel A. Lynde* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was argued and submitted with Nos. 663 and 664, as involving the same general questions. It was disposed of in the court below with those cases in the same opinion, (171 Fed. Rep. 680,) and on the same ground, to wit, that the effect of the order of the Commission to enjoin which the suit was brought apportioned "out the country into zones tributary to given trade centers and not tributary to others," resulting in protection and favor to the first. The case is here on appeal from an order

granting a preliminary injunction, which was moved upon the bill (to which there was a demurrer by the Interstate Commerce Commission) and upon certain supporting affidavits.

The order enjoined was made by the Commission in a proceeding instituted before it by one George J. Kendall, in which he attacked certain rates charged by certain carriers from New York, Chicago, St. Louis, Omaha, and points taking similar rates to Denver, on the ground that the same were excessive and discriminatory, and attacked rates from Denver to Salt Lake City on similar grounds. By an amended complaint certain commodity rates were also attacked.

After hearing and argument the Commission made its report, from which the following is an extract:

"In the *Burnham, Hanna, Munger Case, supra* (14 I. C. C. Rep. 299), we found that the defendant carriers had for years maintained a line of proportional class rates between Chicago and the Twin Cities, applicable on traffic from the Atlantic seaboard, one-third less than their local class rates between Chicago and the Twin Cities, and that their local rates had not thereby or therefore been pulled down or reduced. We cannot accept the theory that if in this case the through rates from Chicago and St. Louis to Denver are reduced, like reductions in the local rates from Chicago or St. Louis to the Missouri River or from the Missouri River to Denver must automatically follow. If rates applicable only to through business and that are materially lower than the local rates can be maintained between Chicago and St. Paul, and in the many other instances which could be cited where the carriers adopt and maintain the same principle, without forcing reductions in the local rates, it is obvious that the same thing can be done between Chicago and the Missouri River or between Chicago and Denver. As has been seen, the class rates from the Missouri River to Denver, short

line distance 538 miles, are on a scale of $1.25 per 100 pounds, first class, and from Denver to Utah common points, about 650 miles, they are on a scale of $1.64 per 100 pounds, first class. Measured by any test, these rates are in both instances unreasonable and excessive. It seems obvious that they must be revised, either by voluntary action of the carriers in conformity with the principles announced in the *Spokane Case, supra* (15 I. C. C. Rep. 376), or in some other proceeding before this commission. For that reason no reduction of those rates will be ordered in this case, although upon the record we are convinced that they are unwarrantedly high, and that reasonable reduction therein would not work any undue reduction in the revenues of defendants. If those rates are reduced so that the combination on the Missouri River or on Denver results in reasonable through rates it does not necessarily follow that these through rates must again be reduced. Certainly it is better in every instance where important readjustment of rates is necessary to have it worked out by the carriers or with their coöperation, if that be possible.

"The present class rates from Chicago to the Missouri River are, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	80	65	45	32	27	32	27	22	18½	16

"The present class rates from Chicago to Denver are, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	205	165	125	97	77	92	72	62	53½	46

being made up of the sums of the class rates from Chicago to the Missouri River crossings, as above, and the class rates from the Missouri River to Denver, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	125	100	80	65	50	60	45	40	35	30

"The present class rates from St. Louis to Denver are, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	185	145	115	92	72	84½	64½	57	48½	41

being made up of the class rates from St. Louis to the Missouri River, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	60	45	35	27	22	24½	19½	17	13½	11

and the above-named class rates from the Missouri River to Denver.

"As hereinbefore stated, we find that this rate adjustment is unjustly discriminatory in favor of the Missouri River cities and against Denver. The through class rates from Chicago to Denver and from St. Louis to Denver are unreasonably high in and of themselves. The reduction of those rates as herein ordered will not involve any unreasonable or undue reduction of the revenues of the defendants affected thereby, and for these reasons and upon the whole record we are of the opinion that for the future reasonable class rates from Chicago to Denver should not exceed, in cents per 100 pounds, the following:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	180	145	110	85	67	80½	63	54	47	40

and that reasonable class rates from St. Louis to Denver should not exceed, in cents per 100 pounds, the following:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	162	127	101	80½	63	74	56	50	42	36

"

An order was directed to be entered in accordance with those views, which was done, and the railroads were required thereby to cease and desist, on or before the first of May, 1909, and for a period of two years, to exact for the transportation of traffic rates in excess of those above mentioned, respectively, from Chicago and St. Louis to Denver, and to establish on or before that date and maintain said rates between said cities.

The railroads affected, to wit, Chicago, Burlington and Quincy Railroad Company, the Chicago, Rock Island and Pacific Railway Company, Chicago and Northwestern

Railway Company, Chicago, Milwaukee and St. Paul Railway Company, the Atchison, Topeka and Santa Fe Railway Company, Missouri Pacific Railway Company, Union Pacific Railroad Company, and the Wabash Railroad Company, filed a bill to enjoin the enforcement of the order.

In their bill the companies described their respective roads and the termini of the roads, and alleged that the companies were respectively engaged as common carriers in the transportation of property by railroad by continuous carriage or shipment from and to the points designated in the report and order of the Commission. The bill alleged the relation of the carriers to one another and the extent of their roads westward and eastward and their relation to roads east of Chicago and the Mississippi River. The manner of charging and adjusting rates is described in the bill and the classifications of freight which existed as in the bill in Nos. 663 and 664.

In the bill in those cases the Mississippi River was alleged to be a basing point for freight destined to the Missouri River cities. In the case at bar the Missouri River is added as a basing point in the making of rates for the transportation of merchandise originating east of the Mississippi River, destined to territory between the rivers and to the Missouri River cities and west thereof. And it is alleged that the making of such basing points "has been due both to natural physical conditions and to the natural development of railroad construction and operation to and beyond said rivers and in territory between the same, and has naturally resulted in the evolution and development of railroad transportation, and the business and commerce in and through Western territory."

The facts which caused such result are set out at length and are in substance that railroads were built westward to certain points and that other and independent roads were constructed farther westward, each road charging its

separate rate, and that the places to which and from which the roads were built were natural distributing centers, "and were able to compete on the basis of equality with each other in the distribution and sale of their merchandise."

The relation of the two rivers as basing points and why the Missouri was made one is set forth in the following paragraph:

"Your orators further aver that long prior to the construction of any railroad westward across the Missouri River to the city of Denver the said Missouri River had been made a basing point in the making of rates to territory west of said Missouri River, and that, as is above stated, for many years the only railroads serving the said Missouri River cities were lines of railroads entering said cities from the east and terminating there, and lines of railroad beginning at said cities and extending west therefrom, and that at the time the said four lines of railroad of your orators, the Chicago, Burlington and Quincy Railroad Company, the Chicago, Rock Island and Pacific Railway Company, the Missouri Pacific Railway Company, and the Atchison, Topeka and Santa Fe Railway Company, were constructed west of and across the said Missouri River to the city of Denver, or other Colorado common points, the said Missouri River cities and the commercial interests therein had become extensive and important, and the competition with the railroads whose lines terminated at said Missouri River cities had become so active and the competition between the several distributing points on said Missouri River and east thereof had become so extensive and important that the said four companies whose lines were extended across said river and westward therefrom were compelled by reason of commercial and competitive conditions to recognize, adopt and apply at said Missouri River cities the said system of basing rates on the Missouri River which had always

theretofore obtained as hereinabove set forth." That is, as had obtained on the Mississippi River.

The other allegations supplement the above and are substantially like those which formed the basis of the contentions made and argued in the other cases.

The bill, as we have said, was supported by affidavits. They were substantially the same and set forth the acquaintance of their makers with railroad construction, development and management. They set forth with detail the facts and circumstances which their makers conceived to be determinative of the questions involved and a justification of the system of ratemaking established by the companies, and which, they averred, affected "vitally all the important lines of business of the Western country." They further averred that a change in the system, whereby the practices under it "should be forbidden, would be a change which would revolutionize the methods of doing business throughout the Western country, and would work injury to the west and its business, the extent of which would be so great as to be difficult of computation."

It will be seen, therefore, that this case and the other cases are alike except as to the points of destination of the roads and the cities that are concerned with the rates charged and reduced. This and they turn on the same question of the power of the Commission, the effect of its order on business conditions and the systems of ratemaking by the railroads, its effect upon the revenues of the companies, and by their reduction to cause a deprivation of the property of the companies without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

Further elaboration we think is unnecessary, and on the authority of cases Nos. 663 and 664 the decree of the Circuit Court is reversed and the case remanded with directions to set aside the injunction and dismiss the bill.

So ordered.

IN RE HENRY A. CLELAND, PETITIONER.

MANDAMUS.

No. 12, Original. Argued April 4, 1910.—Decided May 31, 1910.

Where the circuit judge certifies that he is satisfied that the suit involves a controversy within the jurisdiction of the Circuit Court mandamus will not issue to compel him to dismiss the case even if this court differs with him in his conclusions of law.

Jurisdiction does not depend on motive. Although shares of stock may have been transferred to a non-resident to enable him to bring suit in the Federal court, if it appears from the record that he is the absolute owner of properly issued shares, exceeding $2,000 in value, jurisdiction exists.

Jurisdiction of a suit to wind up a corporation having once properly attached, a receiver appointed, and creditors, as between whom and the corporation diverse citizenship exists and the requisite amount is involved, joined as parties, the jurisdiction cannot be subsequently defeated by denials in *ex parte* affidavits of the jurisdictional facts.

THE facts are stated in the opinion.

Mr. C. D. Joslyn, with whom *Mr. Paul B. Moody* was on the brief, for petitioner.

Mr. De Forest Paine for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a writ of mandamus commanding the Honorable Henry H. Swan, sitting in the Circuit Court of the United States for the Eastern District of Michigan, to dismiss a cause on the ground that the suit does not really and substantially involve a controversy within the jurisdiction of that court. Act of March 3, 1875, c. 137, § 5. 18 Stat. 470, 472. The suit in question was begun

on March 30, 1901, by a shareholder in an insolvent Michigan corporation, a mutual building and loan association, to have a receiver appointed and the association wound up. There were provisions in the Michigan statutes for such cases, but after conference with the Secretary of State, now the Governor of Michigan, the Attorney General of the State and officers of the corporation, it was decided that the most saving and beneficial course would be to have a receiver appointed by the United States Court, the assets of the company being partly scattered in distant States. As the requirement of proceedings under the state law was understood to be mandatory upon the Secretary of State, the beginning of this suit was hastened. To that end Aldrich, who had been counsel for the corporation and who wanted to be appointed receiver, transferred and procured to be issued certificates of stock to a friend of his, Bishop, the original plaintiff, and Bishop thereupon signed and swore to the bill alleging the par value of his stock to be over $2,000. No doubt he intended thereby to help Aldrich, but he also understood that he was acting for the benefit of all concerned, and undoubtedly one reason for applying to him was to save time in getting a non-resident shareholder. It was for the benefit of all in fact. The answer to the present petition states that all the shareholders have come in. Moreover, although it was disputed at the bar, we see no ground for denying that on the face of the bill the jurisdiction of the court was established. The laws of Michigan did not exclude it, and the corporation was not so far in the hands of the state officers as to prevent action by the court. See further, *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530.

It is unnecessary to set forth the proceedings under the bill at length. They have gone on from March 30, 1901. Real estate has been sold by the receiver, assets collected and all the debts of the corporation outside the claims of

shareholders have been paid, except one disputed claim for $3,000. The main matter outstanding is a suit against directors and certain withdrawing shareholders for money alleged to have been paid improperly and upon other claims, which is on the docket for hearing. See *Aldrich* v. *Gray*, 147 Fed. Rep. 453. *S. C.*, 77 C. C. A. 597. It is enough to say that after considerable litigation and much expense and trouble the proceedings are drawing to a close.

The petitioner never has been admitted formally as a party to the suit, but he proved his claim as holder of shares of the par value of $2,000 on May 29, 1902, and while since that time he has been active in trying to have the receiver removed, and in having him called to account, his various petitions have not been dismissed by the Circuit Court on the ground that he had no standing before it. It may be assumed for purposes of decision that he has a standing here.

After continuing this activity for years the petitioner now, without adequately explaining his delay and change of attitude, seeks to reduce all the proceedings to naught. *Deputron* v. *Young*, 134 U. S. 241. His pecuniary interest in doing so is infinitesimal, even if not actually contravened. It cannot be believed the motive for the petition is such as to appeal to the discretion of the court. But apart from questions of discretion, so far from its appearing to the satisfaction of the Circuit Court, as the statute requires, that the suit did not involve a controversy within its jurisdiction, the judge certifies that he is satisfied that it does involve such a controversy. *Put-in-Bay Water Works, Light & Railway Co.* v. *Ryan*, 181 U. S. 409, 431. On the face of the record he was right, and the summary remedy of mandamus would not be proper, even if our conclusion from the evidence were different from his, which is not the case. *In re Winn*, 213 U. S. 458, 468.

It is said that on the undisputed facts Bishop was not

a *bona fide* shareholder, and that the proceeding was collusive. But the first proposition is not true and the second is not law. Bishop became the absolute owner of the shares in his name. The answer to the petition so finds, and there is no question about it. See *South Dakota* v. *North Carolina*, 192 U. S. 286, 310. Some of these shares had been issued to Aldrich in payment for service, others were issued by the corporation upon payment of ten dollars, the proper sum at the start. It is said that the corporation being insolvent the issue of the certificate was a fraud on the other shareholders. No one complains here except the petitioner. It seems to have been to the advantage of all. Certainly it was not necessarily a fraud upon them. As to collusion, there is nothing unlawful in transferring shares to a man out and out for the convenience of immediately beginning a suit that other shareholders have a right to begin, that all parties in interest want to have begun, and that the authorities of the opposing jurisdiction approve.

Perhaps the most plausible ground would have been that Bishop's interest was not as great as his allegation implied, even granting his right as a shareholder. But there is no reason to doubt that he thought that it was. See *Barry* v. *Edmunds*, 116 U. S. 550. And with regard to this and the objections previously mentioned, it is enough to quote the language of the court in *Put-in-Bay Water Works, Light & Railway Co.* v. *Ryan*, 181 U. S. 409, 432, 433: "Jurisdiction having attached under the allegations of the original bill, and the court having proceeded, in a proper exercise of its discretionary power, to appoint a receiver, . . . and the court having also, in the exercise of its power as a court of equity, allowed the intervention of other creditors, as between some of whom and the defendant company there was jurisdiction in the court, both as respects diversity of citizenship and amount of claims, we think its jurisdiction did not fail by reason

of anything that appeared in *ex parte* affidavits . . . denying the truth of the allegations . . . in respect to the amount in dispute."

Rule discharged.
Writ of Mandamus denied.

DOZIER *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 105. Submitted January 25, 1910.—Decided May 31, 1910.

The protection of the commerce clause of the Federal Constitution extends beyond the strict lines of contract, and inseparable incidents of a transaction of interstate commerce based on contract are also interstate commerce.

Where, under the contract to purchase a picture, the purchaser has the option to take at a specified price the frame in which the picture shall be delivered, and both picture and frame are manufactured in and delivered from another State and remain the property of the vendor until paid for, the sale of the frame is a part of the original transaction and protected by the commerce clause of the Constitution.

The imposition of a license tax for soliciting orders for enlargements of photographs and frames on persons not having a permanent place of business in the State and keeping such articles as stock in trade is a regulation of commerce between the States and void under the commerce clause of the Federal Constitution, both as to the orders for the picture itself and as to an optional right to take, at a price specified in the contract, the frame in which the picture is delivered, and so *held* as to the license tax imposed under § 17 of the statute of March 7, 1907, of Alabama.

154 Alabama, 83, reversed.

THE facts are stated in the opinion.

Mr. A. D. Gash for plaintiff in error:

Congress has sole power to regulate commerce between the States. Art. I, § 8, Const. U. S. Section 17 of the

Alabama act of March 7, 1907, requiring every person who solicits orders for pictures or frames or sells or disposes of picture frames to pay a license tax in each county is an attempt to interfere with and to regulate commerce and as such is invalid as to an agent of a corporation residing out of the State. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Brenan* v. *Titusville*, 153 U. S. 289; *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *Lyng* v. *Michigan*, 135 U. S. 161; *Crutcher* v. *Kentucky*, 141 U. S. 47; *The State Freight Tax*, 15 Wall. 232; *Brown* v. *Maryland*, 12 Wheat. 419; *Stockard* v. *Morgan*, 185 U. S. 27.

No State has a right to abridge the privileges of citizens of other States or to discriminate in its laws against the rights and privileges of citizens of the other States, Art. XIV, § 1, Const. U. S., and § 17 does discriminate against the rights and privileges of citizens of the other States.

An agent of a foreign corporation who delivers a frame to each purchaser of portraits whose contract of purchase provides that the portrait will be delivered in a suitable frame that may be accepted at factory price, who has only one frame fitted to and surrounding each portrait as it is delivered and who does not offer to sell any frame to others than those whose contract calls for the option of accepting said suitable frame and who carries no extra frames whatever, but keeps the title for his company or returns to his company any frame that is refused is engaged solely in interstate commerce. *Chicago Portrait Co.* v. *Mayor of Macon*, 147 Fed. Rep. 967; *State* v. *Coop*, 52 So. Car. 908; *City of Laurens* v. *Elmore*, 55 So. Car. 477.

The mere fact that the purchaser may refuse to accept the frame does not deprive the transaction of its qualities of interstate commerce.

Mr. Alexander M. Garber, Attorney General of the State

of Alabama, and *Mr. Thomas W. Martin* for defendant in error:

Although an agent from without the State cannot be convicted for soliciting orders for the enlargement of pictures because the taking of the orders therefor and the delivery thereof in pursuance of the order-contract, constituted interstate commerce, in this case as held by the state court the sale of the frames was made and completed in Alabama by the agent, after the frames were brought into the State, and while in the possession of the agent and, therefore, the transaction with respect to the frames was not *inter*state but *intra*state commerce. The conviction, therefore, should be sustained under the latter alternative in the complaint. The question has not been decided by this court. *State* v. *Montgomery*, 52 Maine, 433; *Chrystal* v. *Mayor*, 33 S. E. Rep. 810. And see also *Machine Company* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Rearick* v. *Commonwealth of Pennsylvania*, 203 U. S. 506; *General Oil Co.* v. *Crane*, 209 U. S. 231. See also dissenting opinions in *State* v. *Coop*, 52 So. Car. 908, and *City of Laurens* v. *Elmore*, 55 So. Car. 477.

Stripped of all its technicalities, the transaction in this case resolves itself into a shipment of the picture frames by the manufacturer to its agent in another State there to be sold without any order from any person for such frames and in such cases the agents are liable in each case for the payment of the license tax. *Machine Company* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296. See also *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *General Oil Co.* v. *Crane*, 209 U. S. 212. *Rearick* v. *Pennsylvania* does not apply.

Mr. Justice Holmes delivered the opinion of the court.

The plaintiff in error was convicted and sentenced to a fine on a complaint for breach of an Alabama statute of

March 7, 1907. By § 17 of that act a license tax was imposed on persons who did not have a permanent place of business in the State and also keep picture frames as a part of their stock in trade, if they solicited orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they made charge for such frames or not, or if they sold or disposed of picture frames. The Chicago Crayon Company, having its only place of business in Chicago and being engaged in the business of making and enlarging portraits from photographs and in the manufacturing of picture frames, solicited orders in Alabama without paying the license tax. These orders were given in writing for a portrait of the size and kind wanted, specified the price, cash on delivery, and continued, "I understand that my portrait is to be delivered in an appropriate frame which this contract entitles me to accept at factory price." The agent of the company gave back a written acceptance, repeating the other terms of the bargain and adding, "all portraits are delivered in appropriate frames, which this contract entitled the purchaser to accept at factory prices," with particulars purporting to show that these prices were from one-third to one-half the retail or usual ones. The plaintiff in error, who also had no permanent place of business in Alabama and had paid no license tax, was an agent of the company who delivered pictures and frames and collected for them in pursuance of the agreed plan. The pictures and frames were sent to the agent and remained the property of the company until paid for and delivered. On these facts the Supreme Court of Alabama, while admitting that the dealings concerning the pictures were commerce among the States, sustained the conviction on the ground that the sale of the frames was a wholly local matter. 154 Alabama, 83.

No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it

took place wholly within the State of Alabama, if a sale was made. But as was hinted in *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512, what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices,' and the company and factory were in Chicago, obviously it was contemplated if not agreed that the frame should come on with the picture. In fact the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous and one, at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions the statute as applied to this case is a regulation of commerce among the States, and void under the Constitution of the United States. Art. I, § 8. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. *Caldwell* v. *North Carolina*, 187 U. S. 622. *Rearick* v. *Pennsylvania*, 203 U. S. 507.

Judgment reversed.

THOMAS, AS TRUSTEE IN BANKRUPTCY OF LIGHTSTONE, *v.* SUGARMAN.

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

No. 131. Argued April 12, 1910.—Decided May 31, 1910.

Where the trustee in bankruptcy brings a bill in equity in the Circuit Court to set aside a transfer made by the bankrupt, the appeal is not governed by § 25 of the Bankruptcy Act but by the Court of Appeals Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545.

The rule that an act of election directed toward a third person may operate *in rem* and establish title as to all concerned, does not apply, where, as in this case, the title is in the person enforcing the remedies, and there was no element of election.

The fact that a trustee in bankruptcy obtained a money judgment against one to whom the bankrupt transferred certain assets to delay and defraud creditors, *held*, in this case, not to have amounted to ratification of the bankrupt's act or to an election not to pursue the assets transferred, but the bankrupt was entitled to also maintain a bill in equity to set aside the transfer.

157 Fed. Rep. 669, reversed.

THE facts are stated in the opinion.

Mr. Abram I. Elkus and *Mr. Carlisle J. Gleason* for appellant:

The proceedings upon which the plea in bar is based were merely possessory in character and were an attempt on the part of the trustee to get that possession of property held by the bankrupt to which he was entitled under the Bankruptcy Act.

When the trustee qualified all the property of the bankrupt vested in him and he was entitled to possession thereof. The bankrupt was under the legal duty of de-

livering to him all assets, irrespective of their source. Bankruptcy Act, § 70.

The bankrupt could not assert an outstanding title in anyone else as against his trustee. *Re Beall*, Fed. Cas. No. 1156; *Re Vogel*, Fed. Cas. No. 16,982; *Matter of Moses*, 1 Fed. Rep. 865; *In re Smith*, 100 Fed. Rep. 795.

The trustee took the property subject to all the rights of third parties, and in the same condition in which the bankrupt had it. *Re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514.

The turn over order is not a judgment or decree for the payment of money against the bankrupt, but a mere order for delivery of assets to the trustee. It is merely an assertion of possessory rights. *Re Schlesinger*, 102 Fed. Rep. 117.

Under § 70, as to possession, the trustee undoubtedly stands in the shoes of the bankrupt, but as to rights against fraudulent transferees he is clothed with the powers of a creditor.

The acts of the trustee in the proceedings upon which the plea in bar is based were not irreconcilable with the bringing of a suit against Sugarman to set aside the fraudulent transfer.

The doctrine of election of remedies applies only where the remedies asserted are irreconcilable. 15 Ency. of Law and Pro., 257, 261; *Mills* v. *Parkhurst*, 126 N. Y. 89, 93; *Matter of Garver*, 176 N. Y. 386.

The trustee did nothing which will bar the claims of creditors. *Bowdish* v. *Page*, 153 N. Y. 104, 110; *Butler* v. *Hildreth*, 5 Metcalf, 49.

Where the act relied upon as constituting an election is that of the representative of creditors, a distinct and clear case within the doctrine of election must be made out because the rights of creditors, ignorant of the facts, are in question.

It is apparent that no equitable estoppel is involved in

this case. The trustee took no steps and was guilty of no omission upon which Sugarman could in the least rely, or which could in the slightest degree tend to affect his actions or even his beliefs. *Jenness* v. *Berry*, 17 N. H. 549; *Robbins* v. *Worten*, 128 Alabama, 373, 379; *Woods* v. *Potts*, 140 Alabama, 425.

Not one of the appellee's authorities supports his contention that there has been an election by the trustee in bankruptcy in the case at bar.

There could be no election under the allegations of the bill of complaint.

Sugarman had full knowledge of the fraudulent intent and insolvent condition of the bankrupt, etc., and had no right of action against the trustee and no right of action against anyone else by reason of the fraudulent transfer. He was *in pari delicto* with the bankrupt and the court would leave him where it found him. *Wheeler* v. *Sage*, 1 Wall. 518; *Selz* v. *Unna*, 6 Wall. 327; *Railroad Co.* v. *Sutter*, 13 Wall. 517; *Mullen* v. *Hoffman*, 174 U. S. 639; *Goodrich* v. *Houghton*, 134 N. Y. 115.

Sugarman being actually fraudulent, would not be entitled, upon final judgment against him for the property transferred, to have credit for the money he had paid the vendor. *Lynch* v. *Burt*, 132 Fed. Rep. 417; *Johnson* v. *Forsyth*, 127 Fed. Rep. 845; *Burt* v. *Gotzian*, 102 Fed. Rep. 937; *Baldwin* v. *Short*, 125 N. Y. 553, 559, 560; *Fowler* v. *Deering*, 9 App. Div. 220; *Conde* v. *Hall*, 92 Hun, 335.

Under the fraudulent conspiracy charge in the complaint, the bankrupt and Sugarman are jointly and severally liable to the trustee. The pursuit of one and the gaining of judgment against him where that judgment is not satisfied would not bar action against the other. *Watts* v. *British Co.*, 60 Fed. Rep. 483; *Lovejoy* v. *Murray*, 3 Wall. 1; *Russell* v. *McCall*, 141 N. Y. 437; *Osterhaut* v. *Roberts*, 8 Cow. 43; *Preston* v. *Hutchinson*, 29 Vermont, 144.

This court has jurisdiction of the appeal. It is from a final decision of the Circuit Court of Appeals in a suit in equity involving more than $1,000, besides costs. It is taken within one year under § 6 of the Judiciary Act of March 3, 1891, c. 517, § 6, 26 Stat. 828, and is not a case where decision of the Circuit Court of Appeals is final under § 6.

Mr. John J. Crawford for appellee:

The appeal should be dismissed because not taken in due time. General Order No. 36 applies. *Conboy* v. *National Bank*, 203 U. S. 141; *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296. General Order No. 36 was not involved or discussed. *Richardson* v. *Shaw*, 209 U. S. 365, came up on certiorari and does not apply.

In seeking to recover the proceeds of sale as a part of the bankrupt's estate, the complainant necessarily affirmed the sale, and hence he may not now proceed upon the theory that the sale was void. *Robb* v. *Vos*, 155 U. S. 13; *Connihan* v. *Thompson*, 11 Massachusetts, 270, 272; *Butler* v. *Hildreth*, 5 Metc. 49; *Sickman* v. *Abernathy*, 14 Colorado, 174; *Hathaway* v. *Brown*, 22 Minnesota, 214.

When any creditor with knowledge of the wrong that has been done him, makes his election to take from the grantee the purchase price agreed to be paid for the land, his conduct is, in effect, an affirmance of the sale and a waiver of the right to complain of the fraud. *Millington* v. *Hill*, 47 Arkansas, 301. See also *Iron Gate Bank* v. *Brady*, 184 U. S. 665; *W. W. Bierce, Ltd.*, v. *Hutchins*, 205 U. S. 340; *Furness* v. *Ewing*, 2 Pa. St. 479; *Cunningham* v. *Campbell*, 3 Tenn. Ch. 708; *Butler* v. *O'Brien*, 5 Alabama, 316; *Lemay* v. *Bibean*, 2 Minnesota, 251; *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450; *Reunich* v. *Bank of Chillicothe*, 8 Ohio, 529; *Scarf* v. *Jardine*, L. R. 7 App. Cas. 345.

The election is determined by the commencement of

the proceeding, and not by the result. *Robb* v. *Vos*, 115 U. S. 13; *Matter of Garver*, 176 N. Y. 386; *Lowenstein* v. *Glass*, 48 La. Ann. 1422; *Smith* v. *Gilmore*, 8 App. D. C. 192; *Thensen* v. *Bryan*, 113 Iowa, 496; *Sherman* v. *Watt*, 104 Michigan, 201; *Ludington* v. *Patton*, 111 Wisconsin, 208.

The rule for which the appellant contends would work great hardships. The creditors have rights and equities, it is true, but so have other persons. Where a man has purchased goods from one who afterwards fails, he must at some time be secure in his position. The trustee cannot consume months or years in an attempt to collect the proceeds from the bankrupt, and then, having failed in this because those proceeds have been lost or squandered by the bankrupt, turn about and attempt to disaffirm the sale.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by a trustee in bankruptcy to set aside a transfer of accounts and bills receivable made by the bankrupt to the defendant Sugarman with intent to delay and defraud creditors. Sugarman pleaded in bar that the plaintiff had ratified his dealings because, with knowledge of all the facts, the plaintiff had taken a judgment against the bankrupt for $17,500, a part or all of which was money remaining in the bankrupt's hands of $30,000 alleged by the bill to have been paid to him by Sugarman in pursuance of the fraudulent scheme. A majority of the Circuit Court of Appeals held the ratification made out, on the ground that, to get the judgment, the trustee had to rely upon a right inconsistent with that now set up. 157 Fed. Rep. 669; *S. C.*, 85 C. C. A. 337. The plaintiff appealed to this court.

It is argued that the appeal was too late because not taken within thirty days after the decree, as required by

General Orders in Bankruptcy No. 36, for appeals under the act. But this is not an appeal under the act, § 25, by authority of which the General Order was adopted, and is not governed by that order. The appellate jurisdiction is under or is the same as that under the Court of Appeals Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. *Knapp* v. *Milwaukee Trust Co.*, March 7, 1910, 216 U. S. 545. The appeal was taken within a year and was in time.

On the merits we are of opinion that the decision was wrong. We are quite ready to assume what the court below was at some trouble to establish, that an act of election directed toward a third person may operate *in rem* and establish title as to all parties concerned. But the demand of the trustee on the bankrupt, even when enforced by a resort to the courts and by judgment, had no element of election about it. The legal title to the money had been in the bankrupt, and was transferred by the statute to the trustee, § 70. He was entitled to have that money in his hands as against the bankrupt in any event, whether he decided to hand it back to Sugarman or to distribute it in dividends. The law had put him in the bankrupt's shoes with additional powers. Therefore to insist that the bankrupt should do what the statute required him to do was as consistent with a subsequent rescission of the bankrupt's fraudulent acquisition of title as with an affirmance of it. It had no relation to that question, except possibly to put the plaintiff in a position better to decide it.

Decree reversed.

HERNDON, PROSECUTING ATTORNEY OF CLINTON COUNTY, MISSOURI, AND SWANGER, [ROACH] SECRETARY OF STATE OF THE STATE OF MISSOURI, *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

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

No. 150. Argued April 14, 1910.—Decided May 31, 1910.

Objections to a bill for multifariousness and improper joinder of parties must be promptly made, and properly by special demurrer specifically directed to the objection; and so *held* that in the absence of specific objection properly raised at the outset the court can determine in the same action, as against the prosecuting attorney of a State, whether a statute is enforceable under the Constitution of the United States, and, as against the secretary of state, whether the bringing of the action in the Federal court will, under another statute, forfeit complainant's right to do business in the State.

Ex parte Young, 209 U. S. 1, and *West. Un. Tel. Co.* v. *Andrews*, 216 U. S. 165, followed, to effect that an action brought to enjoin state officers charged with the execution of a state statute from enforcing the same on the ground that such statute violates the Federal Constitution is not an action against the State within the prohibition of the Eleventh Amendment.

Where a railroad company has already provided adequate accommodation at any point, a state regulation requiring interstate trains to stop at such point is an unreasonable burden on interstate commerce and void under the commerce clause of the Federal Constitution, and this rule equally applies to junction, as to other, points; and so *held* as to the act of March 19, 1907, amending § 1075, Rev. Stat. of Missouri.

A statute requiring interstate trains to stop at junction points for the convenience of passengers should be construed as a regulation of commerce and not as a police statute for the protection of life and limb.

While the right to do local business within a State may not be derived from the Federal Constitution, the right to resort to Federal courts is one created by that Constitution; and, as against a foreign cor-

poration already established within its borders, a State cannot forfeit the right to do business because of the bringing of an action in the Federal court, and so *held* that the act of March 13, 1907, of Missouri, imposing such a penalty, is unconstitutional and void as to a foreign corporation already in the State at that time.

THE facts, which involve the constitutionality of certain statutes of the State of Missouri, are stated in the opinion.

Mr. James T. Blair, with whom *Mr. Elliott W. Major*, Attorney General of Missouri, and *Mr. Charles G. Revelle* were on the brief, for appellants:

Statutes requiring trains to stop at the intersection of the track on which they are running with the tracks of other railroads are valid as police regulations. *I. & St. L. R. R. Co.* v. *People*, 91 Illinois, 455; *Birmingham R. R. Co.* v. *Jacobs*, 92 Alabama, 191; *R. & D. R. R. Co.* v. *Freeman*, 97 Alabama, 297; *P. & P. U. Ry. Co.* v. *P. & F. Ry. Co.*, 105 Illinois, 117; *C. & A. R. R. Co.* v. *J. L. & A. Ry. Co.*, 105 Illinois, 400; *S. A. & A. P. Ry. Co.* v. *Bowles*, 88 Texas, 639; *Louisville R. R. Co.* v. *E. T. Ry. Co.*, 22 U. S. App. 110; *State* v. *K. C., Ft. S. & G. R. R. Co.*, 32 Fed. Rep. 724; *Ches. & Ohio Ry. Co.* v. *Commonwealth*, 99 Kentucky, 176; *Commonwealth* v. *Ches. & Ohio Ry. Co.*, 29 S. W. Rep. 136; *F. & P. M. R. R. Co.* v. *D. & B. C. R. R. Co.*, 64 Michigan, 370; *K. C. Sub. B. Ry. Co.* v. *K. C., St. L. & C. Ry. Co.*, 118 Missouri, 623; *L. S. & M. S. R. R. Co.* v. *Railway Co.*, 30 Ohio St. 610; 33 Cyc. 670; Freund on Police Power, § 73; *Southern Ry.* v. *King*, 87 C. C. A. 290; Elliott on Railroads, 2d ed., § 668; *Cleveland Ry. Co.* v. *Illinois*, 177 U. S. 522, 523; *Iowa* v. *C. M. & St. P. Ry. Co.*, 122 Iowa, 24.

Appellee is not in a position to assail the act. *Castillo* v. *McConnico*, 168 U. S. 680; *Balt. Traction Co.* v. *Belt R. R. Co.*, 151 U. S. 138. As construed by the state court the statute is designed to secure proper facilities for the

accommodation of those passengers of each intersecting road whose destination is some point on the other. *State* v. *W. & St. L. & P. Ry. Co.*, 83 Missouri, 148; *Logan* v. *H. & St. J. R. R. Co.*, 77 Missouri, 666; *State* v. *Railroad*, 105 Mo. App. 212.

An act affecting different classes may be unconstitutional as to some and valid as to the rest. In such case one of a class within the valid provisions of the act cannot set up the unconstitutionality of the provisions which are inapplicable to him. *Supervisors* v. *Stanley*, 105 U. S. 311; *In re Garnett*, 141 U. S. 12; *Clark* v. *Kansas City*, 176 U. S. 118; *Patterson* v. *Bark Eudora*, 190 U. S. 176; Cooley's Const. Lim., 250; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 318; *Hatch* v. *Reardon*, 204 U. S. 160.

Appellee cannot assail the act as it was in force prior to its entrance into Missouri. *Daggs* v. *Orient Ins. Co.*, 136 Missouri, 398; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 566; *Louis. & Nash. Rd. Co.* v. *Kentucky*, 183 U. S. 512, 513.

The act as construed by the state courts is valid. *N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 631; *Missouri* v. *Larabee Mills*, 211 U. S. 621; *Gladson* v. *Minnesota*, 166 U. S. 430; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 522; *Mich. Cent. R. R.* v. *Powers*, 201 U. S. 291; *Pacific Express Co.* v. *Seibert*, 142 U. S. 348.

The bill contains no grounds for equitable interposition as against Herndon. *Cruikshank* v. *Bidwell*, 176 U. S. 80; *Pacific Exp. Co.* v. *Seibert*, 44 Fed. Rep. 315. There must be a real and not an imaginary danger of a multiplicity of suits. *T. & B. R. R. Co.* v. *B. H. T. & W. Ry. Co.*, 86 N. Y. 128; *Arbuckle* v. *Blackburn*, 191 U. S. 413, 415.

The bill is bad as it attempts to join two distinct proceedings. Street's Fed. Eq. Prac., § 440; *Gaines* v. *Chew*, 2 How. 642; *Brown* v. *Guarantee Trust Co.*, 128 U. S. 412.

This objection can be taken despite the fact that the question was not raised specifically by the demurrer.

Hefner v. *Northwestern Ins. Co.*, 123 U. S. 751; *Emmons* v. *Nat. Mut. B. & L. Assn.*, 68 C. C. A. 330.

The suit is one against the State within the prohibition of the Eleventh Amendment. *Smyth* v. *Ames*, 169 U. S. 518, 519; *Ex parte Young*, 209 U. S. 149 *et seq.*

This is a suit merely to test the constitutionality of the act by suit against the secretary of state, as such, and cannot be maintained. *Fitts* v. *McGhee*, 172 U. S. 530; *Ex parte Young*, 209 U. S. 156, 157; *In re Ayres*, 123 U. S. 443.

No case being made against the prosecuting attorney the suit against the secretary of state cannot be maintained.

The act against removals is not repugnant to Art. III of the Constitution. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288.

The guaranty in Art. III as to trial by jury, relates to the trial of crimes. *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 101.

The act does not violate the interstate commerce clause of the Constitution. It specifically permits the transaction of interstate business by appellee even after revocation of its license for violating the act. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 46; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 512, 518.

Appellee is not denied the equal protection of the laws. *Ducat* v. *Chicago*, 10 Wall. 415; *Norfolk Ry. Co.* v. *Pennsylvania*, 136 U. S. 118.

As no domestic corporation can resort to the Federal courts in cases in which jurisdiction is dependent upon diversity of citizenship, the act instead of destroying equality, effects it. *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 257.

The classification was not an illegal one. *Board of Education* v. *Illinois*, 203 U. S. 561; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 188. Legislation dealing with

railroads as a class has been frequently upheld. *Missouri Ry. Co.* v. *Mackey*, 127 U. S. 209; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 29; *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512.

Appellee is not deprived by the revocation of its license of its property without due process of law nor are its privileges and immunities abridged. *National Council U. A. M.* v. *State Council*, 203 U. S. 163.

It is the enforcement of a law contravening the Fourteenth Amendment, not its enactment, which constitutes deprivation without due process. *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U. S. 269; *Yesler* v. *Wash. Harbor Line Commissioners*, 146 U. S. 656.

The act abridges no immunity, denies no privilege which appellee could enjoy as a "citizen of the United States." The constitutional provision invoked does not apply to appellee. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 45, 46; Cooley's Const. Lim., 7th ed., 567; *Slaughter-House Cases*, 16 Wall. 74 *et seq.*

Appellee and its predecessors secured no contract with Missouri under the act of 1870. Contracts between States and railroads are not created by this court by implication in order that acts of state legislatures may be overturned. *Williams* v. *Wingo*, 177 U. S. 603; *Jackson* v. *Lamphire*, 3 Pet. 289; *Stone* v. *Mississippi*, 101 U. S. 816; *Central R. R. & Banking Co.* v. *Georgia*, 92 U. S. 670.

The provisions of general law applicable to foreign railway corporations were not rendered immutable and petrified, by the license taken out in 1902, under the act of 1891. *Schurz* v. *Cook*, 148 U. S. 407; *Gregg* v. *Granby M. & S. Co.*, 164 Missouri, 627; *Bienville Water Co.* v. *Mobile*, 186 U. S. 218; *Stone* v. *Mississippi*, 101 U. S. 816.

A mere license by a State is always revocable. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 540; *Barron* v. *Burnside*, 121 U. S. 199; *Schurz* v. *Cook*, 148 U. S. 409.

The act of 1870 included no guaranty with reference to the right to sue in the Federal courts. No question, as to the State's right to prohibit the institution or removal by appellee of suits by reason of any other ground of Federal jurisdiction, is presented by the bill, and this investigation will be restricted to the case made. *Castillo* v. *McConnico*, 168 U. S. 681; *Supervisors* v. *Stanley*, 105 U. S. 311; *In re Garnett*, 141 U. S. 12; *Patterson* v. *Bark Eudora*, 190 U. S. 176; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 318; *Hatch* v. *Reardon*, 204 U. S. 160.

Mr. M. A. Low, with whom *Mr. E. C. Lindley* was on the brief, for appellee in No. 150:

The grants contained in the several acts of the legislature of the State of Missouri authorizing foreign railway corporations to construct and operate railways are, when accepted, express and binding contracts, the impairment of which is a violation of the Federal Constitution. They are not mere licenses revocable at will. *New Jersey* v. *Yard*, 95 U. S. 104; *N. Y., L. E. & W. Ry. Co.* v. *Pennsylvania*, 153 U. S. 628; *Commonwealth* v. *M. & O. R. Co.*, 64 S. W. Rep. 451.

To add to the contract conditions imposing additional burdens, or taking away substantial rights, is to impair its obligation. *State ex rel.* v. *Cook*, 171 Missouri, 348.

To forbid a railway company to continue to transact its business within the State would be to destroy its property, and it has no power to do that, so long as the company continues to do business in the State in accordance with the terms of the contract under which it was admitted. *American Smelting Co.* v. *Colorado*, 204 U. S. 103. And see *So. Ill. & Mo. Bridge Co.* v. *Stone*, 174 Missouri, 1; *Stevens* v. *Pratt*, 101 Illinois, 217; *Academy* v. *Sullivan*, 116 Illinois, 375.

The act of the legislature of the State of Missouri providing for revoking the license, right and authority of a

non-resident railway company to do business in the State whenever it resorts to a Federal court, impairs the obligations of the contract with the State authorizing appellee to do business in the State, takes its property without due process of law, and deprives it of the equal protection of the laws.

If there be an impairment of the obligation, the amount is not material; this court has power to redress the wrong. *Farrington* v. *Tennessee*, 95 U. S. 679, 683; *Commonwealth* v. *M. & O. R. Co.*, 64 S. W. Rep. 451. The State did not in any statute admitting railroads to do business in the State, reserve the right after the railway company had accepted the grant to deprive it of its right to resort to the jurisdiction of Federal courts. No state legislature can deprive any person of the right to resort in a proper case to the courts of the United States. *Blake* v. *McClung*, 172 U. S. 239, 255; *Cowles* v. *Mercer County*, 7 Wall. 118, and see as to right of a foreign corporation to control its own business, *N. Y., L. E. & W. R. Co.* v. *Pennsylvania*, 153 U. S. 628; *Railway Co.* v. *Whitton*, 13 Wall. 270, 286.

The act of March 13, 1907, also denies equal protection of the laws. By the invitation and permission of the State, appellee is doing business therein, and is subject to its process at the instance of suitors, as fully as any domestic corporation. Under such circumstances it is entitled to invoke the protection of this clause of the Federal Constitution. *Northwestern National Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 248; *G., C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154.

The statute cannot be justified on the ground of classification. Foreign railway corporations which have been admitted to do business in the State upon an equality with domestic corporations, cannot be denied the equal protection of the laws of the State. *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64, 71;

M. & St. L. Ry. Co. v. *Beckwith*, 129 U. S. 26; *State* v. *Cadigan*, 50 Atl. Rep. 1079, 1081; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123, 146; *Barbier* v. *Connolly*, 113 U. S. 27, 31.

A State cannot give a preference in litigation to its own citizens over those of other States, *Blake* v. *McClung*, 172 U. S. 239, 254–256, nor can it deny to a foreign railway corporation, authorized to operate railways in the State, access to the courts of the land when such right is fully and freely given to every person and to all other foreign corporations, as well as to domestic corporations. *Home Insurance Co.* v. *Morse*, 20 Wall. 445.

The act by reason of the enormous penalties imposed for an unsuccessful effort to test its validity, as well as by reason of the arbitrary power conferred upon the secretary of state, without a hearing, to revoke the license of appellee to do business within the State, takes its property without due process of law.

Due process of law means law in the regular course of administration through courts of justice, Kent, Com., 13. It requires notice, hearing and judgment, *Bertholf* v. *O'Reilly*, 74 N. Y. 519; *Londoner* v. *Denver*, 210 U. S. 373, 385.

The State cannot give its secretary of state purely personal and arbitrary power to take the property of a person or corporation, or to forfeit its right to use that property. *Wynehamer* v. *People*, 13 N. Y. 378, 392; *Hagar* v. *Reclamation District*, 111 U. S. 701, 708.

Cases holding that the licenses of certain transitory corporations, licensed, temporarily, to do business in a State, may be revoked on account of the removal of cases from state to Federal courts, can be distinguished. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 343.

The act requiring all passenger trains to stop at the junction points is an unwarranted interference with interstate commerce. *Illinois Cent. R. Co.* v. *Illinois*, 163 U. S.

142; *Gladson* v. *Minnesota*, 166 U. S. 427; *L. S. & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285; *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514.

After all local conditions have been reasonably provided for, railways may rightfully adopt special provisions for through traffic, and legislative interference therewith is an unreasonable and unlawful interference with interstate commerce. *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Mississippi R. R. Com.* v. *Illinois Cent. R. Co.*, 203 U. S. 335; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328.

This statute cannot be upheld as a reasonable exercise of the police power in regard to safe passage of the trains of one company across the railroad of another, as its manifest purpose is to provide for the transfer of passengers, baggage, mails and express freight at junction points.

The bill is not multifarious. *Graves* v. *Ashburn*, 215 U. S. 331; *Campbell* v. *Mackey*, 1 Mylne & Craig, 603, 617.

The objection of multifariousness comes too late. Multifariousness is a technical objection, *Brown* v. *Guarantee Trust Co.*, 128 U. S. 403, 412, which must be raised, if at all, at the first opportunity, and if not so presented, it is waived. When it appears on the face of the bill, the objection should be raised by special demurrer. *Billings* v. *Mann*, 156 Massachusetts, 203, 205; 1 Street's Fed. Eq. Pr., § 936; Daniel's Chanc. Pl. & Pr., 6th Am. ed., 586, note 5; *Jackson* v. *Glos*, 144 Illinois, 21.

While the court may, *sua sponte*, raise the objection of multifariousness, even on appeal, there seems to be no case in which it has been done. *Oliver* v. *Piatt*, 3 How. 332, 496.

Mr. James P. Gilmore and *Mr. Gardiner Lathrop*, with whom *Mr. Robert Dunlap* and *Mr. Thomas R. Morrow*

were on the brief, for appellee in No. 151, argued simultaneously herewith:

The act in question is unconstitutional in that it impairs the obligation of a contract between the State of Missouri and the appellee, which had, prior to its passage, complied with the laws of that State relating to the qualification by foreign corporations to do business therein and which had received license or franchise therefor. *State ex rel.* v. *Cook*, 171 Missouri, 348; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *American Smelting & Refining Co.* v. *Colorado*, 204 U. S. 103; and see the recently decided cases by this court of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; and also *Railroad Co.* v. *Pennsylvania*, 153 U. S. 628; *Gordon* v. *Appeal Tax Court*, 3 How. 133.

A contract created by a charter cannot be impaired during the life of the charter grant. *Attorney General* v. *Bank*, 4 Jones Eq. (N. C.) 287; *Wendover* v. *City*, 15 B. Monroe (Ky.), 258; *Commonwealth* v. *Mobile & Ohio R. R. Co.* (Ky.), 64 S. W. Rep. 451; *Bank* v. *Knoop*, 16 How. 369.

Similar statutes imposing burdens on foreign corporations were held unconstitutional in *Seaboard Railway Co.* v. *Railroad Commission*, 155 Fed. Rep. 792; *Railway Co.* v. *Ludwig*, 156 Fed. Rep. 152; *Western Union Telegraph Co.* v. *Julien*, 169 Fed. Rep. 166; *Railroad Co.* v. *Cross*, 171 Fed. Rep. 480.

The act deprives appellee of its property without due process of law. As the appellee acquired its railroad in the State of Missouri, with privileges and franchises appurtenant thereto, which included the right to use the same in the transportation of persons and property under the act of 1870, these rights and franchises appurtenant to the property became vested, and the State could not thereafter under the act of 1907 impose an arbitrary or

unreasonable condition upon the further exercise of such rights. After the rights and privileges had become vested, the State could only impose such reasonable police regulations concerning the use of the property and the conduct of the business as would be necessary to protect the public in general. *Society for Savings* v. *Coyte*, 6 Wall. 594; *Hamilton County* v. *Massachusetts*, 6 Wall. 632; *California* v. *Railroad Co.*, 127 U. S. 1; *State ex rel.* v. *Ackerman*, 51 Ohio St. 163; *Life Insurance Co.* v. *County*, 28 Montana, 484; *State* v. *Railroad*, 43 Minnesota, 17; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Railroad Company* v. *Hewes*, 183 U. S. 66. See also *Railway Co.* v. *Sullivan*, 173 Fed. Rep. 556.

Rights and privileges which attach to the use of the property, when they become vested under the law of the State, are property rights which cannot be taken away without compensation by the State. *Gulf & S. I. R. R. Co.* v. *Hewes*, 183 U. S. 77; *Monongahela &c. Co.* v. *United States*, 148 U. S. 312; *Wilcox* v. *Cons. Gas Co.*, 212 U. S. 22, 44; *Brunswick & T. Water Dist. Co.* v. *Maine Water Co.*, 59 Atl. Rep. 537; *Garfield* v. *Goldsby*, 211 U. S. 249, 262.

The action of the secretary of state in cancelling the permit and forfeiting rights is unrestricted without any provision to protest against his decision in the first instance, or to review it after it has been made. *Hagar* v. *Reclamation District*, 111 U. S. 701; *Murray's Lessees* v. *Lancow*, 18 How. 272; *Holden* v. *Hardy*, 169 U. S. 366; *Scott* v. *McNeal*, 154 U. S. 34; *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *In re Quong Wo*, 13 Fed. Rep. 229; *In re Wo Lee*, 26 Fed. Rep. 471; *Barthet* v. *City*, 24 Fed. Rep. 563.

The action of the secretary of state is also made conclusive, which, under the circumstances of this case, cannot be permitted. It is not even subject to review in subsequent prosecutions for penalties. *Railway Co.* v.

Minnesota, 134 U. S. 418; *Felix* v. *Wallace County*, 62 Kansas, 832; *Railway Co.* v. *Simmonson*, 64 Kansas, 802; *Railway Co.* v. *Payne*, 33 Arkansas, 816; *Mayer* v. *Verlandi*, 39 Minnesota, 438.

The penalty provisions of the statute in question are so excessive and unreasonable that they violate the Fourteenth Amendment to the Constitution of the United States and result in depriving appellee of its property without due process of law. *Ex parte Young*, 209 U. S. 123.

The *Prewitt Case*, 202 U. S. 246, and other cases can be distinguished. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Bigelow* v. *Nickerson*, 70 Fed. Rep. 113; *Reimers* v. *Seatco Mfg. Co.*, 70 Fed. Rep. 573.

The right of a State to impose conditions upon foreign corporations doing business therein is not unlimited. *Insurance Co.* v. *French*, 18 How. 404; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *American Refining & Smelting Co.* v. *Colorado*, *supra*, also distinguished.

Mr. Justice Day delivered the opinion of the court.

This suit was brought by the Chicago, Rock Island and Pacific Railway Company in the Circuit Court of the United States for the Western District of Missouri to enjoin the execution of certain provisions of the acts of the legislature of the State of Missouri, as violative of complainant's rights under the Federal Constitution. The bill was filed against Harry T. Herndon, prosecuting attorney of Clinton County, Missouri, and John E. Swanger, secretary of state of the State of Missouri.

The bill is very lengthy, and as the decision of the court was made upon demurrer to it, it will be necessary to call attention to some of its pertinent allegations. Complainant avers that it is a duly organized corporation of the

State of Illinois, operating a railroad in certain States, among others, in the State of Missouri, and is engaged in both state and interstate commerce. It sets forth in detail the acts of the State of Missouri authorizing the consolidation, extension and operation of the railroads under which it claims to have acquired its system of railroads in that State. It avers that it duly filed with the secretary of state of the State of Missouri a copy of its charter, in compliance with the laws of the State, and received a certificate, November 22, 1902, in all respects in compliance with the laws of the State, authorizing the complainant to carry on business in said State for the term ending April 3, 1903, which certificate is in full force, never having been cancelled or withdrawn.

The bill sets forth the act of March 19, 1907, amending § 1075 of the Revised Statutes of Missouri, requiring railroad companies to perform certain duties, among others to stop passenger trains at the junction or intersecting points of other railroads. As that amended section is one of the acts complained of it is set forth in the margin.[1]

[1] SEC. 1075. Every railroad corporation in this State which now is, or may hereafter be, engaged in the transportation of persons or property, from one point in this State to another point in this State, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads, and at the junction of branch railroads of the same system as herein defined, carrying passengers, and at the several stopping places; and shall, at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now, or may hereafter be made upon the same grade, and the character of the land at such crossing or intersection will admit of the same, erect, build, and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house and waiting room or rooms sufficient to comfortably accommodate all passengers

Concerning this section, and the requirement to stop trains at junction points, the bill sets out that the complainant has traffic rights over the Chicago, Burlington and Quincy Railway track between Cameron Junction and Kansas City; that the town of Lathrop is a town of about one thousand inhabitants, situated in Clinton County, Missouri, between Cameron Junction and Kansas City on said line of railway; that complainant, for the purpose of carrying on its business as a common carrier, at the said station of Lathrop stops a morning and evening passenger train each way, two west bound, and two east bound, and, in addition thereto, stops two passenger trains, one east bound and one west bound, which are local freight trains regularly carrying passengers. Complainant further sets forth that it runs a fast through passenger train between Chicago, Fort Worth, and Dallas, Texas, by means of connecting carriers in the State of

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awaiting the arrival and departure of trains at such junction, or railroad crossing, and shall keep such depot or passenger house or rooms warm, lighted and open to the ingress and egress of all passengers for a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads, and they are further required to receive all passengers and baggage for, and to stop, on a flag or signal, all trains carrying passengers, at the junction of all branch railroads of the same system, which said branch railroads are eighteen miles or more in length and at the terminus of which is located any county seat town of any county in this State a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting, intersecting, or branch roads whenever the same shall be delivered to them. And every railroad company or corporation owning, operating or leasing any railroad in this State shall keep all its depots, stations, or passenger houses, whether located at the crossing or intersection of

Texas, and a fast through passenger train between Chicago and the Pacific coast by means of connecting carriers beyond the Territory of Oklahoma, neither of which stop at the station of Lathrop to take on or let off passengers; that said trains which do not stop at Lathrop are immediately preceded by trains that do stop there, and which are maintained for the purpose of collecting passengers from local stations and conveying them to nearby stations on the line of the road of the complainant, where both of said fast through trains do stop for the purpose of taking on and letting off passengers.

The complainant further avers that the tracks of the complainant cross and intersect with the tracks of the Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop; that the Atchison, Topeka and Santa Fe Railway runs two trains each way every day, all of which stop at the station of Lathrop, and which make close and direct connection with the trains which the

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other roads or elsewhere, warm, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations or passenger houses. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporation or company refuses, neglects or fails to comply therewith, shall forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the State of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term "railroad corporations," as used in this act, shall include the term "railway company and railway corporation."

SEC. 2. Inasmuch as the train service is very inconvenient and unsatisfactory in some places constitutes an emergency within the meaning of the constitution; therefore, This act shall take effect and be in force from and after its passage.

complainant stops at the station of Lathrop; that except under unusual circumstances passengers seldom find it convenient to change from the complainant's railway to that of the Atchison, Topeka and Santa Fe line at the station of Lathrop. Complainant avers that to stop the through interstate trains running between Chicago, Fort Worth and Dallas, Texas, and between Chicago and the Pacific coast would be a direct, unreasonable and unwarrantable interference with its interstate business, and that said through trains are maintained for and are essential to the purpose of transporting interstate passenger traffic, and for the carriage of the United States mails. The complainant avers that the facilities for the interchange of passengers at the station of Lathrop are amply sufficient to accommodate the public, and that the service is both convenient and satisfactory to the public. The bill further avers that if the said through trains are required to stop at all junctions with other railways and there interchange passengers with such road, their usefulness as through trains will be destroyed, and the interstate business of the complainant interfered with to an unwarranted extent without any corresponding benefit to the traveling public; that the law of March 19, 1907, as applied to said trains which do not stop at the station of Lathrop, is a serious burden upon interstate commerce so conducted by said trains, and an unlawful and unreasonable interference therewith, and in violation of the Constitution of the United States and the acts of Congress regulating commerce. Complainant avers that the act of March 19, 1907, requiring trains carrying passengers to stop at the junction or intersections of other roads for the purpose of interchanging passengers and baggage at such junction points, was not passed in the exercise of the police power of the State of Missouri to protect the traveling public, but solely for the purpose of increasing traveling facilities, and to provide a more convenient and satis-

factory train service at such junction points. Complainant avers that it installed an interlocking plant and an automatic signal device at the intersection with the tracks of the Atchison, Topeka and Santa Fe Railway at the station of Lathrop, and thereby provided an absolutely safe method for its through trains to pass over the tracks of the Atchison, Topeka and Santa Fe road without stopping. The bill avers that Harry T. Herndon, as prosecuting attorney for the county of Clinton, Missouri, threatens to and will, unless enjoined, put in motion the special provisions of the act of March 19, 1907, for the enforcement of penalties of $25 per day since July 21, 1907, which penalties in a short time would amount to many thousands of dollars.

Complainant further avers that defendant John E. Swanger, secretary of state of the State of Missouri, under and by authority of said act of the State of Missouri, approved March 13, 1907, concerning the bringing of cases by foreign corporations in the Federal courts, which act is set forth in the margin [1] threatens to, and will, unless

[1] Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other State, Territory or country, and doing business as a carrier of freight or passengers from one point in this State, to another point in this State, under the laws of this State, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this State, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this State to another point in this State shall forthwith be revoked by the secretary of state, and its right to do such business shall cease, and the secretary of state shall publish such revocation in

enjoined, cancel the complainant's certificate of the right to do business in the State of Missouri, and will take other steps necessary to revoke the license and permit as provided in the act of March 13, 1907, should the complainant file this, its bill of complaint, in the United States Circuit Court, and because of any attempt complainant

some newspaper of large and general circulation in the State, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this State to another point in this State, or to do business as a carrier of passengers or freight of any kind from one point in this State to another point in this State at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this State to a point without this State, or from a point without this State to a point within this State, or from making what are known as interstate shipments and transportation.

SEC. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point in the State to another without a license, permit or certificate of authority therefor first had and obtained from the State of Missouri—to be issued by the secretary of state—or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this State to another point in this State, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the State of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suit to be brought therefor in any court of competent jurisdiction by the attorney general or the prosecuting attorney of any county in the State in which such offense shall have been committed, and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the attorney general or any prosecuting attorney to enforce or carry out the provisions of this act.

SEC. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed.

Approved March 13, 1907.

[Laws of Missouri of 1907, p. 174.]

may make to remove any case in a Federal court from any state court of the State of Missouri, and to bring any case in any Federal court against a citizen of the State of Missouri. The bill then sets out the coming of the complainant into the State of Missouri in accordance with the laws of the State, that it acquired property therein, which included many miles of railroad, depots, station grounds, shops and warehouses, terminals, rolling stock, and other equipment necessary to the maintenance and operation of its line located in the State of Missouri and at an assessed value of $3,252,775. The bill sets out the various particulars wherein it is contended that the act of March 13, 1907, is void under the Constitution of the United States, and the bill avers that if the complainant should attempt to remove into the Federal courts any case commenced in the state courts of Missouri, or should commence proceedings in any Federal court against a citizen of the State of Missouri, the defendant, as secretary of state of the State of Missouri, would deny the right of complainant to do business in the State of Missouri, and if the complainant attempted to carry on the same it would be subject to forfeit and to pay to the State of Missouri a penalty of not less than $2,000 or more than $10,000, to be recovered in any court in the State having jurisdiction. An injunction was prayed against the defendant Harry T. Herndon as prosecuting attorney of the county of Clinton, Missouri, requiring him to refrain from enforcing, or attempting to enforce, the provisions of the act of March 19, 1907, so far as it relates to the stopping of the trains aforesaid, at the crossing of the Atchison, Topeka and Santa Fe Railway at the station of Lathrop, Clinton County, Missouri, and from enforcing, or attempting to enforce, the penalties of the statute; and that the defendant John E. Swanger, secretary of state of the State of Missouri, be restrained from enforcing, or attempting to enforce, the provisions of the act of March 13, 1907,

providing for the revocation and cancelling of the complainant's charter because of the removal of cases from a state to a Federal court, or bringing suit in a Federal court against any citizen of the State of Missouri.

A demurrer was filed to the bill by both of the defendants, the same was overruled, and a final decree was entered enjoining the enforcement of the act of March 13, 1907, because of the beginning of the suits, or the removal of cases to Federal courts, and enjoining the enforcement of the act of March 19, 1907, so far as it relates to the complainant's said trains passing through Lathrop, or the stopping of such trains at the station of Lathrop, and enjoined the defendant prosecuting attorney of Clinton County, Missouri, from enforcing, or attempting to enforce, the provisions of said act as to stopping said trains, or enforcing the penalties provided for in that act for the failure to comply with the provisions thereof.

It is evident from the foregoing statement that the constitutional questions involved in this case are: First, whether under the act of March 19, 1907, the complainant can be compelled to stop its through trains, described in the bill, at the station of Lathrop, and whether such a statute, so far as it relates to interstate commerce trains, is void as an attempt to regulate interstate commerce, and imposes a burden thereon by state legislation. And, secondly, under the act of March 13, 1907, can the license and right of the complainant to do business in the State of Missouri be lawfully revoked because it has begun a suit, or may remove a suit, from a state court to a Federal court, complainant being a corporation organized in another State.

Before considering these questions we will notice some of the objections to the decree below made by the learned counsel for the State. It is asserted that the bill is multifarious, and that there is no right to join the defendants, the prosecuting attorney and secretary of state in the

same bill. But no objection to such joinder of the parties was specially taken, and it is well settled that an objection of this character must be promptly made. The proper way to raise such question is by special demurrer specifically directed to the objection. Street Fed. Equity Practice, vol. 1, § 936. It is true that a court may itself take the objection in extreme cases, when that course is essential to the necessary and proper administration of justice. But, as laid down in *Oliver* v. *Piatt*, 3 How. 333, 412, Mr. Justice Story, speaking for the court, says, "if the court can get to a final decree without serious embarrassment, it will do so," and, continues the learned justice: "*A fortiori*, an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity." No such case exists here. Certainly, in the absence of a specific objection, there is no difficulty in hearing at the same time the case against the secretary of state and the prosecuting attorney. The bringing of the suit against the prosecuting attorney in the Federal court, if the statute of March 19, 1907, is to be carried out, will forfeit the complainant's right to do business within the State, and we see no reason why the right to declare such forfeiture may not be considered with the case against the prosecuting attorney. We find no merit in the objection of multifariousness.

As to the objection that the suit is one against the State, we think no discussion is necessary, and content ourselves with a reference to the late cases in this court to that point. *Ex parte Young*, 209 U. S. 123; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165.

The act of March 19, 1907, requiring the stopping of certain trains, upon its face seems to require the stoppage of all passenger trains at the junction or intersection of other roads. But it is contended by counsel for the State that this statute is but an amendment of former statutes, and that the requirement to stop trains carrying pas-

sengers, as qualified by the subsequent language of the act, means to stop such trains for a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express from the trains of the roads connecting or intersecting to the trains of the other road, and that, therefore, the act applies only to the operation of trains actually carrying such passengers, personal baggage, mails and express as are destined for points on the connecting road, and does not require the stoppage of all trains carrying passengers, as is set out in the bill. And this conclusion, it is said, must necessarily follow because of the construction given to the statute prior to its amendment on March 19, 1907. *State ex rel.* v. *The W. St. L. & P. Ry. Co.*, 83 Missouri, 148; *Logan* v. *H. & St. J. R. R. Co.*, 77 Missouri, 666; *State ex rel.* v. *Railroad*, 105 Mo. App. 212.

The contention is that the amendment of 1907 has only the effect to bring into the statute certain provisions as to branch railroads. Assuming this to be a correct interpretation of this statute, and that it only requires the stoppage of trains at Lathrop carrying passengers destined for points on the intersecting railroad, or to take up passengers there destined for points on complainant's road, the question remains, Would the requirement of the act of March 19, 1907, to stop the through trains described in the bill, for such purpose and under the circumstances set forth, be an unlawful attempt to regulate interstate commerce and impose an unlawful burden thereon?

The extent of the right to control through interstate transportation of passengers by state legislation, or under orders of a commission authorized by the State, has been recently before this court. *Miss. R. R. Co.* v. *Illinois Central R. R. Co.*, 203 U. S. 335; *Atlantic Coast Line Co.* v. *Wharton*, 207 U. S. 328.

The principle to be deduced from these cases is, that where a railroad company has already provided ample

facilities for the adequate accommodation of the traveling public such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers through the same places, at which such interstate trains do not stop, a state regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce. Applying the principles thus settled and taking the allegations of the bill as true, which we must do in view of the fact that the case was decided upon demurrer, we think that construing the statute so as to require the stoppage of the through trains whenever any persons might seek to avail themselves thereof, in order to permit a transfer of passengers from one road to the other upon such trains, would be an unnecessary and unlawful burden upon interstate traffic. The averment of the bill is that the business is already amply provided for in the other trains of the company and the connecting road, and the serious detriment to the interstate carrying business from the requirement to stop the through trains described for the purpose of permitting such transfers, is fully set forth in the bill, and admitted by the demurrer.

It is true that the bill avers that few persons require transfer at such connecting point, but if passengers have the right under this statute to require the stoppage of such through trains at Lathrop whenever they may desire to avail themselves of such privilege, serious inconvenience would result to the interstate traffic in question. It is to be remembered that this statute is not of that class passed in the exercise of the police power of the State for the promotion of the public safety and requiring the stoppage of trains by one railroad before crossing the tracks of another railroad—this statute, as its second section shows, was passed for the purpose of providing

greater facilities of travel, and not for the protection of life and limb. We therefore reach the conclusion that the Circuit Court did not err in granting the injunction so far as it relates to the enforcement of the act of March 19, 1907, relating to the stoppage of the interstate commerce trains at the station at Lathrop.

As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the State of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, or remove one from the state courts to the Federal courts, but little need be said. This is so because of the cases decided at this term involving contentions kindred to the one made in this case. See *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Tel Co.*, 216 U. S. 146; *Southern Railway Co.* v. *Green*, 216 U. S. 400.

Applying the principles announced in those cases, it is evident that the act in controversy cannot stand in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy a domestic railroad company might bring an action in the Federal court, or in a proper case remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that

while the right to do local business within the State may not have been derived from the Federal Constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.

It is enough now to say that within the principles decided at this term, in the cases cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void. We find no error in the decree granted in the Circuit Court, and the same is affirmed.

Affirmed.

THE CHIEF JUSTICE concurs in the result.

ROACH, SECRETARY OF STATE OF THE STATE OF MISSOURI, *v.* ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.[1]

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

No. 151. Argued April 14, 1910.—Decided May 31, 1910.

Decided on the authority of the preceding case.

THE facts are stated in the opinion.

Mr. James T. Blair, with whom *Mr. Elliott W. Major*,

[1] Original docket title Swanger, Secretary of State, etc., *v.* Atchison, Topeka & Santa Fe Railway Company; on December 9, 1909, Roach, Secretary of State, was substituted as plaintiff in error.

Attorney General of the State of Missouri, and *Mr. Charles G. Revelle* were on the brief, for appellants.[1]

Mr. M. A. Low, with whom *Mr. E. C. Lindley* was on the brief, for appellees in No. 150.[1]

Mr. Gardiner Lathrop, with whom *Mr. Robert Dunlap*, *Mr. Thomas R. Morrow* and *Mr. James P. Gilmore* were on the brief, for appellee in No. 151.[1]

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued at the same time with No. 150, and involves the validity of the statute of March 13, 1907. The case was also decided upon demurrer to the bill. The allegations of the bill and supplemental bill showed that the Atchison, Topeka and Santa Fe Railway Company was within the State of Missouri in compliance with its laws; that it had acquired a large amount of property therein; that, being a foreign corporation, it had removed suits from a State to the Federal court, and the company averred that for that reason its right to do business in the State of Missouri was about to be revoked by the action of the secretary of state. This case comes within the principles just laid down in No. 150, and the decree of the Circuit Court is affirmed.

Affirmed.

THE CHIEF JUSTICE concurs in the result.

[1] See abstracts of arguments in preceding case with which this was argued simultaneously.

FRANKLIN v. STATE OF SOUTH CAROLINA.

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

No. 164. Argued April 20, 21, 1910.—Decided May 31, 1910.

On writ of error to review a judgment of conviction of the state court this court has no jurisdiction to notice errors other than those which involve alleged violations of Federal rights. The States have the right to administer their own laws for the prosecution of crime so long as fundamental rights secured by Federal law are not denied.

Whether provisions as to qualifications of jurors and electors in subsequently adopted constitution and subsequently enacted laws of one of the States enumerated in the act of Congress of June 25, 1868, c. 70, 15 Stat. 73, providing that the constitution of such States should never be amended so as to deprive citizens of the United States of their rights as electors, violate such act will not be determined at the instance of a person convicted of crime unless it appears that persons qualified under the Federal act were disqualified and thereby prevented from serving on the jury by the constitution and laws the validity whereof is attacked.

Quære whether the act of June 25, 1868, c. 70, 15 Stat. 73, does restrict the States enumerated therein in fixing the qualifications for suffrage within such States respectively.

Where the real objection is that a grand jury is so made up as to exclude persons of the race of accused the facts establishing the contention must be averred and proved. *Martin* v. *Texas*, 200 U. S. 316.

Where the state court has held that under the state jury law the commissioners are only required to select men of good moral character and that competent negroes are equally eligible with others, this court cannot hold that a negro is denied equal protection of the law by reason of the statute because the commissioners have not selected any negroes for the grand jury which indicted him; and so held as to the jury law of 1902 of South Carolina.

The granting and denial of continuances are matters within the discretion of the trial court and are not ordinarily reviewable; in this case the refusal to grant a continuance did not amount to a denial of due process of law to the accused.

Quære, and not decided in this case, to what extent one can resist arrest under process issued under a void or unconstitutional law.

Where one about to be arrested by an officer of the law under process issued under a law which is unconstitutional shoots the officer upon his entering the room, the question of right of resistance to arrest is for the jury and the accused is not entitled to a peremptory instruction of dismissal, nor is he denied due process of law under the Fourteenth Amendment by the refusal of the court to give such instruction because the process was issued under a statute violative of the Thirteenth Amendment to wit, § 357 of the Criminal Code of South Carolina in regard to agricultural contracts.

80 So. Car. 332, affirmed.

THE facts are stated in the opinion.

Mr. Jacob Moorer and *Mr. John Adams*, for plaintiff in error.

Mr. Charles J. Bonaparte submitted a supplemental brief for plaintiff in error.

Mr. J. Fraser Lyon, Attorney General of the State of South Carolina, and *Mr. D. S. Henderson*, with whom *Mr. C. M. Efird* and *Mr. B. H. Moss* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error, Pink Franklin, a citizen of the negro race, was convicted, in the Court of General Sessions for the county of Orangeburg, South Carolina, of the crime of murder by the shooting of one H. E. Valentine; thereupon he was sentenced to suffer the death penalty, and upon appeal to the Supreme Court of South Carolina the judgment of the Court of General Sessions was affirmed. *State* v. *Franklin*, 80 So. Car. 332. The case is here upon a writ of error to the Supreme Court of South Carolina.

The record discloses that the homicide occurred upon the attempt of H. E. Valentine, a constable, to arrest Franklin upon a charge of "having violated and broken

an agricultural contract," against the form of a statute made and provided in such cases in the State of South Carolina. The statute referred to is § 357 of the criminal code of South Carolina, which provides:

"Any laborer working on shares of crop or for wages in money or other valuable consideration under a verbal or written contract to labor on farm lands, who shall receive advances either in money or supplies and thereafter wilfully and without just cause fail to perform the reasonable service required of him by the terms of said contract, shall be liable to prosecution for a misdemeanor, and on conviction shall be punished by imprisonment for not less than twenty days nor more than thirty days, or to be fined in the sum of not less than twenty-five dollars nor more than one hundred dollars, in the discretion of the court: *Provided*, The verbal contract herein referred to shall be witnessed by at least two disinterested witnesses."

Upon the filing of the complaint before a magistrate what is termed an arrest warrant was issued directed to Henry E. Valentine, as special constable, commanding him to apprehend the plaintiff in error because of the alleged violation of the agricultural contract, and to bring him before the magistrate to be dealt with according to law.

As it becomes necessary, in considering the Federal questions raised in the record, to know the facts concerning the homicide we take occasion to briefly summarize such as are pertinent. The testimony offered for the State and that offered for the plaintiff in error differed widely as to what occurred at the time the constable was shot. The record discloses that about the time of the attempted arrest Valentine, the constable, summoning one Carter to assist him, about three o'clock on the morning of the homicide proceeded to the farm of one Spires, who lived near to Franklin's house, and requested him to induce Franklin to go to his house that he might be there arrested.

Accordingly, Spires went to Franklin's, and, having aroused him, asked him to do some plowing for him. Franklin replied that he would do the plowing that afternoon, but could not work for Spires that morning. Thereupon Valentine and Carter went to Franklin's house to make the arrest. For the State the testimony tended to show that the door of Franklin's house and the inner door of his bedroom were open; that Valentine rapped with a knife on the steps of the house, and called to Franklin, and received no response; that Valentine thereupon directed Carter to go around the house, which he did, and Valentine, entering the door, was instantly shot by Franklin, and Valentine's pistol was seized and wrung from his hand; that after he was shot a colored woman came in with an axe and said that she had a good will to finish up the job; that Carter, upon hearing the pistol shots, which were fired in rapid succession, ran around the house, and was caught by the leg by Franklin's son, a small boy; that upon entering the house he, too, was shot, receiving a slight wound.

On the other hand, the accused testified that he had no acquaintance with Valentine; that he did not know that he was an officer of the law and armed with a warrant for his arrest; that he heard nothing until the door was hurled open, and Valentine said to him "Hands up!" that he (Franklin) did not move; that Valentine shot him, inflicting a wound in his shoulder; that he fell down by his pallet, got his gun, and fired, intending to get out of the way, and did get out as fast as he could.

In a proceeding of this kind this court has no jurisdiction to notice other errors than those which involve alleged violations of Federal rights secured by the Constitution of the United States or Federal statutes. The States have the right to administer their own laws for the prosecution of crime, and the jurisdiction of this court extends only to the reversal of such state proceedings

where fundamental rights secured by the Federal law have been denied by the proceedings in the state courts. *Rogers* v. *Peck*, 199 U. S. 425, 434, and cases there cited.

We will proceed then to examine the errors assigned which may be fairly said to raise Federal questions reviewable here. A motion was made to quash the indictment because of the disqualification of the grand jury which returned it. The argument being that the Federal act of June 25, 1868, c. 70, 15 Stat. 73, provides that the constitutions of certain States, including South Carolina, should never be amended or changed so as to deprive any citizen, or class of citizens of the United States, of the right to vote in said State given to them by the constitution thereof named in the act, except for the punishment for crimes such as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the States. The necessary qualifications of voters in South Carolina at that time were defined in § 2, art. 8, of the constitution of South Carolina of 1868, and were: "Every male citizen of the United States of the age of twenty-one years and upward, not laboring under the disabilities named in this constitution, without distinction of race, color or former condition, who shall be a resident of this State at the time of the adoption of this constitution, or who shall reside thereafter in this State one year and in the county in which he offers to vote sixty days next preceding any election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any election: *Provided*, That no such person be allowed to vote or to hold office who is now or hereafter may be disqualified therefor by the Constitution of the United States until such disqualification be removed by Congress of the United States: *Provided further*, That no person while kept in any almshouse or asylum, or of unsound mind, or confined in any public

prison, shall be allowed to vote or to hold office." These qualifications for voters were changed by the constitution of 1895, and now are:

"Art. 2, Sec. 4. The qualification for suffrage shall be as follows: '(*a*) residence in the State for two years, in the county one year, in the polling precinct in which the elector offers to vote, four months, and the payment six months before any election of any poll tax then due and payable; . . . (*d*) Any person who shall apply for registration after January first, 1908, if otherwise qualified shall be registered: *Provided*, That he can both read and write any section of this constitution submitted to him by the registration officer, or can show that he owns and has paid all taxes collectible during the previous year on property in this State assessed at three hundred dollars ($300) or more.' "

This change in the qualification for voters, it is said, worked a deprivation of the rights of the accused, because the qualification of grand jurors under the constitution of 1895, they being required to be electors of the State, made eligible different persons than those who were qualified to be electors under the constitution of 1868. As to this contention the South Carolina Supreme Court held that the constitution of 1895 laid no restriction on color or previous condition to entitle one to be an elector; that the act of Congress of 1868 had no reference to the selection of jurors, and that it was inapplicable to the constitution of the State in regard to juries.

If it could be held that the act of Congress restricted the State of South Carolina in fixing the qualifications for suffrage it is unnecessary to decide the point in this case, as there is nothing in the record to show that the grand jury, as actually impanelled, contained any person who was not qualified as an elector under the constitution of 1868, nor is there anything to show that the grand jury was so made up as to prevent citizens of the race of the

plaintiff in error from sitting thereon. There was no allegation in the motion to quash upon this ground or offer of proof in the case to show that persons of the African race were excluded because of their race or color from serving as grand jurors in the criminal prosecution of a person of that race, therefore the case does not come within the rule laid down in *Carter* v. *Texas*, 177 U. S. 442; *Rogers* v. *Alabama*, 192 U. S. 226, and kindred cases. Moreover, if the restriction upon the right to fix qualifications for suffrage in the Federal act could have the effect contended for as to subsequent state action, there was nothing in the act to prevent the selection of grand jurors having the qualifications prescribed for electors in the constitution of 1895, in the absence of a showing that such legislation operated to exclude citizens from such juries on account of race. *In re Shibuya Jugiro*, 140 U. S. 297, 298. In this class of cases when the real objection is that a grand jury is so made up as to exclude persons of the race of the accused from serving in that capacity it is essential to aver and prove such facts as establish the contention. *Martin* v. *Texas*, 200 U. S. 316.

It is next contended, concerning the jury law of South Carolina, that it confers arbitrary power upon the jury commissioners in selecting jurors. Section 2 of the act of 1902 provides (p. 1066):

"They [the jury commissioners] shall . . . prepare a list of such qualified electors under the provisions of the constitution, between the ages of twenty-one and sixty-five years, and of good moral character, of their respective counties as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions, which list shall include not less than one from every three of such qualified electors," etc.

We do not think there is anything in this provision of the statute having the effect to deny rights secured by the Federal Constitution. It gives to the jury commissioners

the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. There is nothing in this statute which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications. *Murray* v. *Louisiana*, 163 U. S. 101, 108; *Gibson* v. *Mississippi*, 162 U. S. 565, 589.

Under this statute the Supreme Court of South Carolina held that the jury commissioners were only required to select men of good moral character, and that competent colored men were equally eligible with others for such service. We find no denial of Federal rights in this provision of the statute.

It is next contended that the plaintiff in error was denied due process of law in the refusal of the court to continue his case when the same was called for trial. It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law. A continuance was asked for because, it was alleged, the counsel for the accused had not had sufficient time or opportunity to examine the notes of the testimony taken before the coroner who investigated the case. The record discloses that, in support of the motion to continue, counsel for the plaintiff in error made affidavit that two weeks before the beginning of the term he had called upon the clerk of the court and asked to see the testimony taken before the coroner, and that the clerk had informed him that the coroner kept his book in a room upstairs, but that the

room was locked at the time; that the plaintiff in error's counsel thereupon made a search for the coroner, and that, failing to find him, he called upon the solicitor for the State, and asked him if he had the original testimony, and the same was handed him, which testimony was partly in shorthand, and, the stenographer who took the same being out of town at the time, counsel for the accused could, therefore, not get a proper and intelligent reading of the testimony. Counsel for the accused further deposed that he called upon the deputy sheriff and asked him to go into the room used by the grand jury at the time to get the coroner's book. This was on Tuesday or Wednesday of the week of the trial. He found upon examination that the testimony had not been copied into the coroner's book, and that, therefore, the counsel were not enabled to read and become familiar with the testimony "absolutely needed for contradiction on the trial of such causes." Counsel for the State stated in this connection that when the attorney for the accused came to his office and asked for the coroner's inquisition he handed to him the papers in the case, telling him at the time that he did not know whether he could read them or not, because they were written in a kind of short or running hand; that he had suppressed no record in the case, and had given the counsel all the records which he had; that the record was written in a kind of running long hand; that the young man who took the testimony was out of town at the time, and that he had so stated. Upon this showing the court declined to continue the case. Certainly there was no deprivation of due process of law in this action.

It is next contended that the court erred in refusing to direct a verdict upon motion of the defendant's counsel at the close of the testimony, because the warrant on which the deceased attempted to arrest the plaintiff in error was null and void, because the act under which it

was issued was unconstitutional, and this, so far as Federal questions are concerned, because it was in violation of Article IV of, and repugnant to the Thirteenth and Fourteenth Amendments to, the Federal Constitution. Responding to this motion to direct an acquittal, the court said:

"It is not necessary to argue that point further, even if you were to establish the fact that the warrant was null and void, or even if the man had no warrant at all it would not be competent for the court to direct a verdict in favor of the defendant Pink Franklin, and the motion is refused. I will also leave it to the jury as to the guilt or innocence of the other defendant. I don't care to discuss the matter, but I do not apprehend that it is a case in which the court ought to direct a verdict in case of either of the defendants, and the motion is therefore refused."

The only Federal question raised in this connection is found in this denial of the motion to direct a verdict in favor of the accused, because the statute under which he was sought to be arrested was void under the Federal Constitution, and the warrant issued for his arrest under such unconstitutional law therefore void and of no effect. That the statute under which the proceedings were had and the warrant issued is unconstitutional was held by the Supreme Court of South Carolina in *Ex parte Hollman*, 79 So. Car. 1. In that case the court reached the conclusion that the statute in question not only violated the constitution of the State, but was in contravention of the Thirteenth and Fourteenth Amendments to the Constitution of the United States and § 1990 of the Revised Statutes of the United States, known as the peonage statute. See *Clyatt* v. *United States*, 197 U. S. 207.

But an inspection of this record does not disclose that by any request to charge, or otherwise, any advantage was sought to be taken of the unconstitutionality of the act other than is found in the request for the peremptory

instruction to acquit the accused. Even if one attempted to be arrested under process issued under a void and unconstitutional law has the right to resist arrest, even to the taking of human life, a point we do not find it necessary to decide, the case could not have been taken from the jury upon the testimony disclosed in this record. The right to make such resistance to the officer, under the circumstances here shown, must have been left to the determination of the jury under proper instructions. In this case, if the State's testimony is to be believed, the accused without any warning, or resorting to any other means of resistance, and after the constable had knocked for admission, shot the officer upon his entering the open door armed with a supposed warrant of arrest. Upon this showing the case could certainly not be taken from the jury because of any supposed right to resist with all necessary force an unlawful arrest because of the invalidity of the statute or the warrant issued in pursuance thereof.

It was insisted in the oral argument of this case, and an elaborate brief was filed by eminent counsel, making the contentions that the proceedings for the arrest of the accused were in violation of the Thirteenth Amendment to the Constitution and of § 1990 of the Revised Statutes of the United States, abolishing and prohibiting peonage, and declaring null and void the resolutions, regulations and usages of any State or Territory in that respect; and that they were in violation of § 5526 of the Revised Statutes of the United States, punishing any person who holds, arrests or returns, or causes to be held, arrested or returned, or in any way aids in the arrest or return of any person to a condition of peonage, and were in violation of the Thirteenth Amendment. This being so, and the statute and the warrant being illegal and void, the accused, it is contended, had the right to use all reasonable force to protect his person, his liberty and his habi-

tation from such unlawful arrest, and that, therefore, the firing of the fatal shot was only a reasonable use of force for the defense of the accused under the circumstances shown.

But, as we have said, the only attempt to raise questions of a Federal character concerning the validity of the statute and the warrant under which it was issued, and the right to resist arrest under such warrant, was in the request for a peremptory instruction for an acquittal. Even upon the theory of his rights now advanced he was not entitled to a peremptory instruction taking the case from the jury.

The Supreme Court of South Carolina considered and overruled certain grounds of appeal, which embrace objections to the charge. But we do not find in these rulings any determination of Federal questions adverse to the plaintiff in error which would warrant a reversal of the judgment by this court. These rulings were upon questions of general law, concerning which no Federal right was asserted and denied as is essential to enable this court to review the judgment of a state court.

After giving this case the examination its importance deserves, in view of its gravity, we are unable to find in the record anything which worked a deprivation of Federal rights warranting this court in disturbing the judgment of the Supreme Court of South Carolina, and the judgment is affirmed.

Affirmed.

WATSON *v.* STATE OF MARYLAND.

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

No. 174. Argued April 27, 1910.—Decided May 31, 1910.

The decision of the state court that an offense under a statute did not depend on conditions as to notice contained in another statute is conclusive on this court; and one convicted in a state court is not denied due process of law by reason of such construction.

The police power of the State particularly extends to regulating trades and callings concerning public health, and practitioners of medicine are properly subject to police regulation, the details of which are primarily with the legislature and are not to be interfered with by the Federal courts so long as fundamental constitutional rights are not violated. *Dent* v. *West Virginia*, 129 U. S. 114.

Classification will not render a state police statute unconstitutional as denying equal protection of the law so long as there is a reasonable basis for such classification; nor will exceptions of specified classes render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted class. *Williams* v. *Arkansas*, 217 U. S. 79.

The medical registration law of Maryland (art. 43, § 83, Code of 1904) is not unconstitutional as denying equal protection of the law because its provisions do not apply to those who practiced prior to a specified date and treated at least twelve persons within a year prior thereto, or because it does not apply to gratuitous services, or to physicians in hospitals, none of the exceptions being unreasonable.

105 Maryland, 650, affirmed.

THE facts, which involve the constitutionality of the statute of Maryland relative to registration of medical practitioners in that State, are stated in the opinion.

Mr. Charles G. Watson for plaintiff in error.

Mr. Isaac Lobe Straus, Attorney General of the State of Maryland, for defendant in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error was convicted in the Circuit Court of Allegany County, Maryland, for a violation of § 99 of article 43 of the Maryland Code of 1904, for the offense of practicing medicine in the State of Maryland without being registered in accordance with the provisions of §§ 83 and 89 of the same article. The Maryland act in question, requiring registration of physicians, provides a comprehensive system for the regulation of the practice of medicine and surgery, and, concerning the necessity of registration, enacts (Art. 43, § 83):

"All persons, except physicians who were practicing medicine in this State prior to the first day of January, 1898, who are now practicing medicine or surgery and can prove by affidavit that within one year of said date said physician had treated in his professional capacity at least twelve persons, who shall commence the practice of medicine or surgery in any of their branches after the eleventh day of April, 1902, shall make a written application for license to the president of either board of medical examiners," etc.

The statute requires proof of good moral character, certain school education, and makes provision as to the effect of diplomas from certain medical colleges, and as to other and various details required of an applicant for the practice of medicine or surgery.

The judgment of conviction was affirmed by the Court of Appeals of Maryland (105 Maryland, 650), and the case is brought here to review that judgment, because of alleged violation of certain rights secured to the plaintiff in error by the Federal Constitution. The first of these grounds concerns § 80 of the same act, which provides for the sending of notice to physicians practicing in the State without being legally registered, and further providing that those physicians being entitled to register, and yet

have failed to comply at the expiration of four months from the election of the secretary-treasurer of the board, shall be prosecuted; and that no one after the eleventh day of April, 1902, shall be allowed to practice medicine or surgery without being duly registered according to the provision of the subtitle.

The contention of the plaintiff in error is that there being no charge in the indictment, nor proof in the case, that he was furnished with this notice, his conviction was without due process of law. But the Court of Appeals of Maryland, examining this question, determined that § 99, under which the indictment was prosecuted, making it a misdemeanor to attempt to practice medicine in the State of Maryland without registration, was not subject to the limitations of § 80, relating to the sending of the notice, etc.

The offense, the Court of Appeals held, was created solely by § 99 in broad and general language, without exceptions or qualification, and that for conviction under that section it was not essential to prove the sending of the notice required by § 80. This construction of the Maryland statute is conclusive upon us. The accused had a trial before a court and jury under the statutes of Maryland, was proceeded against under the forms provided for by the laws of that State, and under a statute which the highest court of the State has held completely defined the offense without resorting to the necessity of notifying unregistered physicians before they became liable for the penalties of the act for practicing without registration. The contention that the conviction in this aspect was without due process of law under the Federal Constitution cannot be sustained.

It is next contended that § 83 violates the Federal Constitution, in the Fourteenth Amendment thereof, in denying to the plaintiff in error the equal protection of the laws, in that it makes unreasonable and arbitrary

distinctions in its classification of physicians, including some and excluding others, and in making unreasonable omissions of certain classes from the requirements of the act, as shown in the exemption of certain classes from its requirements. It is contended that to except from the provisions of the act the physicians who were practicing medicine in the State prior to the first day of January, 1898, who at the time of the passage of the act were practicing medicine or surgery, and who could prove by affidavit that within one year of said date they had treated at least twelve persons in their professional capacity, is an unreasonable and arbitrary classification, resulting in the exclusion from the exception of physicians of equal merit and like qualifications with those who are within its terms.

It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the State may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties. To this end many of the States of the Union have enacted statutes which require the practitioner of medicine to submit to an examination by a competent board of physicians and surgeons, and to receive duly authenticated certificates showing that they are deemed to possess the necessary qualifications of learning, skill and character essential to their calling. In *Dent* v. *West Virginia*, 129 U. S. 114, the subject is elaborately considered, and this view affirmed by Mr. Justice Field, speaking for the court.

In such statutes there are often found exceptions in favor of those who have practiced their calling for a period of years. In the *Dent Case, supra,* an exception was made in favor of practitioners of medicine who had continuously practiced their profession for ten years prior to a date shortly before the enactment of the law. Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts. In the statute under consideration the excepted class were those who had practiced before the first day of January, 1898, being more than four years before the passage of the law, and who could show, presumably with a view to establishing that they were actively practicing at that time, that they had treated at least twelve persons within one year of that date.

Conceding the power of the legislature to make regulations of this character, and to exempt the experienced and accepted physicians from the requirements of an examination and certificate, the details of such legislation rest primarily within the discretion of the state legislature. It is the lawmaking body, and the Federal courts can only interfere when fundamental rights guaranteed by the Federal Constitution are violated in the enactment of such statutes.

This subject has been so frequently and recently before this court as not to require an extended consideration. The right to regulate occupations was considered by this court at the present term in the case of *Williams* v. *The State of Arkansas,* 217 U. S. 79, in which it was held that a state statute which prohibited a certain class of drumming or soliciting of business on trains did not amount to a denial of the equal protection of the law. In that case the recent cases in this court were reviewed and fol-

lowed. It was therein held that regulations of a particular trade or business essential to the public health and safety are within the legislative capacity of the State in the exercise of its police power, and that unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the State; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws. Applying these tests, we see nothing arbitrary or oppressive in the classification of physicians subject to the provisions of this statute which excludes from its requirements those who have practiced prior to January 1, 1898, and were able to show that they had treated at least twelve persons in a professional way within a year of that date.

But it is insisted that undue discrimination is shown and equal protection of the law denied in the exceptions of the statute provided for in Art. 43, § 101, of the code. These exceptions are contained in the following portions of that section:

". . . but nothing herein contained shall be construed to apply to gratuitous services, nor to any resident or assistant resident physician or students at hospitals in the discharge of their hospital or dispensary duties, or in the office of physicians, or to any physician or surgeon from another State, Territory or District in which he resides when in actual consultation with a legal practitioner of this State or to commissioned surgeons of the United States Army or Navy or Marine Hospital Service, or to chiropodists, or to midwives, or to masseurs or other manual manipulators, who use no other means; nor shall the provisions of this subtitle apply to physicians or sur-

geons residing on the borders of a neighboring State, and duly authorized under the laws thereof to practice medicine or surgery therein, whose practice extends into the limits of this State: *Provided*, That such practitioners shall not open an office or appoint places to meet their patients or receive calls within the limits of this State without complying with the provisions of this subtitle: *Provided*, That the same privileges be accorded to licensed physicians of this State: *Provided, further*, That nothing in this subtitle shall annul any of the provisions of article 32, title 'Dentistry,' nor shall apply to any registered graduate of dental surgery now practicing in the State of Maryland, with the sign titles: Dentist, Surgeon Dentist, Dental Surgeon or Stomatologist."

The Court of Appeals of Maryland contented itself on this branch of the case with a reference to its former decisions as to certain of the exceptions, and as to the others with the expression of the opinion that all of them came within the discretion vested in the legislature in the exercise of the police power to make regulations for the public health and safety. We shall not take occasion to consider each of these exceptions. A reading of them makes it manifest that they are not without reason. Before a law of this kind can be declared violative of the Fourteenth Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is "no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." Such was the expression of this court in *Missouri, Kansas & Texas R. R. Co.* v. *May*, 194 U. S. 269, quoted with approval in *Williams* v. *Arkansas, supra.*

The stress of the argument for the plaintiff in error as to these exceptions is put upon the exemption of resident physicians, or assistant physicians, at hospitals, and students on hospital and dispensary duties. The selec-

tion of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive and apply equally to all persons similarly situated. We cannot say that these exceptions nullify the law. The reason for them may be that hospitals are very often the subject of state or municipal regulation and control, and employment in them may be by boards responsible to public authority under state law or municipal ordinance. Certainly the conduct of such institutions may be regulated by such laws or municipal regulations as might not reach the general practitioner of medicine. In any event, we cannot say that these exceptions are so wholly arbitrary and have such slight relation to the objects to be attained by the law as to require the courts to strike them down as a denial of the equal protection of the law within the meaning of the Federal Constitution.

Other questions are made in the record, but they do not present alleged denials of rights of a Federal character, reviewable here. We find no error in the judgment of the Court of Appeals of Maryland, and the same is affirmed.

Affirmed.

CITY OF OMAHA *v.* OMAHA WATER COMPANY.

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

No. 159. Argued April 19, 1910.—Decided May 31, 1910.

In the absence of any provision in the submission, the award of arbitrators or appraisers must be unanimous in matters of private concern, but a majority can act when the matter submitted is one which concerns the public.

The fact that public affairs are controlled by majorities is probably the basis of the above rule although the reason for the distinction therein contained is not altogether clear.

The purchase by a municipality, under authority and direction of the legislature of the State, of a water supply system, and the determination of the price to be paid for an existing plant are matters of public concern.

There is a distinction between an arbitration and an appraisal of value and although arbitrators may not independently take testimony as to disputed facts appraisers may, as in this case, properly examine books and papers relating to the property, in the absence of counsel, without being guilty of misconduct; and, in the absence of bad faith, such examination will not vitiate the award.

The legislature of a State may authorize a municipality to purchase a water system which extends beyond the city limits and to supply water to adjacent sections; and so *held* that the city of Omaha has such right, and that an appraisal of a water system is not bad, and hence not binding on the city, because it includes the entire system, parts of which are beyond the city limits.

There is a presumption against an intent to dismember a complete waterworks system, and an ordinance to purchase such a system will not be construed as requiring such dismemberment, even if the city had no power to use certain portions of the system.

Cost of duplication, less depreciation, of a water system, is less than the commercial value of the system as a going concern; and, even though the value of the unexpired franchise be expressly excluded from the appraisal, where the parties contemplate the purchase of a complete water system in operation, a reasonable amount should be included in the appraisal for the "going value" over the value of the physical properties.

A transaction of great magnitude such as the purchase by a city of a water supply system will not be defeated because of minor obstacles; and if the deed tendered includes a few properties to which title is not perfect or if there are incumbrances on the properties, the court can bring the proper parties in and the deed can be modified and interests protected so as to carry out, and not defeat, the transaction.

THE facts are stated in the opinion.

Mr. John Lee Webster, with whom *Mr. Carl C. Wright* and *Mr. Harry E. Burnam* were on the brief, for petitioner:

The award is void because not concurred in by the three appraisers. The election to purchase contemplated the valuation to be ascertained by all three appraisers.

The fact that each party selected an appraiser, and these two the third appraiser, does not give the right by implication or otherwise, to two appraisers alone to make an award, and one so made is void. *Willis* v. *Higginbotham*, 61 Mississippi, 164; *Harvin* v. *Denton*, 87 Mississippi, 238; *Weaver* v. *Powel*, 148 Pa. St. 372; *Lowe* v. *Brown*, 22 Ohio St. 463; *Stose* v. *Heissler*, 120 Illinois, 433; *Sherman* v. *Cobb*, 10 Atl. Rep. 591; *Memphis & Charleston Ry. Co.* v. *Pillow*, 56 Tennessee, 248; *Jeffersonville Ry. Co.* v. *Mounts*, 7 Indiana, 669; *Patterson* v. *Leavitt*, 4 Connecticut, 50; *United Kingdom &c.* v. *Houston*, 1 Q. B. L. R. 567.

The contract of submission will be construed as requiring the award to be concurred in by all the appraisers or arbitrators, unless by express words or necessary implication it authorizes an award by less than all. *Richards* v. *Holt*, 61 Iowa, 529; *Hubbard* v. *Great Falls Mfg. Co.*, 80 Maine, 39; *Lowe* v. *Brown*, 22 Ohio St. 463; *Godfrey* v. *Knodle*, 44 Ill. App. 638; *Oakley* v. *Anderson*, 93 N. C. 108; *Mackey* v. *Neill*, 53 N. C. 214; *Anderson* v. *Farnham*, 34 Maine, 161; *Owens* v. *Withee*, 3 Texas, 161; *Stose* v. *Heissler*, 120 Illinois, 433; *United Kingdom &c.* v. *Houston*, 1 Q. B. L. R. 567.

All must concur in the award to make it valid unless the parties have agreed that it may be made by less than all. Unless there is such an agreement clearly and unmistakably expressed the award will be held void when signed by two and not concurred in by the third. *Leavitt* v. *Windsor*, 54 Fed. Rep. 439; *Harryman* v. *Harryman*, 43 Maryland, 140; *Byrd* v. *Harkrider*, 108 Indiana, 376; *Willis* v. *Higginbotham*, 61 Mississippi, 164; *Weaver* v. *Powel et al.*, 148 Pa. St. 372; *Eames* v. *Eames*, 41 Connecticut, 177; *Towne* v. *Jaquith*, 6 Massachusetts, 46; *Green* v. *Miller*, 6 Johns. 39; *Patterson* v. *Leavitt*, 4 Connecticut, 50; *Nettleton* v. *Gridley*, 21 Connecticut, 531; *Jeffersonville Ry. Co.* v. *Mounts*, 7 Indiana, 669; *Smith* v.

Waldon, 26 Georgia, 249; *Lattin* v. *Gamble*, 154 Michigan, 177.

This case is distinguishable from one where the terms of the submission provide that a third party is an umpire, to be selected in the event of a disagreement. The submission in case at bar does not make the third man an umpire. *Sherman* v. *Cobb*, 10 Atl. Rep. 591; *Lowe* v. *Brown*, 22 Ohio St. 463; *Jeffersonville Ry. Co.* v. *Mounts*, 7 Indiana, 669; *Stose* v. *Heissler*, 120 Illinois, 433; *Godfrey* v. *Knodle*, 44 Ill. App. 638.

The case at bar is not a public appraisement which would justify an award by a majority of the appraisers. Such rule only prevails in cases of international controversies, or where the appraisers are appointed under a public law of the State and are acting in a public or *quasi*-judicial capacity.

Contracts between cities and water and gas companies are business contracts between private individuals. *Omaha Water Co.* v. *City of Omaha*, 147 Fed. Rep. 1; *Wagner* v. *City of Rock Island*, 146 Illinois, 139; *Illinois Trust Co.* v. *Arkansas City*, 76 Fed. Rep. 271; *Appeal of Brum*, 12 Atl. Rep. 855; *Safety Ins. Wire & Cable Co.* v. *Mayor*, 66 Fed. Rep. 140; *Cincinnati* v. *Cameron*, 33 Ohio St. 336.

The cases cited by the Court of Appeals to effect that this appraisement was a matter of public concern do not support that view.

A public appraisement is where the appraisers or arbitrators are appointed under a state or national law and act as *quasi*-public officers in the performance of a public duty. *Grindley* v. *Barker*, 1 Bos. & Pull. 229; *King* v. *Beetson*, 3 Term. 529; *Withnell* v. *Gartham*, 6 Tennessee, 388; *Ex parte Rogers*, 7 Cow. 525; *Sinclair* v. *Jackson*, 8 Cow. 543; *Young* v. *Buckingham*, 5 Ohio, 485; *State* v. *McMillan*, 29 S. E. Rep. 540; *S. C.*, 52 S. C. 60; *Carroll* v. *Alsup*, 107 Tennessee, 271; *Cortis* v. *Kent Water*

Works, 7 B. & C. 314; *Cooley* v. *O'Connor*, 12 Wall. 391; *The King* v. *Whitaker*, 9 Barn. & Cress. 648; *People* v. *Walker*, 23 Barb. 304; *People* v. *Coghill*, 47 California, 361; *Hewitt* v. *Craig*, 5 S. W. Rep. 280; *S. C.*, 9 Ky. Law Rep. 232.

The award is void because after the appraisers concluded the formal hearing, they privately and against the protest of the city, received and secretly examined, *ex parte*, the books of the water company, under an understanding that the city should not be permitted to see or know the contents of said books. The question to be considered involves a moral principle. The incident complained of did not give the city a "square deal." Such an examination was misconduct and made the award void. *Catlett* v. *Dougherty*, 114 Illinois, 568; *Emery* v. *Owings*, 7 Gill. 448; *Bassett* v. *Harkness*, 9 N. H. 164; *Jenkins* v. *Liston*, 13 Gratt. 535; *Rand* v. *Peel*, 74 Mississippi, 305; *National Bank* v. *Darragh*, 30 Hun, 29; *Warren* v. *Tinsley*, 53 Fed. Rep. 689; *Cameron* v. *Castleberry*, 29 Georgia, 495; *Walker* v. *Frobisher*, 6 Ves. 69; *Strong* v. *Strong*, 9 Cush. 560; *Hewitt* v. *Reed City*, 124 Michigan, 6; *Vessel Owners' Towing Co.* v. *Taylor*, 126 Illinois, 250; *Elmendorf* v. *Harris*, 23 Wend. 638; *Dobson* v. *Groves*, 9 Q. B. 637; *Western Female Seminary* v. *Blair*, 1 Disney, 370; *In re Plews and Middleton*, 6 Q. B. 845; *In re Tidswell*, 33 Beav. 213; *Passmore* v. *Pettit*, 4 Dall. 270; *Wood* v. *Helme*, 14 R. I. 325; *Jackson* v. *Roane*, 90 Georgia, 669; *Wilkins* v. *Van Winkle*, 78 Georgia, 557; *Rosenau* v. *Legg*, 82 Alabama, 568; *Knowlton* v. *Mickles*, 29 Barb. 465; *Sisk* v. *Gary*, 27 Maryland, 401; *Cleland* v. *Hedley*, 5 R. I. 163; *Lattin* v. *Gamble*, 154 Michigan, 177–181; *Lutz* v. *Linthicum*, 8 Pet. 165; *McFarland* v. *Mathis*, 10 Arkansas, 560; *Eastern Counties Ry. Co.* v. *Eastern Union Ry. Co.*, 68 Eng. Ch. 609.

These cases also hold that the court will not permit an inquiry into the *ex parte* evidence, but will set aside the

award, and it was not necessary for the city to introduce evidence that the arbitrators were improperly influenced by the *ex parte* evidence, but the award will be held to be void, even though it appears that the appraisers were respectable gentlemen, or did not consider the *ex parte* evidence, or were not influenced thereby.

An arbitrator who takes instructions from one side is in law acting corruptly. *Strong* v. *Strong*, 9 Cush. 560; *Western Female Seminary* v. *Blair*, 1 Disney, 370.

The general rule is that valuers of property, although called appraisers, or referees, or commissioners, in receiving evidence and in making awards, are governed by the law relating to arbitration. *Continental Ins. Co.* v. *Garrett*, 125 Fed. Rep. 589; *Christianson* v. *Norwich Ins. Co.*, 84 Minnesota, 526; *Mason* v. *Fire Ins. Assn.*, 122 N. W. Rep. 423; *Hills* v. *Home Ins. Co.*, 129 Massachusetts, 345; *Washburn* v. *White*, 197 Massachusetts, 540; *Insurance Co.* v. *Hegewald*, 161 Indiana, 631; *Manf. Builders' Ins. Co.* v. *Mullen*, 48 Nebraska, 620; *Sherman* v. *Cobb*, 15 R. I. 570; *Lowe* v. *Brown*, 22 Ohio St. 463; *Godfrey* v. *Knodle*, 44 Ill. App. 638; *Stose* v. *Heissler*, 120 Illinois, 433; *Emery* v. *Owings*, 7 Gill. 448; *Redner* v. *N. Y. Fire Ins. Co.*, 92 Minnesota, 306; *Earle* v. *Johnson*, 84 N. W. Rep. 332; *Hart* v. *Kennedy*, 47 N. J. Eq. 51.

The award is void because the appraisers exceeded their authority in appraising and including in the award the sum of $562,712.45 for going value. *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 52.

The award includes property the city is without authority to purchase, and used only to supply other towns.

A municipality acts under delegated power and can exercise only such rights and powers as are expressly conferred or necessarily implied from express grants; and all grants of power are to be strictly construed. *Citizens' St.*

Ry. Co. v. *Detroit Ry. Co.*, 171 U. S. 48, 53; *City of Fort Scott* v. *Eads Brokerage Co.*, 117 Fed. Rep. 51, 54; *State* v. *Irey*, 42 Nebraska, 189.

Cities have no power to levy taxes for the purpose of maintaining or to own or construct waterworks for the benefit of adjoining municipalities. *Sutherland-Innes Co.* v. *Village of Evart*, 86 Fed. Rep. 597; *Ottawa* v. *Carey*, 108 U. S. 121; *Quincy* v. *City of Boston*, 148 Massachusetts, 389; *Arnold* v. *Pawtucket*, 21 R. I. 15; *Duluth* v. *Gas & Water Co.*, 45 Minnesota, 210; *Farwell* v. *City of Seattle*, 43 Washington, 141; *Town of Bristol* v. *Water Works*, 23 R. I. 274.

The only exception is where there is express statutory authority to that end. *West Hartford* v. *Water Commissioners*, 68 Connecticut, 323; *Pittsburg* v. *Brace*, 158 Pa. St. 174.

A decree of specific performance should not be entered. Such a decree will not be entered where the purchaser would only obtain an equitable title. *Wesley* v. *Eells*, 177 U. S. 37; *City of Tiffin* v. *Shawhan*, 43 Ohio St. 178; *Guild* v. *Atchison, Topeka & Santa Fe Ry.*, 57 Kansas, 70. A court of equity will not decree a specific performance except where the right is clear. *Willard* v. *Tayloe*, 8 Wall. 557, 565; *Hennessy* v. *Woolworth*, 128 U. S. 438, 442; *McCabe* v. *Matthews*, 155 U. S. 550, 553; *Hildreth* v. *Duff*, 148 Fed. Rep. 676.

Although the proof might not authorize the court to set aside the award, it may be sufficient for a court of equity to refuse specific performance. *Shoop* v. *Burnside*, 78 Kansas, 871, 876; *Banaghan* v. *Malaney*, 200 Massachusetts, 46.

The award fixes the value of the property as of the date of the award, while the law requires the valuation to be fixed as of the date of the election to purchase. *Bristol* v. *Bristol*, 25 R. I. 189; *Water Co.* v. *Cherryvale*, 65 Kansas, 219; *Caldwell* v. *Frazier*, 65 Kansas, 24; *Water Co.* v.

Rockport, 161 Massachusetts, 279; *C., M. & St. P. Ry. Co.* v. *Stewart*, 19 Fed. Rep. 5.

Mr. Howard Mansfield and *Mr. R. S. Hall*, with whom *Mr. Herbert C. Lakin* was on the brief, for respondent:

There was no misconduct, improper procedure, concealment or secrecy on the part of the board of appraisers in the examination of the water company's books, nor were the books offered in evidence in any technical sense. The company was entirely within its rights in restricting the examination of its books to the sole purpose of the appraisal.

The board of appraisers was not subject to the rules of procedure governing arbitrations. *Lutz* v. *Linthicum*, 8 Pet. 165; *Bliss* v. *Supervisors*, 15 N. Y. Supp. 748; 1 Words and Phrases, 487, 490; *Garr* v. *Gomez*, 9 Wend. 649, 651; *Hall* v. *Norwalk Fire Ins. Co.*, 57 Connecticut, 105; *Continental Ins. Co.* v. *Garrett*, 125 Fed. Rep. 589.

The subject of the present review is not an arbitration but an appraisal; and the determination of the matter submitted to the board of appraisers is not an award, but an appraisement.

The vital distinction between an arbitration and an appraisal has been clearly and uniformly recognized from remote time by the courts. *Leeds* v. *Burrows*, 12 East, 1; *Lee* v. *Hemingway*, 3 Nev. & M. 860, note to *Parkes* v. *Smith*, 15 Q. B. 305; *Collins* v. *Collins*, 26 Beav. 306; *Eads* v. *Williams*, 4 De Gex, MacN. & G. 674; *Bottomley* v. *Ambler*, 32 L. T. N. S. 545; Fry on Specific Performance, 2d ed., § 341; *Garr* v. *Gomez*, 9 Wend. 649; *Garrard* v. *Macey*, 10 Missouri, 161; *Curry* v. *Lackey*, 35 Missouri, 389 (1858); *Kelly* v. *Crawford*, 5 Wall. 785; *G. & C. Sts. Ry. Co.* v. *Moore*, 64 Pa. St. 79; *Palmer* v. *Clark*, 106 Massachusetts, 373; *N. E. Trust Co.* v. *Abbott*, 162 Massachusetts, 148; *Norton* v. *Gale*, 95 Illinois, 533; *Stose* v. *Heissler*, 120 Illinois, 433; *James* v. *Schroeder*, 61 Michi-

gan, 28; *Noble* v. *Grandin*, 125 Michigan, 383; *M. E. Church* v. *Seitz*, 74 California, 287; *Guild* v. *Railroad Co.*, 57 Kansas, 70; *Wurster* v. *Armfield*, 175 N. Y. 256; *Norwich Gas & El. Co.* v. *Norwich*, 76 Connecticut, 565; *Earle* v. *Johnson*, 81 Minnesota, 472, distinguished; *Colombia* v. *Cauca Co.*, 190 U. S. 524.

The three engineers were, from the outset, regarded by the counsel for both parties, as constituting a board of appraisers and not a board of arbitrators, and by agreement of both parties were given the widest latitude of procedure.

The objection as to the examination of the books comes too late. *Drew* v. *Drew*, 33 Eng. Law & Eq. 9.

The appraisement cannot be set aside, except on positive proof of corruption, partiality or actual misconduct. *Republic of Colombia* v. *Cauca Co.*, 106 Fed. Rep. 337; *Brush* v. *Fisher*, 17 Michigan, 469.

The terms of the contract reserving to the city of Omaha the right to purchase the waterworks necessarily authorized a valuation by a majority of the board of appraisers.

The distinction between appraisements in private and in public concerns is obvious. *Colombia* v. *Cauca Co.*, 190 U. S. 528. The acquisition by a city of a system of waterworks is a matter of public concern. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Wagner* v. *Rockland*, 146 Illinois, 139; *Minneapolis Mill Co.* v. *Water Commissioners*, 56 Minnesota, 485. See also *Winters* v. *Duluth*, 82 Minnesota, 127; *Water Co.* v. *Eau Clair*, 132 Wisconsin, 411; De Portibus Maris, 1 Harg., Law Tracts, 78; *Munn* v. *Illinois*, 94 U. S. 113. See also *Budd* v. *New York*, 143 U. S. 517; *Slingerland* v. *Newark*, 54 N. J. L. 62; *Kennebec Water District* v. *Waterville*, 96 Maine, 234.

Public policy requires that in a matter of public concern the determination of a majority of the appraisers,

where all meet to consider the matter, must be taken as the act of the whole. *Grindley* v. *Barker*, 1 Bos. & Pul. 229; *McCoy* v. *Curtice*, 9 Wend. 17; *Cowan* v. *Murch*, 97 Tennessee, 590, 598; *Carroll* v. *Alsup*, 107 Tennessee, 257, 271; *Washington* v. *Nichols*, 52 N. Y. 478; *Green* v. *Miller*, 6 J. R. 39; *Ex parte Rogers*, 7 Cow. 526, 529; *Young* v. *Buckingham*, 5 Ohio, 485; *Colombia* v. *Cauca Co.*, 190 U. S. 524; *Gas Co.* v. *Wheeling*, 8 W. Va. 320; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142; *Light Co.* v. *Montgomery*, 87 Alabama, 245.

None of the decisions cited by counsel for the city conflicts with the rule that unanimity is not necessary in matters of public concern. See *Patterson* v. *Leavitt*, 4 Connecticut, 50; *Harryman* v. *Harryman*, 43 Maryland, 140; *Lowe* v. *Brown*, 22 Ohio St. 463; *Hubbard* v. *Great Falls Mfg. Co.*, 80 Maine, 89; *Weaver* v. *Powell*, 148 Pa. St. 372; *Cortis* v. *Kent Water Works Co.*, 7 B. C. 314.

The going value of the company's system of waterworks, as distinguished from the unexpired franchise, is an integral and essential element of the appraised valuation of the property. *Water Works Co.* v. *Kansas City*, 62 Fed. Rep. 853; *Gloucester Water Supply Co.* v. *Gloucester*, 179 Massachusetts, 365; *Gas & Electric Co.* v. *Norwich*, 76 Connecticut, 565; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, distinguished.

The valuation by the board of appraisers was properly made as far as practicable as of the date of their report.

By the terms of the ordinance of election the scope of the city's purchase was nothing less than the entire system of waterworks owned and operated by the Omaha Water Company, wherever located.

By the action of the parties, construing the ordinance with a view to the powers conferred by the statute, the scope of the contemplated purchase became irrevocably

fixed. It cannot now be altered. *Knox County* v. *National Bank*, 147 U. S. 91; *Manhattan Life Ins. Co.* v. *Wright*, 126 Fed. Rep. 82. See also *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510; *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273.

The city is equitably estopped from now claiming that it has never been its purpose to acquire the entire system of the complainant. *Reynolds* v. *Adden*, 136 U. S. 348; *Hackett* v. *Ottawa*, 99 U. S. 86, 96; *County of Randolph* v. *Post*, 93 U. S. 502, 513; *Bissell* v. *Jeffersonville*, 24 How. 287, 300; *Sullivan Timber Co.* v. *Mobile*, 110 Fed. Rep. 186, 197; *Brooks* v. *Laurent*, 98 Fed. Rep. 647; *Garber* v. *Doersom*, 117 Pa. St. 162; *Munroe* v. *Danbury*, 24 Connecticut, 199; *Tarr* v. *Mayor of Crete*, 32 Nebraska, 568; *Water Co.* v. *Omaha*, 156 Fed. Rep. 922.

An equitable estoppel may arise in such a case, applicable to a municipal corporation as well as to any other corporation or to an individual. *Water Co.* v. *City of Aspen*, 146 Fed. Rep. 8; *Indianapolis* v. *Consumers' Gas Trust Co.*, 144 Fed. Rep. 640; *Fayetteville* v. *Water, L. & P. Co.*, 135 Fed. Rep. 400; cases *supra* and *Peabody* v. *Westerly Water Works*, 20 R. I. 176.

None of the cases cited by counsel for the city is in conflict with this decision.

Upon the exercise of the option the obligation of the defendant to complete the purchase became absolute and the question cannot be raised as to power to purchase. *Castle Creek Water Co.* v. *City of Aspen*, 146 Fed. Rep. 8; *Water Co.* v. *Braintree*, 146 Massachusetts, 482; *Fayetteville* v. *Water, Light & Power Co.*, 135 Fed. Rep. 400; *Ralls County Court* v. *United States*, 105 U. S. 733; *Sala* v. *New Orleans*, 2 Woods, 188.

No valid equitable considerations appear against a decree of specific performance being entered as directed by the Circuit Court of Appeals.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill seeking the specific performance by the city of Omaha of a contract for the purchase and sale of the system of waterworks owned by the appellee company. The waterworks plant in question was constructed in pursuance of legislative authority and municipal ordinance, which need not be considered, for neither party questions the sufficiency of either. The fourteenth section of the ordinance of 1880, under which the waterworks were constructed by the predecessor of the appellee, was in these words:

"The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said waterworks at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the waterworks company and these two to select the third: *Provided*, That nothing shall be paid for the unexpired franchise of said company."

In 1903 the city elected to exercise this option and a board of appraisers was appointed, one by each of the parties and a third by the two so selected. This board of appraisers organized and proceeded to take evidence, and, after considering the matter for about three years, made an appraisement, fixing the value of the system at $6,263,295.49. The appraiser appointed by the city did not concur. The city rejected the award. Whereupon the company filed this bill, which, upon final hearing, was dismissed upon the sole ground of misconduct of the appraisers, other objections not being passed upon. Upon appeal this decree was reversed and the cause remanded for a decree in pursuance of the opinion of the appellate court. 162 Fed Rep. 232.

The case is here upon a writ of certiorari allowed at a former term.

Three major objections have been urged against the appraisement. First, that it was not concurred in by all; second, that the appraisers heard certain evidence without notice or giving the city an opportunity to hear or rebut; and, third, that the property valued includes a distributing system beyond the corporate limits of Omaha, by which certain suburban villages are supplied, and that to that extent the city made no contract to buy, and if it did, had no power to do so.

These in their order:

1. The only matter to be determined was the value of the waterworks system, which had long served the public. Its construction had been authorized by legislative enactment under which the municipal ordinance was passed. One section of this ordinance provided that the city at the end of twenty years might, at its election, purchase the works at a value to be determined by appraisers. The contention is that the refusal of one of the appraisers to concur in the valuation fixed by the majority defeated the appraisal. The matter in question was in no proper sense an arbitration. The contract was in all of its terms agreed upon. One party was to sell and the other to buy at a valuation determined by the board of appraisers, and unanimity was not stipulated for. Unanimity was hardly to be expected in a board made up as this was. When a matter of purely private concern is submitted to the determination of either arbitrators or appraisers the rule seems to be that there must be unanimity of conclusion by such board, unless otherwise indicated by the terms of the submission. *Hobson* v. *M'Arthur*, 16 Pet. 182, 192; *Green* v. *Miller*, 6 Johns. 39; *Gas Company* v. *Wheeling*, 8 W. Va. 320, 351 *et seq.* The rule is, however, otherwise when the submission is one which concerns the public. In such submissions, whether it be the arbitration of a difference or the ascertainment of a value, a majority may act, unless otherwise indicated by the agreement for

submission. Why this distinction should exist is not altogether clear. In both instances the persons to whom the submission is made are acting under a power and must stay within it. The reason probably lies in the fact that public affairs are controlled by majorities, and, by analogy, a majority should control when the submission is a matter which concerns the public. But whatever the reason, so are the authorities. *Colombia* v. *Cauca Co.*, 190 U. S. 524; *The People ex rel.* v. *Nichols*, 52 N. Y. 478; *Gas Company* v. *Wheeling*, 8 W. Va. 320; *Grindley* v. *Barker*, 1 Bos. & Pul. 229.

The construction and acquisition of a system of water supply and distribution was a public municipal function. The Nebraska legislature, in 1903, went so far as to require municipal ownership of a water supply system in the city of Omaha, and that this should be accomplished either by construction or by the purchase of the existing system. The city, in compliance with and in the exercise of the power conferred when the existing plant was constructed, elected to purchase the existing system under the ordinance of 1880 and the power therein reserved. That in such circumstances the determination of the price to be paid by a submission was a matter of public concern, is too clear for argument. The cases cited above cover the point. The appraisal was not therefore defeated because not concurred in by all.

The distinction suggested by counsel that the authority for the submission must come from the public, if there be anything of substance in it, does not prevent the operation of the rule here, for the purchase upon a valuation settled by appraisers was in the ordinance of the city, in pursuance of legislative authority, and, in a very true sense, was an authority to submit to appraisers which came from the public.

2. The next objection is that the appraisers heard evidence in the absence of the city and without opportunity

to reply, and that this was such misconduct as to vitiate the valuation. As already hinted, this was not a board of arbitrators. An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute and difference. But when, as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate.

Counsel have cited and pressed upon us the case of *Continental Insurance Co.* v. *Garrett*, 125 Fed. Rep. 589, as a case where an appraisement of a fire loss was set aside because evidence was heard in the absence of the parties. But that was a case where the full amount of the insurance was claimed as the extent of the loss. This was denied. It was therefore a plain case of the submission of a dispute or difference which had to be adjusted. The rule applicable to a judicial proceeding therefore applied. It was in fact an arbitration, though the arbitrators were called appraisers. The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation because it was not in existence. Evidence was therefore essential to show what had been destroyed as well as its value. The case is wholly unlike the one here presented.

In *Collins* v. *Collins*, 26 Beav. 306, where there was a contract for the sale of a brewery at a price to be fixed by persons called arbitrators, one chosen by each party and a third by these two, before entering upon valua-

tion; it was ruled that they were not arbitrators but appraisers, and the Master of the Rolls, Sir John Romilly, said:

"But I do not think that in this particular case the fixing of the price of the property is an arbitration, in the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one, and one which has been properly relied upon in the case. If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them. It might be, that if the purchaser knew the price required by the seller, there would be no difference, and that he would be willing to give it. It may well be, that if the vendor knew the price which the purchaser would give, there would be no difference, and that he would accept it. It may well be, that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. Undoubtedly, as a general rule, the seller wants to get the highest price for his property, and the purchaser wishes to give the lowest, and in that sense it may be said that an expected difference between the parties is to be implied in every case, but unless a difference has actually arisen, it does not appear to me to be an 'arbitration.' Undoubtedly, if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, they say, 'we will refer this question of price to A. B., he shall settle it,'

and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an 'arbitration,' in the proper sense of the term, and within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to me to be an arbitration."

In the present case there was not only no antecedent disagreement as to price, but the ordinance under which the purchase was to be made provided that the property was to pass "at an appraised valuation, which shall be ascertained by the estimate of three engineers," etc. The board was accordingly made up of such engineers selected because they were experts of experience in the service they were expected to perform. That it was the understanding that these engineers were to examine and estimate the value and acquaint themselves with the condition and extent of the property in question in their own way and not according to the procedure required in a judicial proceeding, is made clear by the avowals made by the counsel representing the parties at the beginning of the valuation. Thus the attorney for the city, addressing the valuers, said:

"As to the matter of the procedure to be adopted by your board, as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the city of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of the property of the water company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the water company, the city of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition

of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the city of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, (to) whose judgment the question of value must be submitted upon the examination of the property."

Counsel for the water company appear to have fully concurred in this view of the function of the board.

That the great bulk of the evidence was heard or submitted in the presence of counsel representing both sides is true. This course did not, however, preclude them from enlightening their judgment as experts by either personal inspection or by informing themselves in any other way of the value of the plant in question without calling in counsel if they desired further information. The thing complained of is that the valuers called upon the company for their books and that they had these books gone over by an expert auditor of their own selection. This, counsel say, was done without notice to the city and after the close of the hearings. But it was not done secretly, for the city learned of it and asked an opportunity to be present when the books were submitted. What information was derived from the books is not shown. We have only the lone fact that the appraisers of their own motion asked an opportunity to look over and have audited the company's books, and that the company granted the privilege as "confidential information" for the use of the appraisers only. Neither are counsel justified in saying that the books were called for after the matter was in the hands of the appraisers for conclusion. When the parties had submitted their maps, plats, blue prints and such other evidence throwing light upon the value of the plant, as they desired, and had been heard in argument and upon brief, the chairman of the board said in substance to

counsel that much time would be necessary to reach a conclusion; that the real work of valuation had been but begun, and that "much more information must be sought by this board."

There is not the slightest evidence in the record of partiality, bad motive or misconduct affecting the action of the board. Its members appear to have been gentlemen of high character professionally and otherwise, and if their conclusion is to be set aside it must be because they deemed it within their power to have a confidential examination made of the books of the company to assist them in arriving at a valuation.

If this was a technical arbitration of a matter of dispute or difference between the parties, to be heard and decided upon evidence submitted, the examination of the company's books without the consent of the city or the presence of its representatives would be such misconduct as would vitiate the award. In such a matter the rules relating to judicial inquiry would apply. *Continental Insurance Co.* v. *Garrett*, 125 Fed. Rep. 589, and cases cited. But in an appraisement, such as that here involved, the strict rules relating to arbitration and awards do not apply, and the appraisers were not rigidly required to confine themselves either to matters within their own knowledge or those submitted to them formally in the presence of the parties; but might reject, if they saw fit, evidence so submitted, and inform themselves from any other source, as experts who were at last to act upon their own judgment. *Kelley* v. *Crawford*, 5 Wall. 785, 790; *Railway Co.* v. *Moore*, 64 Pa. St. 79, 91; *Palmer* v. *Clark*, 106 Massachusetts, 373, 389; *M. E. Church* v. *Seitz*, 74 California, 287; *Curry* v. *Lackey*, 35 Missouri, 394.

In the absence of any evidence of actual bad faith we do not hesitate about agreeing with the Circuit Court of Appeals in the conclusion that there was no such misconduct as to vitiate the valuation.

3. The next contention is that the valuation includes property not within the submission, and which the city did not have power to buy. The point from which the water was taken by the existing water plant was beyond the corporate limits of Omaha. In the immediate suburbs of the city there are several villages outside the corporate limits. The distributing system of the Omaha Water Company has, from time to time, been extended to these outlying suburban towns. It is now said that the appraisers have valued these outlying distributing systems as a part of the plant to be acquired by the city under the ordinance electing to purchase.

As to the power of the city: The charter, § 27, Laws of Nebraska 1897, page 99, provided for the construction and maintenance of waterworks "either within or without the corporate limits of the city." This is said to only allow the location of pumping works or source of supply outside the city. The city does not therefore object to valuing the supply station and mains extending to the city as within the contemplated purchase. But it is said that the authority is limited to a distributing system wholly within the corporate limits. That the primary purpose was to supply the people of Omaha with water for public and private purposes is clear. But does that forbid that those who live outside may not be also supplied from the main plant, and, if necessary, by such extensions, not inconsistent with the primary object, as may prove desirable as suburbs grow up around the city?

These powers were supplemented by the charter of 1897. Under § 27 of that charter it was given, among other things, "power to appropriate any waterworks system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying within said city or in part without the city and within ten miles from the corporate limits of such city, including all real estate, buildings,

machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of or connected with said system, plant or property, and franchises to own and operate the same, if any." This was again supplemented by the act of 1903, chapter 12, providing a method of procedure for acquiring municipal water plants and the creation of a water board for their control and management, being the act under which the city was required to take steps to acquire its own water plant system. Again, by the act of 1907, chapter 12*a*, it is, among other things, provided by § 242, that the water board may contract with any municipality adjacent to said city to supply such municipality with water for domestic, mechanical, public or fire purposes, a provision plainly contemplating just such a condition as would ensue if the city should acquire the existing system of works with a distributing system extending to villages adjacent. The review of the legislation touching the power of the city, and the conclusion of the Circuit Court of Appeals from that legislation, that the city had the power to acquire the system as it existed, and has the power to operate so much of it as is intended to supply the suburban towns adjacent which may be acquired, is full and satisfactory, and meets our approval.

We are also satisfied with the conclusion of the Circuit Court of Appeals that the acquisition of the system as it existed at the time the city made its election to purchase was within the contemplation of both the city and the water company, and that the valuation of the system as an entirety was the matter which the appraisers were required to do. What we shall say upon this point will support our conclusion as to the power of the city, for the legislation upon that matter must be read in the light of the subject-matter and of all the known local conditions. The most weighty fact in this connection is, that the system was one single system, having a common source

of supply and common main connections therewith. Its dismemberment is not to be thought of unless it is clear that the ordinance exercising the option is so plainly limited to the purchase of only so much of the distributing system as lay wholly within the corporate limits as to admit of no other meaning. A presumption against dismemberment is not overthrown even if the city had no power to sell water to people or municipalities beyond its limits. If these outside distributing pipes could not be lawfully used by the city for the purpose for which the water company had used them, it does not follow that a contract to buy would be thereby any the less a contract to buy the plant as a unitary system. Aside from contract obligation which may pass with the plant, the city might cut off the supply of water to such outlying environs, if it saw fit, whether it could or could not legally supply water through the distributing pipes which had theretofore reached them. Certain it is that as the several towns adjacent had no source of supply, no pumping station of their own, disintegration would leave the water company with no means of supplying them with water. The distributing pipes under ground would, separated from the ownership of the pumping station, reservoir, filling, or settling basins, necessarily lose much of the value which attached to them as a part of a going plant.

The reservation in the ordinance under which the works were constructed should be read and interpreted in the light of the almost certain extension of the plant as the expansion and growth of the city might demand. The city, at the time the ordinance was passed, had some thirty thousand people. When the election to buy the plant was made it had, approximately, four times as many. As is usual in respect of growing cities, there had grown up around it groups of population, which, in some cases, expanded into semi-dependent municipalities. Con-

nected by continuous streets and car lines, they made one large community, and constituted greater Omaha. The water company, as was obviously expected from the beginning, expanded with Omaha and met the public necessities by including these outside populations within its distributing system.

The appraisers in making their estimate of valuation included $562,712.45 for the "going value." This separation of an element contributing to the value of each tangible part was done because required to be done under an order made in the Circuit Court in a suit in which the water board of the city of Omaha was complainant and the members of the board of appraisers and the water company were defendants. The object of that suit was to instruct the appraisers in respect to the mode and manner in which they should proceed. An order resulted which required the board to report the separate elements making up the aggregate value of the plant.

The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That kind of good will, as suggested in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, is of little or no commercial value when the business is, as here, a natural monopoly, with which the customer must deal, whether he will or no. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the

commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks* v. *Kansas City*, 62 Fed. Rep. 853, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned Justice, and shall not try to. That case has been approved and followed in *Gloucester Water Co.* v. *Gloucester*, 179 Massachusetts, 365, and *Norwich Gas Co.* v. *City of Norwich*, 76 Connecticut, 565. No such question was considered in either *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, or in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19. Both cases were rate cases, and did not concern the ascertainment of value under contracts of sale.

Aside from the errors pointed out in the petition for the writ of certiorari counsel have suggested certain difficulties before a final decree, which are not disposed of in the opinion or decree of the Circuit Court of Appeals. The Circuit Court had dismissed the bill. The Circuit Court of Appeals considered and decided all of the large questions which were involved under the bill, but did not direct the precise form of the decree which the Circuit Court should enter, and remanded the case with direction to reverse the decree dismissing the bill, and to proceed in accordance with the opinion. Referring to certain matters left open, the court, in its opinion, said:

"In a transaction of this magnitude there will always be encountered minor obstacles that will readily yield to business methods. What the parties cannot agree upon the trial court has full power to determine according to principles of right and justice. We refer here to such contentions as that there are two or three properties in the city of Omaha belonging to the company but not needed in the business, and also that there are supposed defects in its title to other properties. The latter are not of great importance in comparison with the magnitude of the entire system. The property not needed was ap-

praised separately and it can be excluded from the sale, and the trial court can determine whether the title to other properties is defective. It is not necessary that the title of the company to all the lands upon which its works are built or through which its pipes are laid should be a fee simple, perfect in every particular and subject to no criticism. An irrevocable license, for instance, would be sufficient, or a title based upon prescription. If, however, there should be found substantial defects opportunity should be given the company to remedy them, and if it is unable to do so the parts of the property so circumstanced can be valued and the purchase price abated accordingly. It would be expressing too narrow a view to say that an appraisal of a great system of waterworks under a contract of purchase must fail because the title to a small part not vital to the integrity of the system was afterwards found to be defective. That the deed tendered by the company was not such as the city was required to take is immaterial. It is sufficient that the company was able, ready and willing to do what might lawfully be required of it. At some time during the progress of the cause in the trial court the trustees of the mortgages should be made parties to the end that the precise amount of outstanding bonds may be ascertained and paid and the liens discharged concurrently with payment by the city of the purchase price. Doubtless the company will have to use the proceeds of sale in paying its mortgage indebtedness. Or if an arrangement is desired such as was made in the Kansas City case, whereby the mortgages are assumed by the city, and the company released from liability, the presence in the case of the trustees would facilitate it.

"The decree is reversed and the cause is remanded with direction to proceed to decree in accordance with the views expressed in this opinion."

We do not feel ourselves under any obligation to do

more than to hold that we find no error in the decree of the Circuit Court of Appeals and to remand the case to the Circuit Court to be proceeded with accordingly.

Affirmed.

HERTZ, COLLECTOR, *v.* WOODMAN.

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

No. 640. Argued April 25, 26, 1910.—Decided May 31, 1910.

Where, as in this case, the certificate sufficiently states both the question and the desire of the Circuit Court of Appeals for instructions so that it may make a proper decision, it conforms in substance to the provisions of § 6 of the act of March 3, 1891, c. 517, 26 Stat. 826.

The rule of *stare decisis* tends to uniformity and consistency of decision but it is not inflexible, and it is within the discretion of a court to follow or depart from its prior decisions.

It is the practice of this court to affirm without opinion where the judgment under review is not decided to be erroneous by a majority of the court sitting in the cause.

While the affirmance of a judgment by this court by a divided court is a conclusive adjudication between the parties, it is not an authority on the principles of law involved for the determination of other cases in this or in inferior courts; and this, although a different rule has been sanctioned in England.

While an unqualified repeal of a law operates to destroy inchoate rights as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute, § 13, Rev. Stat., based on § 4 of the act of February 25, 1871, c. 71, 16 Stat. 431, operates, unless the repealing act does not expressly or by implication exclude such operation, as a general saving clause for all repealing statutes and extends not only to penalties and forfeitures but to liabilities under the repealed statute. *Great Northern Railway Co.* v. *United States*, 208 U. S. 452.

Upon the passing by death of a vested right to the immediate possession or enjoyment of a legacy or distributive share there was imposed by the inheritance tax provisions of the War Revenue Act of 1898

the tax or duty exacted upon every such right of succession which was saved by the saving clause of the repealing act of April 12, 1902. *Mason* v. *Sargent*, 104 U. S. 689, distinguished.

Although in the statute a time limit as to payment of a tax upon distributive shares and legacies may refer to the death of the testator, it may be construed as applying to shares in intestate estates as well as to legacies from testators, the omission being supplied by necessary implication.

The fact that the testator died within one year immediately prior to the taking effect of the repealing act of April 12, 1902, c. 500, 32 Stat. 96, does not relieve from taxation legacies otherwise taxable under §§ 29 and 30 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, as amended by the act of March 2, 1901, c. 803, 31 Stat. 895.

THE facts, which involve the construction of the act of April 12, 1902, c. 500, 32 Stat. 96, repealing certain provisions of the war revenue act of 1898 relating to inheritance taxes, are stated in the opinion.

The Solicitor General for the plaintiff in error.

Mr. H. T. Newcomb, with whom *Mr. Edward Lauterbach* was on the brief, for the defendant in error:

The question was improperly certified and should not be answered because the Circuit Court of Appeals does not require the instruction for a proper decision. *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266, 269.

This precise question has twice been argued before this tribunal, *Eidman* v. *Tilghman*, 136 Fed. Rep. 141; 203 U. S. 580, and *Philadelphia Trust Co.* v. *McCoach*, 142 Fed. Rep. 120; 203 U. S. 539, two cases, and four times this court has affirmed judgments which depended upon its affirmative decision, *Norris* v. *McCoach*, 142 Fed. Rep. 120; 203 U. S. 539, three times as above, and in a fifth case, *United States* v. *Marion Trust Co.*, 143 Fed. Rep. 301; 203 U. S. 594, a judgment was affirmed which, although involving the estate of an intestate, cannot be reconciled with any theory of interpretation except that

which requires an affirmative response to the question certified. In two subsequent cases, *United States* v. *Stephenson*, and *Kinney* v. *Conant*, 166 Fed. Rep. 720; 214 U. S. 526, the United States has sought to bring the question again before this court with the effect that judgments against the United States involving the affirmative decision of the present question have been so far sanctioned by this court as to become final and binding upon the parties.

The trial court was bound by the judgment of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Stephenson*, decided May 20, 1908, not reported; certiorari refused, 212 U. S. 572, and *United States* v. *Marion Trust Co.*, 143 Fed. Rep. 301, affirmed, 203 U. S. 594, and, as it committed no error in following those cases, its judgment should have been affirmed. It was bound to apply the rule of *stare decisis* to this case and this is not affected by the fact that the Circuit Court of Appeals for the Eighth Circuit, in *Westhus* v. *Union Trust Co.*, 164 Fed. Rep. 795, *S. C.*, 165 Fed. Rep. 617, adopted a different conclusion.

Even if a single affirmance, when this court is equally divided, does not settle the law, *Durant* v. *Essex Co.*, 7 Wall. 107, so as to constitute an authority in this court, such an affirmance binds every subordinate tribunal. 26 Amer. & Eng. Ency. Law, 2d ed., 165; *State Tax Law Cases*, 54 Michigan, 417, 444; *City of Florence* v. *Berry*, 62 S. Car. 469; note by Horace Binney Wallace appended to *Krebs* v. *The Carlisle Bank*, 2 Wallace, Jr., 49, citing *Durant* v. *Essex Co.*, 7 Wall. 107. And see Appendix to 7 Wall. 735; *Beamish* v. *Beamish*, 9 H. L. Cas. 274; *S. C.*, 5 L. J. 97; *Lessier* v. *Price*, 12 How. 72.

The rulings of the Circuit Judge were adopted and affirmed by the judgment rendered in the Supreme Court, in like manner that they would have been had both judges concurred in affirming the judgment on all the

grounds assumed by the court below; to hold otherwise would be declaring that nothing had been decided in the state court of last resort, and thereby a second writ of error to this court would be defeated. This is true notwithstanding the contrary conclusion was reached in *Hanifen* v. *Armitage*, 117 Fed. Rep. 845, and *Westhus* v. *Union Trust Co.*, 168 Fed. Rep. 617.

The interpretation of the act of June 13, 1898, should now be regarded as settled because in no less than seven cases, with the express sanction of the Supreme Court, citizens, similarly situated in every respect, have been finally relieved from the payment of the tax; besides, a contrary conclusion would make the tax operate unequally and create gross injustice.

Numerous cases, in addition to those already referred to, involving the question now presented, have been decided against the Government and applications for the writ of certiorari not having been made to this court within the proper time, these judgments have become final. Among these cases are: *Gill* v. *Austin*, 157 Fed. Rep. 234; *Lawrence* v. *Jordan* (not reported); *United States* v. *Rouss* (not reported); *McCoach* v. *Bamberger*, 161 Fed. Rep. 90.

These cases are now *res judicata;* the estates affected have forever escaped the exaction of the tax. On the authority of these judgments and those cited under the preceding heading, many other estates have been distributed without the payment of the tax and without litigation and the property so distributed is no longer within the reach of the collectors; these estates have forever escaped the exaction of the tax.

Where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Knowlton* v. *Moore*, 178 U. S. 41, 77.

Congress intended to prevent the collection of any legacy tax which did not become due and payable prior to July 1, 1902, because the calculations and statements contained in the report of the Committee on Ways and Means of the House of Representatives show that revenue from this source was expected to stop on the date of the repeal. See Rep. on Ways and Means H. Rep., House Report No. 320, February 3, 1902, entitled "Repeal of War-Revenue Taxation," 57th Cong., 1 Sess.

Such evidence is competent. *The Delaware*, 161 U. S. 459, 472; *Buttfield* v. *Stranahan*, 192 U. S. 470, 495.

The tax was repealed because the revenue it produced was unnecessary and burdensome, a menace and an impediment to the prosperity of the country; the act declared that the repeal should take effect on July 1, 1902; the committee estimated that there would be no revenue from this source after July 1, 1902. These facts are conclusive.

The "saving clause" in the repealing act does not disclose any purpose to continue this tax.

The period of one year between the death of the testator and the date on which the statute made the tax due and payable coincides with the period ordinarily allowed for presenting and proving claims against the estate; until that period has elapsed and the net value of the estate has been ascertained the interests of legatees and distributees are "contingent beneficial interests" which cannot become absolutely vested in possession or enjoyment within the meaning of the refunding and declaratory act of June 27, 1902. The act of June 27, 1902, was in part a declaratory statute.

The terms necessary to express a different intent were well understood and Congress would have used them and every doubt or ambiguity in the act of June 13, 1898, and amendment acts must be construed in favor of the citizen.

The intention to tax any subject can never be implied and the expression of the sovereign will to tax must always be set forth with completeness and precision. *Eidman* v. *Martinez*, 184 U. S. 578, 583; *Eidman* v. *Tilghman*, *supra*, 136 Fed. Rep. 143; *Disston* v. *McClain*, 147 Fed. Rep. 114; *Lynch* v. *Union Trust Co.*, 164 Fed. Rep. 161; Cooley on Taxation, 2d ed., 464.

The cases cited by The Solicitor General can be distinguished.

MR. JUSTICE LURTON delivered the opinion of the court.

This case comes to this court upon a certificate under § 6 of the act of 1891, creating Circuit Courts of Appeals. The action in the Circuit Court was one by the executor and legatees under the will of James F. Woodman, to recover an amount of money which had been paid, under protest, as a tax upon legacies under the will of the testator, by virtue of §§ 29 and 30 of the act of June 13, 1898, and amendments, known as the War Revenue Act.

The facts certified are: That Woodman died at Chicago, March 15, 1902, leaving a will, which was there duly probated on May 3, 1902, and that the Illinois Trust and Savings Bank qualified as executor. The clear value of legacies payable under the will to the defendants in error was $166,250. On January 17, 1905, and before the payment of these legacies, the collector claimed and collected, as the amount of duty and tax due and payable upon said legacies, under the act of Congress before mentioned, the sum of $2,812.49. After stating the facts, substantially as above, the certificate concludes as follows:

"Upon the foregoing facts the question of law concerning which this court desires the instruction and advice of the Supreme Court is this: Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902 (U. S. Comp.

Stat. Supp. 1903, p. 279), relieve from taxation legacies otherwise taxable under sections 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901?"

The form of this certificate has been criticised, but we think it sufficiently states both the question and the desire of that court for the instruction of this court that it may make a proper decision. It conforms, in substance, with the statute, and finds precedence in a number of instances in matter of form. *Helwig* v. *United States*, 188 U. S. 605; *United States* v. *Pridgeon*, 153 U. S. 48; *United States* v. *Ju Toy*, 198 U. S. 253.

It is also urged that the Circuit Court of Appeals for the Seventh Circuit is precluded from requesting the instruction of this court, because it had in two cases theretofore decided the very question now certified. *United States* v. *Marion Trust Co.*, 143 Fed. Rep. 301; *United States* v. *Stephenson*, not yet reported. In both cases the decision was adverse to the contention of the United States. The first was affirmed by this court without opinion, by an evenly divided court, 203 U. S. 594, and, in the second, an application by the United States for a writ of certiorari was denied. 212 U. S. 527. It is further contended that, if not concluded by its own decisions, it was bound to follow the judgments of this court in *Eidman* v. *Tilghman*, affirming the judgment of the Circuit Court of Appeals of the Second Circuit, reported in 136 Fed. Rep. 141, the affirmance by this court being reported in 203 U. S. 580, and similar judgments of affirmance in *Philadelphia Trust Co.* v. *McCoach*, 142 Fed. Rep. 120, and 203 U. S. 539, and *United States* v. *Marion Trust Co.*, *supra*.

All of these cases were affirmances by an equally divided court of the judgments of the court below in favor of the legatees or distributees who had sued to recover taxes paid upon legacies or shares which had passed to the plaintiff within one year after the death of the testator

or intestate, the several lower courts having ruled that the tax had not been saved because it was not due and payable at the time of the repeal of the act under which the tax was claimed.

The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided. The court below in this instance, when called upon to reconsider its former construction of the inheritance tax act, found itself confronted by the fact that this court had been equally divided in opinion as to the proper interpretation of the act, and for that reason alone obliged to affirm the ruling of that and other courts against the legality of the tax which had been collected. If the decision of the court under review had been in favor of the legality of the tax an affirmance must likewise have resulted from an equal division. That court also found that its own former view of the act had not been satisfactory to the Circuit Court of Appeals for the Eighth Circuit, which court had decided contrariwise in *Westhus* v. *Union Trust Co.*, 164 Fed. Rep. 795. In such circumstances the court below was not only free to regard the question as one open for determination, but one which might well be certified to this court, that the question of law which had never been authoritatively decided by this court might be so determined by an instruction as to how it should decide the matter when thus presented for reconsideration.

When this court in the exercise of its appellate powers is called upon to decide whether that which has been done in the lower court shall be reversed or affirmed, it is obvious that that which has been done must stand unless reversed by the affirmative action of a majority. It has

therefore been the invariable practice to affirm, without opinion, any judgment or decree which is not decided to be erroneous by a majority of the court sitting in the cause. The earliest precedent is that of *Etting* v. *United States Bank*, 11 Wheat. 59, 78. Chief Justice Marshall said at the conclusion of the opinion:

"In the very elaborate arguments which have been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it."

In *Durant* v. *Essex Company*, 7 Wall. 107, 110, Mr. Justice Field, for this court, said, in respect of the effect of the affirmance by a divided court:

"There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself."

To the same effect are *Westhus* v. *Union Trust Co.*, 168 Fed. Rep. 617; *Hartman* v. *Greenhow*, 102 U. S. 672, 676. A different rule seems to have been sanctioned in the English courts. *Calherwood* v. *Caslin*, 13 Meeson & Welby, 261; *Beemish* v. *Beemish*, 9 H. L. Cases, 274.

Under the precedents of this court, and as seems justified by reason as well as by authority, an affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting

prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts. The affirmance by a divided court in the second case shows this, for if it was not so the second equal division could not have happened, for the case would have been controlled by the first equal division.

We shall therefore proceed to determine the question of law presented by the certificate of the Circuit Court of Appeals, feeling free to decide it as our judgments may dictate.

The statutes involved and requiring consideration are the twenty-ninth section of the act of June 13, 1898, c. 448, 30 Stat. at Large, 464; the thirtieth section of the same act, as amended by § 11 of the act of March 2, 1901, c. 806, 31 Stat. at Large, 948, and §§ 7, 8 and 11 of the act of April 12, 1902, c. 500, 32 Stat. at Large, part 1, page 97 *et seq.* So much of the sections referred to as is material to the present question is set out in the margin.[1]

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[1] Section twenty-nine of the act of June 13, 1898, is as follows:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say: . . ." 30 Stat. 464, chap. 448.

So much of section thirty of the act of June 13, 1898, as amended by section eleven of the act of March 2, 1901, as is material, reads:

"That the tax or duty aforesaid shall be due and payable in one year after the death of the testator and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be duly paid to and dis-

The seventh section of the act of April 12, 1902, which act we shall hereafter refer to as the repealing act, did not go into effect until July 1, 1902. That section explicitly repealed § 29 of the act of June 13, 1898, which was the only section imposing a tax upon inheritances and the only authority for the tax collected from the defendants in error. The claim of the United States was and is that, as the testator's death occurred prior to July 1, 1902, the tax demanded had been imposed as an obligation before the repeal of the taxing section, and that

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charged by the United States; and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainor last resided within thirty days after he shall have taken charge of such trust, and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, or in which the property was located in case of nonresidents, the amount of the duty or tax assessed upon such legacy or distributive share," etc.

Sections seven, eight and eleven of the act of April 12, 1902, are as follows:

"SEC. 7. That section four of said act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight and twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed.

"SEC. 8. That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this act, shall be subject, as to lien, charge, collection and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows: . . .

"SEC. 11. That this act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two." 32 Stat. pt. 1, pp. 97, 98, 99; chap. 500.

the liability thus imposed was saved by the eighth section of the repealing act. For convenience that section is here again set out:

"SEC. 8. That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this act shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows. . . ."

The question for solution must therefore turn upon the inquiry whether the tax in question had been imposed prior to the going into effect of the repealing act within the intent and effect of the saving clause just set out.

There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say, that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute. *United States* v. *Reisinger*, 128 U. S. 398; *Curtis* v. *Lovett*, 15 N. Y. 9, 152 *et seq.; Town of Belvidere* v. *Warner R. R. Co.*, 34 N. J. L. 193; 1 Lewis' Sutherland Stat. Const., §§ 282 *et seq.*

There has been a marked legislative trend in the direction of escaping from the serious consequence sometimes incident to this common-law rule of construction, indicated by general statutes saving liabilities, penalties and forfeitures incurred under repealed statutes. Such a general statute was passed by Congress on February 25, 1871, ch. 71, 16 Stat. 431, the fourth section of which was carried into the revision of 1878 and is now in force as § 13, Rev. Stat. That section reads as follows:

"The repeal of any statute shall not have the effect to

release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress. *United States* v. *Reisinger*, 128 U. S. 398; *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452.

In the last case cited the court said of this section that—

"As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13. For the sake of brevity we do not stop to refer to the many cases from state courts of last resort dealing with the operation of general state statutes like unto § 13, Rev. Stat., because we think the views just stated are obvious and their correctness is established by a prior decision of this court concerning that section. *United States* v. *Reisinger*, 128 U. S. 398."

This section is not alone applicable to penalties and for-

feitures under penal statutes. It extends as well to "liabilities," and a liability or obligation to pay a tax imposed under a repealed statute is not only within the letter, but the spirit and purpose of the provision. Therefore we must take that general saving clause into consideration as a part of the legislation involved in the determination of whether a "liability" had been incurred by the imposition of a tax prior to the act that destroyed the law under which it had been imposed.

The repealing act here involved includes a saving clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in § 13, the latest expression of the legislative will must prevail. In the case of *Great Northern Ry. Co.* v. *United States*, cited above, the question was whether the saving clause in the Hepburn act was so plainly in conflict with the rule of construction found in § 13 as to limit the actions or liabilities saved to those enumerated therein, but the court held that as the later clause applied to remedies and procedure, it was not by implication in conflict with the general provision of § 13, which saved penalties, forfeitures and liabilities. 208 U. S. 466, 467.

The significance of § 13 is therefore this: That if prior to the repealing act the defendants in error were under any liability or obligation to pay the tax or duty imposed by § 29 of the act of June 13, 1898, that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing act, unless the special character of that clause by plain implication cuts down the scope and operation of the general rule in § 13.

In the light of these principles of interpretation we come then to the question as to whether, at the date of the repeal of § 29 of the act of June 13, 1898, the legacies to the defendants in error were subject to any tax or duty under the repealed section which constituted a "liability" under

§ 13, or to a tax or duty "imposed," under the saving clause of the repealing act.

The only section which imposes any tax upon inheritances is the twenty-ninth. Any legacy or distributive share, or gift in anticipation of death, "passing after the passage of the act," is by the express terms of that section "made subject to a duty or tax to be paid to the United States, as follows," etc.

Section 30 of the same act deals only with the return, payment and procedure for the collection of "the tax or duty *aforesaid*," referring to the tax imposed by § 29.

Now, what is the property, right or thing which is made subject to the tax? This has been most conclusively answered by *Knowlton* v. *Moore*, 178 U. S. 41, 56, where the section in question is construed as laying a tax upon the transmission, or the right to succeed to a legacy or distributive share or gift in contemplation of death, passing after the act.

For reasons and upon grounds not necessary to be restated it has been also conclusively decided in *Vanderbilt* v. *Eidman*, 196 U. S. 480, that the tax or duty does not attach to legacies or distributive shares until the right of succession becomes an absolute right of immediate possession or enjoyment. It was therefore held in the case cited that a legacy upon conditions which might never happen was not subject to the tax or duty prior to the time, if ever, when the right of possession or enjoyment should become absolute.

To repeat then: The subject of the tax or duty exacted by § 29 is the right of succession which passes by death to a vested beneficial right of possession or enjoyment to a legacy or distributive share.

Upon the facts certified the right of succession which passed by the death of the testator was an absolute right to the immediate possession and enjoyment, a right neither

postponed until the falling in of a life estate, as in *Mason* v. *Sargent*, 104 U. S. 689, nor subject to contingencies, as in *Vanderbilt* v. *Eidman*, *supra*. No further event could make their title more certain nor their possession and enjoyment more secure. The law, then unrepealed and in full force, operated to fasten, at the moment this right of succession passed by death, a liability for the tax imposed upon the passing of every such inheritance or right of succession. The time for scheduling or listing was practically identical with the time for payment, and the listing or scheduling was required to be done by the executor charged with payment, but might be and was postponed for reasons of grace and of convenience. That is almost universal under any taxing system. The liability attaches at some time before the time for payment. But the liability for the payment of the tax exacted under § 29 of the act of June 13, 1898, accrued or arose the moment the right of succession by death passed to the defendants in error, and the occurrence of no other fact or event was essential to the imposition of a liability for the statutory tax upon the interest thus acquired.

Much has been urged because the tax was not "due and payable" when the repealing act took effect, and the contention is that because not "due and payable" no tax had been theretofore imposed within the intent of the saving clause. What we have already said answers this. But let us see the very unreasonable result which would ensue if we are required to say that by "tax or duty imposed under section twenty-nine" Congress meant a tax or duty due and payable when the repealing act should go into effect.

No one questions but that one effect of this saving clause would be to save any such tax as was "due and payable" one year before July 1, 1902. This being so, it would be very unjust if the tax in the latter case is saved and the other remitted, inasmuch as the thing made subject to

the tax would in each case be the same, namely, the transmission of a beneficial right to the possession and enjoyment of a legacy or distributive share at the death of a testator or intestate. In the one case the tax paid upon the right passing by death would be preserved. In the other a tax upon a like inheritance would be remitted. The only difference would be that in one case the time for payment had arrived, while in the other it had not, though in the later case the ultimate obligation to pay was equally as certain and fixed as in the first case.

Now, did Congress intend to make such an unjust distinction as would result from such an interpretation of the saving clause in question as shall make the time limit for payment the test as to whether one tax shall be preserved and the other remitted in a situation otherwise identical?

The saving clause does not in terms limit the right saved to a tax or duty which should be due and payable at the date of the repeal. It is perhaps an obvious suggestion that if that had been the purpose of Congress, it would have been easy to make that purpose clear.

But in place of saying in so many words that "all taxes or duties which should be due and payable prior to the taking effect of the act" should be subject to the provisions of § 30, etc., the Congress said that "all taxes or duties imposed by section twenty-nine," etc., prior to the taking effect of this act, should be subject to the provisions of § 30. Now it is to be noticed that this § 30, which is the remedial or procedure section, is not one of the sections repealed. The twenty-ninth section, which alone imposes any tax, is the one which is repealed. The plain purpose of the saving clause was to preserve some liability which had been imposed under § 29, which would otherwise be lost. This it did by providing that all taxes "imposed" prior to the going into effect of the act should, notwithstanding the repeal of the section which originated the tax, be preserved, and as to collection lien, etc., be

subject to the unrepealed § 30. It must also be borne in mind that this time limit for payment to "one year after the death of the testator" came into the thirtieth section only by the amendment of March 2, 1901. Up to the time of that amendment the only provision as to time was that *still* found in the *later parts of the same section*, namely, that "before payment and distribution to the legatees" the executor, administrator or trustee "shall pay to the collector . . . the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render (to the collector) a schedule, list or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified," etc. The same original section also provided that in case of neglect to so pay or deliver the statement required "*within the time hereinbefore provided*," certain penalties should be incurred, and that the collector should make out schedules, etc. This reference to the "time hereinbefore provided" is in the original section, and must, therefore, refer to a time before "payment and distribution" to the legatees and distributees.

It would seem to follow that the purpose and effect of the amendment making such tax "due and payable in one year after the death of the testator," was to advance the time of payment so as to require payment *within one year* if there should be longer delay in paying legacies and distributive shares, leaving in full force the requirement that the tax should be paid before the payment of legacies and distributive shares, if such payment and distribution should be made in less than one year. We have not passed over the fact that this time limit in terms applies only to the tax due under wills and to the uncertainty as to the time for the payment of the tax upon distributive shares. It, however, seems quite obvious that that time limit was intended to apply to shares in intestate estates, as well as

to legacies from testators, and that the omission may be supplied by necessary implication.

It has been suggested that the lien given by § 30 only attaches when the tax is due and payable. The lien was in the section before the amendment, and, in view of its purpose, would attach with the obligation or liability for the tax. There is no reason which would justify the assumption that the lien only attached when the day of payment might arrive, a date most indefinite before the insertion of the time limit by the amendment of 1902.

But it has been urged that any conclusion which saves a tax from the effect of a repealing act which was not actually due and payable is in conflict with *Mason* v. *Sargent*, 104 U. S. 689. That case arose under the inheritance tax law of 1864. The plaintiff's testator died while the law was in force, it having been repealed October 1, 1870. The legacy to the plaintiff, which was in that case held to have been illegally taxed, was one payable after the death of the widow of the testator, which did not occur until 1872, and after the repeal of the law under which the tax was claimed. But that case is distinguishable from this in more than one particular. The legacy sought to be taxed did not vest in possession and enjoyment before the repeal of the act under which it was supposed to be taxable. If, therefore, no taxable succession occurred during the existence of the inheritance tax law of 1864, the right to the tax would fail under the very test which this court in *Vanderbilt* v. *Eidman* made the test of whether a tax had been imposed during the operation of the act of June 13, 1898, and the very test which is applied in the present case.

The precise question here involved, and upon which this case must turn, namely, whether a tax is not at once "imposed," by succeeding to an immediate right of possession and enjoyment, during the operation of the act of June 13, 1898, in such sense as to be within the

intent of the saving clause in the act which repealed that act, was not and could not have been involved in the case cited. The terms, both of the act of 1864, as amended in 1866, and of the act which repealed that act, and of the saving clause in the repealing act, are in some important aspects to be differentiated from the acts here involved. It is enough, however, to say of that case that no taxable succession having occurred before the repeal of the act, there was nothing to save by the saving clause in the repealing act. In the present case it is equally as clear that if no taxable succession actually vested prior to the repeal of the taxing act, no tax would be saved. If, however, there did occur such an absolute right to the possession and enjoyment of the legacies to the present defendants in error as made it subject at once to the imposition of a tax under the law in operation when such succession occurred, a very different question must be decided from any decided in *Mason* v. *Sargent*.

The conclusion we reach is, that upon the passing by death of a vested right to the immediate possession or enjoyment of a legacy or distributive share, there was imposed the tax or duty exacted upon every such right of succession which was saved by the saving clause of the repealing act.

The question certified must be answered in the *negative*.

Mr. Justice McKenna, with whom concurred The Chief Justice and Mr. Justice Day, dissenting.

I am unable to agree to the judgment of the court. I regret that time does not serve to give adequate expression to my views or to consider opposing ones. Some of the elements of dissent I can only hastily give. The question of the interpretation of a statute is, however, seldom in broad compass. The purpose is to get at the meaning of the words, and fortunately there are well-known rules

to assist the process. The first of these is the motive of the law. Whatever construction advances that carries a presumption of truth.

There must be a strict or liberal construction according to the purpose of the law, the former if it imposes burdens, the latter if it relieves from them. The contentions of the Government, it seems to me, reverse this order. Their consequences seem to me to be: The law is a taxing one, is concededly of doubtful meaning, it must nevertheless be construed against the taxpayer. It was intended to relieve from burdens, its ambiguities must be resolved to retain them.

These contradictions between intention and result are intensified if we consider the general purpose of the law proclaimed at the time of its enactment. It was intended as a repeal of war revenue taxation. In other words, to take from a time of peace burdens laid in a time of war. A worthy purpose, I submit, and based on wisest considerations of governmental policy, and not to be defeated or impaired in any of its details by resolving the uncertainties of language against it.

There was emphatic and illustrative unanimity in the Committee of Ways and Means of the House of Representatives that reported and recommended the law. There was a difference of opinion in the committee as to the extent of the reduction which should be made, resulting from a difference in other views of its members, but there was no difference as to the necessity of a reduction of revenue.

The majority of the committee recommended a reduction of $73,000,000; the minority was of opinion it should be $123,000,000. In the reduction there was a special item of legacies. The figures need no comment. They display the purpose of Congress. Words, however, were added to emphasize it. "Sound business judgment," it was said, "dictates a sweeping reduction of our revenues."

The final word of recommendation of the measure was that "every consideration of prudence commends" its "wisdom." This then was the purpose of the measure, sanctioned by the highest considerations of judgment and wisdom. Should it not prevail, certainly have dominance in the interpretation of the law passed to effect it? Even as to a live and continuing law, the rule of interpretation is that taxes must be expressed in clear and unambiguous language. If there be doubt it is to be resolved against the Government. *Eidman* v. *Martinez*, 184 U. S. 578. Such a rule of interpretation certainly should be applicable to a statute repealing taxation. To what an anomalous contrast does its disregard bring us? Shall a law passed to supply the wants of a deficient treasury have a more restrictive construction than one passed against the burden of a constantly increasing surplus? Indeed, this case presents even a stronger contrast. Under the rule of interpretation announced in *Eidman* v. *Martinez* a law providing for the exigencies of war cannot prevail against the right of the taxpayer to resist taxation, the authority for which is equivocally expressed. But peace legislation, it seems, may claim a more determined power, though it have no necessities but the reduction of revenue, though it proclaims that purpose and is urged to it by governmental policy. It may have a double sense and yet be unfaltering in its exactions, resisting presumptions of law and legal rules, but a war measure may not.

I cannot believe that Congress intended to leave uncertainty, or, if uncertainty should inadvertently result, that it was to be resolved to retain taxes and not abolish them. And it had the means of certainty, and, I must assume, availed itself of them. Prior cases had given it examples of the interpretation of taxing laws—indeed, of the special kind of taxing laws which it was repealing, and we may be sure that it had those examples in mind in fixing the scope of its enactment. And this is in accordance

with a familiar rule of interpretation which this court has applied and necessarily will be called upon to apply again. That is that when provisions which have received judicial interpretation are used in a statute, they are supposed to be used with the meaning that had been given to them. Under any other rule judicial decisions would make "not light but darkness visible."

In *Clapp* v. *Mason*, 94 U. S. 589, a statute passed in 1864 subjected to a tax legacies and successions. Under it a tax was assessed upon certain real estate devised by Mason to his widow for her life, or until she should cease to occupy the same as a place of residence, and upon her death, or ceasing to occupy the same, to Clapp. The widow occupied the real estate until June 17, 1872. Mason, the testator, died December 4, 1867; the tax was assessed on the fifteenth of May, 1873. It was paid on the thirty-first, under protest, to avoid distraint or other forcible process to collect the same.

Under the statute of 1864 the tax would have been a proper one, but by a statute passed July 14, 1870, the tax imposed by the former act was repealed. The repealing clause, however, continued the provisions of former acts levying and collecting all taxes properly assessed or liable to be assessed or accruing under their provisions. It provided also that "any act done, right accrued or penalty incurred under former acts" should be saved.

The collector insisted that the tax upon the succession in question had *accrued* before the repeal of the act of 1864, that is, upon the death of the testator. The devisees contended that it did not *accrue* until they came into possession of the land, and before that occurred, it was asserted, the statute assessing the tax had been repealed.

The court stated the question to be when the right to the tax accrued, "at the death of the testator, or at the death of the widow, when the plaintiff became entitled to the possession of the land?" In answer to the question the

court conceded that the will of Mason conveyed an estate to William P. Mason and Charles H. Parker, (those who took after the widow,) and that, although they were not entitled to immediate possession, they had a vested estate. And it was conceded that not only vested estates, but those in expectancy, were within the statute. The admission, however, the court said, did not aid them in deciding the point before them, as the question of time still arose, When was the vested estate taxable?

The question was answered by saying, after a consideration of the provisions of the statute, that it would be difficult to carry out its "system in any other manner than by the provision that the succession should not be deemed taxable until such time as the successor should be entitled to its possession." It was further said:

"The act of 1864 contains no statement or intimation that this duty creates any lien upon the land, or that any obligation arises, or that any right accrues at a period earlier than that fixed for the payment of the duty. See sections 133, 137.

* * * * * * * *

"It is manifest that the right does not accrue until the duty can be demanded, that is, when it is made payable; in other words, at the end of thirty days after becoming entitled to possession."

The questions were reëxamined and decided the same way in *Mason* v. *Sargent*, 104 U. S. 689. The latter case, however, exhibits more clearly the applicability of the principles discussed to the case at bar. Mason died December 4, 1867. He bequeathed by his will certain personal property to the plaintiffs in the action in trust for his widow, and upon her death one-half to William P. Mason and one-half to Eliza R. Cabot. The widow died in 1872. In April, 1873, the tax in question was assessed. It was paid under protest and plaintiffs brought the action for the refunding of the tax on the ground that the property

did not vest in possession of the legatees until the death of the testator's widow, which occurred after the repeal of the legacy succession tax act, and that the tax had not accrued so as to come within the saving clause of the act of repeal.

The act of June 30, 1864, c. 173, 13 Stat. 223, 285, subjected legacies and distributive shares of personal property to a tax passing from a decedent, in the hands of an executor or administrator, varying in amount according to the degree of relationship of the beneficiary to the decedent. It further provided that the tax or duty should be payable whenever the party interested in the legacy or shares should become entitled to the possession and enjoyment thereof. The repealing act contained the saving clause which has been already set out.

The collector contended that the tax had accrued when the repealing act took effect, October 1, 1870. The opposing contention was that the tax did not become a claim in favor of the Government until the legacy itself became payable, which was not until after the death of the widow, June 17, 1872. The latter contention was sustained and the tax declared to have been illegally demanded.

It was decided that the legacy was the subject of the tax; that it was exempt during the life of the widow, and only became payable upon her death; that it did "not become a subject of taxation until the right" accrued "to reduce it to possession." The provision of the law which required the trustee to give written notice to the assessor of his trust within thirty days after he should take charge of it was declared "not material to the argument," and that the provision of the act of 1864, that the tax or duty thereby imposed should be a lien or charge upon the property bequeathed for twenty years, or until the same be paid within that period, determined nothing as to the time when the tax accrued.

Clapp v. *Mason* was cited as applicable, and the court

concluded as follows: "No right to the payment of the tax had accrued at the date when the repealing act took effect; and, therefore, none to collect it can be deduced from its saving clauses."

Clapp v. *Mason* and *Mason* v. *Sargent* were followed as determinative of when, under § 7 of the act of April 12, 1902 (the act now in question), should be regarded as "imposed" in *Eidman* v. *Tilghman* by Circuit Judge Lacombe at circuit, and also by the Circuit Court of Appeals of the Second Circuit. 131 Fed. Rep. 652; 136 Fed. Rep. 141. The judgment was affirmed by this court by an equal division of its members. 203 U. S. 580.

A distinction is made between those cases and that at bar, and there is some distinction in the facts, but not such, in my opinion, as to take this case out of the principle announced in them. They were made to turn upon the fact that the tax or duty was upon the legacy or distributive shares. In this they were applied in *Sturges* v. *United States*, 117 U. S. 363, and followed in *Knowlton* v. *Moore*, 178 U. S. 41, and *Vanderbilt* v. *Eidman*, 196 U. S. 480, in which the act of June 13, 1898, was interpreted. It is said in *Knowlton* v. *Moore*, "that the provisions of the act of 1864 were in mind when" the act of June 13, 1898, was drafted. The cases of *Clapp* v. *Mason* and *Mason* v. *Sargent* were decided when that act was drafted. Is it not a fair inference that it and its repealing act were intended to have the same meaning and interpretation which had been given to its prototype and its repealing act?

Those cases were also made to turn on the fact that as the tax was upon the legacy or distributive share, there could be no tax nor claim in favor of the Government until such legacy or share was vested in the possession and enjoyment of the legatee or distributee. In this again they were followed in *Vanderbilt* v. *Eidman*. And, it seems to me, therefore, that there is such resemblance of the provisions of the act of 1864 to those of the act of

June 13, 1898, as to make the cases interpreting the former decisive precedents of the meaning of the latter.

The time of payment is in both acts at a date subsequent to the death of the testator. In the act of 1898, one year after his death; in the act of 1864, when the legacy came into possession and enjoyment. This difference in time can make no difference with the principle that the tax does not accrue, until it becomes due and payable. And, I submit is not "imposed" until then, does not become a claim in favor of the Government until then, and not being such is not saved by § 8 of the repealing act. The lien does not attach until then. By § 30 of the act of 1898 the tax is due one year after the death of the testator, and is secured by a lien, but when the lien attaches is not stated. There is the same silence in the act of 1864. The omission was supplied by *Mason* v. *Sargent*, which declared that the lien presupposed the existence of the tax and only attached when the tax accrued. This must also be the meaning of § 30, and we have a further parallel between the acts completing the application of the cited cases. Mark, too, the words of § 8 of the repealing act, associating the tax and the lien, showing how closely the legislative mind followed the judicial decisions and gave its legislation, as I think, the certain meaning that the interpretation of the prior enactments afforded. Section 8 provides as follows: "That all taxes or duties imposed by section 29 . . . shall be subject as to lien, charge, collection and otherwise to the provisions of section 30. . . ."

An argument is made to show that a tax may be said to be imposed, though it be not due and payable. The argument is answered, I think, by what I have said. A tax is not imposed by a mere provision for it. Illustrations of this will readily come to mind besides those afforded by the cited cases. However, I will not attempt to further review the contentions of the Government or the opposing

ones, nor consider from which the greater embarrassments, if any, will result. The force of the conflicting contentions, and of course they have force, establish the ambiguity of the statute and the different meanings that can be ascribed to it. In such situation the rule of interpretation which I have announced and which I have shown is sanctioned by this court, should turn decision against the tax. I will not quote the Circuit Courts and the Circuit Courts of Appeal, which have so thought and have pronounced against the Government. They make a body of authority, persuasive in their numbers and rank. And this court has divided in opinion. I do not mention the fact as a circumstance which should preclude consideration of the question, but I bring it forward as an element of some power in the discussion. It may not have the "true, fixed and resting quality" of *stare decisis*, but it has nevertheless strong appeal and persuasion. It has persisted through quite a period of time and against many attempts to disturb it. It is certainly something more patent than inaction. It gave authority to the decision of the Circuit Court of Appeals in *Eidman* v. *Tilghman*, and that again determined other judgments and became a rule of decision for the settlement of estates.

I think the question certified should be answered in the affirmative.

I am authorized to say that THE CHIEF JUSTICE and MR. JUSTICE DAY concur in this dissent.

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

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

No. 11. Argued April 26, 27, 1910.—Decided October 17, 1910.

The grant made by the act of May 12, 1864, c. 84, 13 Stat. 72, was one *in præsenti.*

Where a railway land grant is one *in præsenti* the beneficiary is entitled to all the lands granted within place limits which had not been appropriated or reserved by the United States for any purpose, or to which a homestead or preëmption right had not attached, prior to the definite location of the road proposed to be aided.

A claim by a State that it is entitled to lands as swamp or overflowed under the Swamp Land Act of September 28, 1850, c. 84, 9 Stat. 519, is not an appropriation or reservation if the land is not in fact swamp or overflowed and the claim sustained by a decision or ruling to that effect of competent authority.

Under the Swamp Land Act power to identify lands as swamp or overflowed within the meaning of the act is conferred solely on the Secretary of the Interior. *French* v. *Fyan*, 93 U. S. 169.

A decision of the Commissioner of the Land Office, on notice to all parties and after hearing, that lands claimed as swamp or overflowed under the Swamp Land Act of 1850, are not swamp or overflowed, or of a character embraced by the act, and which has never been appealed from, modified or reversed, but has been relied on by purchasers for value and in good faith, should not, after a lapse of twenty-five years, be disturbed by the courts where it does not appear that the lands were actually swamp or overflowed, when the decision was made.

160 Fed. Rep. 818, affirmed.

THE facts are stated in the opinion.

Mr. Barton Corneau, special assistant to the Attorney-General, for the United States.

Mr. Charles E. Vroman for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an act approved March 3, 1887, c. 376, 24 Stat. 556, (amended by act of March 2, 1896, c. 18, and by act of March 2, 1896, c. 39, 29 Stat. 6, 42), Congress provided for the adjustment of land grants theretofore made in aid of the construction of railroads and for the forfeiture of unearned lands, and for the relinquishment or reconveyance to the United States of lands which had been certified or patented to or for the use of any railroad company.

If upon completing such adjustment it appeared that from any cause lands had been erroneously certified or patented by the United States, to or for the use of a railroad company, by, through or under grant from the United States, to aid in the construction of a railroad, then it became the duty of the Secretary of the Interior to demand the relinquishment or reconveyance of such lands to the United States, whether within granted or indemnity limits; and if such demand was not complied with by a named time, then the Attorney-General was to institute the necessary proceedings to cancel all patents, certificates or other evidence of title issued for such lands, and to restore the title to the United States. Provision was made for the protection, by patents, of purchasers in good faith from the grantee company, and the Secretary of the Interior was required to demand, on behalf of the United States, "payment from the company which has so disposed of such lands of an amount equal to the Government price for similar lands;" and if payment was refused, within a time named, "the Attorney-General was to institute suits against the company for such amount." 24 Stat. 556; 29 Stat. 6, 42.

Under the authority of that act the present suit was brought by the United States in 1903. It relates to about

4,300 acres of lands in Kossuth, Palo Alto and Dickinson Counties, Iowa, which, the United States alleges, were erroneously patented (in 1880) to the defendant railway company. That company sold the lands to purchasers in good faith, and refuses to account to the United States for the proceeds of such sales.

The relief asked is a decree compelling the railway company to account for such proceeds, and declaring such indebtedness to be a lien upon all funds in its hands realized from the above sales. The company took issue with the Government by answer, but before the cause was heard the material facts were stipulated by the parties. The Circuit Court dismissed the bill and its judgment was affirmed by the Circuit Court of Appeals.

In order that the grounds upon which the lower courts proceeded may fully appear, the circumstances under which the defendant railroad company became connected with the lands must be stated.

By an act passed May 12, 1864, c. 84, 13 Stat. 72, Congress, in aid of the construction of certain railroads, granted to the State of Iowa, for the use and benefit of the McGregor Western Railroad Company, "every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are *definitely located*, sold any section or any part thereof granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or

otherwise appropriated, or to which the right of homestead settlement or preëmption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid: *Provided,* That the lands so selected shall in no case be located more than twenty miles from the lines of said roads: *Provided, further,* That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement *or other purpose whatever,* be, and the same are hereby, reserved and *excepted from the operation of this act,* except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States." The provisions of this act were duly accepted by the State in 1866. Laws of Iowa, 1866, p. 189, c. 144.

The McGregor Western Railroad Company failed to comply with the conditions of the above act. Thereupon, all lands and rights to land granted to it by the act of 1864 (the lands now in dispute being part of those so granted) were "absolutely and entirely resumed by the State of Iowa," by an act of February 27, 1868, which declared that "the same be and are as fully and absolutely vested in the State as if the same had never been granted to said railroad company." Laws of Iowa, 1868, p. 20. The State then, by an act of March 31, 1868, gave the benefit of the grant for the road in question to the McGregor and Sioux City Railway Company, which accepted the terms prescribed by that act. Laws of Iowa, 1868, p. 70, c. 58. But that company also failed to comply with the terms of the grant, and the lands and rights of lands granted were again resumed by the State and afterwards were passed upon certain terms and conditions to the Chicago, Mil-

waukee and St. Paul Railway Company, by an act passed February 27, 1878. The latter company accepted the provisions of that grant, and in recognition of its rights the United States in 1880 patented to the State for the benefit of that company the following lands, covered by the act of 1864: 320 acres in Dickinson County, by patent of April, 1880; 3754.81 in Kossuth and Palo Alto Counties. These lands embraced all sued for except two tracts aggregating 200 acres in Kossuth County, to which the present defendant asserted no title. Laws of Iowa, 1878, p. 18, c. 21. Upon compliance with the terms and conditions prescribed in that act the Governor of Iowa was authorized to patent and transfer to the present defendant, the Chicago, Milwaukee and St. Paul Railway Company, the lands mentioned in the act of Congress of 1864.

In 1864 and 1869 maps of definite location, designating the line of said road in Iowa, as indicated in the act of 1864, were filed in the office of the Commissioner of the General Land Office.

It is alleged in the bill of complaint that, at the date of such definite location, all the lands, the proceeds of the sale of which the Government now claims and which were within the ten-mile or place limits of the railroad, were covered by existing claims of record in the office of the Commissioner of the General Land Office, consisting of homestead entries, preëmption declaratory statements, warrant locations, etc., and were pending before the Department of the Interior for adjudication. If that were true, then, by the very terms of the act of Congress, the lands in question would have been excepted from the grant of 1864. But the defendant denied in its answer that such fact existed, and it does not appear from the evidence that any homestead entry, preëmption, declaratory statement or warrant location had been made prior to the definite location of the line of the railroad. On the contrary, it was stipulated in the case that prior to and on

August 30, 1864—which was after the passage by Congress of the original granting act and was the date of the filing of the plat of definite location of the road—*none of the lands described in the bill of complaint had been covered by any homestead entry, preëmption, declaratory statement or warrant location or other existing claims of record in the office of the Commissioner of the General Land Office.* In that view, and if this were the whole case, then, beyond all question, the law would be in favor of the railway company; for the grant of 1864 was one *in præsenti* for the purposes therein mentioned, and according to the settled doctrines of this court, the beneficiary of the grant was entitled to the lands granted in place limits which had not been appropriated or reserved by the United States for any purpose or to which a homestead or pre-emption right had not attached *prior to the definite location of the road* proposed to be aided. The grant plainly included odd-numbered sections, within ten miles on each side of the road, which were part of the public domain, not previously appropriated or set apart for some specific purpose at the time of the definite location.

But the Government insists that before the passage of the act of 1864 these lands had been reserved by what was done under or in execution of what is known as the Swamp Land Act of September 28, 1850, and cannot, therefore, be regarded as granted by, but were excepted from the operation of, the act of 1864. 13 Stat. 72, § 1. Consequently, it is contended by the United States, patents could not have been legally issued to the railway company under the act of 1864. The contention of the railway company, on the other hand, is that the lands in question were not, in fact, swamp or overflowed lands granted by the act of 1850, to which any right could legally attach, in behalf of the State under that act; therefore, it is contended that nothing done under that act availed or could have availed the State except a decision

or ruling by competent authority, in due form, that these lands were, in fact, within the class of swamp or overflowed lands mentioned in the act of 1850.

In view of what has been said it becomes necessary to inquire into the scope and effect of the Swamp Land Act of 1850.

By the act of Congress of September 28, 1850, c. 84, 9 Stat. 519, Congress granted to Arkansas all the *swamp and overflowed lands* unfit for cultivation, within its limits, and which remained unsold at the time, to enable the State to construct the necessary levees and drains to reclaim such lands. That act provided that it should be "the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the *proceeds* of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, *as far as necessary,* to the purpose of reclaiming said lands by means of the levees and drains aforesaid," § 2; that "in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom," § 3; and that "the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated," § 4.

We have seen that by the act of 1864 the railroad company, by the grant *in præsenti* in that act contained, was

to get the odd-numbered sections, within ten miles on each side of its line and not sold by the United States before definite location, or to which no right of preëmption or homestead settlement had attached at the time of such location, or which had not been previously reserved by the United States for some purpose. It is stipulated that when the line of the railroad was definitely located none of the lands in question "were covered by any homestead entry, preëmption, declaratory statements or warrant locations, or other existing claims of record in the office of the Commissioner of the General Land Office of the Department of the Interior." But the United States contends that what was done, prior to the definite location of the road, for the purpose of bringing these lands under the operation of the act of 1850 as swamp and overflowed lands, created a claim that covered or attached to these lands. But this contention of the Government must be considered in the light of the fundamental inquiry whether the latter claim can avail anything whatever *if the lands were not in fact swamp or overflowed lands;* for, only lands *of that character* were granted by the act of 1850, and no mere claim that they were swamp or overflowed lands could make them such, unless it was sustained by some decision or ruling by competent authority to that effect. There never was any such decision or ruling. It is true that Dickinson, Palo Alto and Kossuth Counties—acting, we may assume, for the purposes of this case, under the sanction of the State—made selections of those lands as swamp lands; but it is stipulated and agreed in this case that those selections were never adopted, ratified or confirmed in any manner by the Interior or Land Department, but remained pending and undetermined therein down to the year 1876; that "during that time the State of Iowa claimed said lands as being swamp and overflowed lands granted to it under and by virtue of said act of Congress of September 28, 1850, and as having been selected

as such by said several counties under authority of an act of its legislature, approved January 13, 1853; and said McGregor Western Railroad Company and said McGregor & Sioux City Railway Company (afterwards McGregor and Missouri River Railway Company) successively made claims to the same lands as being neither swamp or overflowed in character, but as inuring to them respectively, under the act of Congress of May 12, 1864, as place lands, within the ten mile limits of said grant, under the plat of definite location filed August 30, 1864; that on May 31, 1876, and on October 21, 1876, the Commissioner of the General Land Office upon public hearings of the matter of such respective claims and after due notice to all parties interested, duly held and adjudged in writing that the lands in said Dickinson, Kossuth and Palo Alto Counties, Iowa, mentioned and described in complainant's Exhibit 'A' and in paragraphs 11 and 12 of defendant's answer in this cause, were not *in fact swamp or overflowed lands*, and were not *of a character embraced* in said act of Congress of September 28, 1850, and known as the Swamp Land Act; and that the State of Iowa and said several counties, were never entitled to said lands, or any part thereof, under said act. Said hearings were had pursuant to the requirements of the act of Congress of March 5, 1872, and said findings and decisions of the commissioner were never appealed from, reversed or modified in any manner as shown by the records of said General Land Office." Nearly thirty years have passed since this decision of the Land Department; and the United States, without ever appealing from the decision of the Land Department, now comes forward and asks a court of equity to cancel the patent issued in 1880 and 1881 under which the railway claims. Touching this aspect of the case the Circuit Court of Appeals said: "Since then most, if not all, of the lands have been sold and conveyed to numerous purchasers of small tracts who bought them in good faith and for value.

Twenty-five years or more of quiet enjoyment of the land in question have now elapsed. No fraud or unfair practices in any stage of the proceeding leading up to the final patents are charged against the railway company or any person acting for it. In such circumstances, it would, in our opinion, be inequitable and conducive of no good results to grant the relief sought by this bill."

In determining this case it must not be overlooked that the act of Congress confers upon the Secretary of the Interior and upon him alone, the power to identify particular lands as swamp and overflowed lands embraced by the act of 1850. Referring to the second section of that act, Mr. Justice Miller, speaking for the court in *French* v. *Fyan*, 93 U. S. 169, 171, said: "It was under the power conferred by this section that the patent was issued under which defendant holds the lands. We are of opinion that this section devolved upon the Secretary, as the head of the Department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and *made his office the tribunal whose decision on that subject was to be controlling.*" To the same effect, on this point, are *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68, and *Rogers Locomotive Machine Works* v. *American Emigrant Co.*, 164 U. S. 559, 571. In the latter case the court said: "The identification of lands as lands embraced by the swamp land act was therefore necessary before the State could claim a patent or exercise absolute control of them."

We repeat that it must be taken that these lands were not swamp or overflowed lands that had been reserved by the United States under the act of 1850. That fact must be regarded as conclusively established, as between the present parties. We say conclusively established; for, after full notice to all parties who were concerned in the matter and who had asserted titles to these lands, the

Commissioner of the General Land Office decided, in 1876, after full hearing, that these lands were not, in fact, swamp or overflowed lands, and that *neither the State nor any of its counties were entitled to them or any of them under the act of* 1850. That hearing by the commissioner was had pursuant to said act of Congress of March 5, 1872, c. 39, 17 Stat. 37, which provided, among other things, that the decision should be "without prejudice to legal entries or the rights of *bona fide* settlers under the homestead and preëmption laws of the United States prior to the date of this act." In any view, that decision was in contemplation of law one by the Secretary of the Interior, who, by the original act of 1850, was directed to make out accurate lists or plats of the lands described by that act as swamp and overflowed lands. *Wilcox* v. *Jackson*, 13 Pet. 498; *Wolsey* v. *Chapman*, 101 U. S. 755, 768. The decision was never appealed from, and has never been reversed or modified. The United States now comes, many years after such decision, and in disregard of the unreversed decision of the Land Department, asks a decree which cannot be rendered except upon the theory that these lands were, in fact, swamp or overflowed lands. We cannot adopt this theory nor make any such decree as that asked. By the act of 1850 Congress granted *in præsenti* to the State only swamp and overflowed lands within its limits, and the State legally, we may concede, for the purposes of this case, passed its interest in such lands to the counties in which they were situated. A dispute arose between the parties interested in the question before the Land Department, among whom were the counties claiming, by sanction of the State, to have legally selected the lands under the act of 1850, as to whether the lands were, in fact, swamp or overflowed lands. That dispute, upon notice and hearing as we have seen, was decided adversely to the contentions of the State and of the counties in question, by the Department which alone had authority to

determine what were and what were not swamp or overflowed lands. We perceive no sound reason why that decision, unreversed and unmodified in any respect, should not be accepted as conclusive of the essential facts upon which it was based. In that view, the United States has no standing in a court of equity to obtain a decree that will be in disregard of the fact thus conclusively found by the Land Department. Therefore, their certification to the State for the benefit of the railway company, under the act of 1864, cannot be held to have been an error. It is, in substance, admitted—at any rate, the record shows—that if the lands were not swamp or overflowed, the company was entitled to them under the act of 1864, as lands not previously reserved but granted for the benefit of the railway company. If, notwithstanding the decision of the Land Department, the court should determine the rights of the parties according to the facts presented to that Department, it would be confronted with the fact, established by the record, that the lands in question were not swamp or overflowed. We omit any reference to other questions, which, if determined, would lead to the same result as above stated. The decree dismissing the bill was right and *the judgment of the Circuit Court of Appeals is sustained.*

HOLT v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 231. Argued October 13, 14, 1910.—Decided October 31, 1910.

Where the acts constituting the assault are alleged to have been made feloniously and with malice aforethought, it is not necessary to make such allegations in the preliminary averment of assault.

Quære, and not necessary to be decided in this case, how far, if at all, the court is warranted in inquiring into the nature of the evidence on which the grand jury acts, and how far in case of such inquiry the discretion of the trial court is subject to review.

Indictments should not be upset because some evidence, in its nature competent, but rendered incompetent by circumstances, was considered along with other evidence.

Unless the error is manifest the reviewing court should not set aside the finding of the trial court refusing to sustain a challenge of a juryman for cause on the ground of partiality or expressed opinions.

Although the more conservative course is to exclude the jury during discussions of admissibility of confessions, in the absence of statutory provision it is within the discretion of the trial judge to allow the jury to remain; and where, as in this case, he cautions the jury that the preliminary evidence has no bearing on the question to be decided, it is not error to do so.

In this case the ruling of the trial court that the District Attorney was not guilty of misconduct in making statements in his opening as to voluntary confessions of the accused sustained.

In considering a motion for new trial in a capital case on the ground that the jury was allowed to separate during the trial and that during the separation they saw newspaper articles bearing on the case, the court may, if it is going to deny the motion, assume that the jurors did read the articles, and the discretion of the trial court in denying the motion will not be reviewed in the absence of any conclusive ground that he was wrong, notwithstanding the more conservative course is not to allow the jury to separate in such cases.

In this case the objections to evidence identifying the military reserva-

tion on which a capital crime was alleged to have been committed, including introduction of deeds and condemnation proceedings, were properly overruled, and *quære* whether the United States is called on to try title to a reservation where it is in *de facto* exercise of exclusive jurisdiction.

The prohibition of the Fifth Amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material; and so held that testimony of a witness that the accused put on a garment and it fitted him is admissible, whether the accused had put on the garment voluntarily or under duress.

In this case, the charge and instructions of the trial court as to legal presumptions of innocence and what constitutes a reasonable doubt held to be correct.

THE facts, which involve the validity of a conviction for murder committed on a military reservation of the United States, are stated in the opinion.

Mr. Hugh M. Caldwell, with whom *Mr. C. F. Riddell* and *Mr. John Lewis Smith* were on the brief, for plaintiff in error.

Mr. Assistant Attorney-General Fowler for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was indicted, in the Circuit Court, for murder, alleged to have been committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States." There was a trial and a verdict of guilty, without capital punishment, as allowed by statute. He was sentenced to imprisonment for life, and thereupon brought this writ of error. 168 Fed. Rep. 141.

The seriousness of some of the questions raised is somewhat obscured by a number of meticulous objections. We shall dispose of the latter summarily, and shall discuss at length only matters that deserve discussion. We shall follow in the main the order adopted by the plaintiff in error.

The indictment is well enough. The words quoted at the outset convey with clearness sufficient for justice that the Fort Worden Military Reservation was under the exclusive jurisdiction of the United States at the time of the murder.—It is alleged that Holt did with force and arms an assault make upon one Henry E. Johnson with a certain iron bar, and did then and there feloniously, wilfully, knowingly and with malice aforethought strike, beat, and mortally wound him, the said Henry E. Johnson, with said iron bar, etc. As the acts constituting the assault are alleged to have been made feloniously and with malice aforethought, there was no need to make such allegations in the preliminary averment of assault.

It is pressed with more earnestness that the court erred in not granting leave to withdraw the plea of Not Guilty, and to interpose a plea in abatement and motion to quash. The ground on which leave was asked was an affidavit of the prisoner's counsel that they had been informed by Captain Newton, of the Coast Artillery Corps, that he testified before the grand jury to admissions by the prisoner, but that these admissions were obtained under circumstances that made them incompetent. The affidavit added that aside from the above testimony there was very little evidence against the accused. Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review, *United States* v. *Rosenburgh*, 7 Wall. 580, it is enough to say that there is no reason for reviewing it here.

All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of criminal practice would be enhanced if indictments could be upset on such a ground. *McGregor* v. *United States*, 134 Fed. Rep. 187, 192, 430. *Radford* v. *United States*, 129 Fed. Rep. 49, 51. *Chadwick* v. *United States*, 141 Fed. Rep. 225, 235.

Next it is said that there was error in not sustaining a challenge for cause to a juryman; with the result that the prisoner's peremptory challenges were diminished by one. On his examination it appeared that this juryman had not talked with anyone who purported to know about the case of his own knowledge, but that he had taken the newspaper statements for facts; that he had no opinion other than that derived from the papers, and that evidence would change it very easily, although it would take some evidence to remove it. He stated that if the evidence failed to prove the facts alleged in the newspapers he would decide according to the evidence or lack of evidence at the trial, and that he thought he could try the case solely upon the evidence fairly and impartially. The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds* v. *United States*, 98 U. S. 145. *Hopt* v. *Utah*, 120 U. S. 430. *Spies* v. *Illinois*, 123 U. S. 131. If the decisions of the State of Washington are of especial importance, we do not understand *Rose* v. *State*, 2 Washington, 310, 312, *State* v. *Croney*, 31 Washington, 122, 125, 126, and intervening cases to be overruled by *State* v. *Riley*, 36 Washington, 441, 447, 448.

Before the above-mentioned motion to withdraw the plea of not guilty was argued the judge was asked to exclude the twelve jurors who had been selected, al-

though not sworn. He replied that he was unwilling to exclude the jury from any part of the proceedings in the trial. Later, after the jury had been sworn, he pursued the same course while hearing preliminary evidence of the circumstances in which the prisoner was alleged to have made statements, and while hearing arguments as to admitting the statements. The district attorney spoke of the admissibility of 'confessions' in the course of his remarks. Exceptions were taken and the judge's refusal is urged with much earnestness to have been error. But we are of opinion that it was within the discretion of the judge to allow the jury to remain in court. Technically the offer of the evidence had to be made in their presence before any question of excluding them could arise. They must have known, even if they left the court, that statements relied on as admitting part or the whole of the Government's case were offered. The evidence to which they listened was simply evidence of facts deemed by the judge sufficient to show that the statements, if any, were not freely made, and it could not have prejudiced the prisoner. No evidence was admitted that the prisoner had made any confession and his statements were excluded. Moreover the judge said to the jury that they were to decide the case on the testimony as it came from the witnesses on the stand; not what counsel might say or the newspapers publish; that he was not excluding them, because he assumed that they were men of experience and common sense and could decide the case upon the evidence that the court admitted. He also told them in the strongest terms that the preliminary evidence that he was hearing had no bearing on the question they had to decide. No doubt the more conservative course is to exclude the jury during the consideration of the admissibility of confessions, but there is force in the judge's view that if juries are fit to play the part assigned to them by our law they will be able to do what a judge has to do

every time that he tries a case on the facts without them, and we cannot say that he was wrong in thinking that the men before him were competent for their task.

Objections similar to the last are taken to the conduct of the district attorney. They are stated and argued, like the last, with many details, which we have examined, but think it unnecessary to reproduce. In his opening the district attorney stated that the prisoner admitted that a coat with soot marks upon it, and a gunner's badge were his, and was going on to recite further statements, when they were objected to. The district attorney answered that these were voluntary confessions, but that he would omit them, if objected to, until the proper time, and desisted. Objection was made to the word confessions, and the judge replied that he did not hear any statement that the prisoner made any confession. No instruction was asked, but, as we have said, the judge told the jury that they were to regard only the evidence admitted by him, not statements of counsel, etc. The attempt to get in the evidence is criticised also as unduly pressed. We see no reason to differ from the judge's statement upon a motion for a new trial that the United States attorney was guilty of no misconduct. The exceptions on this point also are overruled.

We will take up in this connection another matter not excepted to but made one of the grounds for demanding a new trial, and also some of its alleged consequences, because they also involve the question how far the jury lawfully may be trusted to do their duty, when the judge is satisfied that they are worthy of the trust. The jurymen were allowed to separate during the trial, always being cautioned by the judge to refrain from talking about the case with anyone and to avoid receiving any impression as to the merits except from the proceedings in court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that

they had read the Seattle daily papers with articles on the case while the trial was going on. He set forth articles contained in those papers, and moved for a new trial. The court refused to receive counter affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the public prints is so obvious, that for the purpose of passing on the permission to separate it may be assumed that they did so in this case.

We are dealing with a motion for a new trial, the denial of which cannot be treated as more than matter of discretion or as ground for reversal, except in very plain circumstances indeed. *Mattox* v. *United States*, 146 U. S. 140. See *Holmgren* v. *United States*, 217 U. S. 509. It would be hard to say that this case presented a sufficient exception to the general rule. The judge did not reject the affidavit, but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion, it is to be remembered that the statutes or decisions of many States expressly allow the separation of the jury even in capital cases. Other States have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Without intimating that the judge did not go further than we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong.

Several objections were taken to the admission and

sufficiency of evidence. The first is merely an attempt to raise technical difficulties about a fact which no one really doubts, namely, that the band barracks, the undisputed place of the crime, were within the exclusive jurisdiction of the United States. A witness testified that they were within the inclosure of Fort Worden under military guard and control, from which all unauthorized persons are excluded, and that he knew that the fence was coincident with the boundaries shown on a map objected to but admitted. He identified the band barracks as described in certain condemnation proceedings. The State of Washington had assented by statute to such proceedings and Congress had authorized them. The deeds and condemnation proceedings under which the United States claimed title were introduced. The witness relied in part upon the correctness of official maps in the Engineers' Department made from original surveys under the authority of the War Department, but not within his personal knowledge, and he referred to a book showing the titles to Fort Worden compiled under the same authority. The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, even if the evidence of the *de facto* exercise of exclusive jurisdiction was not enough, or if the United States was called on to try title in a murder case. We think it unnecessary to discuss this objection in greater detail.

Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral

compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. *Adams* v. *New York*, 192 U. S. 585.

The remaining exceptions relate to the charge. One was to a refusal to embody an instruction requested as to reasonable doubt. The court, however, gave full and correct instructions on the matter, and indeed rather anxiously repeated and impressed upon the jury the clearness of the belief they must entertain in order to convict. See *Dunbar* v. *United States*, 156 U. S. 185, 199. 4 Wigmore, Evidence, § 2497. Another exception was to the refusal to give an instruction that "the presumption of innocence starts with the charge at the beginning of the trial, and goes with [the accused] until the determination of the case. This presumption of innocence is evidence in the defendant's favor," etc. The judge said: "The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence. And in order to overcome the legal presumption, as I have already stated, the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty," with more to the same effect. This was correct, and avoided a tendency in the closing sentence quoted from the request to mislead. *Agnew* v. *United States*, 165 U. S. 36, 51, 52. See also 4 Wigmore, Evidence, § 2511.

After the jury had been sent out they returned and asked the court what constituted a reasonable doubt. The court replied, "A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit." He denied the notion that any mere possibility was sufficient ground for such a doubt, and added that in the performance of jury service they should decide controversies as they would any important question in their own affairs. This was excepted to generally, and the court was asked to add that if the jury found one fact inconsistent with the guilt of the defendant they should acquit. The court already had given this instruction in the charge, and was not called upon to repeat it. As against a general exception the instructions given were correct. Some other details in the trial are criticised, but we have dealt with all that seem to us to deserve mention, and find no sufficient reason why the judgment should not be affirmed.

Judgment affirmed.

JENNINGS *v.* PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

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

No. 10. Submitted April 26, 1910.—Decided October 31, 1910.

In the absence of an extending order the trial court loses control of the case after the term has been closed and an appeal has been allowed and perfected; and common law rule 55 of the Supreme Court of the District of Columbia allowing thirty-eight days to file a bill of exceptions applies only so long as the judgment term is running and does not operate to extend the power of the trial judge over the record beyond the term.

Grave matters of procedure such as the allowance of a bill of exceptions after close of the term should not rest on mere implication of consent.

A proceeding at the instance of one party to the record cannot be regarded as by consent simply because the other party has notice and does not object; the latter, if he does nothing to prejudice the rights of others, may sit silent and still object that the proceeding is *coram non judice*.

31 App. D. C. 173, affirmed.

THE facts are stated in the opinion.

Mr. Henry E. Davis and *Mr. E. Hilton Jackson* for plaintiff in error.

Mr. Frederic D. McKenney, Mr. John Spalding Flannery and *Mr. William Hitz* for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This case turns primarily upon the question of whether the Supreme Court of the District exceeded its jurisdic-

tion in allowing a bill of exceptions after the close of the term at which the judgment sought to be reversed had become final. The judgment was rendered on December 20, 1907. The term closed December 31, and a new term began on January 1, 1908. On January 10, 1908, an appeal bond was approved and filed. On January 14, the appellant, having given eight days' notice, under rule 55 of the court, presented a bill of exceptions to the court for allowance. The stipulation in respect of this recites: "In pursuance of common law rule No. 55 counsel for the appellee was present, having received the eight-day notice, together with a copy of appellant's proposed bill of exceptions required by said rule. The proposed bill of exceptions was submitted to the court by counsel for the appellant in the presence of and without objection from counsel for the appellee."

Common law rule 55, under which the appellant claimed the right to have his bill of exceptions filed within thirty-eight days after the rendition of the judgment, was applicable only so long as the judgment term was running and did not operate to extend the power of the trial judge over the record beyond the term. No order had been made in term time for the filing of such a delayed bill. Not only had the term closed, but an appeal had been allowed and perfected. The trial court had thereby lost control of the cause, and had no authority to add to or take from the record.

In *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298, this court said:

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circum-

stances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

See also *Morse* v. *Anderson*, 150 U. S. 156; *Muller* v. *Ehlers*, 91 U. S. 249; *Merchants' Insurance Co.* v. *Buckner*, C. C. A., 6th Cir., 98 Fed. Rep. 222.

But it is urged that if the appellee consented that an order might be entered *nunc pro tunc*, permitting the filing and allowance of a bill of exceptions, such consent should be given the force of an order in term or a rule of court. But if this be granted, the order in this case does not profess to have been founded upon consent. The stipulation recites that the proposed bill was presented to the court "in the presence of and without objection from counsel for the appellee."

The proceeding was *coram non judice*. Appellee was not in court or before a court. The judge and the court had lost all power over the cause, the parties and the record. The appellant was pretending to proceed under rule 55. The appellee might well sit silent and let the matter rest upon the claim; it was not asked to say whether it consented. A different case might arise if, by its failure to object, the appellant had been misled to his injury. But there was nothing left undone which might have been done and nothing done to his prejudice. The plain question was, Did the court have power under rule 55, or under any order of the court or controlling practice, to allow a bill of exceptions after the close of the term? The appellee might fairly say nothing.

So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost

all judicial power over the record should not rest upon a mere implication from silence. There should be express consent, or conduct which should equitably estop the opposite party from denying that he had consented. There was nothing of that kind in this case, and the judgment of the Court of Appeals must be

Affirmed.

RICKEY LAND AND CATTLE COMPANY *v.* MILLER AND LUX.

SAME *v.* WOOD.

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

Nos. 4, 5. Argued January 18, 19, 1910.—Restored to the docket for reargument January 31, 1910.—Reargued October 24, 25, 1910.—Decided November 7, 1910.

One court ought to deal with the whole matter in litigation even where the law of different jurisdictions is involved; foreign law may be ascertained and acted upon and rights depending thereon protected.

Where riparian rights of several parcels of land in different States but on the same river are involved, the courts of both States have concurrent jurisdiction, and the court first seized should proceed to determination without interference.

Quære, whether notice to an individual in regard to his property is not notice to a corporation organized by him after such notice and to which he conveys his property.

Where, as in this case, cross-bills are maintainable, jurisdiction in respect to them follows that over the principal bill.

152 Fed. Rep. 11, 22; 81 C. C. A. 207, 218, affirmed.

THE facts are stated in the opinion.

Mr. Charles C. Boynton and *Mr. James F. Peck*, with whom *Mr. Frederic D. McKenney* was on the brief, for petitioners.

Mr. Aldis B. Browne and *Mr. E. F. Treadwell*, with whom *Mr. W. B. Treadwell* and *Mr. Alexander Britton* were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases are brought to this court by certiorari. The facts material to the understanding and decision of them are these. Miller and Lux is a corporation using the water of the Walker River in Nevada, and claiming rights in the same. The two branches of this river, known as East Fork and West Fork, rise in California and unite in Nevada above Miller and Lux. One Rickey used the water of both of these branches in California, and claimed rights superior to those of the parties lower down on the stream. On June 10, 1902, Miller and Lux brought a bill in equity in the Circuit Court for the District of Nevada against Rickey and certain other defendants, some of whom are respondents in the second of the present cases, to enjoin interference with its use of water. Rickey appeared, pleaded to the jurisdiction that the diversion of water by him was in California, 127 Fed. Rep. 573, and, later, answered. But, after appearing, he with other members of his family organized the petitioning corporation, and he conveyed his lands and rights in California to it. On October 15, 1904, this corporation began two actions in a state court of California against Miller and Lux, the defendants in the bill of Miller and Lux other than Rickey, and others, to quiet its title and establish its prior right to 1575 cubic feet per second on the West Fork and to 504 feet on the East Fork. In December, a few days before they were served with process in the last-

mentioned suits, other defendants in the bill brought by Miller and Lux brought a cross bill against their co-defendant Rickey to establish their priority as against him. In 1906 the bills in these present cases were brought by Miller and Lux, and defendants other than Rickey in the original Miller and Lux suit, to restrain proceedings in the California actions, on the ground that the United States court for Nevada had acquired jurisdiction before the California actions were begun. Injunctions were granted as prayed, and now are before this court for review. 152 Fed. Rep. 11. *S. C.*, 81 C. C. A. 207. Affirming 146 Fed. Rep. 574, 581, 588.

The petitioner contends that there is no conflict of jurisdiction, and that the proceedings in the California court should go on. Its argument is this. When a right is asserted in favor of land in one jurisdiction over land in another, different principles are involved from those that suffice when both parcels are subject to the same law. When such rights have been recognized it has been on the ground of an assumed "concurrence between the two States, the one, so to speak, offering the right, the other permitting it to be accepted. *Manville Co.* v. *Worcester*, 138 Massachusetts, 89." *Missouri* v. *Illinois*, 200 U. S. 496, 521. But still there are two parcels of land subject to different systems of law; and although the rights and liabilities in respect of each may require a consideration of the other if they are to be dealt with completely, the fact remains that each may be regulated by the State where the land lies according to its sovereign will. *Kansas* v. *Colorado*, 206 U. S. 46, 93. If then the courts of one State are about to deal with one parcel they should not be indirectly interfered with by a foreign court that has no power to control the use of the *res*. It is said to be a general principle that apart from some privity, such as is created by contract, trust, or fraud, courts of equity recognize the impropriety of using their power over the

person to achieve such a result. *Northern Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233, 242–244. *Carpenter* v. *Strange*, 141 U. S. 87. *Norris* v. *Chambres*, 29 Beav. 246, 253, 254. *S. C.*, 3 De G., F. & J. 583, 584. It is conceivable, to be sure, that the decisions of this court may determine that the States have rights as against each other *in invitum* in streams that flow through the land of both. *Kansas* v. *Colorado*, 206 U. S. 46, 84. *Missouri* v. *Illinois*, 200 U. S. 496, 519, 520. These rights may vary according to the system of law required by natural conditions. They may be more or less analogous to common law rights between upper and lower proprietors, where irrigation is not necessary, as in most of the older States. See *New York* v. *Pine*, 185 U. S. 93, 96. There may be some, perhaps limited, right of appropriation in the upper State, at least in the watershed of the stream, where irrigation is the condition of using the land. See *Kansas* v. *Colorado*, 206 U. S. 46, 100–104, 117. But whatever this court may decide, if a private owner should derive advantage from such a decision it would not be in his own right, but by reason of and subordinate to the rights of his State, and those rights, the petitioner insists, can, or at least should be, determined only in a suit brought by the State itself.

But if for any reason the foregoing argument should not have prevailed as against Rickey if he had brought the actions in California after the beginning of the suit in Nevada, the present petitioner is not affected by the proceedings against Rickey, as they were purely personal and did not concern a purchaser of land outside the jurisdiction. To affect a purchaser with a suit against his vendor, it is said that at least the *res* must be within the territorial jurisdiction of the court in which the suit is brought. See *Fall* v. *Eastin*, 215 U. S. 1.

We are of opinion that the petitioner fails to establish the conclusion for which it contends. The alleged rights

of Miller and Lux involve a relation between parcels of land that cannot be brought within the same jurisdiction. This relation depends as well upon the permission of the laws of Nevada as upon the compulsion of the laws of California. It is true that the acts necessary to enforce it must be done in California and require the assent of that State so far as this court does not decide that they may be demanded as a consequence of whatever right, if any, it may attribute to Nevada. But, leaving the latter possibility on one side, if California recognizes private rights that cross the border line, the analogies are in favor of allowing them to be enforced within the jurisdiction of either party to the joint arrangement. *Great Falls Mfg. Co.* v. *Worster*, 23 N. H. 462. Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken in hand. To adjust the rights of the parties within the State requires the adjustment of the rights of the others outside of it. Of course, the court sitting in Nevada would not attempt to apply the law of Nevada, so far as that may be different from the law of California, to burden land or water beyond the state line, but the necessity of considering the law of California is no insuperable difficulty in dealing with the case. Foreign law often has to be ascertained and acted upon, and one court ought to deal with the whole matter.

We are of opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the States. *Prout* v. *Starr*, 188 U. S. 537, 544. *Ex parte Young*, 209 U. S. 123, 161, 162.

As to the argument that the Rickey Land Company is not affected by any priority that may have been gained

as against Rickey, it might be a question, even if the petitioner was a purchaser without notice, whether the purchaser would not be confined to asserting its rights in the pending cause. See *Whiteside* v. *Haselton*, 110 U. S. 296, 301. But in this case, if the judge below was of opinion as matter of fact on what appears that the institution of the petitioner was merely a device to dodge the jurisdiction of the Nevada court, and that the Rickey Land and Cattle Company was merely Rickey under another name, we could not say that his finding was wrong.

It is urged that the cross bills on which the bill and injunction in the second case were based were not maintainable because not in aid of the defenses to the original suit of Miller and Lux. But it might very well be, as was shown by the argument for the respondents, that even if they admitted the right of Miller and Lux still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller and Lux from working injustice. See further, *Ames Realty Co.* v. *Big Indian Mining Co.*, 146 Fed. Rep. 166. The cross bills being maintainable the jurisdiction in respect of them follows that over the principal bill.

Decrees affirmed.

THE IRA M. HEDGES.[1]

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

No. 18. Argued October 27, 1910.—Decided November 7, 1910.

Where the decree of the lower court is founded on denial of jurisdiction of the Admiralty Court, this court has jurisdiction of the appeal.

The right to contribution is not a mere incident of a form of procedure, but it belongs to the substantive law of the admiralty.

The right to contribution in the admiralty cannot be taken away because the claim is asserted against one of those causing the damage at common law and put into judgment.

Where two vessels cause an injury to a third the fact that the injured party obtains judgment against the owners of one of the vessels in fault does not deprive the admiralty of jurisdiction of a suit brought by those against whom the judgment is entered against the other vessel to compel contribution.

Quære as to what, if anything, such judgment conclusively establishes.

THE facts, which involve the jurisdiction of the Admiralty Court, are stated in the opinion.

Mr. William S. Montgomery, with whom *Mr. Geo. H. Emerson* was on the brief, for appellant:

There is no method under the New York Code by which one joint tort-feasor, defendant in an action, can implead another joint tort-feasor as a defendant; nor, if there were, could libellant have compelled the payment by the claimant in the courts of New York of any part of a joint judgment. *Gittleman* v. *Feltman*, 191 N. Y. 205, does not hold that a joint tort-feasor defendant can implead another joint tort-feasor as defendant. All it holds is that a

[1] Docket title, No. 18, Lehigh Valley Railroad Company *v.* Cornell Steamboat Company, Claimant of Steam-tug Ira M. Hedges.

plaintiff may so amend his pleadings as to bring in another tort-feasor as defendant: an entirely different proposition from one joint tort-feasor impleading another as defendant. The rule that one joint tort-feasor cannot implead another as defendant has been settled for many years in New York. *Chapman* v. *Forbes*, 123 N. Y. 532; *Bauer* v. *Dewey*, 166 N. Y. 402.

The fact that one of the parties injured by the collision elected to proceed at common law cannot defeat the libellant's right to contribution—a right recognized by the admiralty law, and brought into existence the very moment the wrong is committed.

There can be no doubt that the right of contribution exists in admiralty. *The Mariska*, 107 Fed. Rep. 991, reversing 100 Fed. Rep. 500.

As the court there said, the Fifty-ninth Rule did not create the right of contribution, but merely recognized the right as preëxisting, and established a means by which it could be easily enforced. The right to enforce contribution does not fail merely because one of the guilty vessels is out of the jurisdiction. It is not dependent upon the accident of locality, nor should it be dependent upon the mere fact that one of the parties sees fit to pursue the common law remedy.

The right is not given by the form of remedy pursued, but is created by the wrong, and being of admiralty origin may be, and should be, recognized in admiralty so long as it remains unsatisfied. *Erie R. R. Co.* v. *Erie Transp. Co.*, 204 U. S. 220, 225.

The lower court meets these decisions by saying that they involve cases originally arising in admiralty, and holds that by one of the parties (the innocent one, of course) proceeding at common law, this right given by the admiralty can be defeated, but cannot be sustained. If the right of contribution exists at all, it exists from the very moment of the collision, being brought into exist-

ence by the collision, and it cannot be defeated or impaired simply because one of the parties elects to proceed in the common law forum.

This is not a case where the libellant is estopped by its election of the remedy, because it had nothing to say with regard to what remedy should be pursued. It might have been different had the Hedges sued at common law for damages incident to a collision. Then the Hedges would have taken the chances of contributory negligence barring a recovery, and the final judgment would then have been *res adjudicata* as to the Hedges' negligence.

The judgment in the common law action was not *res adjudicata*. *Erie R. R. Co.* v. *Erie Transp. Co.*, 204 U. S. 220; and see *The Juniata*, 93 U. S. 337. If the right of contribution in admiralty can be defeated by the innocent party selecting his forum, then grave injustice may be done, something that admiralty, like equity, abhors. The saving to the suitor of the common law remedy does not mean that under its guise a gross injustice may be done, and that admiralty shall be deprived of enforcing a right which it recognizes; and see also Hughes on Admiralty, 276; *The North Star*, 106 U. S. 17, 20. As to the jurisdictional question, see Hughes on Admiralty, 285.

Mr. J. Parker Kirlin, with whom *Mr. Amos Van Etten* was on the brief, for appellee:

The cause of action stated in the libel did not give rise to a maritime lien, and, accordingly, afforded no foundation for a proceeding *in rem* against the tug.

The action was manifestly one to recover indemnity for the amount of the judgment for damages, costs and interest, and for the amount spent by the libellant in the defense of an action at law.

Though the claim involved in the action at law was maritime in the sense that it could have been sued on in

admiralty, yet it was an action in tort in respect of which the plaintiff was entitled to pursue his remedy at law. When the claim became merged in the judgment, and extinguished by payment, it lost its maritime character. *Brinsmead* v. *Harrison*, L. R. 7 C. P. 190.

The libel did not state a cause of action *in rem* against the tug, and hence the libel should have been dismissed on this ground.

Whether the libellant might proceed in a personal action in admiralty for contribution was not before the District Judge, even if the District Judge was right in treating the libel as one filed for contribution to collision damage, the claim was properly dismissed.

The only appeal by the libellant should be presented to the Court of Appeals and not to this court.

The District Judge properly decided that as the libellant was sued at law, he could not come into admiralty for contribution, at least, until he had satisfied the court that he was without remedy elsewhere. N. Y. Code Civ. Proc., §§ 452, 723; and see *Gittleman* v. *Feltman*, 191 N. Y. 205, which governs this case. *Chapman* v. *Forbes*, 123 N. Y. 532, and *Bauer* v. *Dewey*, 166 N. Y. 402, on which the appellant relies, are distinguishable. The libellant having neglected to have its alleged right of exoneration or contribution litigated and determined in the original action by not bringing appellee in as a co-defendant, cannot escape the consequences of its inaction by attempting to continue the litigation in a different forum.

It does not appear that the railroad company exhausted the usual remedies before seeking indemnity or contribution in admiralty. Pollock on Torts, 6th ed., 195. Contribution can be enforced when it is by inference of law only. See *Ankeny* v. *Moffett*, 37 Minnesota, 109; *Armstrong County* v. *Clarion County*, 66 Pa. St. 218; *Horbach's Admr.* v. *Elder*, 18 Pa. St. 33; *Nickerson* v. *Wheeler*, 118 Massachusetts, 295; *Herr* v. *Barber*, 2

Mackey, 545; *Johnson* v. *Torpy*, 35 Nebraska, 604; *Bank* v. *Avery Co.*, 69 Nebraska, 329; *The Hudson*, 15 Fed. Rep. 162; *Bailey* v. *Bassing*, 28 Connecticut, 455; *Ches. & Ohio Canal Co.* v. *County*, 57 Maryland, 201; *Acheson* v. *Miller*, 2 Ohio St. 203; *Upham* v. *Dickinson*, 38 Michigan, 338; *Eaton & Prince Co.* v. *Trust Co.*, 123 Mo. App. 131; *Andrews* v. *Murray*, 33 Barb. 354; *Gilbert* v. *Finch*, 173 N. Y. 455; *Kolb* v. *National Surety Co.*, 176 N. Y. 233; *Union Stock Yards* v. *Chicago, Burlington & Quincy Ry.*, 196 U. S. 217, do not hold that contribution cannot be recovered outside of admiralty on the allegations of the libel in this case.

The libellant is not entitled to recover a contribution in admiralty in respect of a common law judgment. Though the plaintiff might originally have proceeded against the Slatington or the Hedges, or both, in admiralty, it had an undoubted right to proceed at law, and the railroad company has no ground of complaint because the consequences of the election exercised by the plaintiff may be different from those which would have followed if the plaintiff had elected to proceed in another forum. *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *The Mariska*, 107 Fed. Rep. 989; *Erie R. R. Co.* v. *Erie Transp. Co.*, 204 U. S. 220; *The Juniata*, 93 U. S. 337, 340, support this view. Under the maritime law damage by collision is a common loss upon all vessels whose faults have contributed to the damage. Admiralty Rule 59, recognizing this doctrine, provided a way for bringing all vessels charged with fault before the court, so that the rights and liabilities of all parties concerned in the collision could be adjudicated in a single proceeding. And if one vessel is absent so that it cannot be brought in under Rule 59, contribution for its share of the loss may be obtained by a separate suit.

There is no authority, however, for the proposition that because the plaintiff might originally have sued to recover compensation under the maritime law, a judgment

which he has obtained by pursuing his rights at common law may still be used as the basis of an action for contribution in admiralty. *Selz* v. *Unna*, 6 Wall. 327, 335.

A defendant by paying a judgment obtained against him for a tort at common law does not become subrogated to the plaintiff's original right against another who might also have been sued as a joint tort-feasor.

Without such subrogation (which would follow from the payment of a decree against one of the two joint tort-feasors sued in admiralty) the defendant, who has paid a common law judgment, has no cause of action against his co-tort feasor on the plaintiff's original claim.

Mr. Justice Holmes delivered the opinion of the court.

This is a libel for contribution. The libel was excepted to by the claimant and was dismissed on the ground that the District Court sitting as a Court of Admiralty had no jurisdiction to enforce contribution between the parties on the facts.

The facts alleged are as follows. The appellant was in possession of the tug Slatington under a demise, and the tug was crossing the North River with car-float No. 22 alongside on the port side. The tug Ira M. Hedges was coming up the river on the port side with two stone scows in tow, one on each side. There was a collision between one of those scows, the Helen, and car-float No. 22, which was caused or contributed to by the Ira M. Hedges. The owner of the Helen, not being the owner of the Ira M. Hedges, brought an action at common law and recovered a judgment against the appellant, the owner of the Ira M. Hedges not being made a party defendant in that suit. The appellant paid the judgment and brought this libel against the Ira M. Hedges, in terms to recover the amount of the claim set forth in the libel, but, it fairly may be held, in substance to recover, if not the whole,

then contribution for what the libellant has had to expend.

The first question is whether this court has jurisdiction of the appeal. It is said that the dismissal of the libel, although expressed to be for want of jurisdiction, really is on the merits, because payment of a judgment at common law is not a ground for contribution from a joint wrongdoer, not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235, and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim it is of a kind that the admiralty not only ought not to enforce but has no power to enforce. At all events, the form of the decree must be taken to express the meaning of the judge. If the decree was founded, as it purports to be, on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For all admiralty jurisdiction belongs to courts of the United States as such, and therefore the denial of jurisdiction brings the appeal within the established rule. See *The Steamship Jefferson*, 215 U. S. 130, 138.

Coming to the substance we are of opinion that the decision was wrong. The right to contribution belongs to the substantive law of the admiralty. *Erie R. R. Co.* v. *Erie & Western Transportation Co.*, 204 U. S. 220. It is not a mere incident of a form of procedure. Therefore the fact, over which the libellant had no control, that the injured party saw fit to sue at common law cannot take that right away. The passing of the claim against the libellant into the form of a judgment before the claim was satisfied has no bearing upon the question whether the right to contribution remains. It does not matter to this question, even if it be true, as thought by the court below,

that the libellant might have required the owner of the Ira M. Hedges to be made a party. For it still would have rested with the plaintiff in the former suit to collect from the appellant alone if it saw fit, and, if it had done so, it is at best but a speculation to suggest that the libellant could have recovered from its co-defendant at common law.

The question as to what is conclusively established by the common law judgment is not before us, but only the jurisdiction of the court. But we may add that the appellant seeks to recover contribution for the amount paid, not as *res judicata*, but as one of the consequences of a joint tort from which it could not escape, and which its fellow wrongdoer was bound to contemplate. The claimant of course does not desire to dispute the appellant's negligence. It is free to deny its own. Whether if it were so minded it could controvert the amount of the damage as determined by the judgment need not be discussed. No doubt it would have been a prudent course for the appellant to give notice to the owner of the Ira M. Hedges to take part in the defence, with a view to its possible ultimate liability. Whether a failure to do so would affect its rights is not before us to decide. We do not mean to intimate that the failure is material where there has been a *bona fide* defence.

Decree reversed.

ONG CHANG WING *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 418. Argued October 21, 1910.—Decided November 7, 1910.

As applied to criminal procedure, if the accused has been heard in a court of competent jurisdiction and proceeded against under the orderly processes of law, and only punished after inquiry and investigation on notice with opportunity to be heard, and judgment awarded within the authority of a constitutional law, he has not been denied due process of law.

The lawmaking power in the Philippine Islands has power to preserve by statutory enactment the right to prosecute and punish offenses committed prior to the repeal of an act defining and punishing the offense; and a decision of the Supreme Court of the Philippine Islands holding that one who committed the offense before the repeal of the act can be punished after the repeal, does not amount to a denial of due process of law within the meaning of the due process clause of the act of July 1, 1902.

THE facts, which involve the validity of a conviction in the Philippine Islands and the construction of the act of July 1, 1902, are stated in the opinion.

Mr. Charles F. Consaul, with whom *Mr. Charles C. Heltman* and *Mr. Frank B. Ingersoll* were on the brief, for plaintiffs in error:

The defendants were prosecuted under article 343 of the Penal Code and the act of the Philippine Commission of October 9, 1907, which expressly repealed article 343. There being no saving clause regarding the prosecution of offenses under the repealed articles of the Penal Code, defendants are under both American and Spanish law entitled to an acquittal. 12 "Cyc." 144.

The quotation from Pacheco in *United States* v. *Cuna,*

12 Philippine Rep. 245, does not sustain the decision as there are intimations and even exact declarations to the contrary in Pacheco; and see 1 Viada's Codigo Penal, 402.

Under "due process of law," as that term is used and understood in the United States, and as it was presumably used and understood by Congress when the Philippines Act was enacted, it is not consistent that plaintiffs be punished for infraction of a law which no longer exists on the statute books of the Philippine Islands. See § 10 of the Philippines Act of 1902. This court should construe the term "due process of law" in the same manner as though this case arose in one of the Territories of the United States, unhampered by any theory advanced by the Supreme Court of the Philippines as to what may have been the Spanish law relative to the effect of the repeal of a penal statute.

The Supreme Court of the Philippines erred in its statement of the rule incident to the Spanish law upon this point.

Even were the Supreme Court of the Philippines correct in its statement of the Spanish rule, yet still its judgment should be reversed because utterly repugnant to the definition of the term "due process of law" as used by Congress in the Philippines Act.

There is no substantial difference between the repeal of the statute under which the accused is prosecuted and a pardon. Both wipe out the offense and neither can be ignored by the court.

The decision of the Supreme Court of the Philippines was not in accord with the principles of the common law. *United States* v. *Peggy*, 1 Cranch, 103; *Yeaton* v. *United States*, 5 Cranch, 281. After the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless special provision be made for that purpose by statute. 12 "Cyc." 144. And see *Jordan* v. *State*, 15

Alabama, 746; *Commonwealth* v. *Jackson*, 2 B. Mon. (Ky.) 402; *Keller* v. *State*, 12 Maryland, 322; *Commonwealth* v. *McDonough*, 13 Allen (Mass.), 581; *Commonwealth* v. *Marshall*, 11 Pick. 350; *Teague* v. *State*, 39 Mississippi, 516; *State* v. *Long*, 78 N. C. 571; *Commonwealth* v. *Duane*, 1 Binn. (Pa.) 601; *Commonwealth* v. *Dolan*, 4 Pa. Co. Ct. 287; *State* v. *Lewis*, 33 S. E. Rep. 351 (S. C.); *State* v. *Mansel*, 52 S. C. 468; *Greer* v. *State*, 22 Texas, 588; *Halfin* v. *State*, 5 Tex. App. 212; *Roberts* v. *State*, 2 Overt. (Tenn.) 423; *Wharton* v. *State*, 5 Coldw. (Tenn.) 1; *Bennett* v. *State*, 2 Yerg. 472 (Tenn.).

Even when an indictment has been found and a prosecution is pending under a statute at the time of its repeal, without a saving clause, there can be no conviction under the statute after the repeal. *Carlisle* v. *State*, 42 Alabama, 523; *Griffin* v. *State*, 39 Alabama, 541; *Mayers* v. *State*, 7 Arkansas, 68; *People* v. *Tisdale*, 57 California, 104; *Day* v. *Clinton*, 6 Ill. App. 476; *Hartung* v. *People*, 22 N. Y. 95; *United States* v. *Passmore*, 4 Dall. 372; *United States* v. *Finlay*, 25 Fed. Cas., No. 15,099; *Regina* v. *Mawgan*, 8 A. & E. 496.

Even when the statute is repealed after the accused has been convicted, judgment must be arrested. *Commonwealth* v. *Jackson*, 2 B. Mon. (Ky.) 402; *Commonwealth* v. *Kimball*, 21 Pick. 373; *Commonwealth* v. *Marshall*, 11 Pick. 350.

And if an appeal from a conviction is pending when the statute is repealed, the judgment of conviction must be set aside and the indictment quashed. *Speckert* v. *Louisville*, 78 Kentucky, 287; *Smith* v. *State*, 45 Maryland, 49; *Keller* v. *State*, 12 Maryland, 322; *Commonwealth* v. *Kimball*, 21 Pick. 373; *Commonwealth* v. *Marshall*, 11 Pick. 350.

This is so even though argument has been heard and the appeal dismissed, *Keller* v. *State*, 12 Maryland, 322, or where the repeal takes place pending the proceedings,

State v. *Henderson*, 13 La. Ann. 489; *Wall* v. *State*, 18 Texas, 682.

A party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the offense may have been committed before repeal. Dwarris, 670; 1 Kent, 465; *State* v. *Railroad Co.*, 12 G. & J. 399. The same principle applies where the law is repealed, or expires pending an appeal on a writ of error from the judgment of an inferior court. *Yeaton* v. *United States*, 5 Cranch, 581; *United States* v. *Ship Helen*, 6 Cranch, 203; *United States* v. *Preston*, 3 Peters, 57; *Maryland* v. *Railroad Co.*, 3 How. 534; *Smith* v. *State*, 45 Maryland, 49.

Mr. Edwin P. Grosvenor, Special Assistant to the Attorney General, with whom *Mr. William S. Kenyon*, Assistant to the Attorney General, was on the brief, for the United States:

The right asserted by plaintiffs in error that they go free, in spite of the fact that statute No. 1757, which repealed article 343, preserved gambling among the list of punishable offenses, is not an element of due process of law.

While it was the intention of Congress by § 5 of the act of July 1, 1902, to carry some at least of the essential principles of American constitutional jurisprudence to these islands, and to engraft them upon the law of this people newly subject to our jurisdiction, *Kepner* v. *United States*, 195 U. S. 100, 122; *Dorr* v. *United States*, 195 U. S. 138; *Trono* v. *United States*, 199 U. S. 521; *Serra* v. *Mortiga*, 204 U. S. 370, 474; *Weems* v. *United States*, 217 U. S. 349, the guarantees extended to the Philippines are to be interpreted as meaning what the like provisions meant in the United States at the time when Congress made them applicable to the Philippines.

In this case the right asserted by the plaintiffs in error is not an element of "due process of law" within the

meaning given to that phrase by any American court at the time of the enactment of the Philippine bill. See *Twining* v. *New Jersey*, 211 U. S. 78, 110, holding that exemption from compulsory incrimination is not an element of "due process of law."

It is equally clear that the phrase does not include a right like that asserted by these plaintiffs in error.

As the right asserted by the plaintiffs in error does not come within the conception of due process of law, the writ of error must be dismissed, for there is no other ground on which this court can take jurisdiction.

The Philippines assembly had authority to repeal article 343. The repeal of the statute under which they had been convicted did not impair any rights of the defendants.

Whether the Philippine legislature in repealing article 343 should or should not make impossible the execution of sentences imposed under it was a matter for the Philippine legislature. Whether its act did or did not have that effect was a question for the Philippine courts to decide. *United States* v. *Cuna*, 12 Phil. Rep. 241.

This decision of the Supreme Court of the Philippine Islands is conclusive here. *Perez* v. *Fernandez*, 202 U. S. 80; *Kepner* v. *United States*, 195 U. S. 100, 122. Also see the President's instructions for the guidance of the commissioners of the Philippine Islands, April 7, 1900, Comp. Acts of Philip. Comm. 14, ratified by Congress July 1, 1902, 32 Stat. 691.

Even if the rule of the common law were as stated by the plaintiffs in error, the common law has not been extended to the Philippines by any act of Congress. It can be incorporated into the law of those islands only by legislative enactment.

The decision of the Supreme Court of the Philippines was, however, in accord with the principles of the common law. A repeal of a criminal statute for the purpose

of abolishing the crime is to be distinguished from a repeal effected by a merely superseding statute.

After final judgment is pronounced, the power of the court over the subject-matter is at an end; the ministerial act of executing the sentence is all that remains to be done. *State* v. *Addington*, 2 Bailey's S. C. Law, 516; *Aaron* v. *The State*, 40 Alabama, 307.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiffs in error bring this case here for review by writ of error to the Supreme Court of the Philippine Islands, upon the ground that the effect of the judgment of that court has been to deprive them of due process of law, in violation of § 5 of the act of Congress of July 1, 1902, c. 1369, 32 Stat. 691, 692, enacting the due process clause of the Federal Constitution as a part of the statute for the government of those islands. No other question is presented in the record which we can review.

The plaintiffs in error were tried, convicted and sentenced on October 4, 1907, in the court of first instance, for violation of article 343 of the Philippine Penal Code, which makes it an offense to conduct a gambling house, or to be a banker therein. Plaintiffs in error were sentenced in the court of first instance to two months and one day of arresto mayor, with the accessories of article 61, and to pay a fine of 625 pesetas, and in default thereof to suffer subsidiary imprisonment, not to exceed one-third of the principal penalty, and costs.

Upon appeal to the Supreme Court of the Philippine Islands that court held that the guilt of the appellants was fully established, and affirmed the judgment of the court of first instance. In the Supreme Court the plaintiffs in error made the objection, which is the foundation of the proceedings here, that they were convicted under the provisions of article 343 of the Philippine Code for an

offense committed on the fifteenth of September, 1907, that thereafter the Philippine Commission, on October 9, 1907, by an act numbered 1757, repealed, among others, article 343 of the Philippine Penal Code, and that consequently the court had no authority to impose upon the appellants the penalty prescribed in the repealed article of the code. The Supreme Court of the islands denied this contention upon the authority of another decision in the same court. *United States* v. *El Chino Cuna*, 12 Philippine Rep. 241. A reference to the *Cuna case* shows that the Supreme Court of the Philippines, construing the articles of the local Penal Code, and applying what was deemed the applicable Spanish law, held that whether an act was punishable after the repeal of the act under which it was undertaken to be inflicted depended upon whether or not at the time of the commission of the act there was a law in force which penalized it. The court reserved the question whether the punishment provided in the repealing act could alone be inflicted if such penalty is more favorable to the accused than that prescribed in the former act, because of the provisions of article 22 of the code, which provides that penal laws shall have a retroactive effect in so far as they favor persons convicted of a crime or misdemeanor.

It appears that the new act, No. 1757, which took the place of the repealed act, article No. 343 of the Philippine Penal Code, did not undertake to wipe out the offense of gambling, or keeping a gambling house in the Philippine Islands, but substantially reënacted the former law with more elaboration and detail in its provisions than were contained in the former law.

In the new act § 2 defines a gambling house to be a building or structure or vessel, or part thereof, in which gambling is frequently carried on. Under article 343 of the Penal Code of the Philippine Islands, as it existed when the sentence in this case was imposed, the bankers

and proprietors of houses where games of chance, stakes or hazard are played were punished. The decision of the court of first instance, found in the record in this case, held that, in order to punish the crime of gambling, in accordance with article 343 of the Penal Code, it must appear that the house where the gambling took place was a house devoted to encouraging gambling, as held in various decisions of the Supreme Court of Spain applicable to the case at bar, and that such facts had been fully established by the proof in the case.

The sentence imposed was within the limits provided in act No. 1757, under which the keeping of a gambling house can be punished. The case, therefore, presented for our consideration is one of conviction under a statute which was repealed after the conviction and sentence in the court of first instance, the repealing act also providing for the punishment of the same offense and within limitations not exceeded by the sentence imposed under the former act.

The precise question then is, Did the Supreme Court of the Philippine Islands deny the plaintiffs in error due process of law in affirming a conviction under the circumstances stated? It is argued that the Supreme Court of the Philippines misapplied the provisions of the Penal Code and the Spanish law in the light of which it was interpreted. On the part of the Government it is insisted that, even at common law, the affirmation of a conviction under a law valid when it was had was not erroneous, and that it was within the power of a reviewing court so to do; but we are not concerned with this question. Our sole province is to determine whether the judgment of the Supreme Court of the Philippine Islands amounts to a denial of due process of law.

This court has had frequent occasion to consider the requirements of due process of law as applied to criminal procedure, and, generally speaking, it may be said that

if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. *Rogers* v. *Peck*, 199 U. S. 425, 435; *Twining* v. *New Jersey*, 211 U. S. 78, and the cases therein cited.

In the present case there can be no doubt that the lawmaking power in the Philippine Islands could by statutory enactment have preserved the right to prosecute and punish offenses committed in violation of the former law while in force in the islands, notwithstanding the repeal of the act. The effect of the decision of the Philippine Supreme Court is to hold that under the law and local statutes, the repealing act reënacting substantially the former law, and not increasing the punishment of the accused, the right still exists to punish the accused for an offense of which they were convicted and sentenced before the passage of the later act. In other words, the effect of the decision construing the local law is to accomplish what it was clearly within the power of the legislative authority to do by an express act saving the right to proceed as to offenses already committed. The accused have not been punished for a crime which was not punishable when committed by the sentence imposed. The Supreme Court has only held that the right to impose the penalty of the law under the Philippine Penal Code has not been taken away by the subsequent statute. We are unable to see that due process of law, which is the right of a person accused of a crime, when prosecuted within a jurisdiction wherein the Constitution of the United States, or a statute embracing its provisions, is in force, has been denied.

The judgment of the Supreme Court of the Philippine Islands will be affirmed.

Affirmed.

KERFOOT *v.* FARMERS' AND MERCHANTS' BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 6. Argued October 25, 1910.—Decided November 7, 1910.

In the absence of clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable. The sovereign alone can object; the conveyance cannot be impugned by the grantor, his heirs or third parties.

Although the conveyance of real estate in this case to a national bank was not one permitted by § 5137, Rev. Stat., title to the property passed to the grantee for the purposes expressed in the conveyance and that instrument cannot be attacked as void by an heir of the grantor.

On writ of error to review the judgment of a state court holding that a deed to a national bank was not void under the Federal statute, this court will not review findings of the state court of fact as to the acceptance of the deed.

THE facts, which involve the validity of a transfer of real estate to a national bank, are stated in the opinion.

Mr. Homer Hall and *Mr. Frank Hall*, with whom *Mr. George Hall* was on the brief, for plaintiff in error:

The national banking act is an enabling act, and a national bank cannot exercise any powers except those expressly granted by that act or such incidental powers as are necessary to carry on the business of banking. *First Nat. Bank* v. *Converse*, 200 U. S. 425; *Central Transp. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *California Nat. Bank* v. *Kennedy*, 167 U. S. 363; *First Nat. Bank* v. *Hawkins*, 174 U. S. 363; *Pacific R. R. Co.* v. *Seely*, 45 Missouri, 212.

The only power or authority for a national bank to

acquire or hold real estate is given by § 5137, Rev. Stat., under which it has no power or authority to accept or hold the real estate for the purpose for which it was attempted to be conveyed in this case. The effort to convey the real estate in question being beyond the powers given to the bank to accept and hold the same, the proceedings, therefore, were an absolute nullity; there was no acceptance of the deed by it, and no title vested in it. See cases *supra* and *Pittsburg & Cinn. Ry. Co.* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Merchants' Nat. Bank* v. *Wehrmann*, 202 U. S. 295; *First Nat. Bank* v. *Am. Nat. Bank*, 173 Missouri, 153, 159; *Marble Co.* v. *Harvey*, 92 Tennessee, 115; *Steele* v. *Fraternal Tribunes*, 215 Illinois, 190; *Ellett-Kendall Shoe Co.* v. *Western Stone Co.*, 112 S. W. Rep. 4; *Anglo-Amer. Land Co.* v. *Lombard*, 132 Fed. Rep. 721, 737; *Brown* v. *Needles' Nat. Bank*, 94 Fed. Rep. 925; *Coleman* v. *San Rafael Road Co.*, 49 California, 517; *Pacific Ry. Co.* v. *Seely*, 45 Missouri, 212.

The making of the deed and sending it to the cashier of the defendant national bank being absolutely void, the same can be taken advantage of by any person whose interests are involved. *National Bank* v. *Matthews*, 98 U. S. 621; *Union Gold Mining Co.* v. *National Bank*, 96 U. S. 640, have no application to the facts in this case. These and the cases of *National Bank* v. *Whitney*, 103 U. S. 99; *Schuyler National Bank* v. *Gadsden*, 191 U. S. 451, and similar cases, relate to the taking of real estate security for loans made by national banks.

This is not a question as to the power of a national bank to loan money on real estate security. It involves an entirely different principle which is clearly distinguishable. *California Nat. Bank* v. *Kennedy*, 167 U. S. 363; *McCormick* v. *Market National Bank*, 165 U. S. 538.

Plaintiff in error is neither a third person in law nor a stranger to the transaction, but is a privy of the maker of the deed both in blood and in estate. *Stacy* v. *Thrasher*

6 How. (U. S.) 44; *Subway Co.* v. *St. Louis*, 145 Missouri, 551, 567.

The transaction being *ultra vires* and void for want of authority in the defendant national bank, and of its cashier, to accept the deed or title to the property, either party to the transaction can avail himself of this want of authority.

Plaintiff contends that said state court erred in deciding and holding that the cashier of the defendant bank had the authority to accept said deed from the original maker thereof.

If the cashier had authority to accept the deed for the bank, it was by his general authority in his ordinary business as cashier, otherwise no title vested in the bank and the transaction was a nullity. *United States* v. *City Bank of Columbia*, 21 How. 356, 366; *Bank of United States* v. *Dunn*, 6 Pet. 51; *Western Nat. Bank* v. *Armstrong*, 152 U. S. 346; *Norton* v. *Derby Nat. Bank*, 61 N. H. 589; *Bank of Commerce* v. *Hart*, 37 Nebraska, 197; *Bank of Healdsburg* v. *Bailhache*, 65 California, 329.

The fact that no loss resulted from this particular transaction affords no jurisdiction or excuse for the illegal and unauthorized act. There could be no end to the loss or injury that might result from such a precedent.

The accepting of this deed was not one of the incidental powers necessary to carry on the business of banking, nor was it accepted as a security for a past indebtedness or purchased under judgment in favor of the bank. Neither was it for the purpose of owning a banking house of its own for, as heretofore stated, the bank continued to pay rent as a tenant to the grantor, and the cashier and vice-president immediately after receiving the deed attempted to convey the property away.

There is no evidence that the defendant bank, its officers, except its vice president and cashier, or its board of directors ever knew of this attempted conveyance,

much less ratified the same. There could have been no ratification of the same. The act was unauthorized and beyond its powers, illegal and void, and was incapable of ratification. See cases *supra; Western Nat. Bank* v. *Armstrong*, 152 U. S. 346.

The attempted conveyance of the property by Kerfoot to the bank and the acceptance of the deed by the cashier of the bank being *ultra vires* no title to the property passed from Kerfoot or vested in the bank, because the bank not only did not, but could not accept, the deed or the title to the property. There was neither a delivery nor an acceptance of the deed. *Hall* v. *Hall*, 107 Missouri, 101; *Miller* v. *McCall*, 208 Missouri, 562, 580; *Armstrong* v. *Morrill*, 14 Wall. 120.

Mr. T. J. Beall for defendants in error:

This court will not review the findings of fact made in the state court as to consideration for the deed. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Quimby* v. *Boyd*, 128 U. S. 489.

If a corporation take land by grant which by its charter it cannot hold its title is good against third persons, and the State only can interfere. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Thompson* v. *St. Nicholas National Bank*, 146 U. S. 240; *De Fritts* v. *Parker*, 132 U. S. 282. See also *Smith* v. *Shelley*, 12 Wall. 358, 361; *Myers* v. *Croft*, 13 Wall. 295; *Fortier* v. *New Orleans Nat. Bank*, 112 U. S. 439; *Reynolds* v. *Crawfordsville National Bank*, 112 U. S. 405; *Scott* v. *DeWeese*, 181 U. S. 202.

The cases cited by plaintiff in error are inapplicable to the issues involved in this case, and are clearly differentiated in principle.

The original maker of the deed if living, could not question the power or authority of the bank to receive the deed made by him to it, nor the authority of the bank

to act thereunder, and plaintiff in error stands in no more favorable position in regard to this matter. *French* v. *Spencer*, 21 How. 97; *Broadwell* v. *Merritt*, 87 Missouri, 95; *Wherry* v. *Hale*, 77 Missouri, 20; *Insurance Co.* v. *Smith*, 117 Missouri, 261–289; *Weiss* v. *Heitkamp*, 127 Missouri, 23; *Henderson* v. *Henderson*, 13 Missouri, 107; *Reinhardt* v. *Lead Mining Co.*, 107 Missouri, 616; *Reynolds* v. *Bank*, 112 U. S. 495; *Bank* v. *Flathers*, 45 L. R. A. 75; *Bond* v. *Tennell Mfg. Co.*, 82 Texas, 310; Herman on Estoppel, § 573, p. 577; 1 Morse on Banking, 3d ed., § 75; Perry on Trusts, 4th ed., § 45; *Bob* v. *Bob*, 89 Missouri, 411; 7 Amer. & Eng. Ency. of Law, 29.

Mr. Justice Hughes delivered the opinion of the court.

This action was brought in 1894, in the Circuit Court of Grundy County, State of Missouri, to set aside a deed of real property made by James H. Kerfoot to the First National Bank of Trenton, Missouri, and also a deed by which that bank purported to convey the same property to the defendants Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, and for the recovery of possession. The plaintiffs in the action, which was brought shortly after the death of James H. Kerfoot, were Homer Hall, administrator of his estate, and Robert Earl Kerfoot, his infant grandson, who claimed to be his only heir at law and sued by Homer Hall as next friend. The petition contained two counts, one in equity, the other in ejectment. Upon the trial the Circuit Court found the issues for defendants and the judgment in their favor was affirmed by the Supreme Court of Missouri. 145 Missouri, 418. On his coming of age Robert Earl Kerfoot sued out this writ of error.

The plaintiff in error challenges the conveyance made by James H. Kerfoot to the bank, upon the ground that under § 5137 of the Revised Statutes of the United States,

relating to national banks, the bank was without power to take the property, and hence that no title passed by the deed, but that it remained in the grantor and descended to the plaintiff in error as his heir at law. It appears that the deed, which was absolute in form, with warranty and expressing a substantial consideration, was executed in pursuance of an arrangement by which the title to the property was to be held in trust to be conveyed upon the direction of the grantor; and the Supreme Court of Missouri decided that a trust was in fact declared by the grantor in favor of Hervey, Alwilda and Lester R. Kerfoot, to whom ran a quitclaim deed, which he prepared and forwarded to the bank to be signed and acknowledged by it and then returned to him.

But while the purpose of this transaction was not one of those described in the statute for which a national bank may purchase and hold real estate, it does not follow that the deed was a nullity and that it failed to convey title to the property.

In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter, is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. *Smith* v. *Sheeley*, 12 Wall. 358; *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405; *Fritts* v. *Palmer*, 132 U. S. 282; *Leazure* v. *Hillegas*, 7 Serg. & R. (Pa.) 313. Thus, although the statute by clear implication forbids a national bank from making a loan upon real estate, the security is not void and it cannot be successfully assailed by the debtor or by subsequent mortgagees because the bank was without authority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the bank open to proceedings

by the Government for exercising powers not conferred by law. *National Bank* v. *Matthews, supra; National Bank* v. *Whitney, supra; Swope* v. *Leffingwell,* 105 U. S. 3.

In *National Bank* v. *Matthews, supra,* viewing that case in this aspect, the court said:

"The opinion of the Supreme Court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

* * * * * * * *

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure* v. *Hillegas,* 7 Serg. & R. (Pa.) 313; *Goundie* v. *Northampton Water Co.,* 7 Pa. St. 233; *Runyon* v. *Coster,* 14 Pet. 122; *The Banks* v. *Poitiaux,* 3 Rand. (Va.) 136; *McIndoe* v. *The City of St. Louis,* 10 Missouri, 575, 577. See also *Gold Mining Co.* v. *National Bank,* 96 U. S. 640."

This rule, while recognizing the authority of the Government to which the corporation is amenable, has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result. In the present case a trust was declared and this trust should not be permitted to fail and the property

to be diverted from those for whom it was intended, by treating the conveyance to the bank as a nullity, in the absence of a clear statement of legislative intent that it should be so regarded.

The cases in this court, which are relied upon by the plaintiff in error, are not applicable to the facts here presented and are in no way inconsistent with the doctrine to which we have referred. *McCormick* v. *Market Bank*, 165 U. S. 538; *California Bank* v. *Kennedy*, 167 U. S. 362; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364.

It was also urged by the plaintiff in error that the deed was not accepted by the bank, and was inoperative for that reason. The Supreme Court of Missouri held upon the evidence that it was accepted, and this court, on a question of that character, does not review the findings of fact which have been made in the state court. *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 86; *Egan* v. *Hart*, 165 U. S. 188; *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220.

Assuming that the deed was accepted by the bank, it was effective to pass the legal title, and the plaintiff in error as heir at law of the grantor cannot question it.

Judgment affirmed.

RICHARDSON *v.* AINSA, ADMINISTRATOR OF ELY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 28. Argued November 2, 1910.—Decided November 14, 1910.

Notwithstanding the contention of appellant in this case, the decision of this court in *Ainsa* v. *New Mexico & Arizona R. R. Co.*, No. 2, 175 U. S. 91, that the District Court of Arizona had jurisdiction of an action to quiet title brought by a grantee of the Mexican Government of land in the territory included in the Gadsden Purchase, did not proceed upon a mistake in fact and is not inconsistent with the reasoning of the decision of *Ainsa* v. *New Mexico & Arizona R. R. Co.*, No. 1, 175 U. S. 76.

Under the Gadsden Purchase Treaty with Mexico of December 30, 1853, 10 Stat. 1031, the good faith of the United States was pledged to respect Mexican titles, and one whose title was absolutely perfected prior to the treaty was not bound to present his title for confirmation to the Court of Private Land Claims under the act of March 3, 1891; nor did the fact that he prayed for confirmation, in a suit brought by the United States against him in that court to declare the patent void or to determine boundaries if valid, limit his claim to the recovery of the price specified in the act for land included within the grant but patented to others by the United States.

While under § 14 of the act of March 3, 1891, where the claimant of a Mexican land grant himself presented his claim to a Mexican grant in the Gadsden Purchase to the Court of Private Land Claims he might be limited to recovery in the case of lands within his grant sold by the United States to the price specified in the act, where he is brought into the court by the United States in a suit attempting to set aside a grant, title to which was perfected before the treaty, he is not so limited and patents issued by the United States to lands within the boundaries of his grant are mere usurpations and void.

95 Pac. Rep. 103, affirmed.

THE facts, which involve the title to land in Arizona,

in the territory known as the Gadsden Purchase, are stated in the opinion.

Mr. S. L. Kingan for appellant, submitted:

Although this court had already once decided in this case (*Ainsa* v. *New Mexico Ry.*, 175 U. S. 91) that the District Court of Arizona did have jurisdiction, yet, from the face of the decision it is apparent that the grounds supporting the decision are diametrically opposed to the conclusion arrived at, so that it is patent from the decision itself that it should have been to the contrary.

The acts of July 22, 1854, 10 Stat. 308, and July 15, 1870, 16 Stat. 304, remained in active force and effect until the act of March 3, 1891, creating the Court of Private Land Claims.

Between July 22, 1854, and March 3, 1891, during which time this suit was instituted, the only tribunals, therefore, that had jurisdiction to try title to land grants was the surveyor general of New Mexico and Arizona and the Congress of the United States. *Ainsa* v. *United States*, 175 U. S. 91, and see *Astiazaran* v. *Santa Rita Co.*, 148 U. S. 80.

It is immaterial how this court came to make its said error, whether through stipulations of the parties or otherwise, as jurisdiction cannot be stipulated, and it is always subject to be questioned by a litigant.

The previous decision as to jurisdiction should be changed to the conclusion derived from the grounds cited in support of the correct decision.

The lands in suit were public lands of the United States. While the United States was bound to respect the titles of Mexican grantees, all the land ceded belonged to the United States except the interests of Mexican grant claimants, and a statute was passed giving these grant claimants a right and an opportunity to establish their

claims of record. Until this was availed of by the grantee the land was at least *prima facie* public land. No notice having been given for twenty-five years, the United States was fully able to give such title and patent to the land as would bar the Mexican grant claimants from denying that the lands were public lands.

Under the Gadsden Purchase Treaty grantees from Mexico, of land embraced in the ceded district, are entitled to be protected in their property rights, the same as natural-born Americans. This would probably be so even if nothing were provided in the treaty. But that matter is definitely settled in the context. There is nothing in the statute requiring grantees to prove claims that violate the obligations of the United States under the treaty.

There is no confiscation nor deprivation without due process of law. The statute says that under certain circumstances, when land is patented to others, the grantee from Mexico shall take money in lieu of such land. The Congress of the United States decided that money would be a just compensation, and we have no higher authority. Therefore the grant claimant must have delayed so long as to give one a *prima facie* right to a patent. Even though the statute be in violation of treaty rights, there is no other recourse for the judiciary department than upholding the law. The violation of a treaty is not grounds for the court to act upon. The judiciary department must follow the law promulgated by the legislative department. If the legislators choose to violate a treaty, the affair is of a political aspect, and not a matter for the court's jurisdiction. *Botiller* v. *Dominguez*, 130 U. S. 238; *Edye* v. *Robertson*, 112 U. S. 580; *In re Ah Lung*, 18 Fed. Rep. 28; *Horner* v. *United States*, 143 U. S. 570.

The statute, however, does not violate, but is in furtherance of, the treaty. *United States* v. *Martinez*, 184 U. S. 441.

Even if the Mexican grantee is brought before the

court against his wishes, he is bound by the statute requiring him to accept money in lieu of patented lands within the boundaries of his grant. The United States has power to bring a party into court and have him bound by the decision. The Arizona decision, following the decision of the case in 34 L. D. 612, erred in saying that the defendant was not bound because he had not voluntarily submitted to the court.

All the principles of equity—laches, unjust enrichment, estoppel, fraud, etc.—unite in overthrowing any claim to this Mexican grant. Besides these equitable principles there are both the spirit and express wording of the statute directly in point, the interpretation of which cannot possibly be distorted to cover imaginary exceptions. See *United States* v. *Conway*, 175 U. S. 60; *Real de Dolores* v. *United States*, 175 U. S. 75; *Ainsa, Admr.*, v. *Magee*, 34 L. D. 506; *Botiller* v. *Dominguez*, 130 U. S. 238; *United States* v. *Martinez*, 184 U. S. 441; *United States* v. *Baca*, 184 U. S. 653.

The Court of Private Land Claims had no right to determine that the grant was a perfect one at the time of the treaty, but its only authority was to pass upon its jurisdiction, and to find that it had no jurisdiction.

The statute provides a means whereby the claimants' rights could have been established and recognized and proved for the benefit of all concerned. The statute provides for an adequate means of protecting one's rights in land and for preventing anyone being injured by unknown claims. *Doolan* v. *Carr*, 125 U. S. 618; *Newhall* v. *Sanger*, 92 U. S. 761, cited by appellee, do not sustain his position, nor do *Cameron* v. *United States*, 148 U. S. 301; *Reynegan* v. *Bolton*, 95 U. S. 33.

Appellee's sole authority for the decision of the Arizona Supreme Court is that of the Secretary of the Interior, 34 L. D. 506, which is offset, however, by *Botiller* v. *Dominguez*, 130 U. S. 238.

Mr. Joseph W. Lewis, with whom *Mr. Frank H. Hereford* and *Mr. Selim M. Franklin* were on the brief, for appellee:

This court having heretofore decided on appeal in this case, *Ainsa* v. *New Mex. & Ariz. R. R. Co.*, 175 U. S. 76, that the District Court had jurisdiction of this action, that question is settled and cannot be raised again. *United States* v. *Camou*, 184 U. S. 572, 574; *Hunt* v. *Ill. Cent. Ry. Co.*, 184 U. S. 77, 99; *Sibbald* v. *United States*, 12 Pet. 488, 492; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 471; *Snyder* v. *Pima County*, 6 Arizona, 41, 47; *Beiseker* v. *Moore*, 98 C. C. A. 372; *Washington Bridge Co.* v. *Stewart*, 3 How. 413; *Whyte* v. *Gibbs*, 20 How. 541.

The grant, being a complete and perfect grant prior to the treaty of cession, the grantee thereof, his heirs and assigns, had title in fee, which was not in any way affected by the change of sovereignty. *United States* v. *Percheman*, 7 Pet. 86, 87; *Ainsa* v. *New Mex. & Ariz. R. R. Co.*, 175 U. S. 76, 91; *Dent* v. *Emmeger*, 14 Wall. 308, 314; *Trenier* v. *Stewart*, 101 U. S. 797, 810.

The treaty of cession, commonly called the Gadsden Treaty, so provides. *Ely* v. *United States*, 171 U. S. 220, 241.

The lands embraced within the grant being private property the patents issued to parts thereof under the United States public land laws were utterly void. *Knight* v. *United Land Assn.*, 142 U. S. 161, 216; *Polk* v. *Wendell*, 9 Cranch, 87, 102.

The President of the United States has no right to issue patents for land the sale of which is not authorized by law. *Easton* v. *Salisbury*, 21 How. 426, 432.

Under the acts of July 22, 1854, 10 Stat. 308, and July 15, 1870, 16 Stat. 304, the lands within the limits of the said grant were reserved from sale or other disposal by the Government. 34 L. D. 506, 517.

While so reserved the homestead patents under which Richardson claims title were issued. Patents for lands reserved from sale are void. *Burfenning* v. *Chicago R. R. Co.*, 163 U. S. 321, 325; *Morton* v. *Nebraska*, 21 Wall. 660, 675; *Polk* v. *Wendell*, 9 Cranch, 87, 102; *Minter* v. *Crommelin*, 18 How. 87, 89; *Doolan* v. *Carr*, 125 U. S. 618, 642; *Noble* v. *Union River R. R. Co.*, 147 U. S. 165, 176.

Lands within the limits of a claimed Mexican grant in Arizona, being reserved from sale or disposal by the acts of Congress aforesaid, are not "public lands" of the United States, and are not subject to sale under the public land acts. *Cameron* v. *United States*, 148 U. S. 301, 311; *Reynegan* v. *Bolton*, 95 U. S. 33, 37; *Newell* v. *Sanger*, 92 U. S. 761, 766.

Under the cited acts of Congress the reservation became immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession. Op. Sec. of Int., 30 L. D. 97, 105.

The act of Congress creating the Court of Private Land Claims does not deprive the owner of a perfect grant, if he is brought into that court as a party defendant at the suit of the Government, of lands which previously had been unlawfully and without right patented to others, under the public land laws, and such lands are not excluded by the terms of that act from the grant as confirmed by that court. *Ely's Admr.* v. *Magee*, 34 L. D. 506, 517; *Richardson* v. *Ainsa*, 95 Pac. Rep. (Ariz.) 103, 105.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit to quiet title brought in 1887 by the appellee's intestate in the District Court of Arizona. The decision was in favor of the appellee, and this decision was affirmed by the Supreme Court of the Territory,

whereupon the defendant Richardson appealed to this court.

The appellee represents a title derived from a grant by the Mexican Government of land in the portion of Arizona afterwards acquired by the Gadsden Purchase, December 30, 1853. 10 Stat. 1031. At the time of the Gadsden Purchase this title was complete. The appellant claims through mesne conveyances from holders of patents issued by the United States in 1879 and 1880 under the homestead laws.

The first error assigned is that the District Court was without jurisdiction. That point already has been decided against the appellant in this very case under the name of *Ainsa* v. *New Mexico & Arizona R. R. Co.*, No. 2, 175 U. S. 91, so that it is not open to him to urge it. *United States* v. *Camou*, 184 U. S. 572, 574. But it is proper to say that in our opinion the decision did not proceed upon a mistake of fact and is not inconsistent with the reasoning of the immediately preceding decision between the same parties, 175 U. S. 76, 86, although No. 2 was begun before and No. 1 after the passage of the act of March 3, 1891, c. 539, 26 Stat. 854, establishing a Court of Private Land Claims.

In 1892 the United States brought a suit against the present appellee in the Court of Private Land Claims, alleging that his claim was void, and that the United States had granted patents for portions of the land, praying that the title might be adjudicated, and, if valid, the boundaries established, excepting such parts as might have been disposed of by the United States. The appellee answered setting up title, and praying confirmation. Ultimately in pursuance of the decision of this court, *Ely's Administrator* v. *United States*, 171 U. S. 220, a decree was entered in his favor and a patent issued to him on October 29, 1906, specifying no exceptions other than one of "gold, silver, or quicksilver mines or minerals of the same."

The appellant however contends that by virtue of the above-mentioned statute of March 3, 1891, the effect of the appellee's appearance in the Court of Private Land Claims was to forfeit all portions of the land in controversy that had been patented by the United States, and to give the appellee in place of it a claim for not exceeding $1.25 per acre so patented against the United States. The contrary decision is the other error assigned.

Of course, the patents for homesteads issued in the name of the United States, on the facts that we have stated, were a mere usurpation and were void. The lands covered by them, whether reserved or not by the acts of July 22, 1854, c. 103, § 8, 10 Stat. 308; July 15, 1870, c. 292, 16 Stat. 304, were not public lands, but private property, which the Government was bound by the express terms of the Gadsden Treaty of December 30, 1853, to respect. The appellant's claim rests solely on an interpretation of §§ 8 and 14 of the above-mentioned act of 1891, that would cut down the performance of the treaty promise by the United States to at least to the narrowest limits consistent with good faith. We are of opinion that the different construction adopted by the court below, and also by the Acting Secretary of the Interior in *Ely* v. *Magee*, 34 L. D. 506, 512, is correct. After providing in § 6 for incomplete titles the act goes on in § 8 to deal with complete ones. Holders of claims under such titles, it says, "shall have the right (but shall not be bound) to apply to said court" for a confirmation of their title. Of course, this means that the title is recognized as good without the proceeding in court. *Ainsa* v. *New Mexico & Arizona R. R. Co.*, 175 U. S. 76, 90.

The confirmation is granted, "excepting any part of such land that shall have been disposed of by the United States," and without prejudice to conflicting private interests. Then, in § 14 it is enacted that "if in any case it

shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree," with a provision for a judgment in favor of the claimant against the United States for the proved value of such granted lands, not exceeding $1.25 per acre. If this were all there could be no question that the exception of lands granted by the United States was merely a condition attached to the decree of confirmation, and did not purport to affirm such grants if the claimant did not see fit to go into the Court of Private Land Claims.

But in § 8 there is a further provision by which the United States may proceed against the claimant, as it did against the appellee, on the ground that the title or boundaries are open to question, and therefore the court is to determine the matter, "but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the provisions of this section applicable thereto." The appellant argues that this provision gives a wider meaning to § 14. He says that the words "if in any case" it shall appear that lands have been sold by the United States apply as well to a proceeding by the United States as to one where the claimant goes forward. He argues that so to apply them is just, in view of the supposedly unknown boundaries of the old Mexican grants and the policy of the United States in offering its public lands to settlers—that otherwise there is a suspended threat and possibility of a claimant turning up after many years and dispossessing those who had been encouraged by the United States to go upon the land. *Botiller* v. *Dominguez*, 130 U. S. 238. But the considerations mentioned in the case cited did not prevent the United States in the act of March 3, 1891, from leaving

the holders of perfected titles free not to present them to the court as they were required to do in earlier statutes. The good faith of the United States was pledged to respect the Mexican titles. It recognized in the act of 1891 that holders of such titles need not go into the Land Claims Court to get them confirmed, and we should be slow to suppose that it meant to make a doubt in the Department of Justice as to the validity of a perfect title a ground for cutting down what otherwise it was bound to protect and did by the statute leave intact. But for that unfounded doubt the appellee would have been secure in his rights, and could have turned the holders of the homestead patents off his land. *United States* v. *Martinez*, 184 U. S. 441, 445. The proceeding by the Government was a matter over which he had no control, and ought not to affect his rights. Looking at the words of § 14 more exactly they do not require the appellant's construction. "If in any case" means in any case before the court that the act established. And when the section goes on, "it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold," it is reasonable to suppose that it has reference to those cases in which a claimant is seeking a decree, that is to say, where the claimant is the plaintiff in the case. It is true that a petition by the United States may end in the same result, but the terms of the sentence and the duty of the Government concur in leading us to limit the words as we do. On the other hand, the consideration mentioned sufficiently shows that the claimant did not impair his position by praying for confirmation in his answer. The prayer merely expressed what would have happened without it by the force of law.

Judgment affirmed.

DURYEA POWER COMPANY, BANKRUPT, *v.* STERNBERGH.

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

No. 29. Argued November 2, 1910.—Decided November 14, 1910.

Section 25*b* of the Bankruptcy Law only gives a right of appeal to this court from a decision of the Circuit Court of Appeals affirming or reversing the order of the District Court, allowing or rejecting a claim when the decision is final, whether there is a certificate under § 25*b*, 2 or not. A decision simply allowing or disallowing a claim for voting purposes without prejudice to its subsequent presentation is not final but provisional.

No appeal lies to this court from a decision of the Circuit Court of Appeals in the exercise of supervisory jurisdiction in bankruptcy matters. Nor can a petition for revision to that court be turned into an appeal.

A petition for revision opens only questions of law while an appeal opens both fact and law.

Appeal from 161 Fed. Rep. 540; 88 C. C. A. 482, dismissed.

THE facts, which involve the construction of certain provisions of the Bankruptcy Law, and the jurisdiction of this court of appeals from the Circuit Court of Appeals, are stated in the opinion.

Mr. Edwin C. Brandenburg, with whom *Mr. Clarence A. Brandenburg*, *Mr. F. Walter Brandenburg*, *Mr. Andrew A. Leiser* and *Mr. Thomas K. Leidy* were on the brief, for appellant.

Mr. Cyrus G. Derr, with whom *Mr. John G. Johnson* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case arose on a controversy as to the right of the appellee, Sternbergh, to vote on the selection of a trustee in bankruptcy. At the first meeting of the creditors Sternbergh offered for allowance a proof of claim for $14,438.86, which was objected to on the ground that Sternbergh was indebted to the bankrupt company for unpaid stock. Sternbergh announced that he intended to use this claim for voting purposes. After a hearing the referee refused to allow the claim for use in the election and certified the facts, as Sternbergh's vote, if allowed, would have elected a different trustee. The District Judge stated the question to be whether the referee was right in rejecting the claimant's offer to vote and that it did not involve the extent but only the fact of Sternbergh's liability, and he affirmed the action of the referee. Thereupon Sternbergh filed a petition to the Circuit Court of Appeals seeking a revision of the decree in matter of law under § 24*b* of the Bankruptcy Law. That court, remarking that the facts were not in dispute, proceeded to discuss their significance and effect and reversed the decree, but allowed the selection of trustee to stand, as no allegation was made against him. The bankrupt through the trustee appealed to this court, obtaining a certificate from a Justice of this court under § 25*b*, 2.

The first question to be answered is whether this is a case in which a party is entitled to take an appeal to this court under § 25. And clearly it is not. The right of appeal from a decision of a Circuit Court of Appeals allowing or rejecting a claim is given by § 25*b* only where the decision is final, whether there is a certificate under § 25*b*, 2 or not. The Circuit Court of Appeals may render a final decision when an appeal is taken to it under § 25*a* from a judgment allowing or rejecting a claim of five hundred dollars or over. But this case did not and could not have

come to it in that way, for there was no judgment allowing or rejecting the claim. The Referee's order was "the within claim is disallowed for the present, especially as to voting, without prejudice to the claimant's right to present the claim hereafter." That is the order that was reviewed by the District Court and that was affirmed by it. Therefore Sternbergh's counsel, rightly apprehending that they could not appeal to the Circuit Court of Appeals, brought their petition for revision under § 24*b*, alleging that the District Judge erred in matter of law in confirming the order of the referee refusing to allow the claim of Sternbergh to be filed for voting upon the election of trustee. This is all that was brought before the Circuit Court of Appeals and all that it had authority to decide. Its decision, although directing the District Court to allow the petitioner to prove his claim, was not a final decision upon that point, and did not come to it in such a way that it could be. It simply reversed the provisional order of the referee and made a provisional, though seemingly useless order, the other way.

No appeal to this court lies from a decision in the exercise of supervisory jurisdiction. *Holden* v. *Stratton*, 191 U. S. 115. But it is said that the Circuit Court of Appeals treated this case as an appeal; that it did not follow the findings of the referee and the court below, as it was bound to do on a revisory proceeding; that it filed a statement of the facts found and of its conclusion of law, as required in an appeal by General Orders 36, 3, and that a Justice of this court allowed an appeal from its decision, which, as we have said, does not lie from an order or decree under § 24*b*. It is argued that an appeal to the Circuit Court of Appeals may be treated as a petition for revision, *Holden* v. *Stratton*, 191 U. S. 115, 119, and that conversely a petition for revision may be turned into an appeal, or, at least, treated as one for the purpose of an appeal to this court, if only to establish that the Circuit

Court of Appeals exceeded its jurisdiction. There are two answers to this contention. In the first place, the converse proposition does not hold. An appeal opens both fact and law, and therefore might be regarded as intended to raise questions of law in any way that might be deemed proper. But a petition for revision opens only questions of law, and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with the facts. In the next place, in this case the Circuit Court of Appeals made no such attempt. It treated the facts as undisputed, and differed from the court below only in its understanding of their significance and legal import. It filed no finding of facts at or before the time of entering its decree as required by the General Orders, but did so only two months after the decree had been entered, and a month after an appeal had been taken and allowed by a Justice of this court, upon a petition of the appellant.

We have considered the suggestion that if the appeal should be dismissed a certiorari should be granted, but we are of opinion that no ground is shown for the issue of the writ.

Appeal dismissed.

LING SU FAN *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 20. Argued October 27, 1910.—Decided November 14, 1910.

On writ of error the errors considered must be only those of law, and this court cannot consider sufficiency of evidence to convict if it is conceded that there was any evidence at all.

Sections 1 and 2 of law No. 1411 of the Philippine Commission, prohibiting exportation of Philippine silver coin from the Philippine

Islands, is not void as depriving the owner of such coin of his property therein without due process of law within the meaning of the due process provision of the organic act of 1902. Congress, by the act of March 2, 1903, c. 980, 32 Stat. 952, authorized the government of the Philippine Islands to adopt such measures as it deemed proper and not inconsistent with the organic act to maintain parity of gold and silver coinage.

In determining whether a law of the Philippine Commission is invalid as inconsistent with the organic act this court puts aside all questions of the wisdom of the law, even if enacted in the face of axioms of commerce, and considers only whether power exists to enact under, and whether the enactment is inconsistent with, the organic act.

The power to coin money and regulate its value is a prerogative of sovereignty exclusively vested in the Congress of the United States, from which is derived the power of the government of the Philippine Islands in respect to local coinage.

The quality of legal tender of coin is an attribute of law aside from its bullion value and renders such coin as the Government has made legal tender subject to such reasonable regulations by the police power as public policy may require including prohibition against exportation, and the exercise of such power does not deprive the owner of his property without due process of law even if the bullion value in a foreign country exceeds the legal tender value in the country of coinage.

Where power is given by Congress to the Philippine Commission to prohibit an act, the power includes making violation of the prohibition a misdemeanor.

THE facts, which involve the validity of the Philippine law prohibiting the exportation from the Philippine Islands of silver coin, are stated in the opinion.

Mr. J. M. Vale, with whom *Mr. Marion Butler* and *Mr. Lionel D. Hargis* were on the brief, for plaintiff in error:

The Philippine Commission had no power to enact law No. 1411. The court below rests its decision sustaining the power of the Civil Commission in the premises, mainly upon the police powers of the State, but while the

courts have not defined the limit of the police power under the terms of any general rule, that power has a limit. See *Lawton* v. *Steele*, 152 U. S. 133, 143, holding that it must appear that the interests of the public generally, as distinguished from those of a particular class, require the interference, and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The inhibition upon the use of property imposed by the act passes the limit as here fixed.

Even if the exportation of silver pesos tended to enhance their value above that of the gold pesos, thus disturbing the parity between the two, which is denied, a remedy not impairing the individual right of property was at hand and has been applied to keep coin at home for ages; that of reducing the bullion value of the coin. There was no need of the general public or any reasonable necessity for the act. No necessity existed for the infringement of the rights of private property. The inducement to carry the coins out of the country wholly disappears by an adjustment of the bullion value to commercial conditions, which is one of the functions of government. Money is coined as a medium of exchange. That object is defeated by legislation curtailing its use. The paramount "public interest" lies in a known and accepted medium of exchange supplied by the coin of the realm, not in restrictions upon the use of that coin as a medium of exchange.

A government having a written constitution cannot divest one individual of his property by direct legislation and invest it in another. *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 235.

The effect of the inhibition to export pesos from the Philippine Islands is to legislate the difference in exchange out of the pocket of the owner of the pesos and into that of the money broker.

The means adopted by law No. 1411 for the retention of silver in the Islands are unnecessary and unduly oppressive upon individuals and destroy the property rights of the individual by way of penalty without opportunity to be heard, particularly in that by such legislation the individual is allowed the choice of leaving his money in the Philippine Islands or subjecting himself to the uncertain and erratic course of rates of exchange in removing it.

The act of March 2, 1903, authorizing the Civil Commission of the Philippine Islands to maintain the value of the silver Philippine peso at the rate of one gold peso, specifically limited the power of the Civil Commission to adopting only such measures to accomplish that end as were not inconsistent with the act of July 1, 1902.

The decision of the court below is against the weight of evidence, and without authority of law.

Mr. Assistant Attorney General Fowler for the United States:

The act of the Philippine Commission is not invalid because of any direct effect upon the value of the coin, or any restriction upon the right of contract, nor does it deprive holders of coins of their property within the meaning of the act of Congress, by reducing the value of same; and if their value were reduced, the act was authorized by § 6, c. 980, act of March 2, 1903.

The value of these coins was not reduced by the legislation. They are declared by said act of Congress to be legal tender, unless otherwise provided, and they had the same purchasing power after the passage of the Philippine act as before.

These coins were circulating mediums and continually passed from hand to hand, and undoubtedly were not in the possession of plaintiff in error at the time the act was passed, and they, therefore, possessed precisely the same

value when seized as when they came into his possession.

Under the act of Congress, the Philippine Commission had ample power to enact all reasonable legislation with reference to the circulation of these coins.

By Art. I, § 8, c. 5, of the Constitution, Congress was vested with the power to "coin money, regulate the value thereof, and of foreign coin." The Fifth Amendment was thereafter adopted, which, among other things, provided that no person shall be "deprived of life, liberty, or property without due process of law." Inasmuch as this latter provision was incorporated into the Constitution as an amendment, all the provisions contained in the Constitution as first adopted must be consistent therewith. This amendment repealed or abrogated, by implication, everything in the Constitution which was inconsistent with it, precisely as a subsequent act of Congress repeals by implication all prior provisions of law which are inconsistent therewith; although Congress, since the adoption of the Fifth Amendment, has not possessed any authority with reference to the coinage of money and the regulation of its value, which is inconsistent with the due process of law provision of said Amendment it has always assumed without question to pass laws vesting coins with the qualities of legal tender, depriving them of such qualities, regulating the ratio of coinage, and in fact, all character of laws which are deemed of advantage to the public use of such coins. See acts of May 8, 1792, 1 Stat., c. 39, § 2; February 8, 1793, 1 Stat. 300, c. 5, § 2; § 5459, Rev. Stat.; Penal Code, 165; § 5189, Rev. Stat.; Penal Code, 176.

The act of the Philippine Commission is not inconsistent with the due process of law clause of the organic act of July 1, 1902, in that it restricts or places a limitation upon the right of contract. *Patterson* v. *Bark Eudora*, 190 U. S. 169, 174; *Frisbie* v. *United States*, 157 U. S. 160, 165;

United States v. *Holliday*, 3 Wall. 407; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188; *Buttfield* v. *Stranahan*, 192 U. S. 470, 493.

The act of the Philippine Commission was an authorized exercise of the police power. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 542; *Leitensdorfer* v. *Webb*, 20 How. 176, 177.

Under instructions to the Philippine Commission signed by President McKinley on April 7, 1900, Comp. Acts Phil. Comm., pp. 10–15, and the act of July 1, 1902, the commission is vested with full power of legislating, except as restricted by acts of Congress. Manifestly it may exercise the police power whenever it can be exercised by the legislature of a State.

The case is here on writ of error, and this court will not, therefore, review the evidence. *Behn* v. *Campbell*, 205 U. S. 403. The decision is not against the weight of evidence.

MR. JUSTICE LURTON delivered the opinion of the court.

The plaintiff in error has been convicted of the offense of "exporting from the Philippine Islands Philippine silver coin" in violation of Philippine law No. 1411, being §§ 1998 and 1999, Compiled Acts of the Philippine Commission, title 3, chapter 194. Sections 1 and 2 of law No. 1411 read as follows:

"SEC. 1. The exportation from the Philippine Islands of Philippine silver coins, coined by authority of the act of Congress approved March 2nd, 1903, or the bullion made by melting or otherwise mutilating such coins, is hereby prohibited, and any of the aforementioned silver coins or bullion which is exported or of which the exportation is attempted subsequent to the passage of this Act and contrary to its provisions, shall be liable to forfeiture, under due process of law, and one-third of the sum or value of the bullion so forfeited shall be payable to the person upon whose information, given to the proper au-

thorities, the seizure of the money or bullion so forfeited is made, and the other two-thirds shall be payable to the Philippine Government and accrue to the gold standard fund. Provided, That the prohibition herein contained shall not apply to sums of P. 25.00 or less, carried by passengers leaving the Philippine Islands.

"SEC. 2. The exportation or attempt to export Philippine silver coin or bullion made from such coins from the Philippine Islands, contrary to law, is hereby declared to be a criminal offense, punishable, in addition to the forfeiture of the said coins or bullion as above provided, by a fine not to exceed P. 10,000.00, or by imprisonment for a period not to exceed one year, or both, in the discretion of the court."

We may pass over the assignments of error which challenge the sufficiency of the evidence to warrant a conviction, inasmuch as it is not contended that there was no evidence. This is a writ of error, and upon such a writ the error to be considered must be confined to error of law.

The substantial question is as to whether a law which prohibits the exportation of Philippine silver coin from the Philippine Islands is a law which deprives the owner of his property in such coins without due process of law, in violation of that prohibition of the organic act of July 1, 1902, which provides that "no law shall be enacted in said islands which shall deprive any person of life, liberty or property without due process of law." Act of July 1, 1902, c. 1369, § 5, 32 Stat. at Large, 691, 692. The authority for the law is found in the same act of Congress, §§ 76 *et seq.*, 32 Stat. at Large, 710, which authorized the Philippine government to establish a mint in the city of Manila for coinage purposes and to enact laws for its operation, and for the striking of certain coins. By the later act of Congress of March 2, 1903 (c. 980, 32 Stat. at Large, 952), it was provided that the gold peso, con-

sisting of 12.9 grains of gold, nine-tenths fine, should be the unit of value in the islands. The second section of that act provided as follows:

"That in addition to the coinage authorized for use in the Philippine Islands by the act of July first, nineteen hundred and two, entitled 'An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,' the government of the Philippine Islands is authorized to coin to an amount not exceeding seventy-five million pesos, for use in said islands, a silver coin of the denomination of one peso and of the weight of four hundred and sixteen grains, and the standard of said silver coins shall be such that of one thousand parts, by weight, nine hundred shall be of pure metal and one hundred alloy, and the alloy shall be of copper."

Section six of the same act of March 2, 1903, provided:

"That the coinage authorized by this act shall be subject to the conditions and limitations of the provisions of the act of July first, nineteen hundred and two, entitled 'An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,' except as herein otherwise provided; and the government of the Philippine Islands may adopt such measures as it may deem proper, not inconsistent with said act of July first, nineteen hundred and two, to maintain the value of the silver Philippine peso at the rate of one gold peso;"

In a subsequent part of the same section the issuance of certificates of indebtedness, bearing interest, was authorized as a specific measure for maintaining the parity between the silver and gold peso.

The law of the Philippine Commission, above set out, under which the conviction of the plaintiff in error was secured, must rest upon the provision of § 6, above set out, as a means of maintaining "the value of the silver

peso at the rate of one gold peso." Passing by any consideration of the wisdom of such a law prohibiting the exportation of the Philippine Islands silver pesos as not relevant to the question of power, a substantial reason for such a law is indicated by the fact that the bullion value of such coin in Hong Kong was some nine per cent greater than its face value. The law was, therefore, adapted to keep the silver pesos in circulation as a medium of exchange in the islands and at a parity with the gold peso of Philippine mintage.

The power to "coin money and regulate the value thereof, and of foreign coin," is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States. The power which the government of the Philippine Islands has in respect to a local coinage is derived from the express act of Congress. Along with the power to strike gold and silver pesos for local circulation in the islands was granted the power to provide such measures as that government should "deem proper," not inconsistent with the organic law of July 1, 1902, necessary to maintain the parity between the gold and silver pesos. Although the Philippine act cannot, therefore, be said to overstep the wide legislative discretion in respect of measures to preserve a parity between the gold and silver pesos, yet it is said, that if the particular measure resorted to be one which operates to deprive the owner of silver pesos, of the difference between their bullion and coin value, he has had his property taken from him without compensation, and, in its wider sense, without that due process of law guaranteed by the fundamental act of July, 1902.

Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere conse-

quence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. As an incident, the Government may punish defacement and mutilation and constitute any such act, when fraudulently done, a misdemeanor. Rev. Stat., §§ 5459, 5189.

However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin. To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a violation of private right forbidden by the organic law. Obviously, if the Philippine government had power to prohibit the exportation or melting of Philippine silver pesos, it had the power to make the violation of the prohibition a misdemeanor. The proceedings for the enforcement of the law included the ordinary process in criminal cases lawful in the islands and not forbidden by the act of July, 1902.

Judgment affirmed.

IN RE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

APPLICATION FOR A WRIT OF PROHIBITION OR MANDAMUS.

No. 12. Original.—Submitted May 16, 1910.—Restored to the docket for oral argument May 31, 1910.—Argued October 11, 1910.—Decided November 14, 1910.

All parties to the record who appear to have any interest in the challenged ruling must be given an opportunity to be heard on an appeal, and the decision of the Circuit Court of Appeals reversing a decree of the Circuit Court applies only to the parties brought before that court.

After the Circuit Court has refused to remand, has tried the issues and entered judgment dismissing the complaint as to certain defendants, it cannot, after the Circuit Court of Appeals has, on an appeal to which such defendants were not made parties, reversed the order refusing to remand, vacate the judgment dismissing the complaint as to the defendants not parties after the expiration of the term at which such judgment was entered.

A decree of the Circuit Court refusing to remand a cause cannot, even if error and subsequently reversed on appeal by the Circuit Court of Appeals, be treated as a nullity; and proceedings of the Circuit Court while it retained jurisdiction as to defendants not parties to such appeal remain in full force.

A court cannot deal with a decree other than for correction of clerical error or inadvertance after the termination of the term at which it was entered.

Where the Circuit Court vacates a decree without jurisdiction and refuses to reinstate it, mandamus is the proper remedy to compel it to do so.

THIS is an application by the Metropolitan Trust Company of the city of New York, which had been impleaded as a defendant in the suit of *James Pollitz* v. *The Wabash Railroad Company*, for a writ of prohibition or mandamus directed to the Circuit Court of the United

States for the Southern District of New York, to forbid the exercise of jurisdiction over the petitioner and over a decree dated January 10, 1908, in its favor in said suit, and in the alternative to provide that any order for the vacating of said decree should be set aside. A rule to show cause was issued, to which return has been made, and from the petition and return the following facts appear:

On or about January 15, 1907, James Pollitz brought suit in the Supreme Court of the State of New York against the Wabash Railroad Company and others to declare illegal and void certain securities of the Railroad Company issued in exchange for debenture bonds pursuant to a plan complained of as injurious to the stockholders, and for a reëxchange, and in default thereof for an accounting by the defendants with respect to the new securities which had been issued.

On January 25, 1907, the Railroad Company caused the case to be removed to the Circuit Court of the United States for the Southern District of New York on the ground that there was a separable controversy between it as a citizen of the State of Ohio and the complainant, a citizen of the State of New York.

The complainant moved to remand the cause, and on February 21, 1907, the motion was denied. Thereupon application was made to this court for a writ of mandamus to compel the remand and the petition was denied. *In re James Pollitz*, 206 U. S. 323.

After the removal of the cause the defendants demurred to the bill of complaint, the Trust Company demurring separately, and all the demurrers were overruled, save that of the Trust Company which was sustained. A decree was entered on January 10, 1908, which, after overruling the other demurrers, provided as follows:

"Ordered, adjudged and decreed, that the demurrer of the defendant the Metropolitan Trust Company of the

City of New York, be, and the same hereby is, sustained, and that the bill of complaint be, and the same hereby is dismissed as to the defendant the Metropolitan Trust Company of the City of New York, with costs."

The defendants other than the Trust Company then answered. An earlier suit, to which the Trust Company was not a party, was pending in the same court, with regard to the same transaction, and the court denying the motion of the complainant for leave to discontinue the first suit ordered the suits to be consolidated. After hearing a final decree was entered on February 23, 1909, dismissing the bill in each suit upon the merits.

The complainant then appealed to the Circuit Court of Appeals, but no review was sought of the decree of January 10, 1908, dismissing the bill in the second suit as against the Trust Company; and the Trust Company was not cited and did not in any way become a party to the appeal.

On February 18, 1910, the Circuit Court of Appeals decided that there was not a separable controversy between the complainant and the Railroad Company, and that the motion to remand should have been granted. The court accordingly reversed the final decree with direction to the Circuit Court to permit the complainant to discontinue the first cause and to remand the second cause to the Supreme Court of the State of New York.

Thereupon, on February 28, 1910, an order for remand was entered in the Circuit Court, which contained the following provision as to the Trust Company:

"And it appearing that the defendant Metropolitan Trust Company duly demurred to the complaint and that such demurrer was sustained and judgment entered January 10, 1908, dismissing the complaint as to said defendant which has not been appealed from or reversed,

"Ordered, adjudged and decreed that this judgment remanding said cause to the Supreme Court of the State

of New York shall not apply to said defendant Metropolitan Trust Company."

On March 21, 1910, the complainant moved in the Circuit Court to vacate the decree entered January 10, 1908, and to remand the cause as to the Trust Company. The latter appeared specially and objected to the jurisdiction of the court. The court granted the motion to vacate the decree and denied the motion to remand the cause as to the Trust Company, without prejudice, upon the ground that the application for such relief should be made to the judge who entered the order to remand as to the other defendants.

The Trust Company then applied to this court for a writ of prohibition or mandamus, as stated.

Mr. Tompkins McIlvaine, with whom *Mr. Henry B. Closson* was on the brief, for petitioner:

On the face of the record the Circuit Court was without power or jurisdiction to enter any order affecting the rights of petitioner under the final judgment after the term at which said judgment was rendered had expired. *Bronson* v. *Schulten*, 104 U. S. 410; Rolle's Abridgment, p. 749. See also *Cameron* v. *McRoberts*, 3 Wheat. 590; *Phillips* v. *Negley*, 117 U. S. 665; *Wetmore* v. *Karrick*, 205 U. S. 141.

Whether the Circuit Court has any inherent power to at any time vacate a judgment for want of jurisdiction to enter it is immaterial in this case, since it appears on the face of the record that diversity of citizenship existed between the plaintiff and the removing defendant, who asserted that a separable, removable controversy existed between them. The determination of whether such controversy existed was a justiciable question to be decided by the Circuit Court. The Circuit Court, in the exercise of its proper jurisdiction, did determine that such a controversy existed, which determination, being

unmodified and unreversed, as against the petitioner, is binding and conclusive as to it and cannot be treated as a nullity. *In re Winn*, 213 U. S. 458, distinguishing *Ex parte Nebraska*, 209 U. S. 436; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207. See also *Skillern's Executors* v. *May's Executors*, 6 Cr. 266; *McCormick* v. *Sullivan*, 10 Wheat. 192; *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Dowell* v. *Applegate*, 152 U. S. 327; *Re Pollitz*, 206 U. S. 323.

Where plainly and on the face of the record the Circuit Court is assuming to act beyond its power and jurisdiction, prohibition or mandamus is an appropriate remedy for one who has objected to the jurisdiction improperly assumed to be exercised. As to prohibition see *In re Huguley Mfg. Co.*, 184 U. S. 297, 301; *Smith* v. *Whitney*, 116 U. S. 167; *In re Rice*, 155 U. S. 396; *In re Chetwood*, 165 U. S. 443; *Ex parte Joins*, 191 U. S. 93. As to mandamus see *Re Winn*, 213 U. S. 458; *Ex parte Bradley*, 7 Wall. 364; *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Wisner*, 203 U. S. 449; *Re Metropolitan Ry. Receivership*, 208 U. S. 90; *Matter of Dunn*, 212 U. S. 374.

Mr. J. Aspinwall Hodge, appearing by appointment of Judge Ward, United States Circuit Judge, in opposition to the applications:

This court has no power to issue a writ of prohibition, in any case, except where the court below is proceeding as a Court of Admiralty.

The writ never includes the prohibition of an act already completed. *Ex parte Christy*, 3 How. 292; *Ex parte Easton*, 95 U. S. 68, 72.

The writ of mandamus cannot be used to compel the Circuit Court to take jurisdiction of a cause which it has decided, through its Court of Appeals, it has no

jurisdiction to consider, owing to a failure to show diverse citizenship between the necessary parties.

The conclusion of the Circuit Court that the cause should be remanded is not reviewable here by appeal or writ of error or by mandamus. *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Missouri Pac. R. R.* v. *Fitzgerald*, 160 U. S. 556, 581.

A motion in the nature of a writ of error *coram vobis* "is the exercise of jurisdiction in the court below which does not admit of revision in this tribunal." *Legerwood* v. *Picket*, 15 Fed. Cas. 132; *S. C.*, 1 McLean, 143; *S. C.*, 7 Pet. 144, 148.

The writ of mandamus cannot perform the office of a writ of error. *In re Rice*, 155 U. S. 396, 403, citing *American Construction Co.* v. *Jacksonville Ry. Co.*, 148 U. S. 372, 379; *Ex parte Loring*, 94 U. S. 418; and see *Ex parte Newman*, 14 Wall. 152.

An order or decree sustaining the demurrer of one of several defendants, is not such a final decision as gives the right of appeal to the complainant. *In re Hohorst*, 148 U. S. 262; *In re Atlantic City R. R.*, 164 U. S. 633; *In re Pollitz*, 206 U. S. 323, 332; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.

The Metropolitan Trust Company was not a necessary party to the cause, although a proper party.

The court may vacate a judgment, after the term has expired during which it was entered, and its power so to do is not dependent upon the issue of a formal writ, or the institution of an action in equity; but in a proper case relief can be obtained by service of a notice of motion. *Pickett* v. *Legerwood*, 15 Fed. Cas. 132; *S. C.*, 7 Pet. 142, 147; *Ferris* v. *Douglass*, 20 Wend. 626; cited with approval in *Wetmore* v. *Karrick*, 205 U. S. 141, 151.

Whether the order of January 10, 1908, was final or interlocutory, and whether the Trust Company was a necessary, or only a proper, party, no error was committed,

by the Judge of the Circuit Court, in granting complainant's motion to vacate that order, or decree, on the suggestion or motion of complainant, in view of the mandate of the Circuit Court of Appeals establishing the fact that the diverse citizenship did not exist, which was necessary to give jurisdiction to the court to enter the decree.

The entry of a void judgment does not dismiss the defendant from the court; only a valid final judgment can do that. *City of Olney* v. *Harvey*, 50 Illinois, 453. Much less does the entry of a void interlocutory decree dismiss a defendant. *United States* v. *Wallace*, 46 Fed. Rep. 569; see also 30 Cent. Dig., title Judgment, § 739, and Black on Judgments, § 307; *Baker* v. *Barclift*, 76 Alabama, 414, 417; *Shuforth* v. *Cain*, 1 Abb. U. S. 302; *Re Hohorst*, 150 U. S. 653.

See *Hoyt* v. *Hammekin*, 14 How. 334, 346, invalidating the use of a notice of motion in lieu of a writ of error *coram vobis*. *Mills* v. *Dickson*, 6 So. Car. Law Rep. 487; *Dederick* v. *Richley*, 19 Wend. 108; *Ex parte Crenshaw*, 15 Pet. 119; *Lee* v. *Dick*, 10 Pet. 482; *Wetmore* v. *Karrick*, 205 U. S. 141; *Phillips* v. *Negley*, 2 Mackey (D. C.), 248; *S. C.*, 117 U. S. 665, distinguished, and see also *Bronson* v. *Schulten*, 104 U. S. 401; *Phillips* v. *Negley*, 117 U. S. 665; *In re College Street*, 11 R. I. 472; *Critchfield* v. *Porter*, 3 Ohio, 518, 522.

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

When the complainant moved to remand the cause the Circuit Court had jurisdiction to determine whether or not a separable controversy existed which justified the removal from the state court. Its decision was an act within its judicial authority, subject to review upon appeal after final decree. On the application made to

this court in *In re Pollitz*, 206 U. S. 323, for a writ of mandamus to compel the remand, the court said (pages 331, 333):

"The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court, to which the decision was by law committed.

"The application to this court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision, although in its nature a judicial act, and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

* * * * * * * *

"If the ruling of the Circuit Court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582." See, also, *Ex parte Nebraska*, 209 U. S. 436; *In re Winn*, 213 U. S. 458, 468; *Chesapeake & Ohio Railway Co.* v. *McCabe, Admx.*, 213 U. S. 207.

Having decided to retain the cause, the Circuit Court proceeded, as it was entitled to proceed, to try the issues. It heard the demurrers to the bill and overruling the others it sustained that of the Metropolitan Trust Company. No leave was granted to amend the bill and a decree was entered dismissing it as against the Trust Company. When, after final decree dismissing the bill as against the other defendants, the complainant appealed to the Circuit Court of Appeals, the decree in favor of the Trust Company was not brought before the appellate

court for review and the Trust Company was not a party to the appeal.

The decision of the Circuit Court of Appeals, in reversing the final decree and in directing the remand to the state court, was of course subject to the necessary limitation that it could apply only to the parties who had been brought before that court. It had no other purport. It is one of "the ordinary rules respecting appeals" that "all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal." *Davis* v. *Mercantile Trust Co.*, 152 U. S. 590, 593. See also *Terry* v. *Abraham*, 93 U. S. 38; *Wilson* v. *Kiesel*, 164 U. S. 248, 251. If a party has not had this opportunity he is not bound; as to him an essential element of appellate jurisdiction is lacking. Accordingly, when the decree was entered in the court below upon the mandate of the Circuit Court of Appeals, the Trust Company was expressly excepted from its operation.

It is in this light that the subsequent proceeding in the Circuit Court must be examined. If that court had jurisdiction to vacate the decree of January 10, 1908, in favor of the Trust Company, it was by virtue of its own control over the decree and not by force of the mandate of the appellate court. Nor could the court exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered; for in this case that term had ended before the motion was made. *Cameron* v. *M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald* v. *United States*, 12 Pet. 488; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Ayres* v. *Wiswall*, 112 U. S. 187, 190; *Phillips* v. *Negley*, 117 U. S. 665, 674. The motion was not made for the purpose of correcting a clerical error or an inadvertence. After the term had expired, and after the complainant had exercised his right of appeal to procure a review of the errors of which he

desired to complain, it was sought to set aside a decree which stood unreversed and by which the Trust Company had been dismissed from the cause.

To reach this result the Circuit Court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and the court held that it must be treated as a nullity. But the decree cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable controversy existed, and hence not merely committed error but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this court upon the application for a writ of mandamus in *In re Pollitz*, *supra*. The reversal by the Circuit Court of Appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less "a judicial act, and within the scope of its jurisdiction and discretion;" and as that reversal and direction did not affect the Trust Company the decree in its favor remained in full force.

The question is not with respect to the mere form of the application which was made to the Circuit Court for the purpose of setting the decree aside. When the motion was made the court was without jurisdiction to vacate the decree. As the court, in granting the motion, exceeded its power, mandamus is the appropriate remedy. *Ex parte Bradley*, 7 Wall. 364; *In re Winn*, 213 U. S. 458.

The rule is made absolute and the writ of mandamus awarded.

HOOE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 13. Argued October 25, 26, 1910.—Decided November 28, 1910.

Congress, proceeding under the Constitution, declares what amount shall be drawn from the Treasury in pursuance of an appropriation.

Heads of departments cannot by express or implied contract render the Government liable for an amount in excess of that expressly appropriated by Congress for the subject-matter of the contract.

A claim against the United States for a specific amount of money which is not expressly or by necessary implication authorized by a valid enactment of Congress cannot be said to be founded on the Constitution.

When an officer of the United States takes or uses private property without authority of law he creates no condition under which the Government is liable by reason of its constitutional duty to make compensation. If private property has been taken or used by an officer of the United States without authority of law the remedy is not with the courts but with Congress alone.

A claim for such compensation does not rest on the Constitution, and as an unauthorized act of the officer does not create a claim against the United States, the Court of Claims has no jurisdiction thereof under the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505.

One renting a building to a department of the Government and receiving the entire appropriation for rent for such department has no claim against the Government for any amount in excess of the appropriation, even though he demands more and though he expressly excepts a part of the building from the lease and the department actually occupies the part reserved, nor has the Court of Claims jurisdiction of such a claim as one arising under the provision of the Constitution that private property shall not be taken without compensation.

43 C. Cl. 245, affirmed.

THE facts, which involve the validity of a claim for rent of premises occupied by a department of the United States, the power of an officer of the United States to make contracts in excess of amount appropriated by Congress, and the jurisdiction of the Court of Claims, are stated in the opinion.

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

The Government of the United States has the absolute power to take private property for public use, just compensation being made. The Secretary of the Interior and the Civil Service Commissioners were and are officers of the United States charged with the performance of official duties. The United States acted by and through them. The actions of the Secretary are not to be regarded as his personal acts but as the acts of the Government. *United States* v. *Lynah*, 188 U. S. 465, 466.

The House and Senate were fully informed as to what the Secretary of the Interior and the Commission had done.

There is ample legislative authority for all that was done. Act of January 16, 1883, § 4, 22 Stat. 403, makes it the duty of the Secretary to provide suitable and convenient accommodations for the Commission and he could speak and act through his subordinates or through the officials of the Commission. *Parish* v. *United States*, 100 U. S. 504; *McElrath* v. *United States*, 102 U. S. 436; *McCollum's Case*, 17 C. Cl. 101, 102.

The United States, by its agents, proceeding under the authority of an act of Congress, took appellants' property for public uses, and it thereby became obligated, by virtue of the Constitution, to make just compensation, and this action lies for the value of the use and occupancy of their property. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656; *Great Falls Mfg. Co.* v. *United States*, 124 U. S. 581, 597; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 324; *United States* v. *Lynah*, 188 U. S. 445, 460.

Neither the language of the general appropriation acts nor of §§ 3679 and 3732, Rev. Stat., nor of the acts of June 22, 1874, 18 Stat. L. 144, and March 3, 1877, 19 Stat. L. 370, bars recovery. No act of Congress can defeat or nullify the obligation contained in the Fifth Amendment.

An appropriation act fixes the amount to be paid by the Government in a certain fiscal year, but it does not strike to earth a constitutional obligation by failing to provide enough money to discharge that obligation. *Shipman's Case*, 18 C. Cl. 138, 147; *Graham's Case*, 1 C. Cl. 381; *Collins' Case*, 15 C. Cl. 22, 35; *Briggs' Case*, 15 C. Cl. 48; *Parsons' Case*, 15 C. Cl. 246.

When an act authorizes the officer to do a particular thing without restriction as to cost, and an inadequate appropriation is made, and the same thing done inures to the benefit of the Government, or is accepted by the proper public officers, an action will lie for the reasonable value thereof. *Shipman's Case*, 18 C. Cl. 138, 146; *Freedman's Bank Case*, 16 C. Cl. 19, 29.

The statutes quoted by the court below which prohibit the making of express contracts, apply to officials and not to citizens, and do not apply to those cases or legal rights which arise from the acts of public officers with reference to property in carrying on the business of the Government entrusted to them. *N. Y. C. & H. R. R. R. Case*, 21 C. Cl. 468, 472; *Semmes & Barber Case*, 26 C. Cl. 129; *Rives' Case*, 28 C. Cl. 249; *Smoot's Case*, 38 C. Cl. 418, 427.

Act of January 16, 1883, is a special or particular act, and is an exception to general acts. *Rodgers* v. *United States*, 185 U. S. 83, 87–89; *Ex parte Crow Dog*, 109 U. S. 556, 570; *N. Y. C. & H. R. R. R. Case*, 21 C. Cl. 468; § 3732, Rev. Stat.; see also *McCollum's Case*, 17 C. Cl. 92; *Shipman's Case*, 18 C. Cl. 147; *Dougherty's Case*, 18 C. Cl. 503; *Beaman's Case*, 19 C. Cl. 9.

Where there is no express contract for the use of property in present occupation by the Government, the obligation to make just compensation is fixed by the Fifth Amendment, and it attaches *eo instanti*. *Semmes & Barber Case*, 26 C. Cl. 119.

The obligation to make compensation is constitutional

and does not depend on a contract made by an officer. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656; *Great Falls Mfg. Co.* v. *Attorney-General*, 124 U. S. 581, 597; *United States* v. *Russell*, 13 Wall. 623, 627, 630; *Bauman* v. *Ross*, 167 U. S. 548, 574; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 327.

The Secretary of the Interior had no power to make an implied contract with owners of this property. Section 3744, Rev. Stat.; *Clark* v. *United States*, 95 U. S. 539, 541; *South Boston Iron Co.* v. *United States*, 118 U. S. 37, 42.

Mr. Assistant Attorney-General John Q. Thompson, with whom *Mr. Charles F. Kincheloe* was on the brief, for the United States:

The occupation and use of the basement was a tort, for which there was no right of recovery. It was done without authority. The Government is not liable for unauthorized acts of its officers or agents. *Bank of United States* v. *Owens*, 2 Pet. 527, 539; *Johnson* v. *United States*, 5 Mason, 441; *Hunter* v. *United States*, 5 Pet. 173, 187; *Gibbons* v. *United States*, 8 Wall. 269, 274; *Filor* v. *United States*, 9 Wall. 45, 48; *Whiteside* v. *United States*, 93 U. S. 247, 256.

Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. *Hart* v. *United States*, 95 U. S. 316, 318; *Hawkins* v. *United States*, 96 U. S. 689, 691; *Langford* v. *United States*, 101 U. S. 341; *Moffatt* v. *United States*, 112 U. S. 24, 31; *Camp* v. *United States*, 113 U. S. 648, 653; *German Bank* v. *United States*, 148 U. S. 573, 579; *Hume* v. *United States*, 132 U. S. 406, 414. This bars recovery in cases founded upon the Constitution, as well as cases based upon implied contract, independent of the Constitution. *Hill* v. *United States*,

149 U. S. 593, 597; *Schillinger* v. *United States*, 155 U. S. 163; *Bigby* v. *United States*, 188 U. S. 400, 407, distinguishing *United States* v. *Russell*, 13 Wall. 623; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *The Lynah Case*, 188 U. S. 445; and a decision sustaining this demand would place any executive officer of the Government above Congress and the law in the important function of the expenditure of governmental funds for public purposes; and if there were no other defense, the petition should be dismissed on the ground that a construction of the law and judgment in favor of the appellants would be against public policy. Page on Contracts, § 326; *Randall* v. *Howard*, 2 Black, 585; *Hannay* v. *Eve*, 3 Cr. 242; *Woodstock Iron Co.* v. *Exten. Co.*, 129 U. S. 643; *Gibbs* v. *Gas Co.*, 130 U. S. 408.

No implied obligation for additional rent could arise as the rate of rent that could be paid for quarters for the Commission was expressly limited by law to the amounts appropriated by Congress and paid the appellants.

Receipt of payment, without protest, is conclusive against a claim for additional pay, and there can be no recovery of additional rent even if it should be held that the tenancy was under implied contract, entirely independent of the express contracts, instead of a hold-over tenancy, under the terms and conditions of the preceding express contracts. *United States* v. *Childs*, 12 Wall. 232; *Francis* v. *United States*, 96 U. S. 354, 359; *Murphy* v. *United States*, 104 U. S. 464; *De Arnaud* v. *United States*, 151 U. S. 483; *Garlinger* v. *United States*, 169 U. S. 316, 322; *Chicago, Mil. & St. P. Ry. Co.* v. *Clark*, 178 U. S. 353, 368; *Newman* v. *United States*, 81 Fed. Rep. 122.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellants, plaintiffs below, seek to recover from the United States the sum of $9,000, the amount, which

they allege, is due them on account of the occupation and use, by the Civil Service Commission, of certain premises in the city of Washington, District of Columbia.

The finding of fact by the Court of Claims—using largely the words of the finding—may be summarized as follows:

On the tenth day of July, 1900, the Secretary of the Interior, proceeding under the appropriation act for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30th, 1901 (act of April 17, 1900, 31 Stat. 125, c. 192), made a written agreement with plaintiffs for the leasing and renting to the Government for the use of the Civil Service Commission, of a certain building on E and Eighth streets, in Washington, "except the basement thereof," for the period commencing August 1st, 1900 and ending June 30th, 1901, at the rate of $\$333.33^{1}/_{3}$ per month, or $4,000 for the year—the right being reserved to the Government to terminate the lease, after thirty days' written notice at the end of any calendar month.

The Commission on August 1st, 1900, took possession and remained in exclusive possession of the building, including its basement, until the bringing of this suit. The amount appropriated by Congress for the rent of offices for the Commission for the year ending June 30th, 1901, was $4,000, one-twelfth of which was expended for such rent for July, 1900.

On the third of March, 1901, Congress appropriated for the rent of quarters for the Commission the sum of $4,000 for the fiscal year ending June 30th, 1902. 31 Stat. 1000–1, c. 830, March 3, 1901. The Secretary of the Interior, shortly after the beginning of that year, proposed to the plaintiffs a renewal of the lease for that year. But the plaintiffs expressed their unwillingness "to rent the said building for another year at the rate of $4,000 per annum," or to rent the entire building, including the basement, then occupied by the Commission,

at a rental less than $6,000 per annum. Without further action, on either side, "the defendants continued in possession of said building and basement during said year, paying," however, to the plaintiffs $4,000, the rent specified in the lease for the first year, to wit, $4,000.

In his estimates submitted for appropriations by Congress for the fiscal year ending June 30th, 1903, the Secretary named $6,000 "for rent of quarters for the Civil Service Commission." As the general legislative, executive and judicial appropriation bill for that year did not, as it passed the House of Representatives, include that sum, the plaintiffs' agent, in writing, informed the chief clerk of the Interior Department that unless the Senate fixed the rent at $6,000 the plaintiffs would ask possession of the property at the earliest convenient time. Of this attitude of the plaintiffs the Senate was informed by plaintiffs' agent. He appeared before the House Committee on Appropriations, and by the Secretary of the Interior transmitted the letter of plaintiffs to the Senate Committee on Appropriations. Congress, however, *refused to increase the appropriation to* $6,000, and for the fiscal year ending June 30th, 1903, appropriated "for rent of buildings for the Department of the Interior, namely, . . . For . . . Civil Service Commission, four thousand dollars." 32 Stat. 162, Pt. 1, c. 594, April 28, 1902. No further action was taken by either party in relation to an increase of rent or the demanding of possession, and the United States continued in possession of the property, including the basement, for that fiscal year, paying rent at the rate of $4,000 per year. Although the Secretary of the Interior estimated an increase of $2,000 for quarters of the Civil Service Commission for the fiscal year ending June 30th, 1904, Congress appropriated only $4,500. 32 Stat. 854, Pt. 1, c. 755, February 25, 1903. In consequence of this increase the Secretary sought to rent from the plaintiffs all the "build-

ing and premises for the use of the Civil Service Commission for the sum of $4,500 appropriated," but plaintiffs refused to do that. The Secretary finally, August 18th, 1903, made a lease from claimants for all of said building, "except the basement," for the fiscal year ending June 30th, 1904, at the rate of $4,500 per year.

For the fiscal year ending June 30th, 1905, Congress, March 18th, 1904, appropriated $4,500 for the rent of quarters for the Commission. 33 Stat. 85, Pt. 1, c. 716, March 18, 1904. In accordance with that appropriation the Secretary proposed to the plaintiffs, in writing, to renew the lease of August 18th, 1903, for the fiscal year ending June 30th, 1905, at the rate of $4,500 per annum. The plaintiffs took no action on this proposal, except to write to the Secretary requesting that the basement of the building, which had not been included in either of the leases to the Government, be included "in the lease at the rate of 30 cents per square foot for its floor space." Neither party took any further steps in reference to the renewal of the lease or for an increase of rental for the fiscal year ending June 30th, 1905, and the claimants were paid rent for that year at the rate of $4,500 as provided by the appropriation and as specified in the lease for the preceding year. A like appropriation of $4,500 was made for rent of quarters for the Commission for the fiscal year 1906, and that body, without any express renewal of the lease for that year, continued in occupation of the entire building, up to August 1st, 1905, for which the claimants have been paid at the rate of $4,500 per year.

The Court of Claims further found: "Although the claimants never rented to the Government for the use of the Civil Service Commission, or for any other purpose, that part of the basement of said building not occupied by heating and elevator plants and equipment thereof, yet the Civil Service Commission took possession of this portion of said basement and has continually oc-

cupied and used the same from the 1st day of August, 1900, until the bringing of this action, August 1, 1905;" and in a letter to the Acting Secretary of the Interior, dated November 28, 1904, relative to the matter of a renewal of the Government's lease for the building for that fiscal year, the claimants, among other things, called attention to the fact that the basement of the building was then fully occupied by the Civil Service Commission. The fair rental value of that portion of the basement occupied and used as aforesaid was $400 per year, and the rental value of the entire building, including the basement, was not less than $6,000 per year. "During the time that the defendants have occupied and used said building and basement belonging to the claimants, *the claimants have receipted for rent for the same in full*, except for the basement, which has been specially excluded from each of said receipts given by the claimants. With the exception of this exclusion of the basement from said receipts, it does not appear that any other protest was ever made by the claimants that said payments were not in full for the rent legally due to them for said building. The claimants, however, repeatedly insisted that the defendants were not paying enough rent for said building, and on one occasion asked for extra rent for said basement, as heretofore found."

The court below directed the petition to be dismissed and judgment to be entered for the Government. That was accordingly done.

The pleadings and facts indicate that the claim of the appellants is divided into two parts; one, arising out of the occupancy and use by the Civil Service Commission of the building above the basement; the other, for the occupancy and use by that body of the basement.

Let us, at the outset, inquire as to the circumstances under which an officer of the United States, whether the

Head of a Department or a subordinate, may or may not, by his acts, impose liability upon the Government, in the absence of authority from Congress. The conclusion we have reached upon that inquiry is controlling.

Looking at the statutes in force at the time the transactions here in question occurred, we find that by § 3679 of the Revised Statutes, it was provided that "no department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations;" and by § 3732, that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

An act of Congress of June 22d, 1874, provided that "hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall have been made in terms by Congress." 18 Stat. 133, 144, c. 388. Again, by the deficiency appropriation act of March 3d, 1877, it was provided that "hereafter no contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of building." 19 Stat. 363, 370, c. 106.

The above provisions were all in force when the Civil Service Commission was created. By the act creating that tribunal it was provided that "it shall be the duty

of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said commission." 22 Stat. 403, 405, c. 27, January 16, 1883.

We have seen that the occupancy by the Civil Service Commission of the plaintiffs' building commenced August 1st, 1900. Now, the general appropriation act for the legislative, executive and judicial expenses of the Government, covering the fiscal year ending June 30th, 1901, opened with the clause providing that "the following sums be and the same are hereby, appropriated out of any money in the Treasury not otherwise appropriated, in *full* compensation for the service of the fiscal year ending June 30th, 1901, *for the objects hereinafter expressed*, namely. . . . For rent of buildings for the Department of the Interior, namely, . . . Civil Service Commission, $4,000." 31 Stat. 86, 125, c. 192. Each appropriation act for subsequent fiscal years, covering the whole period of the occupancy by the Commission of the plaintiffs' building, opened with a similar provision. So that the plaintiffs and all others dealing with officers of the Government were distinctly advised as to the amount appropriated by Congress for any specified purpose, and knew, or are to be deemed to have known, that when they received such specified amount for the purpose named, it was intended by Congress to be in full compensation for the service rendered for the Government in that fiscal year. The plaintiffs received before the bringing of this suit the appropriation made by Congress specifically for rent of the building for the Civil Service Commission, during the entire period of the Commission's occupancy and use of it. We recall,

in this connection, the fact found by the court below, that the claimants' receipted bills recited that the amount paid to them was *in full* for the rent, *as fixed by the appropriation acts of Congress*—excepting always, it is true, the rent for the basement of their building. It is also true that the plaintiffs complained that the amount appropriated was inadequate, but they accepted and receipted for it *as the sum appropriated by Congress for purposes of rent for the Commission*, expecting or hoping, no doubt, that Congress would, in due time, remedy the wrong which, as they insisted, had been and was being done to them in respect both of the building and its basement.

But it is said in this connection that the act of 1883 made it the duty of the Secretary of the Interior to cause suitable rooms to be provided for the Commission, and as the plaintiffs' building was occupied and used by the Commission, for public purposes, with his knowledge and consent, the Government is under a liability to pay the claimants the reasonable value of such occupancy and use. This view cannot be accepted, except upon the theory that during the period in question it was within the power of the Secretary, by contract, in the matter of rent for a building for the Commission, to exceed the sum appropriated by Congress for that purpose. We reject that theory as inconsistent with the acts of Congress and therefore inadmissible. It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation. The statutes above referred to make it plain that the Secretary was without power to make any express contract for rent in excess of the appropriation made by Congress, particularly where, as here, Congress had taken care to say, in respect of each year's rent, that the appropriation shall be in *full* compensation for the specific purpose named in the appropriation act. It is equally

clear that the Secretary could not, by his acts, create a state of things from which, in the absence of legislation on the subject, an implied contract could arise under which the Government would be liable, by reason of its *constitutional* duty, to make just compensation for the use of private property taken for public purposes. In such a case the remedy is with Congress, and not with the courts. If an officer, upon his own responsibility and without the authority of Congress, assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the Government is concerned, and no legal obligation arises upon its part to meet its provisions. If the circumstances justify such a course, Congress in its discretion can intervene and do justice to the owner of private property used by officers of the Government in good faith for public purposes, although without direct legislative authority. The plaintiffs' remedy is in that direction.

What we have said is equally applicable to the claim of the plaintiffs for the reasonable value of the use of the basement of the building in question. Granting that the plaintiffs have not been paid for its use such sum as they are justly entitled to have received, we are still confronted with the facts heretofore referred to, that Congress has appropriated, each year of the Commission's occupancy, a specific sum in full for rent of buildings for the use of that body; that it has in effect prohibited the use of the public money, in excess of that sum for rent of buildings for that purpose; and that plaintiffs have already received the entire sums appropriated by Congress for rent. The conclusion necessarily follows that the Government cannot, in this case, be made liable to *suit*, either under an express or implied contract, to pay for the use of plaintiffs' property any amount in excess of the sums appropriated by Congress for that purpose.

But it is contended by the plaintiffs that their right to recover does not depend upon contract, expressed or implied, but upon the duty, expressly imposed by the Constitution, to make just compensation for private property taken for public use. In support of this view we are reminded that the Tucker act of March 3d, 1887, 24 Stat. 505, c. 359, for the first time, in express words, conferred on the Court of Claims jurisdiction to hear and determine claims against the Government "founded upon the Constitution of the United States." The claims here in question, it is argued, can be rested exclusively on the Constitution, without reference to any statute of the United States, or to any contract arising under an act of Congress. The argument is ingenious but it is unsound. It cannot be said that any claim for a specific amount of money against the United States is founded on the Constitution, unless such claim be either, expressly or by necessary implication, authorized by some valid enactment of Congress. The creation of a Civil Service Commission, providing a building or rooms for its use, and the amount to be paid from time to time by the Government as rent for such building and rooms, are all matters within the complete control of Congress. It is the Constitution which places these matters under the control of Congress. If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the Government "founded upon the Constitution." It would be a claim having its origin in a violation of the Constitution. The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers

proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government. So that whether we look at the jurisdiction of the court below, in respect either of claims *alleged to be* founded upon the Constitution or to arise from contract, the plaintiffs cannot maintain this *suit* against the Government; for, they have received the entire sums which Congress appropriated to be paid out of the Treasury on account of rent of buildings or quarters for the Civil Service Commission.

There are other aspects of the case to which the elaborate arguments of counsel have been directed. We deem it unnecessary to notice them in this opinion. Nor do we deem it necessary to follow them in their extended and able discussion of the authorities.

The judgment must be affirmed.

It is so ordered.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY *v.* CITY OF CONNERSVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 19. Submitted October 25, 1910.—Decided November 28, 1910.

A railway corporation accepts its franchise from the State subject to the condition that it will conform at its own expense to any regulations as to the opening or use of streets which are reasonable and proper and have for their object public safety and convenience and which may, from time to time, be established by the municipality,

within whose limits the company operates, proceeding under legislative authority.

The power, whether called police, governmental or legislative, exists in each State, by appropriate legislation not forbidden by its own, or the Federal, constitution to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public good and convenience. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 173 U. S. 285, 298.

A railway company is not deprived of its property without due process of law either under the Fifth or the Fourteenth Amendment because in a street opening proceeding it is not awarded, in addition to the value of the land taken, the cost of the new structure which must necessarily be erected to carry its right of way over the street, as required for the safety and convenience of the public.

170 Indiana, 316, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of proceedings of a street opening through a railway embankment, are stated in the opinion.

Mr. John B. Elam, with whom *Mr. James Fesler*, *Mr. Harvey J. Elam* and *Mr. Reuben Conner* were on the brief, for plaintiff in error:

A right was claimed under the United States Constitution and the highest court of Indiana in its opinion expressly denied that right, hence this court has jurisdiction. *Haire* v. *Rice*, 204 U. S. 291; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Green Bay &c.* v. *Patten*, 172 U. S. 58.

The Fourteenth Amendment requires that when property is taken by power of eminent domain compensation must be made to the owner. *C., B. & Q. Ry.* v. *Chicago*, 166 U. S. 226.

When part of an entire property is taken under the power of eminent domain, the owner is entitled to compensation on account of what is taken and also for injury to what remains. *Chicago Ry. Co.* v. *Huncheon*, 130

Indiana, 529; *Chicago &c. Co.* v. *Hunter*, 128 Indiana, 213; *White* v. *Chicago Co.*, 122 Indiana, 317; *Rehman* v. *New Albany R. R. Co.*, 8 Ind. App. 200.

The measure of damages is the difference between the value of the entire property before the appropriation and of what remains immediately after such appropriation. *Sidener* v. *Essex*, 22 Indiana, 201; *Fifer* v. *Ritter*, 159 Indiana, 8; *Louisville &c. Co.* v. *Sparks*, 12 Ind. App. 410; *Sunnyside Co.* v. *Reitz*, 14 Ind. App. 478; *Lake Erie R. R. Co.* v. *Lee*, 14 Ind. App. 328.

When part of an entire property is taken under the power of eminent domain, the owner must be compensated for what is taken and for damages to that which remains, and unless this is done, such owner is deprived of his property without just compensation, without due process of law, and is denied the equal protection of the laws within the meaning of the Fifth and Fourteenth Amendments. *In re Street Opening* (Mich.), 26 N. W. Rep. 159; *Village* v. *Pere Marquette Co.* (Mich.), 102 N. W. Rep. 947; *Chicago &c. Co.* v. *Springfield &c. Co.*, 67 Illinois, 142; *St. Louis &c. Co.* v. *Springfield &c. Co.*, 96 Illinois, 274; *Chicago &c. Co.* v. *Jacobs*, 110 Illinois, 414; *Robb* v. *Maysville &c. Co.*, 60 Kentucky, 117; *Lake Shore &c. Co.* v. *Chicago &c. Co.*, 100 Illinois, 21; *Chicago &c. Co.* v. *Chicago*, 166 U. S. 226; *Commissioners* v. *Michigan &c. Co.* (Mich.), 51 N. W. Rep. 934; *Commissioners* v. *Canada &c. Co.* (Mich.), 51 N. W. Rep. 447.

When property of a railroad company is taken for another public use, the same rules as to compensation apply as in the case of an individual owner. *Lake Shore &c. Co.* v. *Chicago &c. Co.*, 100 Illinois, 21, 31; *Chicago &c. Co.* v. *Englewood &c. Co.*, 115 Illinois, 375, 384.

When property that has a peculiar value to the owner on account of its being devoted and adapted to a particular use is taken for a public use the owner should be compensated for such taking by assessing damages at

such value. *Ohio Valley Co.* v. *Keith*, 130 Indiana, 314; *Price* v. *St. Paul &c. Co.*, 27 Wisconsin, 98; *King* v. *Minneapolis &c. Co.*, 32 Minnesota, 224; *Dupuis* v. *Chicago &c. Co.*, 115 Illinois, 97; *Chicago &c. Co.* v. *Chicago &c. Co.*, 112 Illinois, 589; *Denver &c. Co.* v. *Griffith* (Colo.), 31 Pac. Rep. 171; *Cincinnati &c. Co.* v. *Longworth*, 30 Ohio St. 108; *Shenango &c. Co.* v. *Braham*, 79 Pa. St. 447; Sutherland on Damages, § 1074.

When a street is opened, as this was, through an embankment which is part of a railroad right of way, the damages caused to the railroad company should include the expense of the changes necessarily and proximately resulting from such removal. *Baltimore &c. Co.* v. *State*, 159 Indiana, 510; *Cincinnati &c. Co.* v. *City*, 68 Ohio St. 510; *City* v. *Grand Rapids &c. Co.* (Mich.), 33 N. W. Rep. 15; *St. Louis &c. Co.* v. *Springfield &c. Co.*, 96 Illinois, 274; *Colusa County* v. *Hudson*, 85 California, 633; *Terre Haute &c. Co.* v. *Crawford*, 100 Indiana, 550; *Lake Erie &c. Co.* v. *Commissioners*, 63 Ohio St. 23; *Morris &c. Co.* v. *City* (N. J.), 43 Atl. Rep. 730.

The expense of substitution of a bridge to carry a track over a street, which will in no way add to safety or convenience is not one that a railroad company can be required to incur under the exercise of the police power. If the damages awarded for the street opening do not include the expense of such structure, then its property is taken without just compensation and without due process of law. *Lake View* v. *Rose &c. Co.*, 70 Illinois, 191; *Ritchie* v. *People*, 155 Illinois, 98; *Chicago &c. Co.* v. *City*, 140 Illinois, 309; *Morris &c. Co.* v. *City* (N. J.), 43 Atl. Rep. 730; *Lake Erie &c. Co.* v. *Shelley*, 163 Indiana, 36; *Chicago &c. Co.* v. *People*, 200 U. S. 561; Lewis on Eminent Domain, § 6.

The following authorities are to be distinguished: *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *North-*

ern &c. Co. v. *Minnesota*, 208 U. S. 583; *Lake Erie &c. Co.* v. *Shelley*, 163 Indiana, 36; *So. Ind. Railway Co.* v. *McCarrell*, 163 Indiana, 469; *Chicago &c. Co.* v. *State*, 158 Indiana, 189; *Chicago &c. Co.* v. *Zimmerman*, 158 Indiana, 189; *Vandalia &c. Co.* v. *State ex rel.*, 166 Indiana, 219; *Chicago &c. Co.* v. *State*, 159 Indiana, 237.

The statute of the State of Indiana upon which the Supreme Court of Indiana relied cannot be so construed without making it conflict with the Fourteenth Amendment. Every railroad corporation in Indiana possesses by statute the general powers, subject to liabilities and restrictions, to construct its road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises. 2 Burns' R. S., 1901, § 5153; *State ex rel.* v. *Indianapolis &c.*, 160 Indiana, 145.

Mr. R. N. Elliott, with whom *Mr. Hyatt L. Frost*, *Mr. Charles F. Jones* and *Mr. David W. McKee* were on the brief, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The Common Council of Connersville, Indiana, adopted a resolution declaring that a railway embankment, maintained by the Cincinnati, Indianapolis and Western Railway Company, the plaintiff in error, across Grand Avenue, in that city, obstructed passage between the north and south ends of the avenue; also, that such avenue should, as a matter of public necessity, be opened as a public street through said railroad embankment.

The question of the expediency, advisability and public utility of opening up the avenue through the embankment was thereupon referred to the City Commissioners, and to the Council's Committee on Streets, Alleys and Bridges, for action. Upon consideration of the matter at a time of which public notice was duly given, and after an examination of the ground sought to be appropriated, the Commissioners reported that the opening of the avenue through the railroad embankment would be of public utility. The report stated that the real estate to be appropriated by the opening of the avenue was so much of the railroad embankment as extended the entire width of the avenue, as then used and opened, immediately north and south of such embankment. The tract sought to be appropriated was 66 feet square and was occupied by the embankment. The Commissioners found and reported that no real estate would be damaged by the proposed opening other than that sought to be appropriated, and that the real estate abutting on both sides of the avenue would be benefited by the proposed opening of the street. There was a hearing—after due notice to all parties concerned, including the railroad company—of the question of injuries and benefits to the property to be appropriated, and of the benefits and damages to all real estate resulting from the opening of the avenue. The result of the hearing was a report by the City Commissioners in favor of the opening, and the value of the real estate sought to be appropriated was estimated at $150.

The City Council adopted the report of the Commissioners, and appropriated for the purpose of opening Grand Avenue the real estate described in the report as necessary to such opening—the property here in question being a part of that to be appropriated. The Council also directed that a certified copy of so much of the report as assessed benefits and damages be delivered to the

Treasurer of the city, and copied in full on the records of the Council with the minute of the adoption of the resolution describing the real estate appropriated.

There were various exceptions by the railway company and by the city, followed by a trial before a jury which found for the railway company and assessed its damages at $800. A motion by the company for a new trial having been overruled and a judgment entered for the defendant company, in the state court of original jurisdiction, the case was carried to the Supreme Court of Indiana (which affirmed the judgment) and it is now here for a reëxamination as to certain Federal questions raised by the railway company.

It was not disputed at the trial that the improvement of Grand Avenue, as ordered by the city of Connersville, made it necessary to construct a bridge over and across the avenue as reconstructed.

The trial court gave the following, among other instructions, to the jury: "It being the duty of the defendant railroad company to construct and keep in safe and good condition all highway crossings, the defendant in this action would not be entitled to any damages for constructing the necessary crossing nor abutments and bridge for supporting its railroad over and across said street when constructed."

It refused to give this instruction asked by the railway company: "If the appropriation of the defendant's property under the proceedings set forth in this case will necessarily and proximately cause expense to the defendant in constructing a bridge to carry its railroad over the proposed street in order that its railroad tracks may have support and its railroad may be operated as such, and as an entire line, and such construction of said bridge will be required for no other purpose, then, in determining the defendant's damages, you should consider the expense of constructing such bridge."

The railway company duly excepted to this action of the trial court, but the Supreme Court of Indiana held that there was no error.

There are twenty assignments of error, accompanied by an extended brief of argument. In addition, a great many authorities are cited by the learned counsel for the railway company. If we should deal with each assignment and argument separately, and enter upon a critical examination of the authorities cited, this opinion would be of undue length. We think the case is within a very narrow compass. This seems to be the view of learned counsel of the plaintiff in error, for, after a general reference to various questions raised at the trial, counsel say that "the case upon final analysis reduces itself to the question whether the police power [of the State] can be so applied as to require the railroad company to build the bridge without compensation."

If the railway company was not entitled to compensation on account of the construction of this bridge—whether regard be had to the Fifth or the Fourteenth Amendments of the Constitution or to the general reserved police power of the State—then it is clear that the jury were not misdirected as to what should be considered by them in estimating the damages which, under the law, the railway company was entitled to recover.

The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court; particularly by *C., B. & Q. Railway* v. *Drainage Com'rs*, 200 U. S. 562, 582, 584, 591; *N. O. Gas Co.* v. *Drainage Com'rs*, 197 U. S. 453; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 571; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 254; *Transportation Co.* v. *Chicago*, 99 U. S. 635. See also *Union Bridge Co.* v. *United States*, 204 U. S. 364. The railway company accepted its franchise from the State,

subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority—within whose limits the company's business was conducted. This court has said that "the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good." *Lake Shore &c. Co.* v. *Ohio*, 173 U. S. 285, 297.

Without further discussion, and without referring to other matters mentioned by counsel, we adjudge upon the authority of former cases, that there was no error in holding that the city could not be compelled to reimburse the railway company for the cost of the bridge in question.

Judgment affirmed.

NATIONAL BANK OF COMMERCE *v.* DOWNIE, TRUSTEE.

SEATTLE NATIONAL BANK *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 31, 32. Argued November 3, 1910.—Decided November 28, 1910.

The prohibition of § 3477, Rev. Stat., against assignment of claims against the United States which have not been allowed and warrant issued therefor is of universal application. It covers all unallowed claims and all voluntary assignments thereof, including assignments made in good faith, as security for advances in course of business, of undisputed claims on contracts being performed by the assignor; and *held*, that assignments of such claims so made by a bankrupt are null and void, not only as against the United States but also as against other creditors, and the claims pass by operation of law to the trustee in bankruptcy.

Section 3477, Rev. Stat., does not embrace the transfer of unallowed claims against the United States when the transfer is by operation of law and not voluntary.

To hold that an act making all assignments of claims against the Government null and void does not embrace claims and assignments of the nature of those involved in this action would effect a repeal of the statute by judicial legislation in disregard of its plain intent.

THE facts, which involve the validity of transfers of unallowed claims against the United States, are stated in the opinion.

Mr. George E. De Steiguer, with whom *Mr. Frederick Bausman* and *Mr. Daniel Kelleher* were on the brief, for appellants:

The trustee in bankruptcy is not entitled to claim and hold the proceeds of the claims pledged to appellants in

disregard of the lien which they claim thereon. Sections 67*d*, 70*a* of Bankruptcy Act.

Section 67*d* applies to purely equitable liens, as well as to liens created by statute and common-law liens. *Chattanooga Bank* v. *Rome Iron Co.*, 102 Fed. Rep. 755; *McDonald* v. *Daskam*, 116 Fed. Rep. 276; *Re Elm Brewing Co.*, 132 Fed. Rep. 299.

An engagement to devote a certain fund to the satisfaction of a claim constitutes an equitable lien. *Walker* v. *Brown*, 165 U. S. 654; 3 Pomeroy, Eq. Jur., § 1235.

Section 3477, Rev. Stat., does not prevent appellants from asserting their liens upon the bankrupt's claims against the United States; nor did these claims pass absolutely to the trustee in bankruptcy for the benefit of general creditors in disregard of such lien.

The purpose of that section is limited to the protection of the Government; the statute concerns disputed claims only, and if applicable at all to assignments of undisputed commercial debts due from the United States, given in the ordinary course of business, as collateral security for mercantile loans, it is not intended to affect, and does not affect, rights to the proceeds of such claims as between the assignee and the assignor or his representatives.

As construed below, a contractor to whom the Federal Government may be indebted a million dollars on undisputed bills for materials furnished is unable to borrow a thousand dollars on the pledge of his expectations.

By such a construction competition for government contracts is limited to those few contracting firms who can complete their work out of their own capital, and who do not need to have recourse to the credit and banking privileges upon which ninety-five per cent of the business of the country is conducted.

This court has repeatedly and wisely held that notwithstanding the broad and comprehensive language of the act, it should be given application only to such cases as fall within its purpose. *Bailey* v. *United States*, 109 U. S. 432; *Goodman* v. *Niblack*, 102 U. S. 556.

Public policy, for the purpose of this statute, does not forbid the giving of liens on payments due from the Government, as between government contractors and their bankers.

As to the history of § 3477, see 9 Stat. 4; Sen. Rep. No. 1, 33d Cong., Sp. Sess. 1853, Vol. 1; C. 81, act of February, 1853, 10 Stat. 170; Debates in Congress, pp. 64, 67, and 216 App. Cong. Globe, Vol. 2, 2d Sess., 32d Cong. 1852–53; Circular for the guidance of the officials of the Government in which First Comptroller announced that the act of 1853 does not include undisputed claims; *Freedmen's Savings & Trust Co.* v. *Shepherd*, 127 U. S. 494; 17 Op. Atty. Gen. 545; 21 Op. Atty. Gen. 75; 12 Op. Atty. Gen. 216. This statute was aimed at evils of the nature of champerty and maintenance, as supported by many expressions of this court; that is the only construction with which all previous decisions of this court can be reconciled. *Marshall* v. *Railroad Co.*, 16 How. 336; *Freedmen's Savings & Trust Co.* v. *Shepherd*, 127 U. S. 494; *Ball* v. *Halsell*, 161 U. S. 72; *Goodman* v. *Niblack*, 102 U. S. 556, 560; *Price* v. *Forrest*, 173 U. S. 410; *Dowell* v. *Caldwell*, 4 Sawy. 217; Fed. Cas. No. 4039.

If the statute be held to apply to undisputed claims, it renders such assignments not void for all purposes but only void or voidable so far as the United States is concerned. It does not apply at all to mere pledges or assignments as security for mercantile loans.

While the act forbids the assignment of "any interest" in such claims, the interest referred to is a share or percentage in an expectancy—a part interest in a disputed demand. It is obvious that the equitable pledge of un-

disputed demands as security for mercantile loans is not referred to by the words "assignments of any interest therein." See *Spofford* v. *Kirk*, 97 U. S. 484; *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Ball* v. *Halsell*, 161 U. S. 72; *Freedmen's Savings & Trust Co.* v. *Shepherd*, 127 U. S. 494; *Hobbs* v. *McLean*, 117 U. S. 567; *St. Paul & Duluth R. R. Co.* v. *United States*, 112 U. S. 733; *Bailey* v. *United States*, 109 U. S. 432; *Price* v. *Forrest*, 173 U. S. 410; *Nutt* v. *Knut*, 200 U. S. 12.

See also state court decisions of Massachusetts, Mississippi, New York and Virginia, holding the statute inapplicable to such a case as that now before the court. *Yorke* v. *Conde*, 147 N. Y. 486; *In re Home*, 153 N. Y. 528; *Jernegan* v. *Osborne*, 155 Massachusetts, 207; *Thayer* v. *Pressey*, 175 Massachusetts, 233; *Fewell* v. *Surety Co.* (Miss.), 28 So. Rep. 755; *Howes* v. *Trigg* (Va., 1909), 65 S. E. Rep. 538.

The interests of the Government are amply protected by its own unquestioned right, even at common law, to disregard the assignment. *United States* v. *Robeson*, 9 Pet. 319; *Bonner* v. *United States*, 9 Wall. 156.

The appellants are neither plaintiffs nor defendants in any suit at law or in equity. They are claimants and petitioners seeking the allowance of their equitable rights in a fund in a bankruptcy court.

A bankruptcy court in administering an estate should regard and protect equitable liens and rights, even such as might not be enforceable by suit in law or equity. *In re Chase*, 124 Fed. Rep. 753, 755; *Hurley* v. *Atchison, T. & S. F. Ry. Co.*, 213 U. S. 126.

Mr. J. E. Horan, with whom *Mr. H. D. Cooley*, *Mr. W. A. Peters*, *Mr. J. H. Powell* and *Mr. Harold Preston* were on the brief, for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

There is no dispute as to the facts out of which the present controversy has arisen. Substantially the facts are these: On the sixteenth day of April, 1907, the appellee Downie was appointed receiver of the property of Gamwell & Wheeler, partners, who had previously, on the same day, been adjudged bankrupts. Subsequently he was elected and qualified as permanent trustee, and by order of the court, June 20th, 1907, was authorized to collect all moneys due the bankrupts *from the United States or any of its departments.*

Gamwell & Wheeler, as a firm, held sixteen unallowed claims *against the United States,* aggregating $33,517.48, the first one being dated December 10th, 1906, and the last February 15th, 1907. The National Bank of Commerce of Seattle was a creditor of that firm in the sum of $37,149.85. These claims were all assigned by Gamwell & Wheeler to the above bank. The Seattle National Bank was likewise a creditor of the firm and to the extent of $22,582.19, with interest, and that firm held certain unallowed claims against the United States, sixty-one in number, and amounting to $38,509.32. The first of the latter claims was dated September 25th, 1906, and the last April 4th, 1907. They were all assigned by Gamwell & Wheeler to the last-named bank.

The parties, by stipulation of July 10th, 1907, agreed: "That each and all of said claims against the United States Government, so assigned, [to the banks named] were claims for money due from the Government of the United States to the said bankrupt upon account of contracts entered into between said bankrupts and the United States for the furnishing of materials by said bankrupts to various departments of said Government; that said assignments were each and all voluntarily made in consideration of a loan made by said bank to said bankrupts

at the time of said assignments and as collateral security for the repayment of said loans, and without notice to the other creditors of said bankrupts. That all of such assignments were made after the entering into of said contracts and after partial performance thereof by said bankrupts before the allowance of any such claims or the ascertainment of the amount due thereon, or the issuing of any warrant for the payment thereof, and that none of said assignments were executed in the presence of any witnesses at all, and that none of them recite any warrant for the payment of the claim assigned, and that none of them were acknowledged by any officer having authority to take acknowledgment of deeds, or any other acknowledging officer at all, and that none of them were certified as being acknowledged by any officer. The said loans to wit of said banks exceeded in amount the value of said collaterals so assigned to secure the same, and there is now due to each of said banks on account of said loans an amount much in excess of the value of the said collaterals so assigned to each of said banks respectively."

The claims of the two banks ($37,149.85 and $22,582.19 with interest) were allowed by the Referee in Bankruptcy, and it was adjudged by the court that the banks were entitled, respectively, to receive, on account of the claims assigned to them, whatever amount might be collected on them from the Government, and the Trustee was ordered to pay over to the banks holding the assignments the collections as they were made thereon.

The District Court allowed the respective claims of the banks as general debts, but disallowed them as preferred. This order was affirmed in the Circuit Court of Appeals, that court rejecting the claim of each bank for a lien upon the fund assigned. The case is here under a certificate by Justice Brewer, to the effect that the determination of the question involved in each case was

essential to an uniform construction of the Bankruptcy Act throughout the United States.

The questions raised by the parties make it necessary to determine the scope and effect of § 3477 of the Revised Statutes in its application to these cases. That section was brought forward from previous acts of Congress and is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The words of that section are so clear and explicit that there cannot be, we think, any reasonable ground to doubt the purpose of this legislation. Its essential features are not new, as can be seen by an examination of the act of Congress of July 29th, 1846, "in relation to the payment of Claims" on the United States, and the act of February 26th, 1853, "to prevent frauds upon the Treasury of the United States." 9 Stat. 41, c. 66; 10 Stat. 170, c. 81. Turning to § 3477, we find Congress had in mind not only *all* transfers and assignments of *any* claim on the United States or part of a claim or *any interest therein*, whether

the transfer or assignment be absolute or unconditional and *whatever was the consideration of the transfer or assignment*, but all powers of attorney, orders or other authorities for receiving payment of any such claim, or *of any part or share thereof*. All such transfers, assignments, powers of attorney, order or authorities are declared to be "absolutely null and void," except there be a compliance with the conditions fully set out in the statute. None of those conditions was complied with in these cases.

In *United States* v. *Gillis*, 95 U. S. 407, 416, it appears that suit was brought in the Court of Claims, by the assignee of an unallowed claim on the United States, and the question arose whether the assignee could maintain a suit in his name for the proceeds of the claim. The Court of Claims sustained the assignee's right to sue, but this court, upon careful examination of the act of 1853, reënacted in § 3477 of the Revised Statutes, reversed the judgment and directed the petition of the assignee to be dismissed. It was contended in that case that the act of 1853 had reference only to claims asserted before the Treasury Department. But that view was rejected. After observing that the comprehensive provisions of the statute excluded any exceptions to the rule presented, the court said: "We think, therefore, the act of 1853 is of universal application, and covers *all* claims against the United States *in every tribunal in which they may be asserted*. And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the act of 1853 was included and reënacted."

Among the earlier cases on the general subject is *Spofford* v. *Kirk*, 97 U. S. 484, 488–489, 490, frequently referred to in later decisions and always followed.

That was a case of a suit by Spofford, in the Supreme Court of this District. He became the holder, by assign-

ment, of certain acceptances which, upon their face, provided for payment to be made out of any moneys received from the United States on the claim of one Kirk *against the Government.* The assignee or holder of the acceptances paid value for them and acted in entire good faith. The question was whether an assignment of a claim against the United States, made before the claim had been allowed and before a warrant had been issued for its payment, had *any validity, either in law or in equity.* The court of original jurisdiction dismissed Spofford's bill, and the judgment was affirmed here. Mr. Justice Strong, speaking for this court, referred to § 3477 of the Revised Statutes, and, among other things, said: "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and *incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.*" After referring to the fact that the court had not been called upon to decide in the *Gillis case,* whether the assignment there involved was invalid as between the assignor and the assignee, the opinion proceeds: "But if after the claim in this case was allowed, and a warrant for its payment was issued in the claimant's name, as it must have been, he had gone to the treasury for his money, it is clear that *no assignment he might have made, or order he might have given, before the allowance would have stood in the way of his receiving the whole sum allowed.* The United States must have treated as a nullity any rights to the claim asserted by others. It is hard to see how a transfer of a debt can be of no force as between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if

that might be—and we do not propose now to affirm or deny it—the question remains, whether the act of Congress was not intended to render *all* claims against the government, *inalienable alike in law and in equity, for every purpose, and between all parties.* The intention of Congress must be discovered in the act itself. . . . We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government. It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was, therefore, rightly dismissed."

In *St. Paul & Duluth R. R. Co.* v. *United States,* 112 U. S. 733, 736, the court held that a voluntary transfer by mortgage, for the security of a debt, and finally completed and made absolute by a judicial sale, was within the prohibition of § 3477, Mr. Justice Matthews, speaking for the court, saying that "if the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition."

The latest adjudication, by this court, construing § 3477 of the Revised Statutes, is that of *Nutt* v. *Knut,* 200 U. S. 12, 13, 14, 20. That case involved, among other things, the validity of the clause in a written contract relating to compensation to be made to an attorney employed to prosecute a claim against the United States. The contract provided that the payment of such compensation "is hereby made a *lien* upon said claim and upon any

draft, money or evidence of indebtedness which may be issued thereon. This agreement not to be affected by any services performed by the claimant, or by any other agents or attorneys employed by him." After referring to the words of § 3477 and citing previous cases in which the scope and meaning of that section were considered (which cases are given in the margin [1]), this court said: "If regard be had to the words as well as to the meaning of the statute, as declared in former cases, it would seem clear that the contract in question was, in some important particulars, null and void upon its face. We have in mind that clause making the payment of the attorney's compensation a *lien* upon the claim asserted against the Government and upon any draft, money or evidence of indebtedness issued thereon. In giving that lien from the outset, before the allowance of the claim and before any service had been rendered by the attorney, the contract, in effect, gave him an interest or share in the claim itself and in any evidence of indebtedness issued by the Government on account of it. In effect or by its operation it transferred or assigned to the attorney in advance of the allowance of the claim such an interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute; for its obvious purpose, in part, was to forbid any one who was a stranger to the original transaction to come between the claimant and the Government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of the Govern-

[1] *Spofford* v. *Kirk*, 97 U. S. 484; *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Ball* v. *Halsell*, 161 U. S. 72; *Freedmen's Saving Co.* v. *Shepherd*, 127 U. S. 494; *Hobbs* v. *McLean*, 117 U. S. 567; *St. Paul & Duluth R. R.* v. *United States*, 112 U. S. 733; *Bailey* v. *United States*, 109 U. S. 432; *Price* v. *Forrest*, 173 U. S. 410.

ment. We are of opinion that the state court erred in holding the contract, on its face, to be consistent with the statute."

In this connection, it must be said that this court has held that the statute in question does not embrace the transfer of a claim against the United States, where the transfer has been by operation of law, not merely as the result of a voluntary assignment by the claimant. In *Erwin* v. *United States*, 97 U. S. 392, 397, this court, speaking by Mr. Justice Field, after referring to the act of 1853 embodied now in § 3477 of the Revised Statutes, to prevent frauds upon the Treasury, said that it "applies only to cases of voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the Court of Claims." This construction of the statute was recognized as settled law in *Goodman* v. *Niblack*, 102 U. S. 556, 560; *St. Paul Railroad* v. *United States*, 112 U. S. 733, 736; *Butler* v. *Goreley*, 146 U. S. 303, 311; *Hager* v. *Swayne*, 149 U. S. 242, 247, and *Ball* v. *Halsell*, 161 U. S. 72, 79.

The present cases are not assignments which by operation of law created an interest in the assignor's claims against the United States. They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words—too clear, we think, to need construction—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. The result is that when Gamwell & Wheeler were adjudged bankrupts they

were *still in law the owners of these claims on the United States*, and all interest therein passed under the bankrupt act to their general creditors, to be disposed of as directed by the bankrupt act, just as if there had been no attempt to transfer them to the banks. Any other holding will effect a repeal of the statute by mere judicial construction in disregard of the plain, unequivocal intent of Congress as indicated by the statute.

The judgment as to each bank is

Affirmed.

LADEW *v.* TENNESSEE COPPER COMPANY.

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

No. 495. Argued October 19, 1910.—Decided November 28, 1910.

Plaintiffs, citizens of States other than that of the defendant, brought suit against the defendants in the Circuit Court of the United States for a district of which neither plaintiffs nor this defendant were inhabitants to compel defendants to abate a nuisance carried on in that district and which was causing damage to plaintiffs' property in another State and in which neither they nor the defendant resided; the Circuit Court dismissed as to this defendant for want of jurisdiction, neither it nor the plaintiffs being inhabitants of that district. In affirming judgment *held* that:

Diversity of citizenship—nothing more appearing—will not give the Circuit Court jurisdiction to render judgment *in personam* where neither plaintiff nor defendant is an inhabitant of the district in which the suit is brought and the defendant appears specially and objects to the jurisdiction.

The jurisdiction given to the Circuit Court by § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470, of suits to enforce legal or equitable claims to real or personal property within the district, even if the parties are not inhabitants of the district, does not extend to suits

to compel the owner of real estate in the district to abate a nuisance maintained thereon. Such a cause of action is not a claim or lien upon the property.

The jurisdiction of the Circuit Courts is determined by acts of Congress enacted in pursuance of the Constitution, and even if the jurisdiction already granted can be extended by Congress, those courts cannot, until such legislation is enacted, exercise jurisdiction not yet conferred upon them.

179 Fed. Rep. 245, affirmed.

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

Mr. Henry B. Closson, with whom *Mr. Charles Seymour*, *Mr. Charles H. Sheild* and *Mr. Benjamin F. Washer* were on the brief, for appellants:

The decree dismissing the suit against the Tennessee Copper Company is a final decree from which an appeal will lie. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, distinguished, and see *Withenbury* v. *United States*, 5 Wall. 819; *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52.

A bill in equity to abate a nuisance is a local suit which can be brought only in the district in which the nuisance to be abated is situated. *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485; *Horne* v. *Buffalo*, 49 Hun, 76.

Unless the court below has jurisdiction to abate the nuisance maintained by this defendant, no Federal court has jurisdiction to do it, although the controversy is wholly between citizens of different States. *Greely* v. *Low*, 155 U. S. 67.

If a bill in equity to abate a nuisance maintained upon real property within the jurisdiction of the court can be described as a suit to enforce a claim to or against that property, there can be no question of the jurisdiction of the Federal court of the district in which the nuisance is situated to entertain the suit even as against a non-

resident defendant. Rev. Stat., § 738; Act of March 3, 1875, § 8; 1 Rose's Code of Fed. Proc., § 856, note *a*, p. 798; *Dick* v. *Foraker*, 155 U. S. 404.

A bill in equity to procure the abatement of a nuisance which is not only upon but is itself real property within the jurisdiction of the court is, within the precise letter and spirit of the statute, a suit to enforce a claim to or against real property within the district. *Rex* v. *Rosewell*, 2 Salk. 459, and cases *passim*, cited under "Abatement of Nuisances," 1 Amer. & Eng. Ency. of Law, pp. 63, 79 *et seq.; People* v. *Gold Run Mining Co.*, 66 California, 138; *People* v. *Vanderbilt*, 26 N. Y. 287; *Horne* v. *Buffalo*, 49 Hun, 76; 1 Amer. & Eng. Ency. of Law, 2d ed., p. 76.

The test whether a local action comes within the purview of the language of the act or not, is whether the relief required can be given without a judgment *in personam* against an absent defendant. *York County Savings Bank* v. *Abbott*, 139 Fed. Rep. 988.

The bill in the present suit is one to procure the abatement of a nuisance upon real property and is itself a claim against real property within the jurisdiction of the court, and therefore one of which the court has jurisdiction.

Under the allegations of fact it must here be taken as true that these furnaces, smelters and ovens, emitting gases which destroy the timber upon the adjacent lands, are, as a matter of law, nuisances which the court has jurisdiction to abate through its own officers, if need be, in the manner prayed. *Campbell* v. *Seaman*, 63 N. Y. 568; *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. Cases, 642; *American Smelting Co.* v. *Godfrey*, 158 Fed. Rep. 225.

Mr. John H. Frantz, with whom *Mr. Howard Cornick* and *Mr. Martin Vogel* were on the brief, for appellee:

The appeal is premature, and, therefore, the court is without jurisdiction to hear and determine the same. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262;

Hill v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52, distinguished, and see *Bank of Rondout* v. *Smith*, 156 U. S. 330; *Ex parte National Enameling Co.*, 201 U. S. 160.

The gravamen of the bill is negligent and improper operation, and the burden of the prayer is for an injunction inhibiting and restraining the operation of the furnaces, smelters, etc., in the manner in which they are now being operated. Such a proceeding is not a local action.

A writ of injunction may be defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing. 1 Joyce on Injunctions, p. 4; 1 High on Injunctions, 4th ed., 2; Jereney's Eq., p. 307; *Childress* v. *Perkins*, Cooke (Tenn.), 2; 16 Amer. & Eng. Ency. of Law, 342; Joyce on Law of Nuisances, § 12; 1 Wood on Nuisances, 3d ed., § 77; *Barclay* v. *Commonwealth*, 25 Pa. St. 503.

Even if this proceeding could be regarded as a proceeding *in rem* or a local action, this would not suffice to bring it within the provisions of the statute under consideration. *Roller* v. *Holly*, 176 U. S. 389, 406.

Complainants have no legal or equitable lien upon or claim to property which they are seeking to assert in this case. The statute under consideration has no reference to the assertion of a right not coupled with an interest in the property, or at least, a claim of interest in the property.

No joint action can be maintained against two separate defendants, each owning separate lands, when the sole purpose of that action is to fix a legal or equitable lien upon or claim to respective properties of the defendants, unless there be an allegation that each defendant is interested in the title to the lands of the other defendant. There is no such allegation in the bill in this cause.

There could be no enforcement of a lien upon such a description of land as in the bill. No jurisdiction attaches

by virtue of any lien or claim to defendants' property. It is conceded that no jurisdiction would exist otherwise. The Tennessee Copper Company is a resident of New Jersey, and the complainants are residents of New York and West Virginia. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *So. Pac. Co.* v. *Denton*, 146 U. S. 202.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action in equity was brought by the present appellants, citizens of New York and of West Virginia, against the appellees, the Tennessee Copper Company, a corporation of New Jersey, and the Ducktown Sulphur, Copper and Iron Company, Limited, a British corporation—each of those corporations having its chief office and place of business in Polk County, Tennessee, within the territorial jurisdiction of the Circuit Court.

The business of each defendant is the mining, manufacturing and producing of copper and sulphur ores and products. The plaintiffs are the joint owners in fee and in possession of more than 6,000 acres of land in Fannin, Gilmer and Pickens Counties, Georgia, and have the timber rights in other lands, exceeding 18,000 acres, in the same counties, just beyond the boundary line between Tennessee and Georgia. All these lands are devoted to forestry, have been and are of the greatest value, and contain various kinds of valuable trees. The plaintiffs employ the forests in the production of timber and bark. But for the acts of the defendants, as hereinafter stated, the lands would be sufficient to afford a continuous supply of lumber and bark in large quantities and for an indefinite period in the future. The lands have upon them forests and trees of different growth, which must receive attention and treatment in order to meet the future needs of forestry and bark industry. Before the commission by the defendants of the acts complained of the

forest and timber rights and holdings of plaintiffs approached $100,000 in value, and the damage alleged to be committed by the defendants will exceed $50,000.

The defendants conduct their business in Tennessee within a short distance of plaintiffs' lands. Recently, before the bringing of this action, the defendants erected, or caused to be constructed, and still own, operate and control furnaces, smelters and ovens, all in close proximity to one another, upon lands owned or leased by them in Polk County, Tennessee. In view of those facts the plaintiffs allege that both in law and equity they are possessed of "a right and *claim in, to* and against the lands and tenements of the defendants in the nature of an easement thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests [in Georgia] of your orators adjacent thereto as aforesaid. But the defendants, by means of said furnaces, smelters and ovens maintained by them upon their lands as aforesaid, and in other ways, are, and for some time past have been, generating and causing to be discharged into the atmosphere, vast quantities of smoke, sulphur fumes and noxious and poisonous vapors and gases and other deleterious substances. Within a short distance from the works and property of the defendants the said smoke, fumes, vapors and gases and other deleterious substances so generated by each respectively inextricably mingle and are together discharged upon the lands and forests and trees of your orators, and as a result thereof great damage has been done and injury is threatened as hereinafter appears."

The plaintiffs further allege that said fumes, gases and vapors have already destroyed a considerable portion of their forests and trees; that unless they receive the relief asked their entire holdings will be destroyed, and their property and interests rendered valueless; that such fumes, gases and vapors have descended upon

plaintiffs' forests and trees, killing the trees and ruining the timber; that the destruction so created and produced is constantly increasing in extent, and includes forests and trees of every variety and species, and in all stages of growth and development; that the taller trees that serve to protect the smaller growth have been the first to suffer damage and destruction; that the enlargement of the zone of destruction is due to the fact that the death of the trees already brought about permits the smoke, fumes, gases and vapors that are constantly increasing in quantity to travel farther before being absorbed; that the forests and timber, destroyed as stated, would have made good lumber, railroad ties, and tanbark, and could have been utilized for purposes of trade and commerce; and that the acts of the defendants, unless restrained by the court, will destroy all the forests, old and young, as well as the timber and bark rights of the plaintiffs.

The bill also alleges that the smoke, fumes, gases and vapors so generated and discharged on the property of the plaintiffs will destroy all forms of plant and tree life, including vegetables, crops, grasses and orchards; that by such destruction the soil loses all moisture and compactness, and, being washed away by the rains, the remaining part of plaintiffs' lands will be rendered bare and barren; that the smoke, fumes, gases and vapors are unwholesome and injurious to the life and health of all coming in contact with them, and render the lands unfit for occupancy; and that the plaintiffs, as well as the Bureau of Forestry of the United States, have frequently demanded that defendants abate the above nuisance, but the latter have refused to obey such demand, leaving plaintiffs no other alternative except to seek an injunction to prevent the above wrongs.

The specific relief asked is a decree that the defendants shall not use their property in Tennessee so as to destroy

or injure the plaintiffs' lands and forests in Georgia; that the alleged nuisance maintained by defendants be abated under the direction of the court through its own officers or otherwise as shall seem suitable and right; and that the defendants be enjoined "from maintaining, operating, directing or permitting upon their land or premises [in Tennessee] the operation or maintenance of any oven, roast heap, pit, furnace or appliance generating or giving forth any of the smoke, gases, fumes or vapors hereinbefore complained of, or otherwise generating, producing or causing any foul or dense or copper or sulphurous smoke, or any noxious, poisonous, unhealthy or disagreeable, or in any manner injurious vapor, gas, fume or odor upon the territory or lands of your orators" [in Georgia].

Such was the case made by the plaintiffs' allegations in their bill.

The summons was served in Polk County, Tennessee, on the General Manager of the Tennessee Copper Company, the highest officer of that corporation; on the British corporation, by leaving a copy with its Acting General Manager in the same county. Each defendant corporation has, as already indicated, its main office and is conducting its business in that county.

The Copper Company, the New Jersey corporation, appeared for the special and sole purpose of objecting to the jurisdiction of the Circuit Court. The British corporation appeared for the special purpose only of entering a motion to dismiss the bill for want of jurisdiction as to it, as well as for want of proper parties. The court, speaking by Judge Sanford, who delivered a well-considered opinion in the case, sustained the motion of the Tennessee Copper Company, and dismissed the bill as to it. The motion of the British company was overruled, the court holding that it had jurisdiction over the alien corporation. *Ladew* v. *Tennessee Copper Co.*, 179 Fed. Rep. 245. There was no appeal by the latter corporation.

The present appeal was taken only from that part of the decree dismissing the bill as to the New Jersey corporation.

The plaintiffs, we have seen, are citizens of New York and West Virginia, while the Tennessee Copper Company is a corporation of New Jersey. But under the statutes regulating the jurisdiction of the Circuit Courts of the United States, diversity of citizenship—nothing more appearing—will not give authority to Circuit Courts of the United States to render a judgment *in personam* where, as here, neither the plaintiffs nor the defendants are inhabitants of the district in which the suit was brought, and where the defendant appears specially and objects to jurisdiction being exercised over it. The defendant corporation, not an inhabitant of the district where suit is brought, cannot be compelled against its will to submit to such jurisdiction for the purposes merely of a personal judgment. 18 Stat. 470, March 3, 1875, § 1, c. 137, as amended and corrected in 1887 and 1888; March 3, 1887, c. 373, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 433; *Macon Grocery Co.* v. *Atlantic Coast Line*, 215 U. S. 501, 508, 510, *and authorities there cited.*

The plaintiffs insist, however, that jurisdiction can be sustained by § 8 of the act of March 3d, 1875, determining the jurisdiction of the Circuit Courts of the United States. 18 Stat. 470, c. 137. The first section of that act, as amended by the above act of 1888, 25 Stat. 433, correcting the enrollment of the act of March 3d, 1887 (24 Stat. 552, c. 373), provides that a suit founded only on the fact of the diversity of citizenship between the parties, shall be brought only in the district of the residence of either the plaintiff or the defendant. But the plaintiffs contend that that section is not to be interpreted apart from the other sections of the same act. Section 8 has relation to the first section and contains provisions that refer to an exceptional class of cases.

The two sections relate to the same general subject, and must be regarded as embodying a scheme of jurisdiction. Considered together, they mean that, if jurisdiction is founded only on diversity of citizenship, the Circuit Court may, without its process being personally served on the defendant, within its jurisdiction, exert the jurisdiction given by the eighth section in the particular cases and *for the special purposes therein specified*—its power in such cases being of course restricted as in that section prescribed. Such is the argument of the plaintiffs.

The eighth section of the act of 1875 provides: "That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or *claim to*, or to remove any incumbrance or lien or cloud upon the title to, real or personal property *within the district where such suit is brought*, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit

in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect *only* the property which shall have been the subject of the suit *and under the jurisdiction of the court therein, within such district.* . . ."

Substantially, the contentions of plaintiffs are that the mode in which the defendant uses its real property in Tennessee, within the jurisdiction of the Circuit Court, creates a nuisance injuriously affecting their property near by in the State of Georgia; that, according to the settled principles of law, they are entitled to have the defendant corporation restrained from so using its Tennessee property as to injure their property in Georgia; and that the right to such protection, against the effects of that nuisance, as maintained by the defendant in Tennessee, should, within the fair meaning of the act of 1875, be deemed a "*claim to* . . . real property . . . within the district where such suit is brought"—such property, it is alleged, being so used in Tennessee as to create a nuisance, causing injury to the plaintiffs' property in Georgia.

Manifestly, unless the plaintiffs can sustain this proposition and bring their case within the eighth section of the act of 1875, there is no ground whatever to maintain the jurisdiction of the Circuit Court as to the defendant corporation; certainly not, as we have said, for the purposes of a personal judgment against the defendant company, since neither the plaintiffs nor the defendant are inhabitants of the district in which the suit was brought, and the defendant corporation refuses to voluntarily appear and submit to the jurisdiction of the court.

We are of opinion that under no reasonable interpretation of the eighth section can the plaintiffs' case be held to belong to the class of exceptional cases mentioned in

that section. In no just sense can their cause of action be said to constitute "*a claim to*" real property in the district. They cannot be regarded as having a "claim to" the leased land or premises on which the alleged nuisance is maintained. It may be that what the defendant is charged with doing creates a nuisance. It may also be that the defendant company wrongfully uses and has used its property in Tennessee in such way as to seriously injure the property of plaintiffs, near by in Georgia, and that plaintiffs are legally entitled by some mode of proceeding in some court to have the alleged nuisance abated, and their property in Georgia protected in the manner asked by them. But it does not follow that they can invoke the authority of the Circuit Court of the United States for the protection of their property against the defendant's acts. The jurisdiction of the Circuit Courts is determined by acts of Congress enacted in pursuance of the Constitution. Apart from the powers that are inherent in a judicial tribunal, after such tribunal has been lawfully created, the Circuit Courts can exercise no jurisdiction not conferred upon them by legislative enactment. It is quite sufficient now to say, without discussion, that it would be a most violent construction of the eighth section of the act of 1875 to hold that the right to have abated the nuisance in question arising from the use in Tennessee of defendant's property, because of the injurious effects upon plaintiffs' real property in Georgia, creates, in the meaning of the statute, a "claim to" real property within the district where the suit is brought. There is absolutely no foundation for such a position. We do not mean to say that Congress, in cases of controversies between citizens of different States, might not so enlarge the scope of the statute regulating the jurisdiction of the Federal courts as to enable the Circuit Court, sitting in Tennessee, to suppress the nuisance in question. Upon that question

we have no occasion at this time to express an opinion. Still less do we say that the plaintiffs have not an efficient remedy in some court either against the defendant corporation, or against the several individuals who, under its sanction, or by its authority, are maintaining in Tennessee the nuisance complained of. We only mean to say—and cannot properly go further in this case—that the statute in question does not cover this particular case, and that the United States Circuit Court, sitting in Tennessee—the New Jersey company refusing to voluntarily appear in the suit as a defendant—is without jurisdiction to give the plaintiffs, citizens of New York and West Virginia, the particular relief asked against that corporation.

The bill was properly dismissed for want of jurisdiction in the Circuit Court and the decree below is

Affirmed.

WETMORE *v.* TENNESSEE COPPER COMPANY.

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

No. 500. Motion to dismiss appeal. Submitted October 11, 1910.—Decided November 28, 1910.

Ladew v. *Tennessee Copper Company, ante,* p. 357, followed to effect that the Circuit Court of the United States did not have jurisdiction of this case.

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

Mr. Charles Seymour for appellant.

Mr. Howard Cornick, *Mr. John H. Frantz* and *Mr. Martin Vogel* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff, George Peabody Wetmore, a citizen of Rhode Island, is the owner in fee and in possession of large tracts of land, valuable for timber, farming and residence purposes, in Polk County, Eastern District of Tennessee. The defendants are the same corporations as those mentioned in *Ladew &c.* v. *Tennessee Copper Co.*, decided, *ante*, p. 357.

The plaintiff, after setting out substantially the same facts as those stated in the *Ladew case* in reference to the conduct by each defendant of its business and to the injury done to his lands by the mode in which that business is conducted, seeks the same relief as to his lands in Tennessee as that asked by the plaintiffs in the other case as to their lands in Georgia. Each defendant appeared specially—the defendant, Tennessee Copper Company, for the purpose of objecting to the jurisdiction of the Circuit Court of the United States sitting in Tennessee, to give the relief asked by the bill against it, and the British corporation for the purpose of moving to dismiss the bill because of misjoinder of parties, and because of want of jurisdiction in that court to sustain an action against it in Tennessee for the wrong alleged to have been done to the present plaintiffs.

The Circuit Court dismissed the bill as to the Tennessee Copper Company, but overruled the motion to dismiss the bill as to the British corporation, the court being of the opinion that it had jurisdiction of the latter corporation. From that decree, so far as it related to the Tennessee Copper Company, Wetmore appealed to this court. In conformity with § 5 of the act of Congress of March 3, 1891, c. 517, 26 Stat. 826, the question of

jurisdiction was certified by the Circuit Court to this court.

On the authority of *Ladew* v. *Tennessee Copper Company*, *ante*, p. 357, the decree of the court below must be affirmed.

It is so ordered.

MONTEZUMA CANAL COMPANY *v.* SMITHVILLE CANAL COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 1. Argued October 21, 24, 1910.—Decided November 28, 1910.

Where the trial court makes findings of facts and states conclusions of law thereon but certifies no rulings in respect of evidence, and the Supreme Court of the Territory enters a general judgment of affirmance, manifestly based upon the correctness of such findings of fact, they furnish a sufficient statement for the appeal; and, in this court, the question is whether they are sufficient to support the decree. *Stringfellow* v. *Cain*, 99 U. S. 610.

Notwithstanding there may have been a prior appropriation of water, if the rights of appropriators were adjudicated in a suit of which the parties had notice, the judgment in that suit may be pleaded as *res judicata* in a subsequent suit to determine the rights of appropriators, and the amount awarded to an appropriator by judgment in the first suit cannot be reduced.

The fact that it is within the legislative power to provide administrative machinery to supervise the common use of water, does not render invalid the decree of a court providing such machinery to carry out a particular decree if the court deems it necessary and proper so to do.

As the laws of Arizona authorize the Supreme Court to cause its judgments to be carried into execution, that court does not transcend its authority in appointing a commissioner to supervise the

taking of water from a stream by the various appropriators to whom its common use is awarded and in apportioning the expense *pro rata* between them.

11 Arizona, 99, reversed.

THE facts, which involve the rights of appropriators of water of a river in Arizona, are stated in the opinion.

Mr. Thomas Armstrong, Jr., with whom *Mr. John J. Hawkins* and *Mr. C. L. Rawlins* were on the brief, for appellant.

Mr. Walter Bennett for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

The decree of the Supreme Court of the Territory of Arizona (11 Arizona, 99; 89 Pac. Rep. 512), which is appealed from, affirmed a decree of a District Court of the Territory determining the rights of appropriators within the county of Graham to the waters of the Gila River.

In the brief of counsel for the appellee it is suggested that the appeal should be dismissed because the matter in dispute does not exceed the sum of five thousand dollars, and because the appellant has no substantial financial interest in the cause. We think, however, that the record sufficiently shows that the jurisdictional amount is involved, and that the appellant has such interest as entitles it to prosecute the appeal. We shall, therefore, consider the case upon the merits.

The issues below were made up by an amended complaint, in which the Smithville Canal Company and the Central Canal Company and the water-users under these canals were plaintiffs, and the Montezuma Canal Company and other canal companies, as also the water-users under such canals, were defendants. The general nature of the controversy is indicated by the character of the

decree entered in the District Court just stated. Incorporated in the answer of the Montezuma Canal Company and its water-users were averments, in the nature of a cross bill against the San Jose Irrigating Company and the San Jose Extension Canal Company and various other defendants, setting up a former judgment recovered in the District Court of Graham County by the Montezuma Canal Company as settling between the Montezuma Company and said co-defendants rights in the water of the river. The San Jose Irrigating Company, it is to be remarked, was incorporated in 1892, and in 1904 the San Jose Extension Canal Company was incorporated, and undertook the management, repair and operation of a part of the canal previously under the control of the San Jose Irrigating Company.

The trial court made findings of fact and stated conclusions of law thereon, but certified no rulings in respect to the admission or rejection of evidence. The Supreme Court of the Territory made no express findings of fact, but entered a general judgment of affirmance, manifestly based upon the correctness of the findings of the trial court. Under such circumstances the findings of the District Court furnish a sufficient statement of the facts for the purposes of this appeal. *Stringfellow* v. *Cain*, 99 U. S. 610. The question for decision, therefore, is whether such findings are sufficient to support the decree. *Ib.*

We are concerned, however, only with the error assigned by the Montezuma Canal Company, as that company alone appealed to the Supreme Court of the Territory, and it is the only party to the record now seeking a reversal of the judgment of affirmance entered by the appellate tribunal.

The contentions urged by the Montezuma Company are twofold: First, that due effect was not given to the prior judgment which it pleaded and which determined its rights in the water of the Gila River as against the

appropriators of water from that river at points above the head of its canal; and, second, that error was committed in the appointment of a so-called water commissioner, charged with the duty of distributing the water among the different canals according to the adjudged priorities. There being then no controversy in respect to the rights to water decreed in favor of the canals situated below the head of the Montezuma Canal Company, the findings in respect to those canals need not be particularly referred to.

Before stating the contents of the decree which was entered in the trial court we make a condensed statement of the facts embodied in the findings upon which the decree was based, in order to a comprehension of the controversy arising for determination.

There are 23,728 acres of land in the county of Graham, Territory of Arizona, which are irrigated by water diverted from the Gila River by means of twenty-five ditches or canals. These canals extend from a point in section 29, township 6 south, range 28 east, at first in a southwestwardly and then in a northwestwardly direction, to a point forty-one miles distant at the northeast corner of the southeast quarter of section 35, township 4 south, range 23 east. Commencing with the head of this irrigation system the canals in question, in their order as respects the flow of the waters of the river and the number of acres irrigated by each canal, are as follows: Brown, 100 acres; Sanchez, 400 acres; Mejia, 320 acres; Fourness, 260 acres; San Jose, 3,000 acres; Michelena, 450 acres; Montezuma, 3,750 acres; Union, 2,900 acres; Sunflower, 400 acres; Graham, 962 acres; Central, 2,675 acres; Oregon, 1,100 acres; Smithville, 1,760 acres; Bryce, 515 acres; Dodge, 450 acres; Nevada, 800 acres; Curtis, 800 acres; Kempton, 850 acres; Reid, 100 acres; Ft. Thomas, 960 acres; Thompson, 240 acres; Military, 400 acres; Saline, 46 acres; Zeckendorf, 500 acres. The Montezuma Canal

was first constructed. The six canals situated above the head of that canal were constructed as follows: The San Jose and the Michelena in 1874, the Mejia in 1877, the Sanchez in 1883, the Fourness in 1891 and the Brown in 1896. The first canal below the Montezuma is called the Union, and was constructed in 1879. Among other things it was found that the Union Canal "carries water for one hundred acres that was reclaimed in 1874 and irrigated by water that was then diverted from the river and carried to the land by the Montezuma Canal. . . ."

Embodied in the "conclusions of law" made by the court is a statement that William Ellsworth and other named individuals "were the persons or successors in interest to the persons who in 1875 appropriated water for and applied it to the first 300 acres of land" in certain named sections, "and who are diverting and carrying water thereto through the San Jose Canal. . . ."

One-half of a miner's inch per acre was found to be necessary for the irrigation of the lands served by the various canals. It was further found that a surface flow of 7,500 miners' inches in the Gila River at the head of the irrigation system furnished more water than is needed to irrigate the entire acreage shown by the evidence to have been in cultivation in the year 1904; and it was also found that "there is a greater flow than this amount during the larger part of the year, so that the amount of water available for irrigation purposes is more than one-half of a miner's inch per acre for a greater length of time each year than the time during which the supply is less than one-half inch per acre."

Substantially all of the canals referred to are now controlled by incorporated canal companies, respecting whom the trial court found as follows:

"The different incorporated canal companies, who are parties plaintiff and defendant herein, are duly and regularly incorporated under the laws of this Territory, and

own and control the several canals as alleged in the pleadings herein, which canals were originally operated by unincorporated partnerships or societies, and the present corporations, parties hereto, are the successors to the unincorporated owners of the several canals, and are in every instance carrying the water for the use of the land owners or the successors in interest of the land owners who were the original appropriators of the water carried therein for irrigation purposes. None of the parties hereto have been engaged or are now engaged in carrying water for hire, and none of the incorporated companies, parties hereto, have appropriated any water in their corporate capacity. None of the several parties hereto who are land owners, appropriators of water, or who are receiving water for irrigation from the different incorporated companies or through the several canals owned by the parties hereto, have ever maintained their right to their several priorities as against the coöwners of land or co-users of water in their respective canals, but the individual land owners and appropriators of water that is furnished under the management of each of the several ditches or canals, herein referred to, have surrendered to their co-users in that canal their priority, and the water that is taken from the river for the use of the land under the several canals has been, by the consent of the different land owners under each canal, delivered to the different tracts of land in accordance with the extent of the interest in the ditch or canal of each land owner, regardless of the acreage cultivated by the said land owner, and regardless of the date when the said acreage was placed under cultivation."

Findings XI and XII are as follows:

"XI. On the 17th day of February, 1897, a decree was entered in this court in action No. 505 wherein the Montezuma Canal Company was plaintiff, the San Jose Irrigating Company, a corporation, Chiricahua Cattle Company, a corporation, Pedro Michelena and others were

defendants, wherein it was judged and decreed that the plaintiff had the right and was entitled to have flow into the Montezuma Canal continuously from the Gila River at all times during the dry season of the year when water is low and scarce in said river, 1,000 miner's inches of water, and was entitled to have flow from the said river into said canal 2,000 miner's inches of water at times of wet seasons of the year when water is high and plentiful therein, as against each and all of the defendants in said action, and in which it was ordered, adjudged and decreed that said defendants above named, and all persons claiming under them and each of them, be perpetually restrained and enjoined from diverting or taking water from the said river above the head of the plaintiff's said canal, or in any manner obstructing the flow of water in the said river, so as to prevent the said water from flowing in the bed of said river down the same, and therefrom into plaintiff's canal to the full extent of a thousand inches during each and every dry season of the year when water is low and scarce, and also from in any manner preventing the said 2,000 miner's inches of water from flowing down the channel or bed of said river, and from flowing therefrom into the plaintiff's said canal during the wet seasons of the year when water is plentiful in said river.

"XII. On the 18th day of September, 1900, a complaint was filed in the District Court of the Second Judicial District, in and for Graham County, Territory of Arizona, in action No. 797, in which the San Jose Irrigating Company was plaintiff and E. L. Tidwell *et al.* were defendants, and on March 31, 1901, a stipulation was filed in the said cause No. 797, by and between the San Jose Irrigating Company and its stockholders on the one hand and Frank Dysart, Pedro Michelena, and Frank McLean, using water on lands owned by them, through the Michelena Ditch, on the other hand, in which it was stipulated and agreed that the grantors and predecessors

in interest of both parties made their original appropriation of the water of the Gila River at the same date or time and that neither should, as against the other, claim or attempt to prove any prior or superior right to any of the water of the said Gila River by reason of having been prior in date or time of making the original appropriation of the water of the said Gila River; and on the 29th of June, 1901, a decree was entered in the said District Court in the said action No. 797, in which it was found and decreed by the court that the first right to diversion, use and enjoyment of the water in the Gila River, after the prior appropriation of 1,000 miner's inches theretofore decreed to the Montezuma Canal Company, was in the plaintiff, the San Jose Irrigating Company, its shareholders and stockholders, to the extent of a perpetual flow of 1,500 miner's inches, and in the defendants Frank Dysart, Alexander McLean, and Pedro Michelena, using water through the Michelena Ditch, to the extent of a perpetual flow of 500 miner's inches of water in the Gila River.

"That neither the plaintiff or defendants, users of water under the Michelena Ditch, have priority of right over the other to the use of the water of the said Gila River, but they shall have equal right thereto, and shall pro rate the flow of water in the Gila River in the above proportions in case of scarcity of water therein, or in case of a failure of a full flow of water in said river from any cause sufficient to supply each with the quantity herein decreed, to be the quantity to which each is entitled in point of time."

We excerpt in full in the margin [1] the decree which was

[1] Be it remembered, that on the 28th day of April, 1905, the same being a regular judicial day of the April term of the said District Court, this cause came on regularly for trial before the court without a jury, a jury having been expressly waived by the parties in open court. The parties appeared in person and by their respective attorneys, and

entered by the trial court, omitting the tabular statement as to the amounts of water to which the water-users under the several canals were entitled when the surface flow at the head of the irrigating system was 300, 400, 500,

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the court having heard the testimony of the witnesses and the arguments of counsel, and having examined the documentary evidence, the records and papers introduced by both parties, the evidence was closed and the cause was submitted to the court for consideration and decision, and after due deliberation thereon and examination of the briefs filed by the attorneys of the respective parties, the court delivered its findings and decision in writing (filed herein) and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged and decreed that the several parties to this suit are entitled to receive and are hereby authorized to divert and convey from the Gila River water sufficient, each for his or their lands, from time to time, in the amounts and in the order of priority as shown in the tabular statement hereto attached, and filed herewith, and marked "Tabular statement of amounts of water to which the water users under the several canals are entitled at different stages of water in the river, showing the accretions to the surface flow at the head of the irrigation system, and giving the approximate amounts thereof at the head of the different canals."

And the several parties hereto are each hereby forever enjoined from in any wise obstructing or interfering with the rights of any of the other parties to this suit and for the purpose of carrying into effect this decree Albert T. Colton is hereby appointed a commissioner of this court, to hold said office and exercise the powers and duties thereof, hereinafter prescribed, until a further order of this court.

The said commissioner shall have the power, at all time, when it shall be proper and necessary, in the discharge of his duties, to enter upon any and all of those certain canals and ditches known as the Brown, Sanchez, Mejia, Fourness, San Jose, Michelena, Montezuma, Union, Sunflower, Graham, Central, Oregon, Smithville, Bryce, Dodge, Nevada, Curtis, Kempton, Zeckendorf-Clavenger, Reid, Fort Thomas, Zeckendorf-Collins, Thompson, Military, Saline, and upon each and every part thereof, and upon all the dams, gates, flumes, and other structures and appliances, for the obstruction, diversion, or conveyance of water from said Gila River for the irrigation of lands under any or all of said canals, or ditches, and have supervision and direction of the placing of, changing, closing or opening, of the same for the

750, 1,000, 1,500, 2,000, 2,500, 3,000, 3,500, 4,000, 4,500, 5,000, 5,500, 6,000, 6,500, 7,000 and 7,500 inches respectively.

The question arises whether due effect was given to

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purpose of the discharge of his duties, and to direct the placing of proper gates, dams or other means for the control of the water of said river at the heads of the canals or other points on the banks of said canals as he may direct, at the expense of the parties hereto interested therein, and to make such rules and regulations as he may deem proper and expedient, to be observed by the parties hereto, for the distribution and use of said water.

And it is further ordered that said commissioner shall in person, with the assistance of such help as he may need, superintend and control the distribution and use of water by the parties hereto, and by the proper practice direct the diversion of such water from said river and its conveyance to the place of use by whatsoever means he may deem best to secure the greatest economy therein. In the service of said water he shall direct the distribution thereof in accordance with the rights of the parties as to the extent of land irrigated and order of priority of time of appropriation as in this decree established. In the distribution and use of such water the commissioner shall take as a basis of the supply necessary for the cultivation of said lands one-half of a miner's inch constant flow for each acre of land, or at that ratio, reckoning forty miner's inches as the equivalent to a flow of one cubic foot per second; provided, however, that no land shall be served with an amount of water in excess of that beneficially used thereon. In measuring the water so supplied the measure shall be taken for the water supplied to the several canals at the point of diversion from the river.

The commissioner shall report, from time to time, to the court as to his action in the premises, and shall, whenever he needs the same, apply to the court for further directions as to his powers and duties to make this decree effective.

Any of the parties to this suit may apply to this court for any proper modification of this order or in the supervision and direction of the commissioner.

The compensation of said commissioner shall be one hundred and fifty dollars and twenty cents ($150.20) per month, and shall be paid by the parties hereto in the proportion set out in the following table, to wit:

A table designating the amounts to be paid by the water users un-

the decree entered in the action No. 505 on February 17, 1897, in favor of the Montezuma Canal Company, referred to in finding No. XI; in other words, Is the decree as entered warranted by the facts as found?

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der the several canals and ditches, as their pro rata proportion of the salary of the commissioner, based upon the acreage irrigated under each canal:

Canal.	Acres.	Amount.
Brown	100	$ .65
Sanchez	400	2.55
Mejia	320	2.00
Fourness	260	1.65
San Jose	3000	19.00
Michelena	450	2.85
Montezuma	3750	23.75
Union	2900	18.35
Sunflower	400	2.55
Graham	962	6.10
Central	2675	16.95
Oregon	1100	6.95
Smithville	1760	11.15
Bryce	515	3.25
Dodge	450	2.85
Nevada	800	5.05
Curtis	800	5.05
Kempton	850	5.40
Reid	100	.65
Ft. Thomas	960	6.10
Thompson	240	1.50
Military	400	2.50
Saline	36	.20
Zeckendorf	500	3.15
Total acres	23,728	Total am't $150.20

And the said parties shall pay said proportionate sum into the office of the clerk of this court for the use of the said commissioner on the first day of each and every month.

And it is further ordered and decreed that the gates of the water users in arrears of payments to said commissioner in accordance with the foregoing provisions may be kept closed by said water commissioner until said arrears are paid and satisfied.

We premise that the Montezuma Canal Company and the defendant, individuals and canal companies in action No. 505, whether viewed as appropriators of water or as mere carriers for others, sufficiently represented the users of the waters of the respective canals to cause such water-users to be bound by the judgment. *Tenem Ditch Co.* v. *Thorpe*, 1 Washington, 566; *Arroyo Ditch & Water Co.* v. *Baldwin*, 155 California, 280; 100 Pac. Rep. 874.

The portions of the tabular statement annexed to the decree with which we are now concerned relate to the distribution of water adjudged as between the Montezuma Canal and the canals above the head of the Montezuma. Although, as against the appropriators of water served by the San Jose Canal and the Michelena Ditch the Montezuma Company by the terms of the decree in ac-

It is further ordered and decreed that in the case of each incorporated company, party hereto, that is operating a canal or ditch the pro rata portion of the said commissioner's compensation falling due from the acreage of the water users of such canal shall be a charge against the canal company and shall be paid by proper officer of such company to the clerk of this court on the first day of each month, for the account of said commissioner, and the said officer of the said canal company is hereby authorized to close the gates of water users, under the canal operated by said canal company, who may at any time be in arrears for more than sixty days in the payment of the pro rata share of said commissioner's compensation due from the acreage owned or controlled by said water users, and the said officer is hereby ordered and required to close the gates of the said canal at any time the said canal company may be in arrears of payment, for more than sixty days, to the clerk of this court of the pro rata part of the compensation due from the acreage irrigated under the said canal, and to keep such gate closed and the flow of water through said canal arrested until said arrearage is paid in full and the commissioner is hereby authorized to superintend such closing of the gate and arrest of flow and to see that the same is done in accordance with provisions of this decree. The parties herein each pay their own cost and the court cost common to all parties necessarily incurred herein is adjudged against all the parties hereto in the same proportion as the salary of the commissioner has been apportioned herein.

tion No. 505 "had the right and was entitled to have flow into the Montezuma Canal continuously from the Gila River at all times during the dry season of the year when water is low and scarce in said river, 1,000 miner's inches of water," these provisions were disregarded in the distribution of water ordered in this case. This plainly appears when it is considered that by the decree the following allowances were made to the San Jose and Michelena Canals, when, if the rights conferred upon the Montezuma Canal by the decree pleaded as *res judicata* had been respected, no allowances whatever at the stated stages of water could have been recognized as existing in the San Jose and Michelena Canals, viz., 120 inches when the surface flow at the head of the irrigation system is 400 inches, 320 inches when the surface flow is 750 inches, 480 inches when the surface flow is 1,000 inches, and 600 inches when the flow is 1,500 inches, with an allowance also to the Mejia Canal in the latter event of 30 inches.

While the findings do not establish the reasons which led to these allowances contrary to the decree which was pleaded as *res judicata*, there is room for conjecture that the deductions from the Montezuma and the allowances to the San Jose and Michelena Canals contrary to the decree were made for the following reasons: *a*, As it was found that in 1875 Ellsworth and others had appropriated water for the irrigation of three hundred acres of land, and were diverting the same through the San Jose Canal, and the date of this appropriation was prior to some of the appropriations served through the Montezuma Canal, it was considered that this priority should be regarded in the distribution, even if to do so would conflict with the prior judgment in favor of the Montezuma Canal; and *b*, Because the share which was given to the Michelena Canal out of the allowances made contrary to the prior judgment in favor of the Montezuma Canal was presum-

ably so given to the Michelena Canal, in order to comply with the terms of the judgment in action No. 797, referred to in Finding XII, which establish an equality of rights in the water between the San Jose and the Michelena Canals. But if this be the theory upon which the court considered it was justified in disregarding the prior judgment, its action was erroneous. This was so, because the rights of the appropriators to the water carried through the Montezuma Canal as against appropriators of water diverted by the San Jose Canal were adjudicated as late as 1897 by the decree which was pleaded as *res judicata*, and as no facts were stated by the court which served to take the appropriations of water made by Ellsworth and others in 1875 out of the operation of the judgment of 1897, we can perceive no reason why the fact that appropriations were made in 1875 by Ellsworth *et al.* justified a disregard of the rights which the judgment of 1897 established in favor of the Montezuma Canal.

The remaining contention urged is based upon the action of the trial court, affirmed by the Supreme Court of the Territory, in the appointment of a water commissioner to make distribution of the waters of the Gila River pursuant to the apportionment adjudicated by the decree, and imposing upon the Montezuma Company a liability to pay its *pro rata* share of the salary of the commissioner as fixed by the decree. The Supreme Court of the Territory was of the opinion "that it is essential that an officer of the court be continuously on the river to regulate the amount to be diverted under the decree by each canal, in accordance with the ever-varying volume of water in the river, according to the tabulated statement," that the appointment of the commissioner was a proper choice of a method to carry the decree into effect, and that the appointment was authorized as well by a section of the Revised Statutes of the Territory, providing that "the court shall cause its judgment and decree to be carried

into execution," as by the power which the court possessed by virtue of its "general jurisdiction to provide all necessary means to carry out its judgment and decree."

It would indeed seem that the decree was modeled upon legislative remedies provided for similar situations in other jurisdictions, as the decree and the remedies which it affords bear a peculiar resemblance to legislative provisions enacted in some of the States where irrigation is practiced, to control and regulate the use of water for irrigating purposes. See part IV, Wiel's Water Rights in the Western States, 2d edition, pp. 590 *et seq.* The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Investment Company* v. *Carpenter*, 9 Wyoming, 110, "to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water."

But because it was within the legislative power to provide administrative machinery to supervise the common use of water in a flowing stream by those having a lawful right to appropriate the water of that stream for beneficial use, it does not result that the decree entered by the court below was in excess of its authority. On the contrary, in view of the absence of legislative action on the subject and of the necessity which manifestly existed for supervising the use of the stream by those having the right to take the water in accordance with the decree, which, undoubtedly to that extent, the court was authorized to render, we think the action taken by the court did not transcend the bounds of judicial authority, and therefore is not justly amenable to the attack made upon it. It follows from what we have said that error was committed by the court below in refusing to give due effect

to the judgment in action No. 505, which was pleaded as *res judicata* by the Montezuma Canal Company.

The judgment of the Supreme Court of the Territory of Arizona is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

ROURA *v.* GOVERNMENT OF THE PHILIPPINE ISLANDS.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 35. Argued November 3, 1910.—Decided November 28, 1910.

Jurisdiction as to amount in controversy sustained on the facts disclosed in affidavits filed in this court, there being none filed in rebuttal.

The decree of the Supreme Court of the Philippine Islands denying a petition for registration of title to land on the ground that the petitioner had no legal title thereto under Spanish law, sustained.

Issue in the courts below having been confined solely to the legality of deeds on which the petitioner sought to register and which those courts held to have been fraudulently obtained and illegal, the title could not be registered on claim of quiet possession subsequent to the obtaining of those deeds and in regard to which there was no proof in the record.

8 Philippine Reports, 214, affirmed.

THE facts, which involve the right of a claimant to land in the Philippine Islands to register the title thereto, are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Howard Thayer Kingsbury* was on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Fowler for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

Maria and Juana Roura petitioned the Court of Land Registration to register their alleged title as undivided equal owners of a piece of real estate situated in the pueblo of San Miguel de Mayumo, province of Bulacan. See for the general functions of the Court of Land Registration, *Carino* v. *Insular Government*, 212 U. S. 449; *Reavis* v. *Fianza*, 215 U. S. 16. This writ of error is prosecuted to a judgment of the Supreme Court affirming the trial court in refusing, on the opposition of the insular government, the prayer for registration.

The right to prosecute the writ is challenged on the ground that the amount involved is not sufficient to confer jurisdiction, and because there are no questions arising adequate alone to give jurisdiction. Without going into detail, we say, in view of the affidavits filed in this court concerning the value of the property, after allowing for the elements of speculation possibly entering into the amount fixed in the affidavits, we think, in the absence of affidavits in rebuttal, a sufficient showing has been made to give jurisdiction. We therefore overrule the motion to dismiss and proceed to the merits.

To reduce the case to the issues essential to be decided requires a statement of the source and history of the title whose registry was asked. We therefore at once state the salient and indisputable facts on that subject. On the twenty-fourth of March, 1885, by act before a notary public, Jose Mercado, declaring that he owned and possessed two parcels of irrigated land situated in Sibul, pueblo of San Miguel de Mayumo, sold the same for cash to Juan Roura. A few weeks after, on May third, 1885, the acting petty governor of the pueblo of San Miguel

de Mayumo issued a certificate, stating that Jose Mercado had declared to him that he possessed and owned three parcels of irrigated land in the pueblo, two of which are rice lands and the other serves as a building lot and garden, where he has his house erected; that he had possessed the land peaceably and uninterruptedly for more than thirty years, and asking that a certificate be issued as to the truth of these declarations. It was recited in the certificate that the "commune of leading citizens" was convoked and that they unanimously declared that the statements of Mercado were in effect true. The certificate was signed by the petty governor and the individual citizens who had been convoked to pass upon its statements. The purpose of obtaining the certificate does not appear, but it is inferable that it was intended to be used in a proceeding to be instituted by Mercado to obtain a recognition from the proper administrative authorities of his alleged title to the land. We say this, because four months after it appears among the files of a proceeding which, on September 10, 1885, the General Directorate of Civil Administration, under the authority vested in it by the regulations authorizing it to adjust and compose outstanding claims of title to the royal and unreclaimed lands, directed a deed to be issued to Mercado covering two tracts of land in the pueblo of San Miguel de Mayumo upon the payment of two and a fraction pesos. The sum thus to be paid, it was declared, represented ten per cent of the assessment of the land, and was exacted "for the expense of surveying and measurement to be made by a deputy surveyor of unreclaimed lands and the fees for the title deed, according to the provisions of the decree of the General Government of these islands of September 12, 1882, approved by royal order of July 25, 1884." On October 19 following, the Director General of Civil Administration executed, on behalf of the Directorate, a deed to Mercado of two

pieces of real estate situate in the pueblo of San Miguel de Mayumo, the description of the second of which pieces in a general sense conformed as to its exterior boundaries to the description of one of the pieces which had been previously sold by Mercado to Roura, and also of one of the pieces described in the certificate of the petty governor. In making this deed the Director General declared that it was executed conformably to the decree of the General Directorate of September 7, 1885, by which decree the ownership of the land had been "awarded gratuitously to Mercado." Shortly prior to the making of the deed by the Director General to Mercado, that is, on September 25, and shortly following, on November 9, deeds authorized by the General Directorate, to unreclaimed land in the pueblo of San Miguel, were made, the one in favor of Regino Pengson, and the other in favor of the parish priest of San Miguel. While the description of the land embraced by these two deeds or the surveys cotemporaneously made concerning the same are not in the record, it is established that the land which they embraced was surveyed by the official surveyor who surveyed the Mercado land, and that it was not supposed by the Directorate that there was any conflict between the three claims.

Shortly after the making of the Mercado deed it would seem that a complaint was made to the Directorate of Civil Administration by Pengson, based upon an alleged conflict between the descriptions of the land embraced in the composition sale made to him and that described in the composition deed to Mercado. The precise character and extent of this conflict is not disclosed, but it is inferable from the documentary evidence that it related to the situation of a medicinal mineral spring, which was apparently claimed by both, Pengson under his composition and by Mercado under his. The matter was heard by the Directorate of Civil Administration, and

the result of the investigation of that body was by it reported to the Governor General, with its recommendation for his action.

The Governor General, conformably to the recommendations made to him, issued an order annulling the composition proceedings and the deeds issued thereunder to Pengson, Mercado and the parish curate. It was expressly directed that all the proceedings in the several compositions be annulled, reserving the right of the parties to apply for a new composition. It was further directed, however, that before such new composition be allowed a competent surveyor be appointed, who should mark out the boundaries of the medicinal mineral spring, with the appurtenant land necessary to enable the public to enjoy its benefits, and that such spring and the land so marked out should be held as public property, reserving to private owners the right to demand compensation for any private land taken in the execution of the order. In addition, the order commanded the local authorities to demand from Pengson, Mercado and the parish priest a return of the deeds issued to them which the order cancelled; that the order be transmitted to the proper provincial and local authorities to be executed and put of record, in conformity to law. The order was published in the official gazette at Manila, and was undoubtedly communicated through the proper administrative channels to all the administrative officers who were concerned with its execution, including local officers of the pueblo of San Miguel. The grounds upon which the Directorate recommended and the Governor General annulled the composition proceedings, as above stated, were thus enumerated in the official files:

"Account having been given by this central office to his excellency the Governor General of the proceeding instituted by Don Jose Fores on behalf of Don Regino Pengson relative to a claim of lands granted by composition in the barrio of Sibul, pueblo of San Miguel de

Mayumo, it being found that not only the land granted to the aforesaid Pengson, but also those granted to Jose Mercado and to the parish priest of San Miguel, do not agree in their location or boundaries with those set forth in the title deeds issued by this general directorate under date of November 9, October 19, and September 25 of last year, respectively, and that these differences originate in errors committed by the expert appraiser of lands, Don Jose Moreno, when he practiced the acts relative to said lands in the capacity of acting deputy of unreclaimed lands. And it being found that the Sibul Spring has never been known as private property, nor is it included in land which may have this character, but rather that those medicinal waters have been utilized, without any hindrance or obstacle, not only by the residents of the pueblo but by the public in general, as is evidenced amongst other things by a certificate of the municipal authorities of San Miguel de Mayumo, and is confirmed by the unanimous and universal voice of the public, and it being found that the general inspection of unreclaimed lands and this general directorate have been taken unawares by the aforesaid expert to issue, as they did issue, by virtue of the surveys made by him, titles of ownership by composition of the lands bordering upon the Sibul Springs, by reason of which it might be believed that the spring is found included within some of them, and that the public and free zone which all springs have and need for their enjoyment had disappeared, and considering that the three proceedings referred to embrace a vice of nullity from their beginning, because the data which appear in the notes of survey and measurement of the lands and the plans which accompany them are not correct, and consequently the title deeds issued do not describe the lands such as they really are, and considering that the party responsible for this discrepancy is the expert, Don Jose Moreno, who, when called to explain

the errors committed by him, has not done so satisfactorily, errors all the more inexcusable in that there are involved parcels relatively small and contiguous and surveyed and measured with an insignificant lapse of time between one and the other, giving rise to the suspicion that said errors have not been caused solely by neglect nor lack of zeal, but voluntarily, and with knowledge of the mistakes which are contained."

We state in a summary way the further official action concerning the medicinal spring, referred to in the order. The Governor General directed the proper provincial and local authorities to establish at the spring a sanitarium for the use of the public. But this not being carried out, it was suggested that the spring be placed under the control of private persons for the purpose of creating a sanitarium for the public benefit, with a moderate subvention from the treasury. This project also fell through, on the suggestion that private capital might not be willing to venture an outlay for the erection of the sanitarium because of the fear of outstanding claims to ownership of the spring and the dread that it might ultimately not be held to be public property. Subsequently the provincial and local authorities were directed by the Governor General to investigate and report concerning the existence of alleged claims to private ownership of the spring, and as incident thereto to expressly report concerning its possession and use during the past. This order brought out an official statement as to the previous composition deeds, their annulment, etc., as we have stated them, coupled with a renewed declaration that investigation disclosed that the spring had never been possessed by any private person, but had always been enjoyed by the public and used as public property. Finally, in September, 1895, from Madrid, a royal decree was issued, the necessary effect of which was to sanction the previous action of the local authorities. This order

directed that the spring, with adequate appurtenant property, be sold at public auction.

Long prior to this, in fulfillment of the order of the Governor General of March 5, 1886, in that year and on the twenty-third of that month, demand was made of the curate of San Miguel for the return of the deed made to him in consequence of the composition proceedings, and he declared that he had mislaid the deed and could not find it. On the same day of the same month and year a demand was made both on Mercado and Pengson for their deeds. Pengson declared that, having filed his in the proceedings to vacate which had taken place before the Directorate, he did not have the deed in his possession. Mercado declared that he had sold the land and had delivered the deed to the purchaser. Not having disclosed who the purchaser was, further orders to call on him for disclosure were made, but he was absent and could not be reached. Afterwards, in October, 1890, Mercado having died, his widow, in answer to an official demand upon her, declared that the property covered by the composition had been conveyed by her husband during his life to Roura, to whom the deed had been delivered, and that Roura being dead, the deed would probably be found in the possession of his heir and daughter, Maria Roura, and she upon demand being made upon her, declared that during the lifetime of her father she had heard the title deed mentioned, "but at the present time I am ignorant of its whereabouts." Although the precise date does not appear, it is certain that Roura died testate, and that, by an amicable adjustment and extrajudicial partition of his estate, his two daughters, Juana and Maria Roura, petitioners before the Court of Registration, became entitled to one undivided half each of his rights in and to the land conveyed by Mercado, if any such there were.

With this prelude, we are brought to the initiation of

the proceedings in the Court of Land Registration, now before us.

The petition was filed on September 19, 1904. It is alleged that the two plaintiffs were the equal undivided owners of a tract of land, which was described, the description evidently relating to one of the tracts of land which had been described in the deed from Mercado to Roura, and in the certificate issued to Mercado by the petty governor. It was besides alleged that the title of the petitioners was derived by them as heirs of their father, and that he had derived his title from the conveyance made to him by Mercado. It was averred that "said property described is not occupied by any one," and, aside from any inference of possession to be drawn from the alleged ownership, there was no averment whatever of possession. Various documents were annexed to the petition, among which it is only necessary to mention the certificate issued to Mercado in 1885 by the petty governor and the deed made by Mercado to Roura.

The insular government appeared and opposed the prayer for registration, on the ground that the petitioners had no title to the property, and that it was a part of the public domain. When the case was called for hearing the husband of Mrs. Modesta Pengson appeared in her behalf to resist the registration applied for, on the ground that she held title to the property, and time was given to formulate an opposition, but this was not availed of, and no further action was taken on behalf of Mrs. Pengson. At the trial the petitioners offered various documents to establish their heirship of their father, which need not be referred to. Declaring that the property to which the petition related was that secondly described in the deed from Mercado to Roura (containing the spring), the petitioners offered that deed and the plan or sketch of the property, which was made in 1885, at the time of the composition proceedings. In addition they offered an

official file containing one of the administrative reports which we have stated, that is, the one saying that it would be unwise to seek to procure private capital for the purpose of establishing a sanitarium until the question of whether there was a private claim to the property was clearly settled. The Government offered files of the administrative proceedings, showing in great detail the facts which we have previously stated, that is, the order for composition in favor of Mercado by the Directorate, the deed to him, the controversy originated by Pengson, the decree of the Governor General vacating the compositions and annulling all that had been done under them, and, indeed, establishing all the facts as to notice, the investigation and report as to possession, and the ultimate making of the royal decree. The evidence being closed, counsel for the petitioner thus stated to the court the proposition upon which he relied to secure the allowance of the registration of the title as prayed:

"The court offers to hear the oral argument of Sr. Ferrer. Sr. Ferrer stated that he sought the Court of Land Registration to obtain title deed to the parcel of land which is the subject of the proceeding. The right which his principals invoked was derived from the right of the original owner, Don Jose Mercado, who acquired the same by virtue of the grant made by the Council of Civil Administration for a stipulated sum, in exchange for the parcel of land. The deceased, Juan Roura, father of the petitioners, acquired possession of this land by virtue of a deed of sale executed by Don Jose Mercado in his favor, and from him the petitioners inherited the same. After some time had elapsed the general government annulled that title by grant without returning the money consideration for the land, and without previously hearing the defenses which the aggrieved owner might set up, when, as a matter of fact, this matter ought to have been heard before the competent court. This is not legal; it

is an embezzlement, since it cannot be conceived that after the possession of this real estate had been lawfully granted and the cost thereof had been paid to the satisfaction of both parties, as is witnessed by the documents in evidence, all of the transaction should be afterward retroactively annulled.

"These points having been explained he requested the registration of the property in the name of his clients."

The court denied the prayer for the registration of the title. Summarily stated, it was of opinion, *a*, that the subject of making the composition as to the unreclaimed land and awarding a deed was within the administrative authority of the officials, as was also the right to revoke and cancel the deed within a limited time for error found to exist or fraud discovered to have been practiced in obtaining the deed; *b*, that it was unnecessary to inquire whether irregularities existed in the proceedings by which the deed was cancelled, or whether an abuse of administrative discretion had happened in those proceedings, because the Spanish law created express and exclusive remedies for the correction of such errors, and required that those remedies should be resorted to within a time designated, and did not therefore allow such complaints to become the subject-matter of ordinary judicial controversies; *c*, that as the deed, which was relied upon as the basis for registration, was the mere result of a composition proceeding and was, in its essence, not a contract upon a moneyed consideration, but a mere gratuitous award without the payment of a price, the question of error committed in the annulment proceedings came within one or the other of the systems of administrative recourse provided by the Spanish law, which, not having been availed of, operated to deprive of the right to complain judicially of the cancellation; *d*, that there was no room for holding that the right to registry obtained because of a prescriptive title, acquired under the composi-

tion deed to Mercado by virtue of article 1957 of the Civil Code, providing that "ownership and other property rights in real property are prescribed by possession for ten years . . . with good faith and a proper title." Because, first, from the date of the annulment of the title good faith had in any event ceased to exist, and, second, because of the absence of the essential element of possession, since "it has not been proved that there had been exercised, either before or after the declaration of nullity of the title, any possessory act on the part of the petitioners or of their predecessor. All effort of counsel for the petitioners consisted, after the opposition of the insular government was known, in proving that the former administration did not act within its powers in declaring the nullity of the title deed offered." The case having been carried to the Supreme Court, that court affirmed the judgment upon grounds substantially identical with those which controlled the action of the trial court.

Although we have concluded, from a consideration of the opinion of the court below, aided by the painstaking and full reference to the Spanish law contained in the brief on behalf of the insular government, that the court below was clearly right in its opinion as to the legal principles held to be decisive, we do not stop to state and review those considerations, because we think the argument at bar renders it unnecessary. We say this, because the argument for the plaintiffs in error in substance but proceeds upon the theory that, although the Spanish law was correctly expounded by the court below, nevertheless that law was inapposite because of conditions which it is insisted existed prior to and at the time the composition deed was issued and when the administrative order of annulment of that title was made. The proposition is thus stated in the argument:

"The position of the plaintiffs may be very briefly summarized as follows: In 1885 Jose Mercado was already,

by virtue of his thirty years' possession, the absolute owner of the land in question. The composition deed of October 19, 1885, did not create his title, but was merely evidence of it. The decree of March 5, 1886, was wholly ineffectual to divest his ownership, and at most only affected the record evidence of such ownership. It is immaterial that no affirmative proceedings were taken by Mercado or his successors in interest to question the validity and effect of the decree of annulment. They were justified in relying on their undisturbed possession and awaiting adverse action, when it would be open to them to raise all such questions. This ownership, founded on possession, was in itself a property right, protected by the treaty of Paris and the Organic Act, and entitled to registration as a title in fee simple. The insular government is now asking this court to carry into effect even beyond its very terms a decree of a Spanish Governor General, made thirteen years before the cession, which is void on its face as in violation of the fundamental laws of the former government, and, by virtue of such void decree, to deny plaintiffs' ownership of lands which have been in their possession for fifty years—a possession which the Spanish Government never undertook to disturb."

And the theory of established possession upon which the contention rests is reiterated in many forms of expression throughout the entire argument. But when the statement of the case which we have made is considered it becomes apparent that this contention misconceives the case as presented, since it proceeds upon an assumption unwarranted by the pleadings and unsustained by any proof whatever. As we have seen, the case as made by the pleadings was rested solely upon the right to register resulting from the composition deed, without the slightest averment of possession prior to the time that deed was issued, except as it may be considered that such possession was alleged as a necessary result of the averments as to

the deed. It is further evident that the validity of the deed to Mercado was the one issue which arose on the opposition of the insular government. That this was understood by both parties clearly results from the fact that not a particle of proof was offered concerning the possession prior to or at the time of the composition deed, irrespective of the administrative proceedings leading up to the issue of that deed and following on its annulment. This, moreover, is additionally demonstrated by the express declaration of counsel for petitioners concerning the matter for decision, made after the evidence was in and the case was ripe for consideration. That the trial court had not the remotest thought that such issue was before it is plainly manifest from its statement that all the effort of the counsel of petitioners was directed to assailing the competency of the administrative officers to avoid the Mercado deed and annulling the composition proceedings, and that no evidence whatever had been offered to prove possession of the property in controversy by Mercado or any of those holding under him from the date of the deed up to and including the time of the submission of the cause. That this conception of the issue also prevailed when the case was taken to the Supreme Court of the islands we think is plainly apparent from the assignment of errors, referred to by the Supreme Court in its opinion. We think it also conclusively results from the opinion of the Supreme Court, when considered as a whole, that that court also thought the issue presented to it was thus limited. True it is that a concluding passage in the opinion of the Supreme Court is referred to as indicating that the court thought that the question of the acquisition by Mercado of the title to the property by preëmption prior to the composition deed was involved. But we do not think the passage in the opinion, when taken in connection with its context, has the meaning attributed to it. If it had, it would be the merest obiter,

since the pleadings did not raise that issue, and there was not the slightest proof concerning it. While it is not necessary, we deem it well to say that in reviewing the action of the court below we are, of course, confined to the record and the case therein made, and may not, as the result of mistaken suggestions as to the issues and proof disregard our duty by deciding, not the case as made, but an imaginary one, wherein issues not made and not presented below would have to be supplied, and whereby conjecture and surmise must be indulged to replace the total absence of all proof on a particular subject. So far as the unwarranted assumption concerning the subject of possession relates to acts done after the deed to Mercado, it is also disposed of by what we have said, and is besides completely answered by the express finding of both courts concerning the absence of all proof of possession during that period.

Affirmed.

MOFFITT *v.* KELLY, TREASURER OF ALAMEDA COUNTY, CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 37. Argued November 4, 1910.—Decided November 28, 1910.

The Constitution of the United States does not, as a general rule, control the power of the States to select and classify subjects for taxation; and vested rights which cannot be impaired by subsequent legislation may still be classified for, and subjected to, taxation.

A State may classify for taxation estates passing by will or intestacy and include therein property held as community property by husband and wife at the time of the death of the husband and becoming completely vested in the wife, without violating either the

contract, due process, or equal protection provision of the Constitution; the mere fact that the wife had a preëxisting right of property creates no exemption from taxation if the selection of that class of estates is legal.

In determining whether a tax imposed by a State is constitutional, this court is not concerned with the designation of the tax or whether the thing taxed may, or may not, have been mistakenly brought within the law; it is confined solely to determining whether the State has power to levy a tax on the subject taxed.

The nature and character of the right of a wife in community property for the purpose of taxation is a peculiarly local question, and the determination of the state court in regard thereto is not reviewable by this court.

The law of California of 1905, taxing all property passing by will or intestacy, having been construed by the highest court of that State as applying to the surviving wife's share of the community property, this court holds that such tax is not in conflict with either the contract, due process or equal protection clause of the Constitution of the United States.

153 California, 359, affirmed.

JAMES MOFFITT was married in California in the year 1863 and there resided with his wife until his death on October 25, 1906. He left a large amount of property, all of which formed part of the community which existed between himself and his wife. By a will, duly admitted to probate, Moffitt disposed of all his estate to his wife and children in the same proportions as if he had died intestate.

The probate court held that "the interest of the widow in the community property of herself and her deceased husband" was subject to be taxed under a law of California of 1905, which taxed all property passing by will or in case of intestacy from any person who may die seized or possessed of the same. A tax of $26,684.57 was thereupon assessed as against Mrs. Moffitt's one-half interest in the estate and an order was entered directing payment of the tax by the executors. An appeal was taken to the Supreme Court of California. The single

question presented by the appeal, as stated in the opinion of the Supreme Court, was "whether the surviving wife's share of the community property is subject to this inheritance tax." The question was answered in the affirmative. In an opinion denying an application for a rehearing the court also adversely disposed of the contention that the enforcement of the tax would violate the contract clause or the equal protection and due process clauses of the Constitution of the United States. 153 California, 359. The case was then brought to this court.

Mr. Warren Olney for plaintiffs in error.

Mr. Robert A. Waring, with whom *Mr. U. S. Webb*, Attorney General of the State of California, was on the brief, for defendant in error.

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

While the plaintiffs in error rely on both the contract clause and the equal protection clause of the Constitution, the latter contention is in substance but an incident, and the former is the fundamental proposition counted on to procure a reversal. We come, however, separately to consider the two contentions.

1. *The alleged violation of the contract clause.*—Considered merely subjectively, the contention is that the rights vested in the wife as a partner in the community existing by virtue of the constitution and laws of the State of California governing at the time of the marriage were contractual rights of such a character that they could not be essentially changed or modified by subsequent legislation without impairing the obligations of the contract, and thereby violating the Constitution of the United States.

But even although this theoretical proposition be fully conceded, for the sake of the argument, it is apparent that it is here a mere abstraction, and is therefore irrelevant to the case to be decided. We say this because there is no assertion of the giving effect to any law enacted subsequent to the contracting of the marriage which purports to essentially modify the rights of the wife in and to the community, as those rights existed at the time the marriage was celebrated. This is so because the state law, the enforcement of which it is asserted will impair the obligation of the contract, is merely a law imposing a tax. It is evident, therefore, when the contention is concretely considered, it involves but a single proposition, that is, that the State of California could not, without violating the Constitution of the United States, impose a tax on the share of the wife in the community property on the occasion of the cessation by the death of the husband of his dominion and control over the common property and the consequent complete vesting in enjoyment of such share in the wife. But in every conceivable aspect this proposition must rest upon one or both of two theories, either that the nature and character of the right or interest was such that the State could not tax it without violating the Constitution of the United States, or that if it could be generically taxed without violating that instrument, for some particular reason the otherwise valid state power of taxation could not be exerted without violating the Constitution of the United States. The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the States to select and classify subjects of taxation, and hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was, nevertheless, within the power of the State, without violating the Constitution of the

United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. And this also disposes of the second conception, since if the State had the power, so far as the Constitution of the United States was concerned, to select the vesting of such right to possession and enjoyment as a subject of taxation, clearly the mere fact that the wife had a preëxisting right to the property created no exemption from taxation if the selection for taxation would be otherwise legal. It follows, therefore, that the mere statement of the contention demonstrates the mistaken conception upon which, in the nature of things, it rests.

It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the State of California has imposed an inheritance tax upon the share of the wife in the community and thereby taxed her as an heir of her husband, when if the laws existing at the time of the celebration of the marriage be properly construed and be held to be contractual she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred and arose only on his death. But for the purpose of enforcing the Constitution of the United States we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because in determining whether the imposition of the tax complained of violated the Constitution of the

United States, we are solely confined to considering whether the State had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment arising upon the death of her husband was subject to be taxed by the State, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern. To make this, if possible, clearer by an illustration we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that on an analysis of the constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffitts, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that on the death of the husband the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, because as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question not involving any violation of the Constitution of the United States, and which therefore we have no right to review. The controlling effect of the reasoning which we have just stated was pointed out and the mistaken conception upon which the contentions of the plaintiffs in error rest was indicated in *Castillo* v. *McConnico*, 168 U. S. 674, 683.

2. The contention pressed in argument as to the equal

protection of the law clause substantially denies the right of the State to impose any tax on the share of the wife in the community property resulting from the termination of the community by the death of the husband, or in substance assumes that we have the right to review the action of the state court in deciding that the tax law which it enforced was applicable. We say this because the entire argument proceeds upon the contention that as the share of the wife in the community property was a vested interest during the life of the husband, it could not on the death of the husband be taxed differently from any other property, viz., according to value, without violating the constitution of California and creating an inequality repugnant to the Constitution of the United States. But this merely rests upon the mistaken conception previously disposed of, since the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question which we have no power to review.

Affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* COMMERCIAL MILLING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 15. Argued October 26, 1910.—Decided November 28, 1910.

Intercourse between the States by telegraph is interstate commerce. *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347.

While a state statute which imposes positive duties and regulates the performance of business of a telegraph company is void as a direct regulation of interstate commerce, as decided in *Western Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347, a statute which imposes no addi-

tional duty but gives sanction only to an inherent duty and declares, as to a public service, the public policy of the State, does not entail any burden on interstate commerce and is not void under the commerce clause of the Constitution of the United States.

Public service corporations are subject to police regulation, and while the police power is not unlimited it does include provisions, in pursuance of the public policy of the State, against such a corporation limiting its liability for its own negligence, and a statute to that effect does not deprive the public service corporation affected thereby of its property without due process of law.

A classification of telegraph companies in a statute prohibiting limitation of liability is reasonable and does not deny equal protection of the law to telegraph companies because it does not apply to common carriers.

The statute of Michigan of 1893, fixing the liability of telegraph companies for non-delivery of messages at the damages sustained by the sender, is not, as applied to interstate messages, unconstitutional as a burden on, or regulation of, interstate commerce, or as depriving telegraph companies of their property without due process of law or denying them the equal protection of the laws.

The common law does not become a part of the law of a State of its own vigor but is adopted by constitutional provision, statute or decision; it expresses the policy of the State for the time being only and is subject to be changed by the power that adopted it. It has no efficacy that the statute changing it does not possess.

Whether a prohibition affecting interstate commerce as construed by the highest court of a State rests on the common-law liability or on a statute of that State makes no difference in determining its validity under the Constitution of the United States.

151 Michigan, 425, affirmed.

THIS is an action for damages for failure to deliver a telegram given to the telegraph company at Detroit, Michigan, to be delivered at Kansas City, Missouri.

On August 15, 1904, the milling company was offered ten thousand bushels of wheat, of a certain kind, at $1.01 a bushel, for immediate acceptance. The telegram in controversy was sent to accept the offer. It was promptly transmitted by the company to its relay station at Chicago within a minute or two after it was filed at Detroit. What became of it afterwards is not shown; it

was not delivered. On the face of the telegram were the following words: "Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to." One of the conditions referred to was this: "It is agreed . . . that the said company shall not be liable . . . for non-delivery of any unrepeated message beyond the amount received for the same." Fifty times the amount received for the message was fixed as the damages for non-delivery in case of its repetition, and there was a provision for insurance upon the payment of a premium.

The case was tried to a jury and the milling company gave evidence of the above facts and of its damages. The telegraph company offered no evidence. The telegraph company asked certain instructions, which, to understand, the statute of the State in regard to telegrams must be given. It is entitled "An act to prescribe the duties of telegraph companies incorporated, either within or without this State, relative to the transmission of messages, and to provide for the recovery of damages for negligence in the performance of such duties." Laws of 1893, No. 195, p. 312. Section 1 of the act provides as follows:

"SEC. 1. The people of the State of Michigan enact that it shall be the duty of all telegraph companies incorporated either within or without this State, doing business within this State, to receive dispatches from and for other telegraph companies' lines and from and for any individual, and on payment of the usual charges for individuals for transmitting dispatches as established by the rules and regulations of such telegraph company, to transmit the same with impartiality and good faith. Such telegraph companies shall be liable for any mistakes, errors or delays in the transmission or delivery or for the non-delivery of any repeated or non-repeated message, in damages to the amount which such person or persons may sustain by reason of the mistakes, errors or delays in the transmission

or delivery, due to the negligence of such company; or for the non-delivery of any such dispatch due to the negligence of such telegraph company or its agents, to be recovered with the costs of suit by the person or persons sustaining such damage."

As to the statute, the telegraph company requested the court to instruct the jury (1) that it did not prohibit a contract like the one made by the parties; (2) the milling company must recover on the contract or not at all; (3) the message was interstate commerce and the statute cannot be held to apply to it. If the statute be held to be prohibitory it is void as an attempted regulation of interstate commerce, in violation of the interstate commerce clause of the Constitution of the United States.

The court refused the instructions, and expressed in its charge to the jury a view antagonistic to the propositions of law expressed in them. A verdict was rendered for the milling company in the sum of $960. The telegraph company moved for a new trial, repeating the propositions expressed in the instructions, and added the further ground that the statute, when construed as prohibiting contracts between persons *sui juris*, is in violation of the Fourteenth Amendment to the Constitution of the United States. Judgment was entered on the verdict, which was affirmed by the Supreme Court of the State by a divided court.

Mr. Rush Taggart, with whom *Mr. C. D. Joslyn*, *Mr. George H. Fearons* and *Mr. Henry D. Estabrook* were on the brief, for plaintiff in error:

There was an express contract, the terms of which, if valid, would defeat any recovery by the milling company.

This court, and the Supreme Court of Michigan, have said that the conditions imposed by this contract are reasonable and binding whether the sender's attention was directed to them or not. *Primrose* v. *West. Un. Tel.*

Co., 154 U. S. 1; *Birkett* v. *West. Un. Tel. Co.*, 103 Michigan, 361.

The Michigan statute so construed as to include interstate messages violates the commerce clause of the Federal Constitution.

With regard to interstate commerce, States in the exercise of their police power may not directly interfere with it, but, in caring for the health, safety and welfare of the people within their boundaries, they may adopt legislation which incidentally affects interstate commerce, but they have not any control over interstate commerce beyond their own boundaries. *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347, can be distinguished. And see *West. Un. Tel. Co.* v. *Chiles*, 214 U. S. 274; *Walling* v. *Michigan*, 116 U. S. 455; *Wilton* v. *Missouri*, 91 U. S. 275, 282; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 577.

West. Un. Tel. Co. v. *James*, 162 U. S. 650, applies only when confined to intrastate messages. Nor do *Pennsylvania Ry. Co.* v. *Hughes*, 191 U. S. 477; *Chicago & Mil. Ry. Co.* v. *Solan*, 169 U. S. 133, govern this case as they might had it been for damages resulting from negligence of the telegraph company in Michigan. In those cases it was simply attempted to enforce the laws of the State within its own borders, while in the case at bar an attempt is made to give the effect of a state statute beyond the borders of the State.

The statute in this case, as construed by the Supreme Court of Michigan, is a regulation of interstate commerce. *Prima facie*, therefore, it is invalid.

The statute cannot be said to be confined in its scope to the enforcement of the performance of duty owed by the company under the general law; in both cases it is a direct discouragement, obstruction and impediment to interstate commerce which Congress has not seen fit to permit.

The statute, as construed, violates the Fourteenth Amendment by abridging privileges and immunities of citizens of the United States. It deprives the telegraph company and the persons with whom it does business of their liberty and property, without due process of law.

While the police power of a State over the right of contract cannot be defined, there is a limit somewhere and its exercise must be for some public good and must be reasonable. *Lochner* v. *New York*, 198 U. S. 45, 56; *Primrose* v. *West. Un. Tel. Co.*, 154 U. S. 1; *Birkett* v. *West. Un. Tel. Co.*, 103 Michigan, 361. The attempted prohibition of such a contract by the legislature is unreasonable and beyond its power.

The statute denies to the telegraph company and the persons with whom it does business the equal protection of the laws. Express companies and other common carriers can limit their liability. *Smith* v. *Am. Express Co.*, 108 Michigan, 572, 578; *Mich. Central Ry. Co.* v. *Hale*, 6 Michigan, 243; *Dorr* v. *N. J. Steam Navigation Co.*, 1 Kern. 493; *McMillan* v. *M. S. & N. Ry. Co.*, 16 Michigan, 109.

Contracts of this nature generally are not, in Michigan, void as against public policy. Express companies, railroad companies, telephone companies and telegraph companies are all of the same nature in that they are *quasi*-public utilities. Telegraph companies in this State are not common carriers, and it has been recognized both by this court and by the Supreme Court of Michigan that public policy requires of them not a greater but a lesser liability than in the case of common carriers. See *Hadley* v. *Baxendale*, 9 Exch. 345.

Mr. Ralph B. Wilkinson for defendant in error:

In the absence of congressional legislation upon the subject, the State may require a common carrier, although in the execution of a contract for interstate car-

riage, to use great care and diligence in the carrying of passengers and the transportation of goods and to be liable for the whole loss resulting from negligence in the discharge of its duties. *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 479; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Chicago, M. & St. P. R. Co.* v. *Solan*, 169 U. S. 133.

Although this court has not directly passed upon the precise question presented in the case at bar in any suit where a telegraph company has been party to the action, the *Hughes case* is on all fours with this present case. As to the question, involving telegraph companies themselves, see Jones on Telegraph & Telephone Companies, § 432; Wharton on Conflict of Laws, 3d ed., § 471*f*; Joyce on Electric Law, 2d ed., § 123; *Bushnell* v. *Chicago & N. W. R. R. Co.*, 69 Iowa, 620; *Cutts* v. *West. Un. Tel. Co.*, 71 Wisconsin, 46; *Telegraph Co.* v. *Beals*, 56 Nebraska, 415; *West. Un. Tel. Co.* v. *Lowrey*, 49 N. W. Rep. 707; *West. Un. Tel. Co.* v. *Cook*, 9 C. C. A. 680; *West. Un. Tel. Co.* v. *Reynolds*, 77 Virginia, 173; Thompson on the Law of Electricity, § 192.

The statute in question is not in conflict with the commerce clause of the Constitution. It does not interfere with or obstruct such commerce, nor regulate the manner in which it shall be conducted, nor fix the rates of service, nor levy any tax upon it, nor does it even impose a penalty. It merely recognizes that the common-law liability exists, and by implication, or in effect, prohibits its nullification by contract. It only declares the law of Michigan to be the same as the common law of the other States as laid down by their respective courts.

This case is for failure to deliver a telegram, not for a mistake in transmission, and there is a vital difference. *Thompson* v. *Telegraph Co.*, 107 N. C. 449; *U. S. Tel. Co.* v. *Wenger*, 55 Pa. St. 262.

A common carrier is liable for damages to goods hap-

pening on his own line no matter where that line may be. *Richmond* v. *Tobacco Co.*, 169 U. S. 311. The statute attaches before the subject of interstate commerce comes into existence. *Turner* v. *Maryland*, 107 U. S. 38.

The statute does not violate the clause of the Constitution prohibiting the States from passing any law impairing the obligation of contracts, nor is it in violation of the Fourteenth Amendment either as to due process, *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *McCulloch* v. *Maryland*, 4 Wheat. 316; or the equal protection of the laws, *Smith* v. *American Express Co.*, 108 Michigan, 572; *U. S. Tel. Co.* v. *Wenger*, 55 Pa. St. 262. See also on this subject: *W. U. Tel. Co.* v. *Blanchard*, 68 Georgia, 299; *W. U. Tel. Co.* v. *Chamblee*, 122 Alabama, 428; *W. U. Tel. Co.* v. *Short*, 53 Arkansas, 434; *W. U. Tel. Co.* v. *Meek*, 49 Indiana, 53; *Ayer* v. *W. U. Tel. Co.*, 79 Maine, 493; *Wertz* v. *W. U. Tel. Co.*, 7 Utah, 446; *Southern Express Co.* v. *Caldwell*, 21 Wall. 264; *Francis* v. *W. U. Tel. Co.*, 58 Minnesota, 252.

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

Intercourse between the States by the telegraph is interstate commerce. *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464; *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356. So considering, one division of the Supreme Court of Michigan was of the opinion that the statute of the State in regard to telegraph messages, if not limited to those which were delivered within the State, would be unconstitutional. In arriving at that conclusion it was considered whether the common law of the State prohibited the stipulation against liability for negligence, and it was asked, if it did not, "Can a statute of a State deny to one engaged in interstate commerce the right which he theretofore possessed of making a contract limiting his lia-

bility?" The first question was answered in the negative, on the authority of the *Western Union Telegraph Co.* v. *Carew*, 15 Michigan, 525, and subsequent cases. The second question was also answered in the negative, as we have seen. It was, in effect, said that if the first question could be answered in the affirmative the case would be determined by the local law, and there would be no power of revision in this court, citing *Delmas* v. *Ins. Co.*, 14 Wall. 661, and *Penn. R. R. Co.* v. *Hughes*, 191 U. S. 477. This presents the seeming paradox that a prohibition against a limitation of liability, if prescribed by the common law, would be valid, and that a like prohibition prescribed by a statute would not be. It is not clear whether it is meant to be said that in the first instance there would be, and in the second instance there would not be, a proper limitation of the liberty of contract and a valid interference with interstate commerce.

The other division of the court, on the other hand, expressed the view that "the legislature intended its action to be coextensive with its authority to act, and that the statute should be given the broadest possible application," and held to cover state and interstate messages and "to forbid a limitation of liability" for negligence and "to make void the stipulation contained in the contract." The power of the legislature to pass it was asserted, and that it did not burden interstate commerce. "The contract," it was said, "was made in the State, is single, involves in its performance service of defendant within and without this State for a single charge." The service was not performed, and for the breach of the common law and contract duty the milling company has brought suit, it was said, and that the telegraph company seeks to avoid liability by the stipulation on the back of the message. To this defense it was answered:

"By the law of the State, the stipulation is of no force or effect. The court so declared. It is contended here

that in so doing the court was in error. It will be well to have in mind the effect of the statute as it was applied by the trial court. Undoubtedly, it was the application of a local law to the contract. But the local law does not attempt to state, measure or define any duty of defendant, or to establish, define or fix the consequences of its miscarriage. The liability of defendant is established without reference to the statute. It is when it asks to be discharged therefrom, by giving effect to the stipulation, that the local law becomes, if at all, effective. These considerations answer those objections which are based upon the notion that the local law has been given extraterritorial effect, and they require, also, that this case and *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, shall be distinguished."

Western Union Tel. Co. v. *Pendleton*, 122 U. S. 347, leaves nothing to be said upon the principles relating to interstate telegraphic messages and the limitations upon the States of power to regulate them. A statute of Indiana was adjudged invalid which prescribed that dispatches should be transmitted in the order of their delivery, whether intended for delivery within or without the State, "under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed." The statute was construed by the Supreme Court of the State to apply to dispatches not delivered in the State, even against the practice of the companies authorized by the laws of another State. The message was delivered to the telegraph company in Indiana, addressed to the care of a person in Ottumwa, Iowa, who lived over a mile from the telegraph station, and not within the delivery district. These facts were set up in the answer and, that in accordance with the custom and usage of the office, and, in order to facilitate the delivery of the message, a copy of the telegram was

promptly placed in the post-office, properly addressed and delivered the following morning. And it was averred that this was in accordance with the laws of Iowa. A demurrer was sustained to the answer and judgment entered for the plaintiff for the sum of $100. It was affirmed by the Supreme Court; it was reversed by this court on the ground that the statute was a regulation of interstate commerce. Of the correctness of that conclusion there cannot be any controversy, but there is a manifest difference between the statute of Indiana and the statute of Michigan and of their purposes and effects. The former imposed affirmative duties and regulated the performance of the business of the telegraph company. It besides ignored the requirements or regulations of another State, made its laws paramount to the laws of another State, gave an action for damages against the permission of such laws for acts done within their jurisdiction. Such a statute was plainly a regulation of interstate commerce, and exhibited in a conspicuous degree the evils of such interference by a State and the necessity of one uniform plan of regulation. The statute of Michigan has no such objectionable qualities. It imposes no additional duty. It gives sanction only to an inherent duty. It declares that in the performance of a service, public in its nature, that it is a policy of the State that there shall be no contract against negligence. The prohibition of the statute, therefore, entails no burden. It permits no release from that duty in the public service which men in their intercourse must observe, the duty of observing the degree of care and vigilance which the circumstances justly demand, to avoid injury to another.

We have seen that one division of the Supreme Court of the State was of the view that if the prohibition rested on the common law its validity could not be questioned. We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct proceed-

ing from the supreme power of the State. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the States of its own vigor. It has been adopted by constitutional provision, by statute or decision, and, we may say in passing, is not the same in all particulars in all the States. But however adopted, it expresses the policy of the State for the time being only and is subject to change by the power that adopted it. How then can it have an efficacy that the statute changing it does not possess?

It is to the laws, whether part of the common law or found in the statutes of the State, that we look for the validity and extent of a contract between persons. They constitute its obligation. How far this principle is limited by the commerce clause of the Constitution of the United States may be illustrated by several cases cognate to the one at bar.

In *Chicago &c. Railway* v. *Solan*, 169 U. S. 133, a statute was considered which prohibited any railroad company from limiting its liability as a common carrier. Solan sued the company to recover $10,000 damages received by him in Iowa from the derailing, by the company's negligence, of a car in which he was traveling under a written contract, by which the company agreed to carry him, with cattle, from Rock Valley to Chicago. It was stipulated in the contract that the company should, in no event, be liable to the owner or person in charge of such stock for any injury to his person in any amount exceeding $500. The company alleged that the stipulation was part of the consideration for the transportation, that it related exclusively to interstate commerce, that it was valid at common law, and that the statute of Iowa was void and unconstitutional, "as being an attempt to regulate and limit contracts relating to interstate commerce." The contentions were rejected. The court said (p. 137):

"Railroad corporations, like all other corporations and persons, doing business within the territorial jurisdiction of a State, are subject to its law. . . . The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

It was further said:

"The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duties resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

Pennsylvania R. R. Co. v. *Hughes*, 191 U. S. 477, 491, may be cited as pertinent. It determined the validity of the common law of Pennsylvania, which prohibited the common carrier from limiting his liability for his own negligence, though the property was shipped from New York to a town in Pennsylvania under a bill of lading which contained a clause limiting the carrier's liability to a stip-

ulated value in consideration of the rate paid, the shipper having been offered a bill of lading without such limitation on payment of a higher rate. The court quoted at length from the *Solan case* and concluded as follows:

"We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into statute or resulting from the rules of law enforced in the state courts. The State has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding."

There is a difference between that case and this—indeed some contrast. In that case a contract was made in New York which limited the liability of the carrier, the limitation being in accordance with the laws of that State; it was disregarded in Pennsylvania, where the act of negligence occurred, and the law of the latter enforced. In this case the contract limiting liability was made in Michigan, the negligent act occurred in another State, and yet the limitation, it is insisted, is void. In other words, in that case the law of the State was disregarded, in this case it is sought to be enforced. These, however, are but incidental contrasts, in no way affecting the basic principle of the cases, which was that the laws passed upon were exercises of the police power of the States in aid of interstate commerce, and although incidentally affecting it did not burden it.

Western Union Tel. Co. v. *James*, 162 U. S. 650, is a strong example of the same distinctions. A statute of Georgia which required telegraph companies having wires wholly or partly within the State to receive dispatches, transmit and deliver them with due diligence under the penalty of $100, was sustained as a valid exercise of the power of the State in relation to messages by telegraph

from points outside of and directed to some point within the State. It will be observed that this case in some particulars exhibits a contrast to *W. U. Tel. Co.* v. *Pendleton, supra,* and yet they are entirely reconcilable, having a common principle. In the latter case the law passed on clearly transcended the power of the State, because it directly regulated interstate commerce, as we have already shown. In the *James case* the power of the State was exercised in aid of commerce. In the latter case prior cases were reviewed and the principle determining the validity of the respective statutes was declared to be whether they could be "fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other States." It was said that a statute of that kind as it would not "unfavorably affect or embarrass" the telegraph company, in the course of its employment should be held valid "until Congress speaks upon the subject." And it was observed that "it is a duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to whom it is addressed with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor." And there can be liability to the sender of the message as well as to him who is to receive it. The telegraph company in the case at bar surely owed the obligation to the milling company to not only transmit the message, but to deliver it. For the failure of the latter it sought to limit its responsibility, to make the measure of its default not the full and natural consequence of the breach of its obligation, but the mere price of the service, relieving itself, to some extent, even from the performance of its duty, a duty, we may say, if performed or omitted, may have consequence beyond the damage in the particular instance. This the statute of the State, expressing the policy of the State,

declares shall not be. For the reasons stated we think that this may be done, and that it is not an illegal interference with interstate commerce.

Another contention is made. It is urged that the statute as construed violates the Fourteenth Amendment of the Constitution of the United States, in that it abridges the privileges and immunities between citizens of the United States and deprives the telegraph company and the persons with whom it does business of their liberty and property without due process of law. The basis of this contention is the liberty of the telegraph company to make contracts. It is rather late in the day to make that contention. The regulation of public service corporations is too well established, both as to power and the extent of the power, to call for any discussion. It is true such power is not unlimited, nor is the police power of the State, but the cases we have cited demonstrate that the statute of Michigan is not in excess of such powers.

Lastly, it is said that the statute deprives the telegraph company and the persons with whom it does business of the equal protection of the laws. This is sought to be sustained on the ground that express companies and other common carriers may by contract limit their liability. The argument to sustain the contention is in effect that which we have considered. If an unjust discrimination is intended to be asserted, *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, is an answer.

Judgment affirmed.

MR. JUSTICE HOLMES dissents.

MOORE PRINTING TYPEWRITER COMPANY *v.* NATIONAL SAVINGS AND TRUST COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 21. Argued October 27, 28, 1910.—Decided November 28, 1910.

Where the prayer of a bill by a trustee is simply for permission to resign the trust and turn over the subject-matter thereof to another trustee in accordance with the terms of the agreement itself, the action cannot be treated as one of, or in the nature of, interpleader.

Where the filing of a cross bill would tie up property pending determination of title, the court does not err in requiring the party filing it, to apply for an injunction and give a bond as required by the rules of the court; nor will this court assume that the amount of the bond was too large when such party did not invoke further action, but took an appeal before the expiration of the time allowed for complying with the provisions of the decree.

31 App. D. C. 452, affirmed.

THE facts are stated in the opinion.

Mr. Charles A. Keigwin, with whom *Mr. George P. Montague* was on the brief, for appellants.

Mr. J. J. Darlington for appellee, National Savings and Trust Co.

Mr. John J. Crawford for appellees, holders of trust certificates.

Mr. J. K. M. Norton for appellees, Thompson and others.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a bill in equity brought by the National Sav-

ings and Trust Company against the appellants and certain others to obtain a decree to permit it to resign a trust created by the deposit with it of 35,005 shares of the stock of the American Planograph Company. The stock was deposited under an agreement signed by George R. Cornwall, Marion Bryan, Charles T. Moore and others, all of whom were made parties to the bill. The agreement contained the following provision:

"And it is hereby mutually agreed by and between all the parties hereto that on the receipt of the respective certificates of the said 35,005 shares of stock by the said trustee from the parties of the first part, the said trustee shall cause to be delivered to each of the parties of the first part who contribute toward said 35,005 shares an assignable trust certificate, which shall recite the number of shares so deposited by him, and state that the holder thereof is entitled to an equitable interest in the said 35,005 deposited shares equivalent to the number of shares so conveyed to and deposited with said trustee by each of said depositors respectively, and that the holder of said trust certificate or certificates has no right to vote on any such shares, but shall be entitled to receive his pro rata share of any dividends paid on the deposited stock, and that on and after March 31, 1911, each holder of such trust certificate will, on surrender thereof to the said trustee, be entitled to a certificate of an equal number of shares of stock of the American Planograph Company, and the trustee shall forthwith cause to be transferred on the books of the American Planograph Company the stock so held in trust and deliver the certificates thereof to each of the holders of the said trust certificates."

The agreement transferred the legal title to the Trust Company, and authorized it to vote the stock in the meeting of the Planograph Company, "for such measures and such persons as the owners of a majority in amount of said trust certificates shall direct." Also to collect

dividends and pay them to the holders of the trust certificates. The agreement also contained the following provision: "It is further agreed that in case the said trustee shall decline to accept or serve, or upon the resignation of said trustee during the term for which it is or may be appointed or elected, then the holders of a majority in amount of the trust certificates shall elect a trustee to fill the vacancy or vacancies." It was further provided that the agreement should continue in force until April 26, 1911, but that the trust might be dissolved before that time by a vote of three-fourths of the depositors.

It is alleged in the bill that the National Savings and Trust Company notified the depositors of its desire to resign its position as trustee, and that the depositors, by an instrument in writing, duly nominated and appointed the New York Trust Company of the city of New York and State of New York to be trustee in its place instead. And further, that on May 22, 1906, it received a written notice from the appellants, purporting to be issued by themselves and others, that the shares had been transferred to it "by breach of trust on the part of the holders of certain of the shares," who were trustees of the appellants, and that suit had been commenced by the beneficiaries of the trust in the State of West Virginia against the Planograph Company to determine, among other things, the ownership of such shares.

It is also alleged that two suits had been brought and were pending against the Savings and Trust Company and others in the Supreme Court of the District, respectively numbered 26731 and 26847, in which restraining orders were issued and were enforced, restraining it and the other defendants, until the court's further order, from removing or attempting to remove from the District of Columbia, and from selling, encumbering or in any manner disposing of any of the shares of the stock of the Planograph Company in its possession or custody. And that by

reason thereof, and of the written notice served upon it by the Moore Company, it is "advised that it may not transfer the said shares of stock in its possession to the said New York Trust Company as its successor in the said trust, without the risk of liability and loss, except through the aid of this court, and that it is entitled in its said capacity as a trustee to apply to this court for its instructions and its protection in the premises."

The prayer of the bill was that the Savings and Trust Company "may be permitted to resign and retire from its said trust, and to surrender the shares of stock now held by it to a new trustee; and that the complainant may be instructed by the court as to the manner and form of transfer by it to its successor in the said trust."

Costs were also prayed and general relief. Copies of the various instruments referred to were attached to the bill.

The answer of the Moore Company neither admitted nor denied the averments of the bill, except that it admitted giving notice to the Savings and Trust Company as alleged by it and the pendency of the suit in West Virginia as alleged. Also, that the shares of stock stand in the name of the Savings and Trust Company on the books of the Planograph Company.

The answer alleges new matter to the following effect: In January, 1900, Moore, Bryan and Cornwall, three of the appellants, entered into a conspiracy for the purpose of wrecking the Moore Company and a company called in the answer the Liomatrix, the stock of which is owned by the Moore Company, and acquiring for themselves the assets of the Moore Company, including certain inventions of Moore. To this end they procured the organization of the Planograph Company, the purposes of which were of the same general character with those of the Moore Company.

Afterwards, by the use of the new incorporation and by a course of fraudulent representations and conduct, which included the piracy of the most valuable machine of the Moore Company, the officers of the latter company were induced to believe that the Planograph Company possessed some inventions of great value, and that the Moore Company would be benefited by a consolidation of the two companies. Such consolidation was effected in 1901, upon terms and in a manner which gave complete control of the consolidated companies to the confederates, and that they have used such control for their own profit, and have by various fraudulent means possessed themselves of a very large part of the 35,005 shares of that company's stock, deposited with the Savings and Trust Company. A detail of the transactions by which this was effected is not necessary to recite.

The answer concludes as follows:

"This defendant admits, on the allegations set forth in the bill of complaint, that the plaintiff is entitled to resign and be relieved of its trust, but it alleges, on information and belief, that the New York Trust Company has not consented to accept said trust; and, further, that no other responsible trust company will be likely to accept the same if it has full knowledge of the facts, and in view of all the facts and circumstances hereinabove set forth, including the restraining orders granted by this court in equity, suits Nos. 26731 and 26847, referred to in the bill of complaint, which orders still remain in force, and prohibit the removal or transfer of the said 35,005 shares of Planograph stock, defendant submits that the plaintiff can be granted relief and the rights of all parties protected only by the appointment of a receiver for the said 35,005 shares of Planograph stock affected by said trust, who shall hold said stock subject to the orders of this court until the rights of the various claimants thereto have been settled and determined."

Certain exhibits were attached to the answer, by which it is alleged its allegations are sustained.

The individual appellants, by a joint answer, adopted that of the Moore Company.

All of the other defendants in the suit and appellees here answered, and gave consent to an order permitting the Savings and Trust Company to resign its trust and surrender the shares of stock held by it to the New York Trust Company. Two of those so consenting are the complainants in the suits Nos. 26731 and 26847, referred to above.

The cause was set down for hearing on bill and answers, and on December 13, 1907, it coming on to be heard, a decree was entered, authorizing and directing the Savings and Trust Company to deliver to the New York Trust Company all of the certificates of stock in the American Planograph Company which it held by virtue of the agreement alleged in its bill, "and to make such endorsement upon such certificates as may be required to enable its said successor to take complete title to such certificates." And it was ordered that upon compliance with the decree it should be discharged from all liability to the defendants in the suit in respect of such certificates and its action as trustee under such agreement.

The decree concluded as follows:

"Provided, however, that this decree and order shall be void if on or before the 23d of December, 1907, the defendants The Moore Printing Typewriter Company, Russell W. Montague and George P. Montague, or one or more of said last-named defendants by way of a cross bill in this case or by original bill in this court, as they may be advised, shall apply for and obtain a restraining order or injunction with undertaking and security as required by equity rule 42 of this court, prohibiting such transfer of said certificates."

The decree was made by consent of all parties ex-

cept by the Moore Company and the individual appellants.

On December 13 the Moore Company offered a cross bill, which repeated the charges of fraud contained in its answer, and made other charges of misconduct. It prayed that the Savings and Trust Company be required to hold the stock subject to such order or orders as should thereafter be made, and that it be a trustee of such stock for the purpose of the cause, and that in the event that it be permitted to resign the person substituted for it be deemed a trustee of the stock and hold it subject to the orders of the court. The other relief prayed is not necessary to mention.

Leave to file the cross bill was granted. Nothing else was done under it, but the appellants took an appeal from the decree to the Court of Appeals, by which court the decree was affirmed.

The contentions of the parties turn upon the question whether or not the bill is one of interpleader. Appellants contend that it is one in the nature of interpleader, being in some respects identical with it, but involving "another principle of equity, namely, a trust, and it has, therefore, a greater scope, and is free from many of the technical restrictions of strict interpleader, particularly as applied to bailors and bailees, principal and agent," &c.

The Court of Appeals considered the bill as one of strict interpleader and rejected the contention of appellants (they were appellants also in the Court of Appeals), because the claim "asserted was not derived from the contractual relation existing between plaintiff [Savings and Trust Company] and the depositors of the stock." In other words, that the claim of appellants and the claim of the depositors were not derived from a common source.

The Court of Appeals quoted from *Richardson* v. *Belt*, 13 App. D. C. 200, as follows:

"An essential foundation of the equity of interpleader is, that the party seeking the relief must not be under an independent or special liability to one of the claimants. Adams Eq. 204; 3 Pom. Eq., sec. 1327. Where there is an independent liability of the party seeking the relief to one of the several defendants, arising out of the relations subsisting between them or upon a special contract creating, for example, the relation of bailor and bailee, landlord and tenant, or creditor and debtor, there can be no interpleader, unless it be made to appear that others have acquired a claim of title or interest derived under the said liability."

But it is not necessary to consider the essentials of a bill of interpleader or one in the nature of interpleader. It is very certain that the bill in the pending case was not intended to be either. The prayer of the bill is for permission to resign the trust created by the agreement between the Savings and Trust Company and the depositors of the stock, a right which the agreement expressly gives it. But appellants say:

"In the present case, either the complainant, the Trust Company, had a right to compel the adverse claimants to come into court and litigate their claims, or it had not. If it had not, the bill should have been dismissed. If, on the other hand, it had such right, as it clearly had, then the stock in controversy should have been awarded to the parties who established their ownership to it, that is, to the appellants; who, it is submitted, fully established their claims, while the defendant-appellees practically made default, which in a case of this nature amounts to a confession that they had no right or title as against appellants to the thing in controversy."

The assumptions of these statements are not justified. The complainant did not bring the appellants into court to interplead their claim to the stock with the depositors of it. The complainant sought only by its bill to termi-

nate its relation to the depositors of the stock and transfer the trust it had undertaken to some one else. There were good reasons for doing so. It had taken the custody of and assumed duties in regard to property, the title to which had come into dispute. Every act that was done in discharge of those duties would be under the shadow of illegality and the possibility of litigation. And besides something had been done under the trust, the propriety of which might be questioned by the new claimants to the property. Whether justifiably, was submitted to the court, and likewise the responsibility of the new trustee. It must be remembered that after the Savings and Trust Company received notice of the new claimants of the stock it had to proceed, if it proceeded at all, in the possibility of such claim being declared the legal one. It sought, therefore, to relieve itself of the trust and receive a complete discharge from past and future responsibility. The appellants sought to make it a trustee for them during, it may be, a protracted litigation. It was something more, as we have seen, than a mere holder of the stock. It had active duties to perform. We see no error, therefore, in the action of the court on the bill and answers.

But it is said that the trial court erred in refusing to receive the cross bill except upon the terms prescribed in the decree, which were, as we have seen, that they apply for an injunction and give a bond, as provided by equity rule 42 of the court. In the motion for permission to file the cross bill, orders were asked that would have suspended the operation of the decree and the transfer of the stock certificates. And it will further be observed that the stock was not to be transferred by the decree to those whose title appellants were seeking to divest, but to a responsible trust company, and that there were shares of stock held by the Trust Company in which others had an interest which, it is not contended, is subject to a trust in favor of appellants. The purpose of the cross

bill was, therefore, to prevent the use of property under a claim of title to it which would take time to determine, and it was not inequitable in the court to require security of the appellants, the security which was required of other litigants who sought the same kind of relief.

Appellants, however, contend that the requirement was inequitable, because the amount of the bond would have been large and beyond their ability to give. But we may not assume that the court's action would have been in excess of what the circumstance would have justified. The appellants did not invoke further action, but took an appeal, even before the expiration of the time which they had been given to comply with the provision of the decree.

Decree affirmed.

ARKANSAS SOUTHERN RAILWAY COMPANY *v.* LOUISIANA AND ARKANSAS RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF LOUISIANA.

No. 38. Argued November 4, 1910.—Decided November 28, 1910.

This court must satisfy itself whether or not the party claiming the benefit of a contract which it claims was impaired by subsequent legislation had acquired rights under the original contract and therefore has jurisdiction.

This court follows the state court in determining the extent of a special immunity from taxation granted by the constitution of the State.

A subordinate body of the State, in the absence of the State distinctly limiting its control thereover, contracts subject, and not paramount, to the power of the State.

A State by authorizing a municipality to levy taxes in the future on taxable property within its jurisdiction does not thereby limit its own power to determine what property shall be taxable when the levy shall be made.

Even if the vote by a parish acting under a state statute in Louisiana to aid a railroad company by an annual tax constituted a contract and the company became entitled to its benefit, a provision in a subsequently enacted constitution exempting certain property then taxable from all taxation does not impair the obligation of the original contract and the special tax cannot be imposed on the property so exempted.

121 Louisiana, 997, affirmed.

THE facts, which involve the validity of certain taxation on property claimed to be exempt under provisions of the constitution of the State of Louisiana, are stated in the opinion.

Mr. Allan Sholars, with whom *Mr. A. A. Gunby* was on the brief, for plaintiffs in error:

This court has jurisdiction. The Federal question was properly presented. *Kansas City Power Co.* v. *Julian*, 215 U. S. 589; *Railway Co.* v. *Snell*, 193 U. S. 30; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Leathe* v. *Thomas*, 207 U. S. 72; *Southern R. R. Co.* v. *German National Bank*, 207 U. S. 270, do not apply, but see *Chambers* v. *Balt. & Ohio R. R. Co.*, 207 U. S. 142; *Sullivan* v. *Texas*, 207 U. S. 416.

The word "taxation" in the clause of Art. 230 of the Louisiana constitution of 1898, exempting new railroads from taxation, does not embrace special taxes voted by a parish in aid of public improvements. An exemption from taxation must be strictly construed. 42 Ann. 1098; 116 Louisiana, 144; 11 Ann. 220.

Statutes have no retrospective effect or operation unless this purpose is announced specifically in the act. 39 Ann. 115.

Voluntary contributions, though in the nature of taxes, do not constitute general or ordinary taxation in the sense in which that word is ordinarily used. 104 Louisiana, 284; see also *Ill. Cent. R. R.* v. *Decatur*, 147 U. S.

190; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662; 108 California, 189; 91 N. Y. 574; 12 Am. & Eng. Ency. Law, Exemptions from Taxation, 314; Words and Phrases, verbo Taxation, p. 6879.

Plaintiff in error had a legal contract with the taxpayers of the parish, in consideration of which its railroad was built. That contract dated from the date on which the special election was held and the tax voted according to law. *Fletcher* v. *Peck*, 6 Cr. 137; *Dartmouth College Case*, 4 Wheat. 657; Civil Code of La., §§ 1761, 2028; and see *James* v. *The Arkansas Southern R. R. Co.*, 110 Louisiana, 145.

If it had a contract, all classes of property taxable at the time the election was held were affected by that contract, and no property in the parish of Winn, or that might come therein, could be exempt from that special tax without violating the Constitution of the United States by impairing the obligation of that contract.

As the tax was voted, the railway company had an interest in that tax; it had the right to perform certain actions, to acquire and possess that tax by doing certain things. This was clearly a vested right.

Not even the sovereign, the legislature, could change the taxability of property. *Tulane Education Fund* v. *Board of Assessors*, 38 Ann. 292, holds that the taxability of property cannot be changed so as to affect acquired rights. *Arkansas Southern R. R. Co.* v. *Wilson*, 118 Louisiana, 395, holds that the tax covered all new property brought into the town.

If the constitutional convention could exempt a part of the property covered by this tax, it could exempt it all. If it could diminish, it could destroy.

The true test is whether the rights of the railroad under its contract have been curtailed; 4 Wheat. 535; whether its value has been diminished. 2 How. 608; 6 How. 301.

Rights under the contract must be determined by laws

in force at the date of the contract. *Fish* v. *Police Jury of Jefferson Parish,* 116 U. S. 132; and see 96 U. S. 595; 16 Wall. 314; *Hunt* v. *Hunt,* 131 U. S. Appx. clxv.

Mr. Henry Moore, Jr., with whom *Mr. Henry Moore, Mr. H. H. White* and *Mr. Samuel Herrick* were on the brief, for defendant in error:

The exemption from taxation of the respondent is claimed under the constitution of 1898, adopted three years prior to the date the Supreme Court of Louisiana found the tax levy of the plaintiff in error became vested, and no law or statute of Louisiana passed subsequent to 1898 is brought into this record or involved in this decision.

When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. *New Orleans Water Co.* v. *Easton,* 121 U. S. 388.

Before this court can assume jurisdiction, the decision of the state court must show squarely that a question arising under the Constitution or statutes of the United States was involved and that the decision of the state court could not have been made without deciding the Federal question thus raised, which cannot be shown in this case.

Even if it should be granted that plaintiff in error accepted the offer of the taxpayers of Winn Parish according to its terms, and had earned the said tax by completion within the time limit, yet, according to the very terms of the said contract, the property of the respondent railroad would not be subject to said tax and the Supreme Court of Louisiana so held.

Under § 6 of Art. 35 of 1886, under which the tax to the plaintiff in error was voted, such tax could be levied only upon all taxable property within the parish. There was no property of the respondent railroad in Winn Par-

ish at that time, and all property now belonging to it within the parish has been brought into existence since the year 1901. Said respondent railroad accepted the offer under the exemption clause of Art. 230 of the constitution of 1898. *LeFranc* v. *New Orleans*, 27 Ann. 188; *New Orleans* v. *Carondelet Canal Co.*, 36 Ann. 396.

To allow this clause of the constitution to be nullified under the guise of special taxation, would, in effect, be allowing the State of Louisiana to perpetuate a fraud against this respondent, and this, by its decisions, the State has refused to do. *McGee* v. *Mathis*, 4 Wall. 143.

The question as to the taxability of property *in futuro* was necessarily left to the determination of the sovereign State. On this point, the decision of the State followed the well-settled jurisprudence of the State. *Tulane Educational Fund* v. *Board of Assessors*, 38 Ann. 292; *Tulane University* v. *Board of Assessors*, 115 La. Ann. 1026. The latter held property exempt from taxation even though it had not then been formally transferred to the University.

The property of the respondent railroad company came into existence under the exemption from taxation granted in the constitution of 1898 and at no time has it been such taxable property within the parish of Winn as that upon which the plaintiff in error has earned the aid voted by the taxpayers of said parish. The theory that property once subject to taxation must always remain so, is opposed to all the tenets of law, not only in the State of Louisiana, but in other States of this Union.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to reverse a decision of the Supreme Court of Louisiana granting an injunction to the plaintiff, the Louisiana and Arkansas Railway Company, the defendant in error, against the collection from it of

a special tax in favor of the Arkansas Southern Railway Company, the plaintiff in error. 121 Louisiana, 997. The agreed facts are these. By Art. 230 of the state constitution of 1898 any railroad thereafter constructed before January 1, 1904, was to be exempt from taxation for ten years from completion, upon certain conditions. The plaintiff built its road through the parish of Winn and gained the right to the exemption. The defendant, plaintiff in error, claims its rights under a vote of the same parish on February 1, 1898, granting a tax of five mills to a predecessor to whose rights the defendant has succeeded. This vote was valid, and effective against all taxable property in the parish. *James* v. *Arkansas Southern Railway Co.*, 110 Louisiana, 145. Act 35, § 6, 1886. Const. 1879, Art. 242. By its terms the grant was for ten years from the completion of the road, the Police Jury adding a condition that the railroad should be completed into Winnfield within three years from the date of the vote. Afterwards the Police Jury extended the time to May 1, 1901, on or before which date and before the acquisition of its right of way and ground by the plaintiff the road was finished. It was accepted by the Police Jury and taxes have been levied and paid in accordance with the vote, beginning with the year 1901. The defendant was proceeding to levy on the property of the plaintiff in the parish and says that if the constitution of 1898 is construed to confer an exemption from this tax upon the plaintiff it impairs the obligation of contracts; contrary to Art. I, § 10, of the Constitution of the United States.

The plaintiff says that there is no constitutional question before this court because the Supreme Court of Louisiana put its decision partly upon the ground that the defendant had not acquired all of its contract rights before the adoption of the constitution of 1898. Of course this court must satisfy itself upon that point and therefore has jurisdiction. *Sullivan* v. *Texas*, 207 U. S. 416,

423. On the other hand the defendant asks us to review the construction given to the state constitution as extending the immunity granted by the above-mentioned Art. 230 to special taxes like this. Upon that point, equally of course, we follow the state court. *Louisville & Nashville R. R. Co.* v. *Kentucky,* 183 U. S. 503, 508; *Missouri* v. *Dockery,* 191 U. S. 165, 171. Leaving these preliminaries behind we come to the point of the case.

We shall not consider whether the vote is to be regarded as having been simply an offer at the time of its passage in consideration of acts to be done thereafter, and as having become a contract only when the road was finished, that is to say, after the constitution of 1898 went into effect. See *Wadsworth* v. *Supervisors,* 102 U. S. 534, 538, 539. We shall assume, without deciding, that it became binding at once, by statutory authority, after the analogy of a covenant, see *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 386, although liable to be defeated by the non-performance of the condition attached. We assume also that the condition was satisfied and the right to the tax earned, and that when earned it had the same validity and force as if it had been gained before the constitution was adopted. It appears further from what we have stated that when the right to the tax accrued the land now in the hands of the plaintiff's road was liable to taxation. But these facts and assumptions are not enough to make out the defendant's case.

No doubt a State might limit its control over the power of a municipal body to tax by authorizing it to make contracts on the faith of its existing powers, *Wolff* v. *New Orleans,* 103 U. S. 358, *Hubert* v. *New Orleans,* 215 U. S. 170, although unless it did limit itself with a certain distinctness of implication a subordinate body would contract subject, not paramount, to the power of the State. *Manigault* v. *Springs,* 199 U. S. 473, 480; *Knoxville Water*

Co. v. *Knoxville*, 189 U. S. 434, 438. But there is no such limitation by the State and no contract by the parish that implies it. An authority given by the State to promise and levy a tax in future years on the taxable property in the parish does not purport to limit the power of the State to say what property shall be taxable when the time comes—at least by general regulations not aimed at aiding an evasion of the promise it has allowed. A vote by a parish to pay five mills on all the taxable property within its boundaries refers on its face to a determination by the sovereign as to what that property shall be. See *Arkansas Southern R. R. Co.* v. *Wilson*, 118 Louisiana, 395, 401. The notion that the statute and the vote separately or together precluded the State from erecting a jail that should be free from such claims is untenable on its face. The same reasoning allows the State to go farther, as it has done. We agree with the Supreme Court that it did not transgress the Constitution of the United States.

Decree affirmed.

FISHER *v.* CITY OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 43. Argued November 9, 10, 1910.—Decided November 28, 1910.

The jurisdiction of this court, under the contract clause of the Federal Constitution, extends to doing away with the interference of a later law impairing the contract,—but not to remedying erroneous construction of the original contract or to seeing that it is carried out according to the interpretation of this court, apart from it.

There is nothing in this case that takes it out of the general rule above stated.

Whether or not delay constitutes laches is for the state court to decide.

Writ of error to review 121 Louisiana, 762, dismissed.

THE facts, which involve the constitutionality, under the contract clause, of certain provisions of the Louisiana constitution of 1898, are stated in the opinion.

Mr. Charles Louque for plaintiffs in error.

Mr. St. Clair Adams, with whom *Mr. I. D. Moore* was on the brief, for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for mandamus to direct the levy of a special tax of one and one-half mills to pay claims and judgments against the New Orleans School Board, based on contracts made by the Board with teachers and others during the years 1874, 1875 and 1876 under the Louisiana Act 36 of 1873. The ground of the petition is that under that act the contracts were authorized and were payable out of a special tax, unlimited in amount; that an attempt to limit taxation in Article 232 of the state constitution of 1898 is void as to them, because it impairs their obligation contrary to Article I, § 10, of the Constitution of the United States; *Hubert* v. *New Orleans,* 215 U. S. 170, 175–178; and that a sufficient amount has not been levied for the years mentioned. The Supreme Court denied the mandamus, 121 Louisiana, 762, and this writ of error was brought.

The plaintiffs in error are met at the outset by a denial of the jurisdiction of this court. The main grounds upon which the Supreme Court of the State decided the case were that the relators had been guilty of laches and that the act of 1873 did not authorize contracts to be made by the School Board in such wise as to bind the city to levy the tax. The court did not purport to rely upon the constitution of 1898, or any subsequent legislation, for the result. It did not purport to enforce any later

law; it simply denied the existence of the right alleged. Therefore on the face of the decision there is no warrant for coming here. But it is said that this court is not limited to the mere language of the opinion but will consider the substance and effect of the judgment; *McCullough* v. *Virginia*, 172 U. S. 102, 116, 117; *Hubert* v. *New Orleans*, 215 U. S. 170, 175; and that this court will decide for itself, with due respect for the state decision, whether a contract had been made and what it was. *Sullivan* v. *Texas*, 207 U. S. 416, 423. Both of these statements are true, of course, and are relevant when the judgment really gives effect to a later act of the State that would impair the obligation of the contract if the contract were as alleged. But the mere allegation of a later constitution or statute impairing the obligation of the contract gives no jurisdiction to this court to see that the contract is enforced according to its tenor, irrespective of the supposed interference of the later law. The jurisdiction extends to doing away with such an interference, but not to remedying an erroneous construction of contracts or to seeing that they are carried out according to the interpretation of this court, apart from it. *Bacon* v. *Texas*, 163 U. S. 207, 218, 219. *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 350, 351, 352; *Weber* v. *Rogan*, 188 U. S. 10, 14; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 110, 111. Therefore the present writ of error must be dismissed unless there is more in the case than the opinion has disclosed.

We discover nothing. If it was true that there was no contract binding the city to levy an extra tax, or that the parties demanding it had lost any rights they might have had by laches, there was no occasion to invoke or enforce any law later than the act of 1873. Obviously, however much we consider the substance of the judgment, it discloses no question of rights under the Constitution any more than does the opinion of the state court. Un-

less the reasons put forward for the decision were but a cover for an unavowed enforcement of the constitution of 1898, which of course there is no ground to suggest, the jurisdiction of this court fails. As a work of supererogation we will indicate in a summary way some of the reasons for denying the power of the Board of School Directors to bind the city to levy the tax upon the facts, simply to show how remote from matter of Federal jurisdiction the decision was.

By § 2 of the Act of 1873 the Board of Directors are to adopt an estimate of debt and expenditures for the current year, and thereafter, in October of each year, to adopt and communicate to the City Council an estimate for the year beginning on the next January 1. By § 4 "the Council, after receiving the estimate . . . shall proceed to make provision for the support of public schools. . . . For the purpose of such support it shall levy a tax of not less than one-fourth of one per cent," etc. Then, by § 10, "the Board of Directors of the Public Schools shall not be empowered to make contracts or debts for the year 1873, or any subsequent year, greater than the amount of the revenue provided for according to this act, or other school laws existing, it being the intent hereof that parties contracting with said Board shall take heed that due revenue shall have been provided to satisfy the claims, otherwise they shall lose and forfeit the same." It will be observed that the City Council is not required by § 4 to make provision for the amount of the estimate received by it, but for the support of the Public Schools, and that the minimum limit set to its action implies that beyond that point it has power of control. The subsequent provisions of § 10 hardly are reconcilable with any other view.

In this state of the law the City Council levied the minimum tax of one-fourth of one per cent, and no more, for the years 1874, 1875 and 1876. But the levy was less

than the estimates of the School Board, and the contention was that the City Council was bound to levy for the full amount of the latter, and that the plaintiffs in error are entitled to demand a levy for the difference between the two now. The contrary decision was natural enough on the face of the act of 1873, and is corroborated by the consideration of other statutes before and after 1873, to which we think it unnecessary to refer. It also is said that a part of the tax levied was not collected. But that was not a ground stated in the petition, and is not a matter with which we have any concern. We do not go into the matter of laches beyond noting that this petition was not filed until 1907. Whether the long delay was sufficiently explained or not was for the state court to decide.

Writ of error dismissed.

HARLAN *v.* McGOURIN, MARSHAL.

GALLAGHER *v.* THE SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Nos. 378, 379. Argued October 11, 12, 1910.—Decided November 28, 1910.

The writ of *habeas corpus* cannot be used for purposes of proceedings in error; the jurisdiction under the writ is confined to determining from the record whether the petitioner is deprived of his liberty without authority of law. *Hyde* v. *Shine*, 199 U. S. 84; *Greene* v. *Henkel*, 183 U. S. 249, distinguished.

A collateral attack on the judgment under which petitioner in *habeas*

corpus proceedings is detained is only permitted where the objections if sustained would render the judgment not erroneous but void.

Under the statutes of the United States relative to the terms of the Circuit Court the term of court at which the petitioners were convicted was properly held.

Objections to the order impanelling the grand jury on the ground that the judge was not in the district at the time, although within his circuit, must be raised by proper pleas in the court of original jurisdiction; they cannot be raised on *habeas corpus* after conviction.

Objections that competent testimony was not presented to, or that the indictment under which petitioner was convicted was not regularly found by, the grand jury, cannot be made for the first time in a *habeas corpus* proceeding.

Where the sentence exceeds the authority of the court at most only the excess will be void; the legal portion of the sentence cannot be attacked on that ground in *habeas corpus* proceedings.

THE facts, which involve the validity of the conviction and sentence of the appellants, and the power of the court to review the proceedings on *habeas corpus*, are stated in the opinion.

Mr. Wm. W. Flournoy for appellants.

Mr. Assistant Attorney-General Harr for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

These appeals are from judgments rendered in the Circuit Court of the United States for the Northern District of Florida discharging a writ of *habeas corpus* and remanding the prisoners to the custody of the United States marshal.

The petitioners in the original *habeas corpus* proceedings, appellants here, were convicted in the United States Circuit Court for the Northern District of Florida of conspiring to hold, arrest and return one Rudolph Lanninger to a condition of peonage, in violation of § 5440

of the Revised Statutes of the United States. The offense of returning to a condition of peonage is defined by § 5526 of the Revised Statutes. Petitioners were sentenced to imprisonment for different terms and to pay pecuniary fines.

The record discloses that the original cases in which appellants were convicted and sentenced were taken to the Circuit Court of Appeals for the Fifth Circuit upon writs of error, and the judgments of conviction affirmed. Afterwards petitions for writs of certiorari to bring the cases to this court from the Circuit Court of Appeals were denied in this court, 214 U. S. 519. Thereafter, the prisoners being in the custody of the United States marshal under the sentences imposed, filed their petitions for writs of *habeas corpus*, and, the cases being heard in the Circuit Court of the United States, a judgment was entered dismissing the writs. 180 Fed. Rep. 119. The cases were then brought here by appeal.

From this statement it will appear that the appellants were convicted in a court of competent jurisdiction of the alleged offense charged in the indictment; that a trial was had before a court and jury, which was reviewed by proper proceedings in error in the Circuit Court of Appeals for the Fifth Circuit, and that this court declined to grant a writ of certiorari to review the judgment of the latter court.

The cases have been earnestly and elaborately argued here by counsel for appellants, upon the theory that in a proceeding of this character the court may inquire into the facts put in evidence at the trial, at least so far as is necessary to determine whether there was any inculpating testimony, and for that purpose may examine the bill of exceptions, which is appended to the petition, and which was originally taken for the purpose of bringing the voluminous testimony in the cases into the record in order that a review might be had by the appellate court.

It is contended that an examination of the bill of exceptions will disclose that the alleged conspiracy was not formed in the Northern District of Florida as laid in the indictment; that there is a total lack of evidence to connect the petitioners with any such conspiracy; that the petitioners (notably the petitioner Harlan) are not shown by any competent testimony to have been concerned in any overt act for the carrying out of the alleged conspiracy; that it is not shown that there is any condition of peonage in which Lanninger had been detained and to which he could be returned, in violation of § 5526 of the Revised Statutes of the United States. In other words, in this feature of the case this court is asked to review the testimony adduced at the trial, with a view to determining the lack of evidence in the record to support the verdict and judgment, although such matters were properly reviewable, and were in fact reviewed, in the error proceedings already referred to.

It is the settled doctrine of this court, often affirmed, that the writ of *habeas corpus* cannot be used for the purpose of proceedings in error, and that the jurisdiction under that writ is confined to an examination of the record, with a view to determining whether the person restrained of his liberty is detained without authority of law. *Gonzales* v. *Cunningham*, 164 U. S. 612, 621; *In re Schneider*, 148 U. S. 162; *Whitney* v. *Dick*, 202 U. S. 132, 136; *Hoy Toy* v. *Hopkins*, 212 U. S. 542, 548; *In re Wilson, Petitioner*, 140 U. S. 575, 582.

But it is contended that two recent cases in this court are authority for the proposition that in a collateral attack by a *habeas corpus* proceeding, while the weight of testimony cannot be examined into, the record may be investigated with a view of determining whether there is *any* testimony to support the accusation, and where there is an entire lack of evidence the court may order a discharge, and language to this effect is referred to in the

opinion in *Hyde* v. *Shine*, 199 U. S. 84, wherein the learned justice, delivering the opinion of the court, said: "In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge."

That case was a proceeding in *habeas corpus* to attack the validity of an order made under § 1014 of the Revised Statutes of the United States for the removal of the petitioner from the State of California to the District of Columbia for trial upon an indictment found in the District. In that case it was contended that inasmuch as § 1014 requires proceedings for the removal of persons from one district to another to be agreeable to the usual mode of process against defendants in such State, and as in the State of California where the prisoner was arrested, the Supreme Court had held that the question of probable cause of the prisoner's guilt might be considered upon the writ of *habeas corpus* it necessarily followed that such should be the course of procedure in the Federal courts. In answer to this contention the language above quoted was used. In so stating, the learned justice, speaking for the court, was but affirming the rule well established under § 1014, that there must be some testimony before the commissioner to support the accusation in order to lay the basis for an order of removal, otherwise the accused could be discharged upon *habeas corpus*, although the court would not weigh the evidence where the record shows that some evidence was taken. This was the construction of § 1014 in *Greene* v. *Henkel*, 183 U. S. 249, 261. In *Greene* v. *Henkel*, Mr. Justice Peckham, speaking for the court, said: "There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual named in that charge and that there is probable cause for believing him guilty of the

offense charged." In the case of *Hyde* v. *Shine* the Justice was but declaring the rule, already recognized and enforced under § 1014 of the Revised Statutes.

So in the other case relied upon, *Tinsley* v. *Treat*, 205 U. S. 20, it was held, under the circumstances shown, that a prisoner would be released upon *habeas corpus* where the proceedings were under § 1014 of the Revised Statutes. It was held that while an indictment constitutes *prima facie* evidence of the offense, when the defendant offered to show that no offense had been committed triable in the district to which removal was sought, the exclusion of such evidence was not mere error, but a denial of a right secured under the Federal Constitution to be tried in the State and district where the alleged offense was committed, and therefore reviewable under *habeas corpus* proceedings. Neither *Hyde* v. *Shine* nor *Tinsley* v. *Treat* is authority for the proposition that a writ of *habeas corpus* can be made the basis of a review of the judgment of a court of competent jurisdiction where proceedings were had under a constitutional statute giving the court authority to examine into the charges and to convict or acquit the accused, when the proceedings show no attempt to exert the jurisdiction of the court in excess of its authority.

The learned counsel for appellants rely upon a number of cases which are said to warrant the court in *habeas corpus* proceedings in examining the bill of exceptions with a view to determining such matters as are herein presented. But an examination of these cases will show that where collateral attacks have been sustained through the medium of a writ of *habeas corpus*, the grounds were such as attacked the validity of the judgments, and the objections sustained were such as rendered the judgment not merely erroneous, but void. In *Ex parte Lange*, 18 Wall. 163, the court undertook to impose a second punishment where it had already exhausted its power in

imposing one of the alternative penalties allowed by law. In *In re Snow*, 120 U. S. 274, the record disclosed that it was sought to impose a second punishment for the same offense. In *In re Bain*, 121 U. S. 1, it was held that the court was without power to order an amendment of the indictment without a submission of the case to the grand jury, and that subsequent proceedings upon an indictment thus changed were without jurisdiction. In *Hans Nielsen, Petitioner*, 131 U. S. 176, it was held that the court exceeded its authority in undertaking to pass the particular sentence imposed. We find nothing in these cases to conflict with the well-established rule in this court that the writ of *habeas corpus* cannot be made to perform the office of a writ of error.

If such would be its effect then this court could readily be converted into an appellate court in criminal proceedings, a jurisdiction denied to it by the statute. No attack can be successfully made upon the right and authority of the Circuit Court of the United States to take jurisdiction of the offense charged in the indictment. No objection is made to the constitutionality of the statute or the right and authority of the court to consider and determine the guilt or innocence of the accused, and for that purpose to weigh and determine the effect of the testimony offered. The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions. See, among other cases in this court, *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Terry*, 128 U. S. 289, 306; *Davis* v. *Beason*, 133 U. S. 333;

Ex parte Parks, 93 U. S. 18, 22, 23; *Kaizo* v. *Henry*, 211 U. S. 146, 148.

We will proceed then to examine such of the objections as go to the authority of the court to try and sentence the accused. It is insisted that the trial in the Circuit Court of the United States at Pensacola, Florida, was without jurisdiction, because the trial took place when the court had no lawful authority to sit, as it was not held at any legal term of court. It is contended that the right to hold a term at Pensacola because of the proceedings disclosed in the record had ended before the accused were tried at the session beginning in November, 1906. It appears that the regular term of court at Pensacola commenced on March 3, 1906, continued in session until May 12, 1906. The clerk of the court testified that the court was in session in Tallahassee, held by the same judge as held the court at Pensacola, on May 13, 14, 15 and 16, 1906. It appears that the clerk was in the habit of using a rubber stamp for the purpose of evidencing the adjournments of the court, and also the adjournments from day to day when the court was not present. These adjournments appear to have been in accordance with a rule of the court, which provides that during the temporary absence of the judge the court shall be deemed open daily at each of the clerk's offices in the district for the transaction of business on the equity side of the court, and also for the filing of papers, and the transaction of business of a general character in court, and the clerk shall be present, in person or by deputy, and the record of the same shall be entered upon the minutes of the court.

Such adjournments were had from June 6, 1906, the last day the judge was present at Pensacola, until he returned to the Circuit Court for the Northern District of Florida in November, 1906, subsequent to which time the indictment, trial and conviction of the appellants took place. The argument of the appellants comes to this—

that as there was no legal adjournment of the term at Pensacola to a day certain when the court proceeded to hold the term at Tallahassee there was no legal authority to resume the sitting of the court at Pensacola in November, and consequently there was no legal term of the court at which the proceeding resulting in the conviction of the accused could be had.

But we cannot agree to this contention. The statutes of the United States provide for two terms of the United States Circuit Court for the Northern District of Florida, the one beginning on the first Monday of February at Tallahassee, the other the first Monday in March at Pensacola. 1 U. S. Comp. Stats. 531. Section 612 of the Revised Statutes provides that the Circuit Courts of the United States can be held at the same time in different districts of the same circuit. Section 672 provides that if neither of the judges of the Circuit Court be present to open and adjourn any regular or adjourned special session, either of them may, by a written order, directed alternatively to the marshal, and in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term. We think the purpose of the law was to provide for statutory terms of court for the Northern District of Florida, beginning on the first Monday of February and March respectively, which term should continue until the beginning of the next term, unless finally adjourned in the meantime. Such is the general and recognized practice in the Circuit Courts of the United States. *East Tenn. Iron & Coal Co.* v. *Wiggin*, 68 Fed. Rep. 446.

There was certainly no adjournment of the court for the term when the judge was absent holding court at Tallahassee, or was out of the State. There was an attempt at least to keep the court open pending the absence of the presiding judge by the adjournments in pursuance of Rule XIII.

Nor do we find anything in the objections made to the manner in which the record of the sessions was kept, which it is unnecessary to examine in further detail, it being sufficient to say that we think the court that sat in November, 1906, was legally in session, with authority to proceed against the accused.

It is next objected that the order for the impanelling of the grand jury was made by a judge of the Circuit Court for the Fifth Circuit, who, although within his circuit, was not within the district where the court was located when the trial was had. If there were otherwise merit in this objection, it certainly could not be made on *habeas corpus*. Such objections must be made by proper pleas filed in the court of original jurisdiction. *Kaizo* v. *Henry*, 211 U. S. 146, 149.

It is contended that competent testimony was adduced to show that the indictments were not properly presented by the grand jury, in that the one under which the accused was tried was not regularly found by the grand jury nor voted upon by them. Testimony was introduced to the effect that after the presentation of the original indictment the grand jury were informed by the district attorney that the indictment needed amendment in some particular, this amendment was read over in the presence of the grand jury, was incorporated into an indictment, the indictment was regularly returned into court, where it was produced with the consent of all the grand jurors. No objection was taken at the trial to the indictment for this reason, and upon proper pleas a trial and conviction were had; certainly an objection of that kind, if ever available, cannot be made for the first time in a *habeas corpus* proceeding.

It was objected in the court below that the original sentence exceeded the authority of the court, in that it required service at hard labor. Upon motion of the Government's counsel that much of the sentence was stricken

out. There is no contention that hard labor has been, or will be, imposed upon the appellants, and, at most, only that part of the sentence in excess of the law will be void. *United States* v. *Pridgeon*, 153 U. S. 48.

We find no error in the judgments of the Circuit Court in refusing to release the petitioners upon the writs of *habeas corpus*, and the same will be affirmed.

Affirmed.

UNITED STATES *v.* ANSONIA BRASS AND COPPER COMPANY.

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

No. 458. Argued October 18, 1910.—Decided November 28, 1910.

Where the United States claimed in an action in the state court to determine liens on vessels in course of construction, that, under the contract, title had vested in the United States, or that liens had been specially reserved thereon, and also claimed that the rights of the United States were superior to all others and could not be retarded or impeded by the state lien law, assertions are made of rights and immunities which are the creation of Federal authority, and, if denied by the state court, this court has jurisdiction under § 709, Rev. Stat., to review the judgment.

Stipulations entered into by the United States district attorney to obtain possession of vessels in course of construction and seized by judicial proceedings under state law should not, under §§ 3753, 3754, Rev. Stat., be construed as depriving the United States of any rights asserted under the contracts for constructing such vessels.

Construing the three contracts for construction of vessels involved in this case, the court construes one contract as vesting title in the United States as the work progressed and the others as not giving the United States a superior lien on the uncompleted vessel as work progressed: in regard to the one contract, the state lien law does not, and in regard to the other contract such law does, apply.

Vessels in course of construction for the United States, the title to which under the contract, vests in the Government as fast as constructed, become instrumentalities of the Government and for reasons of public policy cannot be seized under state laws to answer private claims.

Quære, whether a joint resolution has the effect of an act of Congress; but *held* that the resolution of May 5, 1894, No. 24, 28 Stat. 582, permitting partial payments on vessels under construction for the Treasury Department, did not give the Government an express statutory lien on such vessels superior to those given to materialmen by the state lien law.

110 Virginia, 165, affirmed in part and reversed in part.

THE facts, which involve the construction of contracts for the construction of certain vessels for the United States and the relative rights of the United States and others claiming liens on such vessels, are stated in the opinion.

Mr. Lunsford L. Lewis, United States Attorney, with whom *Mr. Assistant Attorney-General Harr* was on the brief, for the United States:

Contracts made by the United States are not subject to state registry statutes; the recordation statute of Virginia does not apply thereto. *Dollar Savings Bank* v. *United States*, 19 Wall. 227; *Stanley* v. *Schwalby*, 147 U. S. 508; *United States* v. *Snyder*, 149 U. S. 210.

Title to the unfinished dredge did vest in the United States, under the contract, as the work progressed and was paid for.

As title, under the contract, passed to the United States as payments were made, the subsequent liens in question did not and could not attach to the vessel. *Millhiser* v. *Gallego Mills Co.*, 101 Virginia, 579, 585; *Briggs* v. *A Light Boat*, 7 Allen (Mass.), 287, holding that when property is acquired by the United States, it is taken *cum onere*, has no application. While in general, under a contract for a ship or other thing not yet *in esse* but to be constructed, no

title passes to the vendee before it is finished and ready for delivery, a contrary intent if apparent from the terms of the contract or the attending circumstances, that title shall pass before completion, will be effectuated. *Clarkson* v. *Stevens*, 106 U. S. 505; *Woods* v. *Russell*, 5 B. & Ald. 942; *Clarke* v. *Spence*, 4 Ad. & El. 448; *Laidler* v. *Burlinson*, 2 M. & W. 602. But see *Wood* v. *Bell*, 5 El. & B. 772; *Seath* v. *Moore*, 11 App. Cas. 350; *Scudder* v. *The Calais Steamboat Co.*, 1 Cliff. 370, 378; *Andrews* v. *Durant*, 11 N. Y. 35, Parker, J. See also 2 Mees. & Welsb.

The provision requiring the company to give bond with security for its faithful performance of the contract does not create any inference that title was not to vest as payments were made. The bond was no doubt required in order to secure the Government against any damage that might be sustained by reason of failure on the part of the contractor to do the work within the prescribed time or in a proper manner, as, in any other view of the case, the bond was certainly very inadequate security against damage which the Government might sustain on account of its payments or otherwise. *Clarkson* v. *Stevens*, 29 N. J. Eq. 607; *Andrews* v. *Durant*, 11 N. Y. 35; *Williams* v. *Jackman*, 16 Gray, 514; *Briggs* v. *A Light Boat*, 7 Allen (Mass.), 287; and *Clarkson* v. *Stevens*, 106 U. S. 505, distinguished.

As title to the dredge passed under the contract to the United States, the dredge is not subject to the supply-liens in question, and the right to raise this objection was in no wise waived by entering into the stipulation upon which possession of the vessel was surrendered to the Government, under § 3753, Rev. Stat.

Under the state statute, supply-liens can attach only to property belonging to the debtor corporation. *Millhiser &c. Co.* v. *Gallego Mills Co.*, 101 Virginia, 579, 585.

As to the Mohawk, the contract, unlike the Benyuard contract, did not stipulate for title as the work progressed, but for a lien for advances made during the progress of

the work. See joint resolution of Congress approved May 5, 1894, 28 Stats. 582.

When in such a case a lien is reserved the joint resolution operates upon it, and consequently the lien is a statutory lien, and as such, beyond the reach of state legislation. *United States* v. *Snyder*, 149 U. S. 210.

The contract was made with reference to the joint resolution, and Congress in passing the joint resolution did not contemplate that the lien directed to be reserved would be liable to be displaced or overridden by liens of any sort subsequently accruing. While in some States a joint resolution may not have the force of law, as held in *May* v. *Rice*, 91 Indiana, 546, 552; *Burritt* v. *Commissioners of State Contracts*, 120 Illinois, 322, 336; *Boyers* v. *Crane*, 1 W. Va. 176, joint resolutions of Congress do not in their effect differ from bills, and when duly passed have the effect of law. See Art. I, § 7, Constitution U. S.; Cushing, Law & Pr. Leg. Assemblies, 2403; 6 Op. Atty. Gen. 680; see also *Mullan* v. *State*, 114 California, 578, 585.

This joint resolution is not a delegation of legislative power. *Field* v. *Clark*, 143 U. S. 649, 693; 1 Jones, Liens, § 105. The lien of the Government upon the Mohawk is prior to the supply-liens in question, not because of any prerogative right, but because the lien is prior in time; and being prior in time, it cannot be divested or displaced by subsequent liens, although in the joint resolution nothing is said about the priority of the lien.

The contract is to be read in connection with the higher law, to wit, the joint resolution, and not the state supply-lien law, and it is the former and not the latter enactment that "enters into and becomes a part of the contract." *United States* v. *Maurice*, 2 Brock. 96. The power of the United States to contract is coëxtensive with the duties and powers of government. *United States* v. *Tingey*, 5 Pet. 115; *United States* v. *Bradley*, 10 Pet.

343; *Jessup* v. *United States*, 106 U. S. 147; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154; *Moses* v. *United States*, 166 U. S. 571, 586.

The power of the Government to contract is, not less than the power of taxation, a necessary and indispensable incident of sovereignty. *Snyder Case*, 149 U. S. 210, 214. While the States are not expressly prohibited from interfering with the operations of the General Government, the inhibition comes by necessary implication. *Briggs* v. *A Light Boat*, 7 Allen (Mass.), 297; *United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; *United States* v. *Bostwick*, 94 U. S. 53; *Southern Pacific Co.* v. *United States*, 28 C. Cl. 77; *Van Hoffman* v. *Quincy*, 4 Wall. 535; *Walker* v. *Whitehead*, 16 Wall. 314, distinguished. See *United States* v. *Thompson*, 96 U. S. 486; *United States* v. *Herron*, 20 Wall. 251; *Commonwealth* v. *Ford*, 29 Gratt. (Va.) 683.

What has been said in regard to the Mohawk equally applies to the Galveston contract. The Secretary of the Navy had the implied power to reserve a lien on the vessel. *United States* v. *Macdaniel*, 7 Pet. 1; *United States* v. *Corliss Steam-Engine Co.*, 91 U. S. 321. Every act of the Secretary did not have to be authorized by statute. *Haas* v. *Henkel*, 216 U. S. 462, and as to power to reserve the lien, see *Van Brocklin* v. *Tennessee*, 117 U. S. 151. See also *Hauselt* v. *Harrison*, 105 U. S. 401; *Burnheisel* v. *Firman*, 22 Wall. 170, 179; *Rorer* v. *Ferguson*, 96 Va. 411.

Mr. R. G. Bickford and *Mr. Eppa Hunton, Jr.*, for defendants in error:

The sovereignty of the United States Government is lawful, not lawless. Under a contract with an individual, the rights of the Government and the rights, not remedies, of the individual are precisely the same as if the contract were between individuals. *United States* v. *State Bank*, 96 U. S. 36; *United States* v. *Smith*, 94 U. S. 217; *United*

States v. *Bostwick*, 94 U. S. 66; *Mfg. Co.* v. *United States*, 17 Wall. 595; *Smoot's Case*, 15 Wall. 45; *Gleason* v. *Gosnell*, 35 C. Cl. 90; *Southern Pac. Co.* v. *United States*, 28 C. Cl. 105; *Curtis' Case*, 2 C. Cl. 104; *Gilbert* v. *United States*, 1 C. Cl. 28; *858 Bales of Cotton*, 8 Fed. Cas. 389; 29 Am. & Eng. Ency. Law, 170; *McKnight* v. *United States*, 98 U. S. 186; *Fristoe* v. *Blum*, 45 S. W. Rep. 999.

The only difference between the individual and the United States in such contracts is a difference of remedy, not of right. *Brent* v. *Bank of Washington*, 10 Pet. 614; *United States* v. *Bank of Metropolis*, 15 Pet. 392.

It is a sovereign in its power of contract; it is a corporation as to the contract actually entered into. *Jones* v. *United States*, 1 C. Cl. 385. While the United States cannot be sued on its contracts, as that would be an invasion of its sovereignty, it may sue either in state or Federal courts as a corporation or body politic. *United States* v. *Detroit T. & L. Co.*, 200 U. S. 321; *United States* v. *Holmes*, 105 Fed. Rep. 43; *The Davis*, 10 Wall. 22; *Fink* v. *O'Neil*, 106 U. S. 280; *Carr* v. *United States*, 98 U. S. 438; *Mountain Copper Co.* v. *United States*, 142 Fed. Rep. 629; *Walker* v. *United States*, 139 Fed. Rep. 413; *United States* v. *Clark*, 138 Fed. Rep. 299; *United States* v. *Detroit Timber Co.*, 131 Fed. Rep. 677; *United States* v. *Ingate*, 48 Fed. Rep. 253; *United States* v. *Tetlow*, Fed. Cas. No. 16,456; 28 Fed. Cas. 45; 29 Am. & Eng. Ency. of L. 172; 27 Am. & Eng. Ency. of L., 1st ed., 537.

Courts of a State may acquire jurisdiction over the United States by its voluntary submission and incidentally to such submission the United States renders itself liable to the operation of laws of the State of such tribunal. In like manner, the United States may render itself liable to the laws of the State by voluntary contract with persons, and respecting property, subject to state laws. *Ryan* v. *United States*, 136 U. S. 82; *United States* v. *100 Barrels*, Fed. Cas. No. 15,945; *Clifford* v. *United States*, 34 C. Cl.

232; *United States* v. *Ames*, Fed. Cas. No. 14,441; *United States* v. *Crosby*, 7 Cranch (U. S.), 115; *New Orleans* v. *United States*, 10 Pet. 662; *Stearns* v. *United States*, 22 Fed. Cas. 1192; *Briggs* v. *A Light Boat*, 7 Allen, 297; *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 19.

The right in private property or under contract, cannot be greater than the right of its grantor. The state statute fully operated before the right of the United States accrued. The Government took *cum onere*, and that was the intent of the parties. *Knowlton* v. *Moore*, 178 U. S. 41; *United States* v. *Perkins*, 163 U. S. 629; *United States* v. *Fox*, 94 U. S. 315; *United States* v. *Buford*, 3 Pet. 29; *Central Trust Co.* v. *Charlotte, C. & A. R. Co.*, 65 Fed. Rep. 259; *In re Merriam's Estate*, 36 N. E. Rep. 506; *Levaser* v. *Washburn*, 11 Gratt. 578; 25 Cyc. 661.

The Government was entitled merely to what the Trigg Company could give, and all that that corporation could give was that which remained of the property, after satisfying the supply-liens. This would be the result in a contract between individuals, and the same result follows though the vessels were to pass to the United States. *Briggs* v. *A Light Boat*, 7 Allen, 296, 297; *McNeal & Co.* v. *Howland*, 16 S. E. Rep. 857; *The Revenue Cutter No. 1*, Fed. Cas. No. 11,713; *The Revenue Cutter No. 2*, Fed. Cas. No. 11,714.

The contract should be construed agreeably with the intent of the parties. Both the Government and the Trigg Company intended that the rights of the Government should be subject to the supply-lien law. This was an actual as well as a legal intent. As to the legal intent, see *Brine* v. *Insurance Co.*, 96 U. S. 643; *Provident Institution* v. *Jersey City*, 113 U. S. 511; *Van Stone* v. *Stillwell*, 142 U. S. 136; *Brent* v. *Bank of Washington*, 10 Pet. 596.

The Galveston contract, which was the first of the three contracts, expressly recognizes that the rights which were

given by the Trigg Company to the United States were subject and were intended to be subject, to the lien laws of the State. Op. Atty. General Griggs, June 21, 1900, cited approvingly in *Penn Iron Co.* v. *Trigg Co.*, 56 S. E. Rep. 329.

There was no common-law lien; the possession of the Galveston remained with the Trigg Company until long after the supply-liens were filed. Therefore the Government did not have a common-law lien. Neither was it a pledge, for here, also, possession passes to the creditor. 3 Pomeroy's Eq. Jur. 2466. The lien, if any, was void as to third persons at common law. 7 Bacon's Abridgment, 181, and there is a preponderance of authority that there is no lien as between the parties themselves. 22 Am. & Eng. Ency. of Law, 853, 854, 855.

As property remained in the Trigg Company, by the express terms of the supply-lien statute, the supply-lienors had the prior right. The United States is entitled to prior liens or rights only where some statute provides for such priority. *United States* v. *Bank of North Carolina*, 6 Pet. 34; *United States* v. *Canal Bank*, Fed. Cas. No. 14,715; 25 Fed. Cas. 278. See also *Conard* v. *The Atlantic Ins. Co.*, 1 Pet. 441; *Briggs* v. *A Light Boat*, 7 Allen, 297; *United States* v. *American Surety Co.*, 111 Fed. Rep. 914; *United States* v. *Heaton*, 128 Fed. Rep. 414; *United States* v. *Detroit Lumber Co.*, 131 Fed. Rep. 668; *C. C. A. U. S.* v. *American Surety Co.*, 135 Fed. Rep. 79.

There is no statute giving priority; therefore, none exists. The joint resolution requiring the Secretary of the Treasury to insert in the contract a provision for a lien neither gives a lien, nor did Congress intend it to have that effect. It clearly contemplates a contractual and not a statutory lien. *United States* v. *Snyder*, 149 U. S. 210, and see 1 Jones on Liens, § 105; 2 Mechem on Sales, § 755; 2 Parsons on Contracts, 8th ed., 259; *Merritt* v. *Johnson*, 7 Johns. (N. Y.) 473; *Andrews* v. *Durant*, 11

N. Y. 34; *People* v. *Commissioners*, 58 N. Y. 244; *Hall* v. *Green*, 1 Houst. (Del.) 546; *Shaw* v. *Smith*, 48 Connecticut, 306; *Yukon River Steamboat Co.* v. *Brotto*, 136 California, 538; *Williams* v. *Jackman*, 16 Gray, 514; *Low* v. *Austin*, 20 N. Y. 182; *Briggs* v. *A Light Boat*, 7 Allen (Mass.), 287; *Wright* v. *Tetlow*, 99 Massachusetts, 397; *Forsythe* v. *Dickson*, 1 Grant's Cases, 26 (Penn.); *Scull* v. *Shakespeare*, 75 Pa. St. 297; *Lang's Appeal*, 81 Pa. St. 18; *Coursin's Appeal*, 79 Pa. St. 220; *Strong* v. *Dinniry*, 175 Pa. St. 586; *S. C.*, 34 Atl. Rep. 919; *Haney* v. *Schooner Rosabelle*, 20 Wisconsin, 261; *Elliott* v. *Edwards*, 35 N. J. L. 265; *West Co.* v. *Trenton Co.*, 35 N. J. L. 517; *Stevens* v. *Shippen*, 29 N. J. Eq. 602; *Revenue Cutter No. 1*, Fed. Cas. No. 11,713; *Revenue Cutter No. 2*, Fed. Cas. No. 11,714; *The Sam Slick*, Fed. Cas. No. 12,283; *Clarkson* v. *Stevens*, 106 U. S. 505; *The Poconoket*, 67 Fed. Rep. 262; *The John B. Ketchum*, 97 Fed. Rep. 872; see also *Trigg* v. *Bucyrus Company*, 51 S. E. Rep. 175, 176.

The contract is entire and the installment payments were made upon the faith of the complete performance of the entire contract, the doing of all the work, the supplying of all materials.

Giving to the Benyuard contract and specifications the full effect claimed by the Government, the supply-lienors are yet entitled to a claim on that vessel. *Wood* v. *Skinner*, 139 U. S. 293, 295; *Murdock* v. *Memphis*, 20 Wall. 590, 636; Pollard's Code, 1904; *Smith* v. *Howard*, 53 N. E. Rep. 143, 144; see also *Kerr* v. *Moon*, 9 Wheat. 565.

The Virginia recording statutes operate precisely as did the inheritance tax law of New York. See *Knowlton* v. *Moore*, 178 U. S. 41; *United States* v. *Perkins*, 163 U. S. 629; *Ryan* v. *United States*, 136 U. S. 86; *Burbank* v. *Conrad*, 96 U. S. 292, 293; *Stewart* v. *Platt*, 101 U. S. 737; *Montgomery* v. *Wright*, 8 Michigan, 147, 148.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Supreme Court of Appeals of Virginia. The controversy grows out of contracts made between the United States and the William R. Trigg Company, a corporation organized under the laws of the State of Virginia, carrying on business at Richmond, Virginia, for the construction of certain vessels for the United States, namely, a sea-going suction dredge, called the Benyuard, for the War Department; a revenue cutter, called the Mohawk, for the Treasury Department; and a cruiser, for the Navy Department, called the Galveston. The contract price for the Benyuard, apart from its pumping machinery, was $254,550; for the Mohawk, $217,000; and for the Galveston, $1,027,000. These contracts were dated, for the Benyuard, September 9, 1901; for the Mohawk, April 20, 1900; and for the Galveston, December 14, 1899.

In December, 1902, S. H. Hawes & Company filed a bill in the Chancery Court at the city of Richmond, on behalf of themselves and other creditors, asserting liens under the supply-lien law of the State of Virginia, averring the insolvency of the Trigg Company, and asking for the appointment of a receiver, which was accordingly made. The receiver took possession of the property of the Trigg Company, including the vessels above named. Under §§ 3753 and 3754 of the Revised Statutes of the United States a stipulation was executed by the United States district attorney, on behalf of the United States, for the release and discharge of the vessels, and the material on hand applicable thereto.

Thereafter the case proceeded to judgment, and, on final appeal to the Supreme Court of Appeals of Virginia, the liens under the supply-lien law of the State were held superior to any claim or lien of the Government. In the case of the Benyuard, two of the five judges of that court

dissented from the opinion of the majority, holding that the title to the Benyuard had passed to the United States under the terms of the contract under which it was constructed. The case is reported in 110 Virginia, 165.

It is contended that there is no jurisdiction in this court to review the judgment of the Supreme Court of Appeals of Virginia, as no Federal question was decided in that court which would lay the foundation for the writ of error. In the third class of cases provided for in § 709 of the United States Revised Statutes, it is expressly provided that where any right, title, privilege or immunity claimed under the Constitution, treaty or statute of the United States, or an authority exercised under the United States, is specially set up or claimed by either party, and the decision is against such right, title, privilege or immunity, the same may be reëxamined and reviewed by writ of error from this court.

An examination of the record discloses that the Government claimed in the case that under the contract the title to the dredge vested in the United States by virtue of the terms of the contract; that a lien was reserved to the United States under the contract for the cutter Mohawk and the cruiser Galveston, which was superior to the claims of the supply-liens' creditors under the laws of the State of Virginia. The Government further contended that the right of the Government to its superior claims upon the vessels, whether of title or lien, could not be affected by, and were not subject to, the lien statutes of the State of Virginia. The Government also claimed that the State had no power to retard, impede or control the operation of the Federal Government in making and carrying out such contracts as are herein under consideration.

We think that from this statement of the claims made in the court below on behalf of the United States assertions were made of rights and immunities which were the creation of Federal authority, and the denial thereof

by the judgment of the state court brings the case within the provisions of § 709 of the Revised Statutes of the United States. It is not necessary to lay the foundation for jurisdiction that the claims of Federal rights asserted should be well founded; it is enough if they are substantial claims of Federal rights within the statute, and such as were duly asserted and directly or necessarily denied in the judgment and decision of the state court.

Nor do we think there is anything in the stipulation entered into on the part of the Government by the United States district attorney, with a view to getting possession of the vessels, which were in the hands of the receiver, which in anywise deprived the Government of the right to assert any such immunity and privilege as it has because of the nature and character of the contracts and the lien of the Government in the premises.

An examination of these sections, 3753–3754, shows that they are intended to permit the United States to obtain possession of property claimed by it, when the same has been seized by judicial proceedings under the laws of the State, and to give to it and to the persons asserting rights in the property protection in their rights, notwithstanding such changes in possession.

In § 3753 it is expressly provided that "nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment or any judicial process any claim against any property of the United States, or against any property held, owned or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim."

Section 3754 provides for the protection of persons asserting claims against such property, and that after final judgment given in the court of last resort, to which the Secretary of the Treasury may deem proper to carry

the proceedings, affirming the rights of the persons asserting claims for the security or satisfaction of which such proceedings were instituted in the state courts against such property, notwithstanding the claims of the United States, the final judgment shall be deemed to all intents and purposes as a final determination of the rights of such persons, and shall entitle such persons as against the United States to such right as they would have in case the possession of such property had not been changed. The section provides for the payment of such final judgment out of the Treasury of the United States.

The evident purpose of these sections is that neither the United States nor the claimants to the property shall lose any rights because of the release of the property under the stipulation, but as were the rights of the parties before the change of possession such they shall continue to be. We do not agree that by entering into a stipulation, which embodied these terms, the United States lost any right which it had to assert claims under the contracts, or rights by reason of the sovereignty of the United States, if any such exist. We think this court has jurisdiction of this case upon this writ of error.

Taking up the consideration of the case as to these several vessels, and first as to the Benyuard, this dredge was constructed under the provisions of a contract which are thus summarized by the master in the Virginia Chancery Court:

"Materials furnished and the work done by the William R. Trigg Company were to be subject to rigid inspection by an inspector appointed on the part of the Government, his decision to be final as to quantity and quality.

"If the Trigg Company should fail to begin or prosecute the work in accordance with the specifications, which were made a part of the contract, the contract might be annulled by the Government. In that case all payments were to cease, and all money or reserved percentage must

be retained until the final completion and acceptance of the boat. The Government was to have the right to recover anything paid for such completion in excess of the original contract price with the William R. Trigg Company, including all extra cost of inspection; and might proceed under section 3709 of the Revised Statutes of the United States to provide for the completion of the boat by open purchase or contract, unless the time for such completion should be extended.

"It was expressly provided that the William R. Trigg Company should be responsible for and pay all liabilities incurred in the prosecution of the work for labor and materials.

"Section nine of the contract was as follows:

" 'It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfilment of any of the terms of the contract.'

"Section 199 of the specifications was as follows:

" 'The purpose and spirit of these specifications are that the contractor is to provide and deliver a staunch dredge hull and first-class machinery, complete in every respect.'

"Section 206 of the specifications was as follows:

" 'It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for any damage or injury done by or to them from any source or cause.'

"Section 209 provided for sea trials at the expense of the contractor, any defects that might appear to be remedied at his expense and trials to be repeated until the steamer should be found satisfactory in all respects. Section 210 provided that if the requirements of the specifications were complied with, ten (10) equal payments

should be made, based on the reports of the inspector, the first when the hull and propelling machinery should be 10 per cent complete, the second when 20 per cent complete, and so on, to the last payment to be made, when the vessel should be turned over to the United States after successful trial; from each of said payments, except the last, 20 per cent to be reserved until final payment.

"Section 211 was as follows:

"'The parts paid for under the system of partial payments above specified shall become thereby the sole property of the United States, but this provision shall not be interpreted as relieving the contractor from the sole responsibility for the proper care and protection of said parts prior to the delivery of the dredge to the United States, or from any other of the provisions of these specifications.'

"Section 212 provided for insurance against fire and marine risks at the contractor's cost, for and in behalf of the United States, to at least the amount of each partial payment.

"The evidence shows that the Government had paid $142,550.80 on account of this contract when the receiver was appointed in this cause, and that said dredge was then 70 per cent complete."

It is the contention of the Government that the terms of this contract are such that by its expressed provisions the vessel was to become the property of the United States as fast as it was paid for. A majority of the learned judges of the Supreme Court of Appeals of Virginia were of opinion that title did not pass to the Government under this contract, and that it was subject to the superior lien of claimants under the state laws of Virginia. It is undoubtedly true that the mere facts that the vessel is to be paid for in installments as the work progresses, and to be built under the superintendence of a government inspector, who had power to reject or approve the materials, will

not of themselves work the transfer of the title of a vessel to be constructed, in advance of its completion. But it is equally well settled that if the contract is such as to clearly express the intention of the parties that the builder shall sell and the purchaser shall buy the ship before its completion, and at the different stages of its progress, and this purpose is expressed in the words of the contract, it is binding and effectual in law to pass the title. 2 Parsons on Contracts, 8th ed. 259, and cases cited.

All sections of the agreement must be read in the light of the purposes of the contracting parties as gathered from the entire contract, and must be considered in connection with other provisions of the contract. And it is said that § 212, as to insurance, does not show an intention to protect the title transferred to the Government, but must be read in the light of the purpose of the Government to acquire title to the dredge in the event that it ultimately elected to take it over as a purchaser, the ownership in the meantime remaining in the builder until such final decision was made, and the insurance was required for the Government's security for the partial payments.

But we cannot agree to this construction of § 212. The ownership clause provides that parts paid for *are to become the sole property of the United States* (specifications, § 211), insurance was to be provided by the contractor preceding each partial payment, that is, as fast as title vested in the Government by reason of the partial payments insurance was to be effected "to at least the amount of such partial payment, and the property was to be kept insured to at least the aggregate of the payments made until delivery and final acceptance."

It is insisted that the right to reject the dredge, or to annul the contract, is inconsistent with the passage of title under the provisions of § 211 of the specifications, however positive that section may be in terms.

Section 9 of the contract provides:

"It is further agreed by and between the parties hereto that until final inspection and acceptance hereof, and payment for, all the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material, or to require the fulfillment of any of the terms of this contract."

Let it be conceded that this section gave the Government the right to reject defective work or material, or even the entire dredge, if, upon trial and before final acceptance, it proved defective, is that right inconsistent with the vesting of title in the parts as paid for, as specifically provided in § 211? We think not. It may be that in such contingency the Government might reject the dredge. This might be true consistently with the acquirement of title in parts accepted and paid for after inspection. That is, if the whole, upon final trial, proved defective, all, including the restoration of that acquired, might be within the power of the Government. See in this connection, *The Poconoket*, 67 Fed. Rep. 262, 266.

The provisions of § 4 look rather to the completion of the vessel by the Government in the event of the annulment of the contract for failure to keep its requirements. In that contingency it is provided that payments shall cease and reserved payments be retained until the final completion and acceptance of the work. In this section the United States is given a remedy for the cost of completion upon the failure of the contractor to prosecute the work according to the contract.

Nor do we find it inconsistent with the vesting of the title in parts that bond was taken in the sum of $60,000 for the performance of the contract. The United States might well secure itself in this sum, notwithstanding it took title to parts as paid for. Security might nevertheless be required for the faithful doing of the work within the stipulated time. It is also true that the Trigg Com-

pany was to be responsible for and pay all liabilities for labor and material incurred in the prosecution of the work. We are at a loss to see any inconsistency between this provision and the passing of the title in parts as paid for. Construing the whole contract, we find nothing in its other provisions which cuts down or lessens the binding force of the clear and distinct provisions of § 211 as to ownership. The parties therein dealt with a specific part of the contract, they expressed themselves clearly upon the subject, and it is not to be presumed, in the absence of clear expression or necessary implication, that they intended to supersede this provision in dealing with other specific or general parts of the agreement.

It is suggested, in this connection, that the contract with the Government in the case of the Benyuard is not different in effect than the one passed upon in *Clarkson* v. *Stevens*, 106 U. S. 505. In that case the contract provided that the materials received at the yard for the construction of the steamer should be distinctly marked with the letters "U. S.," and should become the property of and belong to the United States. There was no provision that title to the vessel should vest in the United States as fast as parts thereof were constructed, and Mr. Justice Matthews, who delivered the opinion of the court, approved the opinion of the Court of Errors and Appeals of New Jersey, expressing the view that the declaration as to the materials excluded the implication sought to be raised as to the title in the unfinished ship; "for," said Mr. Justice Matthews, "the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment." *Clarkson* v. *Stevens*, 106 U. S. 516.

In *Briggs* v. *A Light Boat*, 7 Allen, 287, a builder's lien, taken under the Massachusetts statute on a light-boat being built for the United States, was sustained. In that case the contract made no provision for a lien in favor

of the Government or the passing of the title to the boat in progress of construction. Mr. Chief Justice Bigelow, delivering the opinion of the Supreme Judicial Court of Massachusetts, used this significant language (page 297).

"If this were a suit brought by the builders to enforce a lien for materials furnished for the construction of a ship under a contract directly with the Government, or for repairs on a public vessel, the title of which was vested in the United States at the time the work was done or the supplies were furnished, the argument founded on public policy, and the suggestions arising from the inconvenience of causing delay and embarrassment to the public service, would be entitled to very great weight. It might in such case be open to grave doubt whether a lien on the property of the United States could be given by virtue of an enactment of the legislature of a State, or whether services rendered and materials supplied directly to the Government must not be presumed to have been furnished exclusively on the faith and credit of the United States, to the exclusion of any intent to rely on a lien upon the public property. But considerations of this nature have no application to a case like the present. It would have been competent for the United States, if they wished to avoid the inconvenience or danger of delay arising from liens in favor of private persons, to make their contract in such form as to divest the builder of any title to the property in the vessel during the process of construction, or to stipulate for the application of the purchase money to the extinguishment of all claims for materials furnished to the builder."

As we construe the contract for the construction of the Benyuard, it did "divest the builder of any title to the property in the vessel during the process of construction." The question in this aspect of the case then becomes one as to the right of a state lien law to fasten upon the prop-

erty of the United States, and that property a vessel intended for the use of the Government in carrying on its necessary operations in the exercise of its governmental authority.

It was in recognition of the inability of contractors for labor and material to take liens upon the public property of the United States that Congress passed the act of August 13, 1894, c. 280 (28 Stat. 278), amended February 24, 1905, c. 778 (33 Stat. 811), providing for bonds in favor of those who furnished labor or materials in the construction of public works. It was in view of this purpose to provide protection for those who could not protect themselves by liens upon public property that the statute was given liberal construction in this court. See *Guaranty Trust Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 425; *Hill* v. *Surety Co.*, 200 U. S. 197, 203.

As we read the decision of the Supreme Court of Appeals of Virginia, it is not held that a lien was fixed upon the dredge, if in fact the title thereto passed to the United States. In any event, it could not be tolerated that property of the United States could be seized or encumbered under state lien laws of the character in question. We are not now dealing with the right of a State to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the Government. We are now treating of property which the United States owns. Such property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty against the consent of the Government. The Benyuard, as fast as constructed, became one of the instrumentalities of the Government, intended for public use, and could not be seized under state laws to answer the claim of a private person, however meritorious.

Nor do we think the case one for the application of the doctrine governing cases where the United States claims an interest in property lawfully in possession of a court which is administering it—as in equity or in admiralty—and the Government intervenes to protect its interest therein. In such instances its rights must be adjudicated in recognition of the rights and demands of others interested in the same property. In this case the vessels were released under a stipulation which fully protected the rights of the United States, and the Government claims the exclusive right and title in the Benyuard as the parts were completed and paid for.

In the case of the Mohawk there is no such stipulation as to passing of the title on partial payments in the progress of the work as is found in the contract for the Benyuard. The Secretary of the Treasury was, in his discretion, to make partial payments under the contract during the progress of the work, not to exceed 75 per cent of the value of the labor and materials actually furnished and delivered, and a lien was reserved for such payments, in the following language:

"*Provided*, That a lien shall be, and hereby is, reserved to the United States upon the hull, machinery, fittings and equipment of said vessel, and the materials on hand for use in her construction, respectively and collectively, for all moneys advanced on account thereof, and that such lien shall commence with the first payment, and shall thereupon attach to the work and the materials furnished, and shall in like manner attach from time to time, as the work progresses, and as further payments are made, and shall continue until the completion and acceptance of said vessel."

This lien, it is asserted, was reserved in accordance with a joint resolution of Congress passed May 5, 1894, No. 24 (28 Stat. 582, 583), which is as follows:

"*Resolved by the Senate and House of Representatives*

of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, authorized to make partial payments, from time to time, upon existing contracts and all contracts hereafter made for the construction of vessels for the Treasury Department, but not in excess of 75 per cent of the amount of the value of the work already done; and that the contracts hereafter made shall provide for a lien upon such vessels for all advances so made: *Provided,* That nothing in this joint resolution shall be construed to hereafter authorize any partial payments except on contracts stipulating for the same, and then only in accordance with such contract stipulation."

On behalf of the Government it is contended that this resolution makes the lien of the Government, reserved under the contract, an express statutory lien by authority of the United States, and consequently superior to any asserted rights under the lien laws of a State. But we cannot agree to this contention. The joint resolution, if it be conceded to have the effect of an act of Congress, does not undertake to create a statutory lien, but directs how contracts thereafter made shall provide with reference to liens upon such vessels. As to future contracts, it is directed that they shall provide for liens upon vessels for advances thus made. We think the lien mentioned is only one created by the terms of the contract and is to be considered in the light of the other provisions thereof.

At the time of entering into the contract, a bond was required and was given by the Trigg Company in the penal sum of $45,000, conditioned for the proper construction of the vessel according to the contract and specifications, and that the Trigg Company should promptly make payments to other persons supplying labor and materials in the prosecution of the work. We think this requirement was a distinct recognition on the part of the Government that the Trigg Company might become in-

debted to other persons who should perform labor or furnish materials in the building of the vessel, who might become entitled, by reason of such claims against the company, to liens upon the property.

The contract was made with the Virginia corporation, and it was intended that the bond required of the Trigg Company should protect the Government against rights arising out of labor performed or material furnished in the construction of the vessel. Conceding it to be true for this purpose, as asserted by the counsel for the Government, that the United States can make contracts providing liens of this character which shall be superior to the claims of any persons for liens under state laws, it is none the less certain that it may if it chooses recognize the authority of the States to protect persons who may furnish labor or materials for the construction of government work. Indeed, such, as we have seen, is the policy of the Government in respect to public buildings and structures, upon which liens cannot be taken under the laws of the States. In order that such claims may be satisfied the United States has made provision for their protection by bonds upon which persons may recover damages, so that those who furnish property of which the Government receives the benefit shall not entail a loss by so doing. Read in the light of this policy, so manifestly just and proper, and the requirements of this contract and bond, we think that the Government did not intend that the lien, which it reserved for itself, should be superior to that of contractors for labor and material who had contributed to the work.

The case of the Galveston is controlled by the same principles. In that contract there was no provision for taking title to the vessel; on the contrary, it was stipulated that on certain conditions the title should vest in the United States as collateral security, and the eighteenth clause of the contract provides for the release of liens

before partial payments shall be required. This clause is distinct and clear in its requirements, and reads:

"When a payment is to be made under this contract, as a condition precedent thereto, the Secretary of the Navy may, in his discretion, require, for the protection of the party of the second part, evidence satisfactory to him, to be furnished by the party of the first part, that no liens or rights *in rem* of any kind against said vessel, or her machinery, fittings, or equipment, or the material on hand for use in the construction thereof, have been or can be acquired for or on account of any work done or any machinery, fitting, equipment, or material already incorporated as a part of said vessel, or on hand for that purpose, or that such liens or rights have either been released absolutely, or so subordinated to the rights of the Government as to make its lien for all payments paramount, so as not to encumber or hinder in any way the right of the Government to accept or reject said vessel, and so as to become absolutely extinguished in case of the acceptance of the vessel."

The effect which we give this provision is strengthened by the opinion rendered to the Secretary of the Navy by the Attorney General, that in his opinion the practice of the Navy Department in making such contracts recognized that liens of this class might be acquired on vessels where there was no provision in the contract for vesting title in the same in the United States. 23 Op. Atty. Gen. 174, 176.

We think that this contract, as the one for the Mohawk, was made in recognition of the rights of those who should furnish work or material for the vessel to secure their claims by liens which it was made the duty of the contractor to provide for in order to protect the title of the United States.

Upon the whole case we reach the conclusion that judgment must be affirmed as to the Mohawk and Galveston,

and reversed as to the Benyuard, and it is so ordered. The case is remanded to the Supreme Court of Appeals of Virginia for further proceedings not inconsistent with this opinion.

CHANTANGCO *v.* ABAROA.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 2. Submitted October 24, 1910.—Decided November 28, 1910.

The general rule of the common law is that a judgment in a criminal proceeding cannot be read in evidence in a civil action to establish any fact there determined. The parties are not the same and different rules of evidence are applicable.

Identity of parties will not always operate to make a judgment in a criminal action admissible in a civil action; there must be identity of issue, *Stone* v. *United States*, 167 U. S. 178, although as held in *Coffey* v. *United States*, 116 U. S. 436, when the facts are ascertained in a criminal case as between the United States and the defendant they cannot be again litigated as between him and the United States as the basis of any statutory punishment denounced as a consequence of the existence of the facts.

In a case coming from the Philippine Islands, however, this court will not apply the common-law rule as to effect to be given in a subsequent civil case to a judgment in a criminal case, but will consider only whether the local law of the Philippine Islands has been rightly applied.

The local law in the Philippine Islands, which is still in force, not having been suspended by legislation, is that indemnity for damages in penal cases is a consequence of the commission of the crime and a verdict of acquittal carries with it exemption from civil liability. This rule applies even against one who in the criminal action attempted to reserve his rights to bring a civil action.

THE facts, which involve the right of recovery in the Philippine Islands of damages caused by alleged crimi-

nal acts of defendant, in a civil action after the defendant's acquittal in a criminal action, are stated in the opinion.

Mr. Aldis B. Browne, with whom *Mr. W. A. Kincaid*, *Mr. Alexander Britton*, and *Mr. Evans Browne* were on the brief, for plaintiffs in error:

There was no determination in the criminal action of the matter in controversy in this action such as to warrant the application of the principle of *res judicata*. A judgment in a criminal action is not evidence in a civil action to support the defense of former adjudication, even though both actions involve the same subject-matter or transaction. Greenleaf on Evidence, § 537; Jones on Evidence, § 589, p. 745; 1 Wharton on Evidence, § 776; Herman on Estoppel, § 413; 2 Black on Judgments, § 529; 1 Freeman on Judgments, § 319. Such has been the rule in England from an early day, and it has always been the law in this country. *King* v. *Boston*, 4 East. 572; *Jones* v. *White*, 1 Strange, 67; Buller's Nisi Prius, 233; *Petrie* v. *Nuttall*, 11 Excheq. Rep. 569; *Justice* v. *Gosling*, 12 C. B. 39–44; *Cottingham* v. *Weeks*, 54 Georgia, 275; *Marceau* v. *Travelers' Insurance Co.*, 101 California, 338; *Burke* v. *Wells, Fargo & Co.*, 34 California, 60–62; *Cluff* v. *Insurance Co.*, 99 Massachusetts, 317; *Morch* v. *Raubitschek*, 159 Pa. St. 559; *Betts* v. *New Hartford*, 25 Connecticut, 180; *Corbley* v. *Wilson*, 71 Illinois, 209; *Johnson* v. *Girdwood*, 143 N. Y. 660; *Chamberlain* v. *Pierson*, 87 Fed. Rep. 420–424; *Dyer County* v. *Railroad Co.*, 87 Tennessee, 712; *United States* v. *Jaedicke*, 73 Fed. Rep. 100; *Van Hoffman* v. *Kendall*, 17 N. Y. Supp. 713; *United States* v. *Schneider*, 35 Fed. Rep. 107; *McDonald* v. *Starke*, 176 Illinois, 456.

There are many other cases in which the principle has been applied. *Gray* v. *McDonald*, 104 Missouri, 303, 309; *Wilson* v. *Manhattan Ry. Co.*, 20 N. Y. Supp. 852; *Skid-*

more v. *Bricker*, 77 Illinois, 164; *Tumlin* v. *Parrott*, 82 Georgia, 732–735; *Sibley* v. *St. Paul F. & M. Ins. Co.*, 9 Biss. 31; *State* v. *Carron*, 73 N. H. 434.

A judgment in a criminal prosecution does not support the plea of *res judicata* in a civil action. *Frierson* v. *Jenkins*, 72 S. Car. 341; see also *Britton* v. *State*, 77 Alabama, 202, 209; *State* v. *Bradnack*, 69 Connecticut, 212, 214, 215; *People* v. *Kenyon*, 93 Michigan, 19, and note in 5 Am. & Eng. Anno. Cases, pp. 78–80; *Stone* v. *United States*, 167 U. S. 178, distinguishing *Coffey* v. *United States*, 116 U. S. 436, 444, and *Gelston* v. *Hoyt*, 3 Wheat. 246; *Commonwealth* v. *Feldman*, 131 Massachusetts, 588; *Cooper* v. *Commonwealth*, 106 Kentucky, 909.

The action is to recover a forfeiture which would have been part of the penalty imposed in the former criminal proceeding, and is between the same parties; the previous acquittal in the criminal action is a bar. *State* v. *Meek*, 112 Iowa, 338; *United States* v. *Butler*, 38 Fed. Rep. 498–499; *State* v. *Adams*, 72 Vermont, 253; *Commonwealth* v. *Ellis*, 160 Massachusetts, 165, do not apply.

Even where both actions are of the same nature, the principle of *res judicata* requires that there shall be identity of parties, either in fact or in privity of interest, as well as identity of the matter at issue. *Robins* v. *Chicago*, 4 Wall. 657, 672; *Amer. Bell Tel. Co.* v. *National Telephone Co.*, 27 Fed. Rep. 657; *Frank* v. *Wedderin*, 68 Fed. Rep. 818; *Weller* v. *Hershey*, 89 Fed. Rep. 575; *Houke* v. *Cooper*, 108 Fed. Rep. 992; *Litchfield* v. *Goodnow*, 123 U. S. 549; *Wilgus* v. *Germain*, 72 Fed. Rep. 773, 775; *Hall* v. *Finch*, 106 U. S. 261; *Stryker* v. *Goodnow*, 123 Fed. Rep. 527; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 48; *Russell* v. *Place*, 94 U. S. 606, 608; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 688; *New Orleans* v. *Citizens' National Bank*, 167 U. S. 371; *Pacific Railway* v. *United States*, 183 U. S. 519, 528; Greenleaf on Evidence, § 523; *Lovejoy* v. *Murray*, 3 Wall.

1, 10; see article 1252 of the Civil Code of the Philippine Islands; *Gaines* v. *Hennen*, 24 How. 553; Art. 105 of the Law of Criminal Procedure; § 107 of General Order No. 58, issued April 23, 1900; Act No. 190, §§ 306, 307, United States Philippine Commission in 1901; §§ 1908, 1911 of the Code of Civil Procedure of California; and see *Tanguinlay* v. *Quinos*, 10 Philippine Rep. 360; *Merchant* v. *International Bank*, 9 Philippine Rep. 554; *O'Connell* v. *Maygua*, 8 Philippine Rep. 422.

The provisions seem to be in entire accord with the general rule on the subject as established by the decisions of this court. *Cromwell* v. *County of Sac*, 94 U. S. 351, 356; *Fayrweather* v. *Rich*, 195 U. S. 276, 299.

There was no brief filed for defendant in error.

Mr. Justice Lurton delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Philippine Islands to review a judgment affirming a judgment of the court of the first instance in favor of the defendant.

The action was to recover indemnification of damages for the destruction of a storehouse and a stock of merchandise therein, valued at $58,473.49, Mexican, which the complaint alleged was "burned maliciously or unlawfully by Eduardo Abaroa," the defendant to the complaint, and defendant in error here.

The defense was, first, a general denial, and second, that the defendant, in a criminal action for the same burning and damage alleged, had been acquitted and held not guilty of the malicious burning now alleged, and in consequence of such judgment was not liable in a civil action for any damage to the plaintiff. The judgment in the criminal proceeding referred to was in these words:

"The evidence introduced by the prosecution indicates

that the defendant might have been the author of the crime, but it is not conclusive. All persons charged with crime are presumed to be innocent until they are proven otherwise. There being in my mind some doubt as to the guilt of the defendant, I should and do hereby acquit him, with the costs of these proceedings de oficio, and the attachment heretofore levied on his property is hereby vacated, reserving to the complaining witness whatever right he may have to bring a civil action against the said Eduardo Abaroa."

Upon a final hearing upon all of the proofs the court of first instance adjudged that the cause of action alleged and proved was one arising from the criminal act which was the subject of the former criminal proceeding; and that the defendant having been acquitted in the criminal action was not civilly liable. This judgment was affirmed by the Supreme Court of the Philippine Islands upon an elaborate opinion.

We have not had the benefit of either brief or argument for the defendant in this writ of error, but have found much assistance in the opinions of each of the Philippine courts, as well from very helpful briefs filed by learned counsel for the plaintiff in error. The contention which has been very forcibly pressed is that the judgment of acquittal in the criminal action does not operate as a bar to a subsequent civil action for indemnification of damages resulting from the same malicious or unlawful burning of the house and goods of the plaintiff, which was charged in the criminal action.

The proposition upon which the Supreme Court of the Philippine Islands grounded its judgment affirming that of the lower court in favor of the defendant Abaroa was, "That it has not been alleged or shown by the plaintiffs, as a cause of action instituted civilly against the defendant, that the aforesaid fire was caused through any fault or negligence on the part of the defendant, nor is there

shown any motive or cause distinct from that act, the subject of the case already terminated in accordance with the provisions of articles 1093, 1902 and 1903 of the Civil Code;" and second, that one who is not criminally responsible for a crime or misdemeanor cannot be made civilly responsible for the crime of which he has been acquitted.

The general rule of the common law is that a judgment in a criminal proceeding cannot be read in evidence in a civil action to establish any fact there determined. The reason for this rule is, primarily, that the parties are not the same, and, secondarily, that different rules of evidence are applicable. In the old case of *Jones* v. *White*, 1 Strange, 67–68, Eyre, J., said, "If a verdict be given in evidence, it must be between the same parties; and therefore an indictment, which is at the suit of the King, cannot be read in an action which is at the suit of the party." The requisite of mutual estoppel is essential to make a judgment in one action obligatory in another, although the point in issue is the same in each case. Unless the parties are the same the matter is *res inter alios*. Buller's Nisi Prius, 233; Wharton's Law of Evidence, vol. 1, § 776; *Dyer* v. *Railroad*, 87 Tennessee, 712.

Neither will identity of parties always operate to make a judgment in a criminal action admissible in evidence in a civil action. There must be identity of issue. Thus in *Stone* v. *United States*, 167 U. S. 178, 187, Stone was sued by the United States to recover the value of timber alleged to have been cut by him from public lands. He had been theretofore indicted, tried and acquitted for unlawfully cutting the same timber from the public lands, and plead this judgment as a bar to a suit for civil liability. This was held to be no defense, and *Coffey's Case*, 116 U. S. 436, distinguished as having been placed upon the ground "that the facts ascertained in a criminal case, as between the United States and the claimant, could

not be again litigated between them, as the basis of any *statutory punishment* denounced as a consequence of the existence of the facts." With respect to the application of *Coffey's case*, Mr. Justice Harlan, for the court, said:

"In the present case the action against Stone is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in *Coffey's case* can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the Government sought to punish a criminal offense, while in the civil case it only seeks, in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the Government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain a civil action; but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. *Regina* v. *Cohen*, 8 Cox C. C. 41; *Regina* v. *James*, 8 Car. & P. 131; *United States* v. *Pierce*, 2 McLean, 14; *Cutter* v. *State*, 36 N. J. Law, 125, 126. But the present action for the conversion of the timber would be supported by proof that it was in fact the property of the United States, whether the de-

fendant knew that fact or not. *Woodenware Co.* v. *United States*, 106 U. S. 432. An honest mistake of the defendant as to his title in the property would be a defense to the indictment, but not to the civil action. Broom's Leg. Max. (5th ed.) 366, 367. It cannot be said that any fact was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime, either forfeited its right of property in the timber or its right in this civil action, upon a preponderance of proof, to recover the value of such property."

There are peculiarities about the character of the action now under consideration which, as will appear later, may bring it under the principles of *Coffey* v. *United States*, *supra*, rather than *Stone* v. *United States*, the indemnification here sought being a part of the punishment attached to the offense of which the defendant has been acquitted.

The case is, however, one which we conceive must be governed by the local law of the Philippine Islands, and the single question to which we need address ourselves is as to whether that law was rightly applied by the local tribunals.

Article 1902 of the Civil Code in force in the Philippine Islands reads thus: "A person who by an act or omission causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done." By §§ 1092 and 1093 of the same code provision is made for the enforcement of civil liability, varying in character according to the origin of the liability. Thus, § 1092 provides that civil obligations arising from crimes and misdemeanors shall be governed by the provisions of the Penal Code. On the other hand, § 1093 provides that, "Those arising from acts or omissions, in which faults or negligence, not punished by law, occurs, shall

be subject to the provisions of Chapter second of Title sixteen of this book." The action here involved comes directly under § 1092 above set out, and is not an action arising from "fault or negligence, not punished by law." The complaint alleges that the act of burning was "malicious and unlawful," and not that it was the result of any "fault or negligence." This was the construction placed upon the complaint by both the courts below, and is a construction not challenged here. It follows that we must turn to the Penal Code to discover when a civil action arises out of a crime or misdemeanor, and the procedure for the enforcement of such civil liability. Article 17 of the Penal Code reads as follows: "Every person criminally liable for a crime or misdemeanor is also civilly liable." May this civil liability be enforced without a prior legal determination of the fact of the defendant's guilt of crime? Does civil liability exist at all if the defendant has been found not guilty of the acts out of which the civil liability arises? The opinion of the court below was that a judgment of conviction was essential to an action for indemnification under the applicable local law. To this conclusion we assent, upon the following considerations:

First, by the positive legislation of the Philippine Codes, civil and criminal, a distinction is drawn between a civil liability which results from the mere negligence of the defendant and a liability for the civil consequences of a crime by which another has sustained loss or injury.

Second, the plain inference from Article 17, above set out, is that civil liability springs out of and is dependent upon facts which if true would constitute a crime or misdemeanor.

Third, the Philippine Code of Procedure plainly contemplates that the civil liability of the defendant shall be ascertained and declared in the criminal proceedings.

Thus § 742 of the Code of Criminal Procedure, after

requiring that in a criminal proceeding all of the minor or incidental offenses included in the principal crime shall be decided, adds: "All questions relating to the civil liability which may have been the subject matter of the charge shall be decided in the sentence."

By § 108 of the same code the prosecuting official is required to prosecute the right of the injured person to restitution or indemnity, unless such person renounces the right.

By § 112 of the same code the civil action is held to be part of the criminal action, "unless the person injured or prejudiced renounces the same or expressly reserves the right to institute it after the conclusion of the criminal action."

In *United States* v. *Catequista*, 1 Philippine Rep. 537, 538, the court below failed to determine the liability of the defendant to indemnify the person injured by the misdemeanor of which he had been convicted. Concerning this, Ladd, J., for the court, said:

"The court also erred in not determining in the judgment the civil liability of the defendant for the *daños* and *prejuicios*, which resulted from the criminal act. Such civil liability is a necessary consequence of criminal responsibility, (Penal Code, article 17,) and it is to be declared and enforced in the criminal proceeding, except where the injured party reserves his right to avail himself of it in a distinct civil action. Code of Criminal Procedure of Spain, article 112, Provisional Law for the Application of the Penal Code in the Philippines, article 51, No. 4. No such waiver or reservation is disclosed by the record here."

It is true that one of the plaintiffs in the present case reserved whatever right he may have had to bring a civil action. This was obviously of no avail, inasmuch as there resulted a judgment for the defendant, and the plain inference from the foregoing is that a verdict of ac-

quittal must carry with it exemption from civil responsibility.

The effect of the application of the substantive law of the Philippine Islands given by the court below, not only in the present case but in the prior cases cited above, accords with the interpretation of identical provisions in the law of Spain by the Supreme Court of that kingdom, as shown by citations from the Spanish Supreme Court Reports. Some of these we have not been able to verify. We have, however, examined the decision of that court cited as of January 3, 1877. In that case the defendant had been tried and acquitted upon a criminal complaint. Notwithstanding this result, the trial court gave a judgment indemnifying the injured person for a loss supposed to have been suffered by him as a consequence of the crime of which the defendant had been acquitted. This judgment was annulled. Upon this point the court, in substance, said that indemnity for damages in penal cases was a consequence of the commission of a crime. The defendant was, therefore, not liable civilly, inasmuch as he had been found not liable criminally.

The foregoing considerations eliminate any question of the effect of such a judgment of acquittal under the principles of the common law, and require an affirmance of the judgment of the court below as properly based upon the applicable substantive law of the Philippine Islands, which has not been superseded by legislation since the establishment of the present Philippine Government.

Judgment affirmed.

RICHARDSON *v.* McCHESNEY, SECRETARY OF STATE OF THE COMMONWEALTH OF KENTUCKY.

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

No. 23. Argued October 31, November 1, 1910.—Decided November 28, 1910.

The duty of this court is limited to actual pending controversies. It should not pronounce judgment on abstract questions, even if its opinion might influence future action under like circumstances.

This court judicially knows that the members of Congress elected at the regular congressional election of November, 1908, have taken their seats, served their terms, and that their successors have been elected.

This court also judicially knows when the term of a Secretary of State of a State expires and whether his successor has been inducted into his office.

An action against the Secretary of State of a State to compel him in certifying nominees for Congress, to proceed under a former apportionment act on the ground that the present act is unconstitutional, is not a suit against the State, nor is it in this case one against a continuing board, but against the Secretary of State personally; and on the termination of his official authority his successor cannot be substituted.

In this case, as the thing sought to be prevented has been done and cannot be undone by judicial action, it is now only a moot case.

Writ of error to review 128 Kentucky, 363, dismissed.

THE facts, which involve the validity of the Kentucky act of 1900 apportioning the State into Congressional districts, are stated in the opinion.

Mr. William H. Holt, with whom *Mr. George DuRelle*, *Mr. W. C. Halbert*, *Mr. E. L. Worthington* and *Mr. W. D. Cochran* were on the brief, for plaintiff in error:

This court has jurisdiction. The validity of the Ken-

tucky statute was distinctly drawn in question on the ground that it is repugnant to the provision in the Federal Constitution which guarantees to each State a republican form of government, and on the ground that it is repugnant to the law of the United States which requires members of Congress to be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.

The Constitution provides that the times, places and manner of holding elections for Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time make or alter such regulations. The Congress has acted upon this question, under this power, and has made regulations as to the places and manner of holding elections for Representatives by stating that they shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. Nevertheless, the Court of Appeals questions the right of Congress to thus determine the places and manner of holding Congressional elections.

The Kentucky act is repugnant to the Federal Constitution, the act of Congress, and Fourteenth Amendment, § 2.

While there are no authorities as to Congressional apportionment, there are as to unequal division of representative and senatorial districts in the various States under similar constitutional provisions. See *Williams* v. *Secretary of State* (Mich.), 108 N. W. Rep. 749; *Giddings* v. *Blacker*, 93 Michigan, 1; *Parker* v. *State*, 133 Indiana, 178.

The courts have jurisdiction to determine the validity of apportionment acts. *McPherson* v. *Blacker*, 146 U. S. 1; *Ragland* v. *Anderson*, 125 Kentucky, 141; *Purnell* v. *Mann*, 105 Kentucky, 91; *People* v. *Thompson*, 155 Illinois, 460; *Parker* v. *State*, 133 Indiana, 178; *Denny* v. *State*, 144 Indiana, 543; *Williams* v. *State*, 108 N. W. Rep.

749; *Giddings* v. *Blacker*, 93 Michigan, 1; *State* v. *Cunningham*, 83 Wisconsin, 90; *State* v. *Cunningham*, 81 Wisconsin, 440; *Sherrill* v. *O'Brien*, 188 N. Y. 185; *Brooks, Clerk*, v. *State*, 162 Indiana, 568, collating all the leading cases on this subject.

While this court cannot be required to determine a moot case wherein its judicial power cannot be exercised and where its judgment would not be final and conclusive upon the rights of the parties, averments of the petition which was dismissed on demurrer present a case where the judgment of this court will be final and conclusive of the rights of the parties, and this court may and should decide upon existing facts, such rights, where substantial relief can be granted effective for the preservation of the rights of citizens; and where the rights upon which a decision is asked are substantial rights to protect which relief should be granted.

The status averred is a continuing status so far as legislation is concerned. This court knows judicially that no new Congressional apportionment act has been adopted in Kentucky, and also that provisions in the Federal statutes, to which that act is repugnant, are still in force.

If relief cannot be granted by this court in this case, no relief can be given against any gerrymander, no matter how infamous, if the courts of the State, elected by the same majority which elects the legislature, do not wish the relief granted, or are not willing that it should be. No imputation is designed, however, upon the courts which have hitherto passed upon this case.

In Kentucky and elsewhere, where relief is sought against a person in his official capacity to compel or restrain official action, the suit does not abate by reason of the death, resignation or expiration of the term of office of the incumbent officer, even when such fact is pleaded in the proceeding. *Maddox* v. *Graham & Knox*, 2 Metc. 71; *City of Louisville* v. *Kean &c.*, 18 B. Mon. 13.

There was no brief filed for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

Shortly stated, this is an attack upon the validity of the Kentucky act of March 12, 1898, and certain amendments thereto, apportioning the State into eleven Congressional districts. The bill alleges that the districts do not conform to the requirement of the acts of Congress apportioning Representatives among the States, which acts require that such districts shall be of contiguous territory, "containing as nearly as practicable an equal number of inhabitants." The averments of the bill are that the districts are grossly and unnecessarily unequal in population.

The bill was filed in an equity court of the State. A demurrer, as not stating a case good in law, was sustained and the bill dismissed. This judgment was affirmed upon an appeal to the Court of Appeals of Kentucky. The ground upon which the Kentucky court rested its judgment was, in substance, that neither the Constitution of the United States nor of the State contained any provision which vested in the court any authority to annul an apportionment of the State into districts for the election of Congressmen, and that the matter pertained to the political department of the government, and was subject only to the supervising control of the Congress, if any such power of supervision existed at all.

The bill, in substance, alleges that a Congressional election in each of the eleven Congressional districts of the State will be held in November, 1908. That under the law of Kentucky it is the duty of the defendant H. V. McChesney, as secretary of the Commonwealth, or his successor in office at the time, to certify, within sixty days prior to said election, the names of the nominees of the Republican and Democratic parties for members of Con-

gress in each district, to clerks of the various county courts of the State, and the duty of such clerks to print the names so certified upon the official ballots to be used in said Congressional election.

The complainant's interest in the matter is that he is a citizen of the United States and of the State of Kentucky, and a qualified voter and resident of Hart County, one of the counties of said State, and as such entitled to vote for a Congressman in the district to which that county is lawfully attached. The act of the General Assembly dividing the State into Congressional districts prior to the act of March 12, 1898, was an act passed April 15, 1882. By this act of 1882 the counties of Hart, Green and Taylor formed part of the Fourth Congressional district. By the act of March 12, 1898, and acts amendatory, the three counties named were made part of the Eleventh district, and certain counties were taken from the Eleventh and placed in other districts.

The contention is that the act of 1898 and its amendments being void, because of gross inequality of inhabitants, the aforesaid act of April 15, 1882, is the apportionment act in force, and that the approaching election should be held for the election of eleven members of Congress in the eleven districts organized by the act of 1882, and not in the districts as shaped by the later illegal arrangement.

The object and prayer of the bill is to require the defendant H. V. McChesney, or his successor in office, to proceed in conformity with the apportionment act of April 15, 1882, by certifying the names of party nominees for Congress made in districts organized in conformity with that act, and to require the county court clerks, who are made defendants, to print only the names of nominees so certified upon the ballots for the election of Congressmen at the election to be held in November, 1908, and that said McChesney, or his successor, be restrained

from certifying, or the defendant clerks from printing, otherwise.

Without considering the question of the authority for judicial interference in respect of a Congressional apportionment act, we are of opinion that this writ of error must be dismissed.

The matter which the defendant McChesney, as secretary of the Commonwealth of Kentucky, is to be prohibited from doing relates solely to an election to be held in November, 1908, and the thing which he is to be required to do relates only to the same election. The election to be affected by a decree, according to the prayer of the bill has long since been held, and the members of Congress were, in November, 1908, elected under the apportionment act of 1900. They were, as we may judicially know, admitted to their respective seats, and, as we may also take notice, their successors have been elected according to the same scheme of apportionment. The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case. *Mills* v. *Green*, 159 U. S. 651; *Jones* v. *Montague*, 194 U. S. 147.

The duty of the court is limited to the decision of actual pending controversies and it should not pronounce judgment upon abstract questions, however such opinion might influence future action in like circumstances.

Aside from this, we may judicially take notice that the defendant H. V. McChesney is no longer secretary of the Commonwealth of Kentucky, his term having expired and a successor having been inducted into office, who has not been substituted as a defendant to this suit.

This is not a suit against the State of Kentucky. The State is not the subject of suit. Nor is it a suit against the Secretary of State as one of a corporation or continuing board, "where the obligations sought to be enforced devolve upon a corporation or continuing body," as

pointed out in *United States* v. *Butterworth*, 169 U. S. 600, 603, distinguishing *Commissioner* v. *Sellew*, 99 U. S. 624, and *Thompson* v. *United States*, 103 U. S. 480. The only ground for making McChesney a defendant is to enjoin him personally from doing something which he may not lawfully do, and to require him personally to do another thing which it is claimed is his legal duty to do as an administrative act requiring no discretion. If he disobey the mandate or injunction of the court he personally would be in contempt. He only can be rightly made to bear the costs of this proceeding if the complainant should succeed, and he only could be compelled to obey the decree of the court. As his official authority has terminated, the case, so far as it seeks to accomplish the object of the bill, is at an end, there being no statute providing for the substitution of McChesney's successor in a suit of this character. The case is governed by *United States* v. *Boutwell*, 17 Wall. 604; *United States* v. *Butterworth*, 169 U. S. 600, and *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 441.

Dismiss the writ of error.

UNITED STATES TO THE USE OF HINE *v.* MORSE AND OTHERS, EXECUTORS OF CLARKE.

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

No. 25. Argued November 1, 1910.—Decided November 28, 1910.

Even if the bill seeking a sale of infant's property for reinvestment does not clearly state a case within the authority of the court, the decree of sale, appointment of trustee and execution of his bond are not mere nullities subject to collateral attack.

The Supreme Court of the District of Columbia is one of general ju-

risdiction possessing all powers conferred on Circuit and District Courts of the United States—in fact, the usual powers incident to a court of equity at the date of the Revolution, not incompatible with the changed forms and principles of government or affected by subsequent legislation. *Clark* v. *Mathewson*, 7 App. D. C. 382.

The inherent power of a court of equity of general jurisdiction over the persons and estates of infants is very wide. Its errors in regard to a sale of real estate of infants are reversible by appellate procedure, but until so corrected its judgment is not a nullity.

The voluntary surety on the bond of a trustee in a proceeding to sell real estate is estopped to attack the validity of the decree appointing the trustee or of the bond.

Where the demurrer to one plea of the answer was overruled and plaintiff did not plead further, reversal of the judgment and sustaining the demurrer to that plea leaves the other pleas open to be dealt with by the court below.

This court only having before it the demurrer on one plea to the answer which was overruled below, it reverses the judgment and sustains the demurrer, and other pleas in defense remain at issue and this court will not consider them on this appeal.

31 App. D. C. 433, reversed.

THE facts, which involve the liability of a surety on a bond given for faithful performance of his duty by a trustee appointed to sell the interest of an infant in real estate, are stated in the opinion.

Mr. Wm. Hepburn Russell, with whom *Mr. W. H. Robeson* was on the brief, for plaintiffs in error:

The Supreme Court of the District having exercised jurisdiction over the subject-matter of the suit in which the bond was given, its determination of its own jurisdiction is, after this lapse of time, binding upon all persons before the court in that case as to all proceedings, including the trustee and his surety. *Florentine* v. *Barton*, 2 Wall. 210, 216; *Evers* v. *Watson*, 156 U. S. 527, 533; *State of Wisconsin* v. *Waupacca Bank*, 20 Wisconsin, 640.

The test of jurisdiction is whether the court had power to enter upon the inquiry; not whether its conclusion

was right or wrong. *Commissioners of Lake County* v. *Platt*, 79 Fed. Rep. 567; Brown on Jurisdiction, §§ 64, 65, 66.

The decree of sale under which the trustee Waggaman sold the property and acquired the funds for the security of which he gave the bond, cannot be collaterally questioned by his surety. *McCormick* v. *Sullivant*, 10 Wheat. 192; *Skillern's Exrs.* v. *May's Exrs.*, 6 Cranch, 267; *Clary* v. *Hoagland*, 6 California, 685; *Tallman* v. *McCarty*, 11 Wisconsin, 401; *Dugan* v. *City of Baltimore*, 70 Maryland, 1; *Ex parte Watkins*, 3 Pet. 191, 203, 209; *Florentine* v. *Barton*, 2 Wall. 216; *Ex parte Parks*, 93 U. S. 20; *Pulaski Co.* v. *Stuart*, 28 Grattan, 879; *Harvey* v. *Tyler*, 2 Wall. 328, 342; *Galpin* v. *Page*, 18 Wall. 350; *Thompson* v. *Tolmie*, 2 Pet. 156; *Grignon* v. *Astor*, 2 How. 318; *Voorhees* v. *Bank of United States*, 10 Pet. 449, 473, 478; *Griffith* v. *Bogert*, 18 How. 158, 164.

The surety Clarke was estopped from denying the jurisdiction of the equity court to enter the decree appointing the trustee and authorizing him to make sale of the property, whether such decree is valid or invalid. *Stephens* v. *Crawford*, 1 Georgia, 574; *Kincannon* v. *Carroll*, 30 Am. Dec. 391; *Ploughman* v. *Henderson*, 59 Alabama, 559.

The jurisdiction of the court in the appointment of an executor cannot be questioned by the surety on the executor's bond. *Moore* v. *Earle*, 91 California, 632; *Parker* v. *Campbell*, 21 Texas, 763; *Cutler* v. *Dickinson*, 8 Pick. 386; *Williamson & McArthur* v. *Woolfe*, 37 Alabama, 298; *Norris* v. *State*, 22 Arkansas, 524; *Burnett* v. *Henderson*, 21 Texas, 588; *Coons* v. *People*, 76 Illinois, 383; *Bell* v. *People*, 94 Illinois, 230; *Allen* v. *Magruder*, 3 Cr. C. C. 6; *Mix* v. *People*, 86 Illinois, 329; *Twin City Power Co.* v. *Barrett*, 126 Fed. Rep. 302, 309; *Taylor* v. *State*, 51 Mississippi, 79; *Green* v. *Wardwell*, 17 Illinois, 278; *Hoboken* v. *Harrison*, 30 N. J. Law, 73.

The bond is a valid common-law obligation and as such

binding upon the surety. *Dudley* v. *Rice*, 95 N. W. Rep. 936. A bond, although not good as a statutory bond because of a want of jurisdiction in the court in the matter, may be good as a common-law obligation. *Dudley* v. *Rice*, 119 Wisconsin, 97; *S. C.*, 95 N. W. Rep. 936; *United States* v. *Tingey*, 5 Pet. 115; *Twin City Power Co.* v. *Barrett*, 126 Fed. Rep. 302; *McVey* v. *Peddie* (Neb.), 96 N. W. Rep. 166; *Griffith* v. *Godey*, 113 U. S. 89; *Dair* v. *Roudebush*, 16 N. E. Rep. 636; *Maleverer* v. *Redshaw*, 1 Mod. 35; *United States* v. *Bradley*, 10 Pet. 343, 360–365; *Justice* v. *Smith*, 2 J. J. Marsh. 418.

Voluntary bonds or those required as a condition of holding office, are valid, though not required or authorized by statute. *United States* v. *Tingey*, 5 Pet. 115; *United States* v. *Phumpries*, 11 App. D. C. 44; *United States* v. *Linn*, 15 Pet. 290; *United States* v. *Bradley*, 10 Pet. 343; *Tyler* v. *Hand*, 7 How. 573; *Howgate* v. *United States*, 3 App. D. C. 277.

Waggaman was trustee *de facto;* the court had general jurisdiction in equity to appoint a trustee to receive and hold funds for the court, and his sureties are, therefore, liable upon his bond as trustee. *Town of Homer* v. *Merritt*, 27 La. Ann. 568; *Commissioners* v. *Brisbin*, 17 Minnesota, 451; *Case* v. *State*, 69 Indiana, 46; *Police Jury* v. *Haw*, 2 Louisiana, 41.

Mr. John Selden for defendants in error:

The grounds of relief set forth in the bill disclosed the necessity for a receiver, but no justification, whatever, for a sale of the property. *Stansbury* v. *Inglehart*, 20 D. C. Rep. 134; *Pike* v. *Wassell*, 94 U. S. 711, 715. The court possessed no jurisdiction of the case made by the bill and could render no valid decree under or in aid of the bill. *Rose* v. *Himely*, 4 Cranch, 269; *Hickey* v. *Stewart*, 3 How. 762; *Reynolds* v. *Stockton*, 140 U. S. 264–265; *Windsor* v. *McVeigh*, 93 U. S. 232; *Williams* v. *Berry*, 8

How. 542; *Bigelow* v. *Forrest*, 9 Wall. 351; *In re Frederick*, 149 U. S. 76; *In re Bonner*, 151 U. S. 256; *Ex parte Reed*, 100 U. S. 23; *In re Mills*, 135 U. S. 270; *Ex parte Lange*, 18 Wall. 176; *Lamaster* v. *Keeler*, 123 U. S. 376, 391; *Ex parte Rowland*, 104 U. S. 612; *Ex parte Fisk*, 113 U. S. 718; *Ex parte Terry*, 128 U. S. 305; *Elliott* v. *United States*, 23 App. D. C. 456, 466; *Elliott* v. *Piersol*, 1 Pet. 340; *Wilcox* v. *Jackson*, 13 Pet. 511; *Thompson* v. *Whitman*, 18 Wall. 467; *Kilbourn* v. *Thompson*, 103 U. S. 197; *Brown* v. *Fletcher's Estate*, 210 U. S. 82.

In the District of Columbia, the jurisdiction of equity to decree a sale of the estate of an infant in landed property is purely statutory. *Thaw* v. *Ritchie*, 5 Mack. 200, 201; *S. C.*, 136 U. S. 519; *Stansbury* v. *Inglehart*, 20 D. C. Rep. 134; *Trust Co.* v. *Muse*, 4 App. D. C. 12, 22; *Clark* v. *Mathewson*, 7 App. D. C. 382–384; *District of Columbia* v. *McBlair*, 124 U. S. 320.

The proceedings taken against non-residents under the bill were void.

The strictness of procedure required for affecting titles to real property under merely statutory methods rendered it wholly unlawful to impair the rights of the absent defendants through such publications, and reduced to a nullity any decree rendered against those defendants. *Guaranty Trust Co.* v. *Green Cove Railroad*, 139 U. S. 137, 146–148; *Thatcher* v. *Powell*, 6 Wheat. 119; *Hunt et als.* v. *Wickliffe*, 2 Pet. 201; *Boswell's Lessee* v. *Otis et al.*, 9 How. 348; *Early* v. *Dow*, 16 How. 610; *Galpin* v. *Page*, 18 Wall. 350; 7 Robinson's Practice, 16–21, 86–99; *Settlemier* v. *Sullivan*, 97 U. S. 444, 448–449; *Cheely* v. *Clayton*, 110 U. S. 701, 708. See also *Ensminger* v. *Powers*, 108 U. S. 292, 301; *Brown* v. *Fletcher's Estate*, 210 U. S. 82, 88; *Harris* v. *Hardeman*, 14 How. 334; *Hagar* v. *Reclamation District*, 111 U. S. 701, 709; *Turpin* v. *Lemon*, 187 U. S. 51, 58.

The extraordinary course of the proceedings in the suit

in equity show that even if conducted under the forms of law, they were not judicial and that complainant procured whatever decrees and orders that were desired; such proceedings are *res judicata* of nothing. *Graffan* v. *Burgess*, 117 U. S. 186; *Ensminger* v. *Powers*, 108 U. S. 301; *Jenkins* v. *Robertson*, 1 Law Rep. Ho. L. (Scotch App.) 122.

The bill, and, with few exceptions, all of the steps taken under it, can be viewed no otherwise than as a succession, in effect, of impositions upon judicial authority.

And it is not in this tribunal that such impositions, whatever the forms they may have assumed, have ever been permitted to prevail. *Lord* v. *Veazie*, 8 How. 251, 255; *Cleveland* v. *Chamberlain*, 1 Black, 419, 425–426; *Wood Paper Co.* v. *Heft*, 8 Wall. 333, 336; *Johnson* v. *Waters*, 111 U. S. 640, 659; *Dakota County* v. *Gledden*, 113 U. S. 222, 225–226; *Tennessee &c. R. R. Co.* v. *Southern Tel. Co.*, 125 U. S. 695; *Gardner* v. *Goodyear Dental Vulcanite Co.*, 131 U. S. ciii; *Meyer* v. *Pritchard*, 131 U. S. ccix; *Little* v. *Powers*, 134 U. S. 547, 557; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Hadfield* v. *King*, 184 U. S. 162.

There was no existence of continued liability to the beneficiary on the part of the surety, as there was an executed arrangement to the prejudice of the surety, between beneficiary and the principal, under which the condition of the bond had become impossible of performance.

The surety assumes no moral obligation beyond such as flows from his contract. *United States* v. *Price*, 9 How. 83, 92; *Pickersgill* v. *Lakens*, 15 Wall. 140, 144.

And he possesses an interest in the terms, and even in the letter, of his contract. *Miller* v. *Stewart*, 9 Wheat. 680, 703; *McMichen* v. *Webb et al.*, 6 How. 292, 298; *Martin et al.* v. *Thomas et al.*, 24 How. 315, 317; *Smith* v. *United States*, 2 Wall. 219, 235; *United States* v. *Boecker*, 21 Wall. 652, 657; *United States* v. *Ulrici*, 111 U. S. 38, 42.

The common-law obligation which, even in their own

right, the United States may enforce, must be a valid obligation. *United States* v. *Linn*, 15 Pet. 311; *Tyler* v. *Hand*, 7 How. 583; *United States* v. *Hudson*, 10 Wall. 408; *Jesup* v. *United States*, 106 U. S. 152; *Moses* v. *United States*, 166 U. S. 371, 386; *United States* v. *Dieckerhoff*, 202 U. S. 302, 309.

There is no estoppel. A mere recital in a bond cannot be made to operate by way of estoppel, so as to preclude the obligor from showing the instrument to be void. *Cadwell* v. *Colgate*, 7 Barb. 253, 256–257; *Thomas* v. *Burnus*, 23 Mississippi, 550; *Crum* v. *Wilson*, 61 Mississippi, 233; *Levy* v. *Wise*, 15 La. Ann. 38; *Hudson* v. *Inhab. of Winslow*, 35 N. J. Law (6 Vroom), 537; Bigelow, Estop. 369*n*; *The Fidelity*, 16 Blatch. 569; *The Monte A.*, 12 Fed. Rep. 331; *The Berkely*, 50 Fed. Rep. 920.

Bonds executed for the relief of void attachments, as they stand in place of the attachments, are themselves void, and cannot create estoppels. *Pacif. Nat. Bk.* v. *Mixter*, 124 U. S. 721; *Plant. Loan & Sav. Bk.* v. *Berry*, 91 Georgia, 264; *First Nat. Bk. &c.* v. *La Due*, 39 Minnesota, 416; *Cadwell* v. *Colgate*, 7 Barb. 253, 256–257; *Horman* v. *Brinkerhoof*, 1 Denio, 185; *Brokman* v. *Hamill*, 43 N. Y. 554; *Poole* v. *Kermit*, 59 N. Y. 554; *Buckingham* v. *Bailey*, 4 Sm. & Marsh. 538.

If, in a void proceeding, one give bond for the accomplishment of an unlawful object, the obligee who has participated in that object, can maintain no action upon the instrument. 2 Smith's Ld. Cas. (9th Am. ed.) 668; *Craig* v. *Missouri*, 4 Pet. 410; *Randall* v. *Howard*, 2 Black, 585, 588–589; *Wheeler* v. *Sage*, 1 Wall. 518, 530–531; *Higgins* v. *McCrea*, 116 U. S. 671, 684–685; *Daniels* v. *Tearney*, 102 U. S. 415.

Mr. Justice Lurton delivered the opinion of the court.

This was an action upon a bond executed by Thomas E.

Waggaman, as principal, and Daniel B. Clarke, as his surety. The bond was in these words and figures:

"In the Supreme Court of the District of Columbia.
In Equity. No. 20225, Docket 46.

Mattie Mc.C. Hine
vs.
Robert Edward Hine et al.

"Know all men by these presents, that we, Thomas E. Waggaman, principal, and Daniel B. Clarke, surety, all of the District of Columbia, acknowledge ourselves indebted to the United States of America in the penal sum of eighteen thousand dollars, for the payment of which we bind ourselves and every of our heirs, executors and administrators, jointly and severally, for and in the whole. Sealed with our seals, and dated this 7th day of July A. D. 1899.

"Whereas the said Thomas E. Waggaman has been duly appointed trustee to make sale of the real estate in the proceedings in this cause mentioned.

"Now the condition of the above obligation is such, that if the above bounden Thomas E. Waggaman shall well and truly discharge the duties devolving upon him as such trustee and shall in all things obey such order and decree as this court shall make in the premises, then the above obligation to be void and of no effect; else to be in full force and virtue."

The bond, as shown by its recitals, was executed in a pending equity cause in the Supreme Court of the District, wherein the parties for whose use this suit is brought were parties, either plaintiff or defendant.

The declaration, in substance, averred a breach of the bond, in this: That Waggaman had assumed the duty and function of trustee for the sale directed by the decree, had sold and conveyed the property as directed, but had not accounted for the proceeds, having unfaithfully vio-

lated the trust and confidence reposed in him by squandering and misappropriating such proceeds. It was further averred that on November 21, 1905, the said Waggaman had disobeyed a decree of the court, requiring him to pay into court the sum of $8,147.27, with interest from August 1, 1904, and was therefore in default.

The defenses with which we are concerned upon this writ are those made by the surety, who, by a plea which the court below sustained, challenged the obligation of the bond. The insistence is that the Supreme Court of the District exceeded its authority in decreeing a sale of the land which was sold by Waggaman, and his appointment to make such a sale was a nullity, and the bond executed by him with the defendant Clarke as surety mere waste paper.

The proceeding in the Supreme Court in which this bond was executed was a bill in equity to sell lot No. 1912 I street N. W., Washington, D. C., as the property of a minor for purpose of reinvestment under like trusts. The title was held under the will of Robert B. Hine, who died in 1895. So much of the will as concerns the title to the premises of which a sale was decreed was in these words:

"I give and bequeath to my dear wife, Mattie McC. Hine, a life interest in all my real estate. As executrix she will collect the income arising from said real estate, and after paying all necessary expenses of collection, fire insurance and repairs, shall retain the remainder of the income for her own use. After the death of my said wife, I give and bequeath my real estate to my son, Robert Edward, and any other children that may hereafter be born to me. If my said wife should marry again, she will from the date of such remarriage, be entitled to retain for her own use, one-half of the net income of my estate, and will pay the remainder to a trustee for my son, and any other children who may hereafter be borne to me. Provided, further, that should my wife marry

again, and should no child of mine by her, be then surviving, the whole net income from my estate shall be retained by her, during her life, and after her death, my real estate shall be sold, and of the proceeds, one-third shall be paid to my father, the Rev. Henry Hine now of Boston Spa. Yorkshire England, if he then be living, he not being then living to my mother Amelia Burnett Hine, neither of them being then living to my sister, Amelia Burnett Hine, and the residue, shall be equally divided between my brothers and sisters share and share alike. If neither parent, nor my sister Amelia Burnett Hine outlives my said wife, then the whole net proceeds of the sale of my real estate, shall be equally divided, between my brothers and sisters. Should any of these have died, before this distribution takes place, their surviving children shall receive the share of the deceased parent, share and share alike."

The complainant in the suit was Mattie McC. Hine, the widow of the testator, who averred that she had never remarried. The defendants were the only issue of her marriage with testator, her son Robert E. Hine, then an infant of nine years of age, and the persons who, under the will, were given contingent interests. The minor Robert E. Hine was duly served and answered by guardian *ad litem*. The other defendants were made parties by publication, as persons not to be found in the District. The bill alleged that the dwelling-house was deteriorating in value, that it was often unrented, that repairs, insurance and taxes left an inconsiderable net income, which would go on diminishing. That she believed she could obtain $8,500 for the premises, a sum much larger than the value of the property to the remaindermen when her estate should fall in, and that the proceeds could be so invested as to much improve her income and better "enable her to provide for the remainderman during his minority." The bill alleged that the will did not

prohibit a sale. The prayer was for a decree of sale and for a reinvestment, in pursuance of § 973, Rev. Stat. D. C.

Upon the pleadings and proof the court directed a sale of the said lot, and in the same decree appointed Thomas E. Waggaman "trustee to make the sale," requiring him to execute a bond with surety "conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future order or decree in the premises." By the same decree he was required "to bring into court the money arising on such sale . . . to be disposed of under the direction of the court," etc.

The contention is that the Supreme Court of the District has no inherent or general power as a court of equity to decree the sale of an infant's property for the purpose of reinvestment, and that its jurisdiction was wholly dependent upon statutory power conferred by §§ 969 *et seq.*, Rev. Stat. D. C., taken from the act of Congress of August 18, 1856. Section 969 reads as follows:

"Where real estate is limited by deed or will to one or more for life or lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of their parent or parents, and the deed or will does not prohibit a sale, the Supreme Court of the District may, upon the application of the tenants for life, and if the court shall be of the opinion that it is expedient to do so, order a sale of such estate, and decree to the purchaser an absolute and complete title in fee simple."

The contention is that the only jurisdiction conferred by this statute is confined to real estate which is by deed or will "limited to one or more lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of either parent," and that under the will of Robert B. Hine the devise to Robert Edward Hine is a vested and not a contingent

remainder, while the contingent remainders—contingent on the death of said Robert and the subsequent remarriage of his mother, the said Mattie—are not limitations over to issue of either Robert B. Hine or Mattie Hine. For this construction of the statute the court below relied upon *Trust Co.* v. *Muse*, 4 App. D. C. 12, 20; *Thaw* v. *Ritchie*, 5 Mack. 200, and *Clark* v. *Mathewson*, 7 App. D. C. 384.

Clearly under the will there was a life tenant and a remainder over at the death of the life tenant to Robert E. Hine, who was the issue of the testator and of the life tenant. The remainder was not absolute, for if the remainderman should die, and his mother, the life tenant, remarry, this lot was to be sold and the proceeds paid over to certain collaterals named. Technically the interest was a vested remainder, subject to open and let in the testator's brothers and sisters and to be divested upon the death of Robert E. Hine and remarriage of the life tenant. The contention now is that if the court erred in the construction of the will, or in the interpretation and application of the statute, and decreed a sale for reinvestment, not strictly authorized by the statute, that its action and decree is to be regarded as a nullity, that the sale is void, and that the appointment of Waggaman as trustee and the execution of his bond are absolute nullities.

But if we assume that upon a critical construction of the will and of the statute the bill seeking a sale of this property for reinvestment did not state a case clearly within the statutory authority of the court, it does not necessarily follow that the decree of sale and all else that occurred are to be treated as mere nullities, subject to collateral attacks such as this is.

The Supreme Court of the District is one of general jurisdiction. It possesses all of the powers which by statute are conferred upon the Circuit and District Courts of the United States. Sections 760 and 765, Rev. Stat.

D. C. It may be said, indeed, to have the usual powers incident to a court of equity at the date of the Revolution, not incompatible with the changed form and principles of government or affected by subsequent legislation. *Clark* v. *Mathewson*, 7 App. D. C. 382.

The inherent power of a court of equity over the persons and estates of infants is very wide. For the purpose of maintenance, the power over real estate is undoubtedly more comprehensive than it is over the sale of real estate for purposes of reinvestment, though manifestly for the interest of the minor. The weight of authority seems to be that it does not extend to sales merely because it shall appear to be for the interest of the infant (Bispham's Equity, § 549; Story's Equity, § 1357; 3 Pomeroy Equity, §§ 1304, 1309), though there is not lacking very respectable authority for the power to sell real estate when shown to be for the manifest interest of the minor. 2 Kent's Comm., 11th ed., * 230; 5 Johns. Ch. 167; 4 Heisk. (Tenn.) 370, and 7 Baxt. (Tenn.) 502. The Supreme Court of the District had jurisdiction over the subject-matter, the *res*. It had jurisdiction over the parties. It was, according to due course of equity proceeding, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If then jurisdiction consists in the power to hear and determine, as has so many times been said, and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities? To this we cannot consent. If the court was one of general and not special jurisdiction, if under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority. To do this

was jurisdiction. If it errs, its judgment is reversible by proper appellate procedure. But its judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity.

In the leading case of *Ex parte Tobias Watkins*, 3 Pet. 193, 203, 206, the opinion was by Chief Justice Marshall. The question arose upon a writ of *habeas corpus*. The petitioner had been indicted and convicted. He sought to be discharged from prison because the indictment upon its face charged no offense cognizable by courts of the United States. The court said, among other things:

"An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court, is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it."

After referring to and commenting upon *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173, and *Skillern's Executor* v. *May's Executor*, 6 Cranch, 267, the court added:

"Had any offense against the laws of the United States been in fact committed, the Circuit Court for the District of Columbia could take cognizance of it. The question

whether any offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, cannot be disregarded."

This case was followed in *Ex parte Parks*, 93 U. S. 18, 23, and in *In re Coy*, 127 U. S. 731, 757, where this court, speaking by Mr. Justice Miller, said of the language just cited from *Ex parte Watkins*, that—

"It may be said that this language is too broad in asserting that, because every court must pass upon its own jurisdiction, such decision is itself the exercise of a jurisdiction which belongs to it, and cannot, therefore, be questioned in any other court. But we do not so understand the meaning of the court. It certainly was not intended to say that because a Federal court tries a prisoner for an ordinary common law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by *habeas corpus* because the court which tried him had assumed jurisdiction.

"In all such cases, when the question of jurisdiction is raised, the point to be decided is, whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of *habeas corpus*."

The principle has been applied in many cases, notably in cases in which want of jurisdiction as a court of the

United States was apparent on the record. *Des Moines Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557, 559; *Dowell* v. *Applegate*, 152 U. S. 327, 337.

In *McNitt* v. *Turner*, 16 Wall. 352, 365, the court, after passing upon various jurisdictional objections to a judicial sale of a title in controversy, said:

"But there is a comprehensive and more conclusive answer to all the objections to the sale which have been considered, and to others suggested which have not been adverted to.

"Upon the filing of the notice with the proof of publication, and the subsequent filing of the petition of the administrator for authority to sell, the Circuit Court had jurisdiction of the case. No presumption on that subject is necessary. Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. The order of sale before us is within this rule. *Grignon's Lessee* v. *Astor et al.*, 2 How. 341, was, like this, a case of a sale by an administrator. In that case, this court said: 'The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law.' This case and the case of *Voorhees* v. *The Bank of the United States*, 10 Pet. 449, are the leading authorities in this court upon the subject. Other and later cases have fol-

lowed and been controlled by them. *Stow* v. *Kimball* affirms the same doctrine."

The line between a judgment which is a plain usurpation of jurisdiction and one which is merely erroneous and reviewable only by seasonable appeal, is a plain one. The case in hand falls, in our judgment, within those which are merely reversible upon appellate proceedings, and the judgment decreeing the sale and appointing Waggaman as trustee to make the sale was not a nullity.

In *Voorhees* v. *Bank*, 10 Pet. 449, 474, this court said:

"The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper. There can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well-merited reproach to our jurisprudence if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it."

In *Fauntleroy* v. *Lum*, 210 U. S. 230, 237, it is laid down that a judgment cannot be collaterally impeached by showing that it was based upon a mistake of law.

But aside from the view we have expressed as to the validity of the proceedings when collaterally attacked, we are of opinion that the question of the validity of the decree of sale, the order appointing Waggaman trustee to make the sale, and the validity of the bond in suit is

not open to question by one who voluntarily became the surety upon the bond, thereby enabling his principal to obtain the proceeds of sale. Having obtained the trust and confidence of the court by aid of the security afforded by the solemn obligation to faithfully execute the order of the court and to pay into the court the proceeds of the sale which he undertook to make, neither the trustee so appointed, nor the surety for his performance of the trust, are in a situation to deny the regularity of the transaction. The proceeds which Waggaman received are either the funds of the beneficial owners of the property, or, if the sale be in fact void so far as to confer no title, the purchaser in equity and justice must be protected before the money is distributed. The benefit which Waggaman expected to secure, he has been enabled to enjoy through the voluntary execution of this bond by Clarke as his surety. That bond recites his due appointment, and it would be inequitable and unjust to permit either the principal or his surety to deny the fact.

This rule of estoppel has been applied in many cases. It was applied in respect to the bond of an Indian agent. The surety upon the bond denied liability because the Government did not produce the commission showing the appointment of his principal. The court said: "The bond upon which the suit was brought recites that he was appointed Indian agent and the obligors in the bond are therefore estopped from denying it." *Bruce* v. *United States*, 17 How. 437, 442.

The principle was applied to a distiller's bond where one of the defenses was that the bond was invalid. The court said:

"But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objec-

tion taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors." *United States* v. *Hodson*, 10 Wall. 395, 409.

It was applied in respect of a stay bond executed under a void act of legislation. "Not to apply the principle of estoppel to the bond in this case would," said the court, "it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice." *Daniels* v. *Tearney*, 102 U. S. 415, 422.

The opinions of the highest courts of the States are full of applications of the rule of estoppel. In *Plowman* v. *Henderson*, 59 Alabama, 559, the sureties upon the bond of an administrator were not permitted to show the illegality of his appointment. To the same effect is *White* v. *Weatherbee*, 126 Massachusetts, 450.

The sureties upon the bond of a sheriff were held estopped to deny validity of his appointment or the regularity of his bond. *Jones* v. *Gallatin County*, 78 Kentucky, 491.

In *People* v. *Norton*, 9 N. Y. 176, the sureties upon the bond of a trustee appointed by a chancery court were held estopped to deny the validity of the order appointing him.

In *State* v. *Anderson*, 16 Lea (Tenn.), 321, 335, and *United States* v. *Maurice*, 2 Brock, 96, the rule is recognized and applied.

The questions which we have considered arose upon

a plea which set out the proceedings in the case in which the bond had been taken, and averred their nullity for want of jurisdiction. Another and distinct defense relied upon in the plea was that after the proceeds of sale had come into the possession of said Waggaman that Mattie McC. Hine, one of the beneficiaries for whose use this suit is prosecuted by the United States, had agreed with the said Waggaman that he should retain in his possession and for his own purposes the fund aforesaid, and should pay to her interest at the rate of five per cent per annum, quarterly. That this agreement was acted upon and the interest so paid from the date of the receipt of the proceeds in 1899 to May 1, 1904, and that the agreement was without the knowledge or consent of the surety. There was a demurrer and joinder thereon to so much of the said plea as set out and relied upon the nullity of the proceedings under which the bond had been executed, and a replication and issue upon the plea relying upon any alleged agreement between Waggaman, the principal, and Mrs. Hine, as one of the beneficiaries in the bond. The demurrer was overruled and complainants electing to stand upon it, declined to further plead; whereupon the action was dismissed. From this judgment there was an appeal to the Court of Appeals of the District, where the judgment was affirmed.

So much of the plea as sought to defend the action in whole or in part in consequence of the alleged agreement between the principal in the bond and Mrs. Hine without the consent of the surety remains at issue undisposed of, and is accordingly not considered by us.

The judgment of the Court of Appeals so far as it determined the validity of the plea aforesaid was erroneous, and the case is reversed and remanded with direction to sustain the demurrer and remand the case for further proceedings not inconsistent with this opinion.

Reversed.

EAGLE MINING & IMPROVEMENT COMPANY *v.* HAMILTON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 51. Submitted November 7, 1910.—Decided November 28, 1910.

Under the Territorial Practice Act of April 7, 1874, c. 80, 18 Stat. 27, the jurisdiction of this court on appeals is limited to the inquiry whether the findings of fact support the judgment and to a review of duly taken exceptions and rulings on admission or rejection of evidence.

Findings of the District Court when adopted by the Supreme Court of the Territory serve the purpose of the statement of facts required by the statute.

Rulings on questions of evidence are not properly before this court when the exceptions thereto do not appear in the record, and, even though objections to testimony may have been noted, if it does not appear what the rulings were and whether the testimony was or was not excluded, this court is confined to determining whether the findings support the judgment; and in this case the facts found by the court below unquestionably support the judgment.

14 N. Mex. 271, affirmed.

THE facts are stated in the opinion.

Mr. Samuel Parker, with whom *Mr. George W. Prichard* and *Mr. Archibald G. Graham* were on the brief, for appellant.

Mr. James G. Fitch for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from a decree of the Supreme Court of the Territory of New Mexico in two suits which were consolidated. The first suit was brought in August, 1903,

in a District Court of the Territory by the appellant, Eagle Mining and Improvement Company, against the appellees, the widow and heirs of Humphrey B. Hamilton, deceased, to have it adjudged that the decedent held a certain undivided interest in mining property in trust for the appellant, and to compel conveyance. In November, 1904, the appellees, one of whom was the administrator of the decedent's estate, brought suit against the appellant, alleging that Hamilton had rendered services as its attorney in connection with the mining property and otherwise, and that the legal title had been taken by him pursuant to an agreement, by which it was to be held as security for the appellant's indebtedness to him; the appellees prayed for foreclosure and recovery of the amount found to be due. The suits were consolidated and a referee was appointed to take testimony. Hearing was had, and a decree was entered in favor of appellees, which set forth separately findings of fact and conclusions of law.

The court found that Hamilton had acquired the legal title to the undivided one-half interest in question under an agreement with the appellant, by which he was to negotiate for the purchase in its behalf and was to surrender a certain equitable claim of lien upon another interest in the property; that in consideration of this surrender and of his services in acquiring the one-half interest Hamilton was to receive the difference between an agreed sum and the amounts to be advanced by the appellant to effect the purchase; that for the payment of this difference—found to amount to $9,500—Hamilton was to hold the legal title as security; and that the agreement to this effect was evidenced by writings signed by Hamilton "and delivered to, accepted and acquiesced in by the said company."

As a conclusion of law, the court found that the heirs of Hamilton were entitled to hold the legal title to the

undivided interest until the payment of $9,500, with interest and costs of suit, had been made to the administrator of Hamilton's estate; that upon such payment they should convey to the appellant, and that in default of payment the undivided interest should be sold to satisfy the indebtedness.

It was further found that Hamilton had been retained by the appellant as its attorney, and at its request had rendered legal services from the date of its organization until his death without express agreement as to the amount to be paid therefor; that these services were reasonably worth $9,519.99, upon which, after deducting payments, there was due $8,419.99. And, as a conclusion of law, the court held that the administrator was entitled to judgment for the last-mentioned sum.

It was decreed accordingly, and from this decree appeal was taken to the Supreme Court of the Territory where it was affirmed.

The record before us contains the testimony taken before the referee, and the letters and documents which, in connection with the testimony, he submitted to the court in his report; and the argument here is directed largely to the effect of the evidence and to the findings of the court below as to matters of fact.

But we are not at liberty to review these findings of fact. We cannot go behind the findings to ascertain whether they are justified by the evidence. Under the act of April 7, 1874, chapter 80, 18 Stat. 27, the jurisdiction of this court, upon this appeal, is limited to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions which have been duly taken to rulings upon the admission or rejection of evidence. *Stringfellow* v. *Cain*, 99 U. S. 610; *Neslin* v. *Wells*, 104 U. S. 428; *Idaho & Oregon Land Company* v. *Bradbury*, 132 U. S. 509; *Haws* v. *Victoria Copper Mining Company*, 160 U. S. 303; *Grayson* v.

Lynch, 163 U. S. 468; *Bear Lake Irrigation Company* v. *Garland*, 164 U. S. 1; *Apache County* v. *Barth*, 177 U. S. 538. The findings of the District Court, having been adopted and affirmed by the Supreme Court of the Territory, serve the purpose of the statement of facts required by the statute. *Stringfellow* v. *Cain, supra; Neslin* v. *Wells, supra; Haws* v. *Victoria Copper Mining Company, supra.*

Nor are there any rulings upon questions of evidence which are properly before us for review, for no exceptions to such rulings appear in the record. When the evidence was taken before the referee appointed by the District Court various objections were made and were noted upon the record, but the referee did not attempt to pass upon the objections and reported to the court the entire proceedings, including the testimony and documents to which objection had been made. What, if any, rulings were made by the court upon these objections is not shown. In the progress of the cause a memorandum of opinion was filed by the judge sitting in the District Court, in which the admissibility of certain testimony, relied upon by the appellant, was said to be doubtful, but it does not appear that the testimony was excluded, and as we have said there are no exceptions which bring up any question for review with respect to the admission or rejection of evidence.

As the facts found by the court below unquestionably support the judgment, it is

Affirmed.

UNITED STATES *v.* MASON.

SAME *v.* SAME.

SAME *v.* SAME.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 510, 511, 512. Argued October 18, 19, 1910.—Decided November 28, 1910.

Clerks of the Federal courts are not controlled in respect to their fees and emoluments and accounting therefor by the provisions of the act of March 3, 1875, c. 144, 18 Stat. 479, or of Rev. Stat., §§ 5490 and 5497, relating to embezzlement of moneys and property of the United States by officers and other persons charged with the safekeeping thereof.

There is a separate system with respect to the fees and emoluments of clerks, and the amounts which the clerk receives are not moneys or property of the United States but a fund from which he receives his compensation and expenses, and as to the surplus for which he must account to the United States he is not trustee but debtor.

THE facts, which involve the validity of indictments for embezzlement against a clerk of the District Court of the United States and the construction of statutes relating to the fees, salaries and accounts of clerks of United States courts, are stated in the opinion.

Mr. Assistant Attorney-General Fowler for the United States.

Mr. Boyd B. Jones, with whom *Mr. George L. Wilson* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The defendant, the clerk of the District Court of the

United States for the District of Massachusetts, was indicted for the embezzlement of certain moneys of the United States. Separate indictments were found as to moneys received by the clerk in the years 1906, 1907 and 1908, respectively. They are precisely alike, save for the difference in the years and the amounts specified. In each case the Circuit Court sustained a demurrer as to three counts of the indictment, the second, third and fourth, and the judgments on the demurrers are brought here for review.

Each of these three counts—which are set forth in the margin [1]—states that the moneys were a "portion of a

[1] Second count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, §§ 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him." The charge of the second count is that the defendant "the same public moneys

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Third count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, during all of the year nineteen hundred and eight was, and ever since has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, §§ 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the last-mentioned public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully and fraudulently did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Fourth count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since then has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, a portion of the money of the United States, a particular description whereof is to said grand jurors unknown, to wit, money to the amount and of the

unlawfully did fail safely to keep" as required by acts of Congress, "and, on the contrary, the same then and there unlawfully did convert to his own use," and thereby "was guilty of embezzlement of said public moneys so converted." The third count is the same as the second, except that it charges that the defendant converted the moneys "fraudulently" as well as "unlawfully." The fourth count charges that he should have paid the money, that is, the alleged surplus, to the United States "in the manner provided by law," and that he "the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle."

To sustain the counts, the assignment of errors refers to §§ 5490 and 5497 of the Revised Statutes, and to the act of March 3, 1875, chapter 144 (18 Stat., p. 479).

Section 5490 is as follows:

"Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged; and shall be impris-

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value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and was a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which money last aforesaid he should, on said first day of February, in the year nineteen hundred and nine, have paid to the United States at Boston aforesaid in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle.

oned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled."

Section 5497, with the addition made by the amendment of February 3, 1879, chapter 42 (20 Stat. 280), provides:

"Every banker, broker, or other person not an authorized depositary of public moneys, . . . who uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law, . . . is guilty of an act of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be punished as prescribed in section fifty-four hundred and eighty-eight.

"And any officer connected with, or employed in, the internal-revenue service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be punished by a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment not less than three months nor more than ten years, or by both such fine and imprisonment."

By the act of March 3, 1875, chapter 144, § 1 (18 Stat., p. 479), "any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable

thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony."

It is also contended, in argument, that the facts alleged in the indictment bring it within the scope of § 5489 of the Revised Statutes, which provides that if "any public depositary fails safely to keep all moneys deposited" he shall be deemed guilty of embezzlement; and this, under § 5493, is to be construed "to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same."

What, if any, application these provisions may have to the clerk of the District Court, with respect to the fees and emoluments of his office, can be determined only after a consideration of the history of his relation to these moneys and of the statutes which specifically define his rights and duties. Prior to 1841 the clerks were not required to render any account of their fees to the Government. *United States* v. *Hill*, 120 U. S. 169, at page 176. The act of March 3, 1791, chapter 22, § 1 (1 Stat. 217), fixed their compensation for attending court and made an allowance for traveling. That of May 8, 1792, chapter 36, § 3 (1 Stat. 277), added such fees as were allowed by the Supreme Court of the State, and authorized the court to grant a reasonable compensation for the discharge of duties not performed by the clerks of the state court and for which the laws of the State made no allowance. But, under these statutes, the fees and emoluments received by the clerks were their own property. And they were to be recovered "in like manner as the fees of the officers of the States respectively for like services." 1 Stat. 278, § 6.

In 1841, for the first time, the clerks were limited as to the amount which they were entitled to retain out of their fees. The act of March 3, 1841, chapter 35, § 1

(5 Stat. 427), provided that the fees and emoluments retained by the clerks after the payment "of such necessary office and other expenses as shall be allowed by the Secretary of the Treasury," within a prescribed limit, should "not exceed, in any case, four thousand five hundred dollars; the overplus of fees and emoluments to be paid into the public Treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury, subject to the disposition of Congress." This was followed by the act of May 18, 1842, chapter 29 (5 Stat. 483), which limited the amount which the clerk could retain out of the fees and emoluments of his office "for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the Treasury," to the sum of thirty-five hundred dollars per year. The clerks were required to make verified returns semi-annually, "embracing all the fees and emoluments of their respective offices, of every name and character," and also "all the necessary office expenses of such officer, together with the vouchers for the payment of the same." It was also provided that the officer, with each return, should "pay into the Treasury of the United States, or deposit to the credit of the Treasurer thereof, as he may be directed by the Secretary of the Treasury, any surplus of the fees and emoluments of his office, which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him." Where the return showed that a surplus might exist the Secretary of the Treasury was to cause the return to be carefully examined and the accounts of disbursements to be regularly audited "and an account to be opened with such officer in proper books to be provided for the purpose."

The plain object of this statute was to limit the amount

which the clerk was to retain and to require an accounting, an audit of expenses, and a payment of the surplus. Otherwise the established method of administering the office was not changed. The fees were to be recovered as theretofore; and to the extent of the amount of the fixed compensation of the clerk and the necessary expenses of his office, he was entitled to use and to pay as formerly. The statute suggests no other course. What, if anything, should be paid into the public treasury at the end of the half year, when he was to make his return, depended upon the amount of the fees, the amount of the expenses and the result of the audit. If his fixed compensation and his necessary expenses exhausted the fees there would be nothing to pay. The amount payable was to be determined when the return was made.

This was the state of the law as to the clerks' fees and emoluments at the time of the passage of the act of August 6, 1846, chapter 90 (9 Stat. 59), which was entitled "An Act to provide for the better Organization of the Treasury and for the Collection, Safe-Keeping, Transfer and Disbursement of the public Revenue." It made careful provision with respect to the duties of the Treasurer, Assistant Treasurers, and of collectors and receivers of public moneys, and the manner in which these moneys should be deposited and disbursed. By § 6 of this act "all public officers of whatsoever character" were required "to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them," until it was ordered "by the proper department or officer of the Government" to be transferred or paid out. See Revised Statutes, § 3639. By § 16 it was provided that if any officer "charged by this act, or any other act, with the safe-keeping, transfer, and disbursement of the public moneys" should use, loan, deposit or exchange, except as allowed by the act, "any portion of the public

moneys entrusted to him" every such act should be deemed an embezzlement. 9 Stat. 63.

This last-mentioned section is the source of § 5490 of the Revised Statutes, which we have quoted above as one of the statutes relied upon to sustain the counts in question, and in construing it we may refer to the purpose and scope of the act from which it was derived. *McDonald* v. *Hovey*, 110 U. S. 619; *United States* v. *Le Bris*, 121 U. S. 278; *Logan* v. *United States*, 144 U. S. 263, 302. Section 5493 must be construed in the same way for a similar reason. And it is clear that the Treasury act of 1846, and the provisions of § 16, did not apply to the fees and emoluments received by clerks of courts, and that the clerks were not charged, within the meaning of that act, with the safe-keeping of these fees and emoluments as public moneys. These were governed by other rules. They lay outside of the prohibition of § 16 against loaning, using, converting to his own use, depositing in banks, and exchanging for other funds, for it was upon these fees that the clerk depended for his livelihood and for the payment of the expenses of his office, subject only to the duty twice a year to make his accounting and to pay over the surplus if the fees exceeded the total amount allowed him.

The statute relating to the Treasury was speedily supplemented by the act of March 3, 1849, chapter 110, entitled "An Act requiring all Moneys receivable from Customs and from all other Sources to be paid immediately into the Treasury, without Abatement or Reduction, and for other Purposes" (9 Stat. 398). This is the source of § 3617 of the Revised Statutes, providing that "the gross amount of all moneys received from whatever source for the use of the United States," with the exceptions stated, (not here important,) "shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or

deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever." But this, obviously, had no application to clerks of courts who continued to receive, hold and use their fees and emoluments subject to the prescribed limitations and the duty to account.

In 1849 the supervisory power of the Secretary of the Treasury over the accounts of clerks was transferred to the Secretary of the Interior (Act of March 3, 1849, chapter 108, § 4, 9 Stat. 395). In 1853, a statute was passed regulating the fees of clerks and other officers of the courts throughout the United States, and the duties of clerks with respect to their returns and payments were defined. This established the present fee bill (Act of February 26, 1853, chapter 80, 10 Stat. 161). In 1870 the supervisory power passed to the Attorney-General. Act of June 22, 1870, chapter 150, § 15, 16 Stat. 164.

The provisions of the act of 1853, as modified by the subsequent legislation, have been incorporated in the Revised Statutes, §§ 823 to 857, and these continue the policy of the act of 1842, *supra*.

Section 823 provides that "the following and no other compensation shall be taxed and allowed to . . . clerks of the circuit and district courts." Section 828 prescribes the clerks' fees. Section 833 provides for semi-annual returns to the Attorney-General, as follows:

"Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney-General in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year. He shall

state separately in such returns the fees and emoluments received or payable under the bankrupt act; . . . Said returns shall be verified by the oath of the officer making them."

Section 839 defines the amount which may be retained out of the clerk's fees for his compensation over and above expenses:

"No clerk of a district court, or clerk of a circuit court, shall be allowed by the Attorney-General, except as provided in the next section, and in section eight hundred and forty-two to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk, or for any such circuit clerk, or exceeding that rate for any time less than a year."

Sections 844, 845 and 846 contain the following provisions, which are applicable to the payment by clerks of the surplus shown by their returns and for the examination and audit of their accounts:

"SEC. 844. Every district attorney, clerk, and marshal shall, at the time of making his half-yearly return to the Attorney-General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

"SEC. 845. In every case where the return of a district attorney, clerk, or marshal shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the accounts of disbursements

to be regularly audited by the proper officer of his Department, and an account to be opened with such officer in proper books to be provided for that purpose.

"SEC. 846. The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts."

Section 857 brings forward the provision of the act of May 8, 1792, c. 36 (1 Stat. 278), as to the manner in which the fees shall be recovered.

Section 5 of the act of February 22, 1875, chapter 95 (18 Stat. 334), provides that if any clerk of any District or Circuit Court of the United States shall willfully refuse or neglect to make or to forward any report, certificate, statement, or other document required by law to be made or forwarded by him, it shall be the duty of the President to remove him from office, and he shall not be eligible to any appointment as clerk or deputy clerk for the period of two years thereafter. By § 6 of the same act, the willful refusal or neglect to make or to forward the report, or other documents mentioned in the preceding section, is made a misdemeanor.

We have also to note the proviso contained in the appropriation act of June 28, 1902, chapter 1301 (32 Stat. 475, 476), as follows:

"That each clerk of the district and circuit courts shall, on the first days of January and July of each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, written returns for the half year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, in-

cluding necessary clerk hire, together with the vouchers for the payment of the same for such last half year; and the word 'emoluments' shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, and all other amounts received for services in any way connected with the clerk's office."

There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. This consideration, however, does not aid the prosecution, for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty on his part to account for any portion of them. The fees and emoluments stand in a different category from other moneys which he may receive by virtue of his office, as, for example, moneys paid into court. Revised Statutes, §§ 995, 996.

In *United States* v. *Hill*, 123 U. S. 681, the action was on the official bond of the clerk of the District Court of the United States for the District of Massachusetts, and it was asserted that this court had jurisdiction to review the judgment because the suit was brought for the enforcement of a "revenue law." The court held that § 844 of the Revised Statutes requiring the clerk to pay into the Treasury any surplus of fees and emoluments shown by his return was not a revenue law within the meaning of § 699, and in delivering the opinion of the court Chief Justice Waite said:

"Certainly it will not be claimed that the clerk of a District Court of the United States is an 'officer of the

revenue,' but there is nothing to indicate that the term revenue has any different signification in this subdivision of the section from that which it has in the other. The clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any 'revenue law,' properly so called, but out of a statute governing an officer of a court of the United States."

None of the statutes relating to embezzlement of moneys or property of the United States, which we have quoted, affords a basis for the counts in question. There may be an honest difference of opinion with regard to the amount, the payment of which, from the fees collected, may properly be allowed. Provision has been made for the examination of the matter and for the ascertainment of the amount due. Pending such audit there would be no justification for indicting the clerk as an embezzler upon the allegation that he had in his hands a surplus which he had converted to his own use. It is not a question of public moneys which are to be deposited as such and are to be disbursed in accordance with the Treasury system. A fixed compensation is to be retained, the expenses of the office are to be defrayed and the question of the necessity of the expenses is to be passed upon; and the clerk is not in default until he refuses or fails to make his return or to pay over the surplus shown by his return to exist or the amount found upon the audit of his accounts to be payable.

We have not before us a case where a clerk has refused or failed to make the return required by statute or to pay over the surplus shown by his return to exist or established by the audit. None of the three counts makes that charge. The second and third counts charge that the moneys in

question constituted a portion of the surplus over and above his authorized allowances, and that he converted the moneys to his own use. Whether or not this surplus was shown by his return, or was the result of the audit contemplated by the statute, is not stated. The fourth count alleges that the clerk should have paid to the United States the moneys which it is said were a part of the surplus; but it is not alleged that the duty had arisen upon the return and accounting required by the statute.

But, for the reasons we have stated, even the duty to pay the surplus shown by the return or audit is not governed by the statutes, relating to embezzlement, which have been referred to in support of these counts. The amount with which the clerk is chargeable upon his accounting is not the "public money" or "the money or property of the United States" within the meaning of their provisions. The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent.

The second, third and fourth counts of the indictment are insufficient, and the judgment of the Circuit Court is therefore in each case

Affirmed.

UNITED STATES *v.* HEINZE.

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

No. 380. Argued November 3, 1910.—Decided December 5, 1910.

Where the Circuit Court held the indictment insufficient because the facts alleged did not constitute a crime under the statute as it held that the latter should be construed, this court has jurisdiction of an appeal by the Government under the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Where the indictment charges an officer of a national bank with willful misapplication of funds of the bank, induced by, and resulting in, his advantage, with the illegal intent to injure and defraud the bank by receiving and discounting with its moneys an absolutely unsecured promissory note of a named party whereby the proceeds of the discount of the note were wholly lost to the bank, it sufficiently charges a violation of § 5209, Rev. Stat. It is not necessary to allege conversion by the officer of the bank and also by the recipient of the proceeds of the discount.

A charge that a note for an amount was received for discount which was wholly unsecured and which sum was lost to the bank amounts to a direct allegation that the loss was caused by the discounting.

A right of appeal is not essential to due process of law, *Reetz* v. *Michigan*, 188 U. S. 505, and neither due process of law nor equal protection of the law is denied to the accused by the act of March 2, 1907, c. 2564, 34 Stat. 1246, giving the Government an appeal to this court under certain conditions from judgments sustaining demurrers to, or motions to quash, indictments because the same appeal is not allowed to the accused in case the demurrer or motion to quash is overruled.

Even if, and not now decided, the equal protection provision of the Fourteenth Amendment apply to the United States, it can have no broader meaning when so applied than when applied to the States; and even if Congress may not discriminate in legislation, it has the power to classify and the classification in the act of March 2, 1907, is well within such power.

161 Fed. Rep. 425, reversed.

THE facts, which involve the validity of an indictment

for misapplication of funds of a national bank under § 5209, Rev. Stat., are stated in the opinion.

Mr. Assistant Attorney-General Fowler for the United States:

A brief prepared by the late *Solicitor General, Mr. Lloyd W. Bowers*, was filed for the United States.

No wrongful act or purpose on the part of any other person than the indicted bank officer or agent himself is essential to the offense of willful misapplication of the bank's funds under Rev. Stat., § 5209. *Evans* v. *United States*, 153 U. S. 584, 593, 594; *United States* v. *Corbett*, 215 U. S. 233, 243; *United States* v. *Simmons*, 96 U. S. 360, 364.

The statute reaches misapplication of the bank's funds to the use or for the benefit of others than the bank officer or agent himself. *United States* v. *Britton*, 107 U. S. 655.

It is contrary to the general rule of criminal law and of morality that anybody should be held guilty or innocent by any other test than his own acts and his own intent. *The Coffin cases*, 156 U. S. 432; and 162 U. S. 664; *Putnam* v. *United States*, 162 U. S. 687.

The third person whose note is discounted and to whom the proceeds of the discount are first paid need not be guilty when the indictment alleges that the misapplication is made "for the use, benefit and advantage of" the bank officer and other persons.

The statute does not mention conversion at all; and no act of technical conversion by the bank officer or agent himself is necessary to the offense of willful misapplication of the bank's funds unless the application of such funds by another than the bank, in violation of the official trust or agency and with an actual intent to defraud the bank, is necessarily also a conversion under the common law. The true nature of the offense is clear; and the question

whether it also amounts to a conversion is really unimportant.

The statute itself enumerates the essential elements of the offense which it denounces, to wit: actual misapplication of bank assets from the bank to another which is beyond the true authority of the transferring bank officer or agent; a conscious disregard of his duty to the bank by its officer or agent in making the transfer; an intent on the part of the bank officer or agent who makes the transfer to injure or defraud the bank or somebody else.

If these things coexist, the statute says that the offense is committed. *United States* v. *Fish*, 24 Fed. Rep. 585.

Possession of the misapplied funds by the offending agent of the bank is not requisite. *United States* v. *Northway*, 120 U. S. 327. See also as to indictments for willful misapplication, *Claasen* v. *United States*, 142 U. S. 140; *Batchelor* v. *United States*, 156 U. S. 426; *Agnew* v. *United States*, 165 U. S. 36.

Each of the fifteen counts of the indictment which the Circuit Court condemned charges every element of the statutory offense.

General allegation of the willfulness of the misapplication and of the bank officer's intent to injure or defraud is enough. *Evans* v. *United States*, 153 U. S. 584, 593, 594; *United States* v. *Corbett*, 215 U. S. 233, 243; *United States* v. *Simmons*, 96 U. S. 360, 364.

The misapplication need not be for the use or benefit of defendant himself. *United States* v. *Britton*, 107 U. S. 665, 669; *Coffin* v. *United States*, 156 U. S. 432; and 162 U. S. 664.

Actual loss to the bank is unnecessary. It is enough that the transaction was unauthorized and had an evil purpose when it occurred, though the bank finally receives payment. *United States* v. *Evans*, 153 U. S. 591; *United States* v. *Morse*, 161 Fed. Rep. 429, 435.

Whether or not the statutory offense always involves a

conversion of the bank's property by its unfaithful officer or agent, such conversion is shown by the indictment in this case. *Vasse* v. *Smith*, 6 Cranch, 226; *Kitchen* v. *Bedford*, 13 Wall. 413; *White* v. *Wall*, 40 Maine, 574; *Laverty* v. *Snethen*, 68 N. Y. 522, 524.

Mr. John C. Tomlinson and *Mr. Aldis B. Browne*, with whom *Mr. John B. Stanchfield* was on the brief, for defendant in error:

The pending writ of error is not within the act of March 2, 1907, and should be dismissed. *United States* v. *Keitel*, 211 U. S. 370, does not apply; and see *United States* v. *Stevenson*, 215 U. S. 190, 195.

Under the act of March 2, 1907, the right of review in this court is conferred upon the plaintiff—the United States—alone in cases involving construction of the Federal laws, while denying it to the defendant in every form and at every stage of the case where not involving a capital crime. The right is wholly unilateral. It opens the doors of this court to the United States as one party to the cause only, and denies the same privilege to the defendant. This is not due process of law under the Fifth Amendment. *The Sinking Fund*, 99 U. S. 700; *Murray* v. *Hoboken Land Co.*, 18 How. 272, 278; *Holden* v. *Hardy*, 169 U. S. 366, 391; *People* v. *King*, 110 N. Y. 418; *Chicago Ry. Co.* v. *Moss & Co.*, 60 Mississippi, 641, 646.

The act of March 2, 1907, is inoperative in so far as it seeks to confer upon the United States alone the right of review of questions which the defendant may not at any stage of his case bring before this honorable court for final hearing and judgment. Where the United States seeks to assert such an exclusive privilege there is necessarily denial of "due process of law."

The contention *contra* is aided by the language of Art. III of the Constitution.

Nor is the privilege to be thus given to the United

States upon any idea that as sovereign the Government may enjoy such opportunity of review which is denied to the defendant. That is obnoxious to every principle of justice and fair dealing.

This court has not jurisdiction of this appeal as the court below did not attempt to construe, nor did it construe, § 5209, Rev. Stat. The opinion does not discuss the statute, but the indictment as a pleading, and finds that it was insufficient as there was no allegation in the counts stating to whom the proceeds of the discount were actually paid by the bank; there was no allegation in the counts stating to whom the demand notes were payable; no statement that payment of the notes had ever been demanded; that the notes had not been paid or that the makers were in default; that the loss to the bank was due to the discounts; or that the makers of the notes were then, or at the time of the discounts, insolvent or unable to pay their obligations.

Omissions in an indictment cannot be supplied by intendment or implication, and where the crime is a statutory one it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth. *United States* v. *Hess*, 124 U. S. 483; *Pettibone* v. *United States*, 148 U. S. 197; *Ledbetter* v. *United States*, 170 U. S. 606; Morse on Banks, 4th ed., 138, 139–162; *Pape* v. *Capitol Bank*, 20 Kansas, 440; *Atlantic State Bank* v. *Sereny*, 18 Hun, 36; *Tracy* v. *Tallmage*, 18 Barb. 462; *Merritt* v. *Todd*, 23 N. Y. 28.

No action for conversion would lie against the "recipient of the discount proceeds," for nowhere is it alleged who the recipient of the discount proceeds was, and a conversion can only arise where there is an unlawful taking; or, if the original taking were lawful, an unlawful detention.

If it be assumed that the court did construe § 5209, the construction is correct. *United States* v. *Britton*, 107 U. S. 665; *United States* v. *Northway*, 120 U. S. 327; *Evans* v.

United States, 153 U. S. 584; *Coffin* v. *United States*, 156 U. S. 432, all sustain the court below to the effect that "conversion" is an essential element of the offense; and on this point see *United States* v. *Fish*, 24 Fed. Rep. 585, 587; *United States* v. *Harper*, 33 Fed. Rep. 471, 473; *United States* v. *Youtsey*, 91 Fed. Rep. 864, 866; *Jewett* v. *United States*, 100 Fed. Rep. 832, 837; *United States* v. *Eastman*, 132 Fed. Rep. 551, 552; *Geiger* v. *United States*, 162 Fed. Rep. 844, 847; *United States* v. *Martindale*, 146 Fed. Rep. 281, 289; *Fleckinger* v. *United States*, 150 Fed. Rep. 1, 2; *Dickson* v. *United States*, 159 Fed. Rep. 801.

The established construction of statutes by officers charged with proceeding under them, is entitled to respect. *United States* v. *Carll*, 105 U. S. 611; *Keck* v. *United States*, 172 U. S. 434; *United States* v. *Evans*, 153 U. S. 587; see *Dunbar* v. *United States*, 156 U. S. 185, 190; *Walrod* v. *Ball*, 9 Barb. 271, 276; *Potter* v. *Merchants' Bank*, 28 N. Y. 641, 655.

There is no allegation of insolvency, and as it is the law that solvency is to be presumed, the indictment is bad and under *MacKnight* v. *United States*, 115 Fed. Rep. 972, 984, the bank received upon the discount "a good note" which the makers "could be made to pay."

Such words as "fraud," "conspiracy," "with intent to defraud," "corruptly" and words of similar import, cannot be used as predicating criminality of facts which in themselves show no criminality. *Ambler* v. *Choteau*, 107 U. S. 586; *United States* v. *Des Moines Co.*, 142 U. S. 544; *Batchelor* v. *United States*, 156 U. S. 426; *United States* v. *Eno*, 56 Fed. Rep. 218, 220.

Mr. Justice McKenna delivered the opinion of the court.

This is a writ of error directed to review the ruling of the Circuit Court upon a demurrer to an indictment against defendant in error.

The indictment contains sixteen counts, charging him with willful misapplication of funds of the Mercantile National Bank of New York city, in violation of § 5209 of the Revised Statutes. The demurrer was sustained as to fifteen counts, and the United States has brought the case here by virtue of the act of March 2, 1907, c. 2564, providing for writs of error in certain instances in criminal cases, among which instances is a decision or judgment sustaining a demurrer to an indictment, "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." 34 Stat. 1246.

The averments of the first count may be taken as an example of all. It averred that Heinze was the president of the bank, and that by "virtue of his official relation to it as its president, and by virtue of the power of control, direction and management," which as president he had over its moneys, funds and credits, he "willfully, wrongfully, unlawfully and with intent to injure and defraud" it "and divers others persons to the grand jurors unknown," and without the knowledge and consent of it or of its board of directors and committees, for his use and benefit and advantage, and of other persons to the grand jurors unknown, misapplied certain of its moneys, funds and credits, to wit, the sum of $100,000, by receiving and discounting with its moneys, etc., a certain promissory note (the names of the drawers being given) for the sum of $100,000, payable on demand, and which note when so received and discounted "was not then and there well secured, and, in fact, was not secured at all," which fact he knew, and which amount, it being the proceeds of the discount of the note, was wholly lost to the bank.

The other counts charge the misapplication of the funds of the bank in the same way, the amounts and makers of the notes discounted being different. And it is alleged of some of them, not that they were not secured at all, but

that they were at the time of discount "not well secured." A total loss to the bank of the respective amounts is alleged.

The demurrer is almost as voluminous as the indictment. It alleges defects and uncertainties, and even repugnances in the indictment. In the brief of counsel emphasis is given to the following: That there is no allegation to whom the proceeds of the discount were paid by the bank, nor to whom the notes were payable; that there is no statement that payment of the notes had been demanded, or that they had not been paid, or that the makers were in default, or that the loss to the bank was due to the discounts, or that the makers of the notes were then or at the time of the discounts insolvent or unable to pay their obligations.

The Circuit Court sustained the demurrer to the first fifteen counts.

Section 5209, the section for the violation of which the indictment was found, is part of the provisions for the regulation of national banking associations, and provides as follows: "Every president, director . . . or agent of any association who . . . willfully misapplies any of the moneys, funds or credits of the association . . . with intent . . . to injure or defraud the association . . . or any individual person, and every person who with like intent aids or abets any officer . . . in any violation of this section, shall be deemed guilty of a misdemeanor."

For its general reasons in support of its ruling on the demurrer the court referred to its opinion in *United States* v. *Morse*, 161 Fed. Rep. 427, and to the views expressed on the first indictment against defendant. 161 Fed. Rep. 425. As to the pending indictment, it was said:

"This indictment seems to me to charge in counts 1–15 this and no more, viz., that with intent to defraud the

bank, of which he was president, and for the benefit of himself and others unnamed, defendant caused the bank to discount single name commercial paper and the bank lost the amount paid on the discount."

And it was further said:

"The crime of which the defendant is guilty, if guilty at all, is 'willful misapplication.' The one characteristic or essential of this crime, on which the Supreme Court has always insisted, is conversion; no method of being guilty without converting the money, funds or credits of the bank has been pointed out. This word 'conversion' has supplied the legal measure which the court has not been able to find in 'willful misapplication.'

"If the facts stated in an indictment do not set forth a case of conversion, the indictment is bad, and a general allegation of wrongful intent will not cure it.

"Taking the first count, for example, could the bank have maintained an action for conversion against the recipient of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts 1–15 are demurrable."

It is contended by defendant that the ruling of the Circuit Court was not a construction of § 5209, Rev. Stat., but only a determination of the sufficiency of the indictment, and that the writ of error should be dismissed. We are unable to concur in that view. The court expressly ruled that the crime of which the defendant was guilty, if guilty at all, was "willful misapplication," and that the essential ingredient of that is "conversion," and made so by the statute. And not only conversion by the officers of the bank, but by the person receiving the proceeds of the discount. The indictment was held insufficient because the facts alleged in it did not constitute such double conversion, that is, it did not constitute a crime under the statute as the latter should be construed. The motion to dismiss is, therefore, denied.

We are, therefore, brought to the merits, and the first contention of defendant (and for convenience in discussion we use his contentions rather than those of the United States, although the decision below was against the latter), is that if the Circuit Court did consider the statute its construction was correct.

A willful misapplication of the funds of a bank is the essence of the crime, it is urged, and that the decision of this court has defined what constitutes a willful misapplication and that the facts alleged in the indictment do not fulfill the definition. The following cases are cited to sustain the contention: *United States* v. *Britton*, 107 U. S. 665; *United States* v. *Northway*, 120 U. S. 327; *Evans* v. *United States*, 153 U. S. 548; *Coffin* v. *United States*, 156 U. S. 432, and certain cases in the Circuit Courts and Circuit Courts of Appeals.

Before examining these cases it will be well to revert to the averments of the indictment to see what exactly it charges. It charges that the defendant was the president of the bank and as such, having control of and possession of its funds, willfully, wrongfully, unlawfully, and with intent to injure and defraud it, and, for his use, benefit and advantage, misapplied certain of its funds. A willful misapplication of the funds of the bank is charged and that it was induced by and resulted in a benefit and advantage to defendant. This is a direct accusation of wrongdoing through his office, and the precise manner by which it was accomplished is averred to have been with the illegal intent to injure and defraud the bank by receiving and discounting with its moneys an absolutely unsecured promissory note of a named partnership, whereby the proceeds of the discount of the note were wholly lost to the bank.

We may now turn to the cases. In *United States* v. *Britton*, 107 U. S. 655, it was decided that the "misapplication made an offense by this statute means a misappli-

cation for the use, benefit or gain of the party charged, or some one other than the association. And further, that to constitute the offense "there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged."

The *Britton case* was referred to in *United States* v. *Northway*, 120 U. S. 327, as holding that it was of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant or of some person other than the association, with intent to injure or defraud the association. This case has further instruction. It makes a distinction between embezzlement and a willful misapplication of the funds. There may be a willful misapplication of the funds, it is said, even though the officer have not the actual possession of them. He may have such control and power of management "as to direct an application of the funds in such manner and under such circumstances as to constitute an offense." A count in an indictment was sustained which charged the misapplication to have been made by causing funds to be paid out to the use and benefit of the officer indicted in an unauthorized and unlawful purchase of the shares of stock of certain stock companies, without the knowledge and consent of the association, and with intent to injure it.

Evans v. *United States*, 153 U. S. 584, 592, was also a case of alleged violation of § 5209, where the sufficiency of an indictment was considered. Evans was indicted for aiding and abetting the cashier in a willful misapplication of the funds of the bank. The misapplication was described to be the unlawful receiving and discounting with the money and funds of the bank with intent to defraud the bank, and for the use, etc., of Evans, a note made by Evans, which when so discounted "was not then and there well secured," which he and the cashier well knew, and which note was never paid, by reason of which the bank suffered

loss in that amount, with intent in Evans to injure and defraud the bank. It was said:

"While the mere discount of an unsecured note, even if the maker and the officer making the discount knew it was not secured, would not necessarily be a crime, if the maker believed that he would be able to provide for it at maturity; yet if his original intent was to procure the note to be discounted in order to defraud the bank, as charged in this count, every element of criminality is present. . . . The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on the part of the defendant to defraud the bank of the amount. . . . No averment was necessary that such discount was procured by fraudulent means, since the offense consisted not in the use of fraudulent means, but in the discount of a note which both parties knew to be unsecured with intent thereby to defraud the bank. An averment that Evans was at the time insolvent, or knew himself to be so, was also unnecessary in view of the allegation that Evans knew that the note was unsecured, and procured the same to be discounted with intent to defraud the bank."

It was said that weight must be given to the words "knowingly, willfully and unlawfully and fraudulently" and "to the general allegation of an attempt to defraud." Pages 592 and 593.

In *Coffin* v. *United States*, 156 U. S. 432, the crime of the misapplication of funds was again considered. One of the contentions of the defendant was that certain counts in the indictment were insufficient, because they failed to aver the actual conversion of the sum misapplied to the use of any particular person. The proposition that the law required an actual conversion was yielded to, and that there must be an averment of it. The indictment was considered and held sufficient, as it described the conversion to consist of paying money out of the funds of the

bank to a designated person when that person was not entitled to take the funds, and that, owing to the insolvency of such person, the money was lost to the bank.

These cases established that there must be, to constitute a misapplication of the funds of the bank, a conversion, but it may be by the officer alone. The words of *United States* v. *Britton* are that "there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged." And this is repeated in *United States* v. *Northway*. The language of the *Britton case* is repeated in the *Evans case*, but it was said that the offense consisted not in the use of fraudulent means, but in the discount of a note which both parties knew to be unsecured, with the intent to defraud the bank. In *Coffin* v. *United States*, conversion of the funds was again recognized as necessary to constitute the offense. In that case the willful misapplication was alleged to have been done "with intent to convert the same to the use of the Indianapolis Cabinet Company," whose check was paid, though it had no funds in the bank. And such averment, it was said, stated the misapplication and actual conversion of money by the methods described, that is to say, by paying it out of the funds of the bank to a designated person when that person was not entitled to take the funds, and that owing to the insolvency of such person the money was lost to the bank. And in the same case, in 162 U. S. 664, 669, it is said that "the primary object of the statute was to protect the bank from the acts of its own servants."

It follows from these citations that the Circuit Court erred in considering as necessary, not only that there should be alleged a conversion by the officer of the bank, but also by the recipient of the proceeds of the discount. The conversion may be to the use of either, and the indictment fulfills the requirement. It charged that Heinze, being president of the bank and having control of its

funds, with intent to injure and defraud it received and discounted the note of $100,000, knowing that it was not secured at all, and which was wholly lost to the bank. And it was charged this was done for his "use, benefit and advantage." This charges a conversion as explicitly as it was charged in *Coffin* v. *United States*, 156 U. S. 432, "that is to say," to quote the language of that case, "by paying money out of the funds of the bank to a designated person when that person was not entitled to take the funds," with the consequence that the money was lost to the bank. And it was fairly inferable (to answer certain of the objections made by defendant) that the proceeds of the discount were actually paid by the bank and to whom paid, and that payment had been demanded and not made. It is more than an inference that the loss to the bank was due to the discounts. The charge that the bank officer received for discounting a note for $100,000, which was wholly unsecured, and which sum was lost to the bank, is quite a direct way of saying that the loss was caused by the discounting. And the statement would receive very little strength or the act of the officer any additional degree of culpability by an allegation that the makers of the note were insolvent, the element which the Circuit Court found in count 16, and which induced it to sustain that count.

It is contended by the defendant that the act of March 2, 1907, is not applicable to the case, because the right it offers is "wholly unilateral." "It opens the door of this court," it is said, "to the United States as one party to the cause only, and denies the same privilege to the defendant." The ultimate contention is that defendant is thereby denied the equal protection of the laws. This inequality is asserted because the United States is given an appeal to this court, and before trial, and a defendant is only given right of review in the Circuit Court of Appeals, and only at the end of the trial. The defendant is

put to expense and peril, it is urged, though the indictment against him may be wholly bad, "and is at every stage of the case forbidden the right of review upon any question in the Supreme Court, except the construction or application of the Constitution or the constitutionality of any Federal statute." And this, it is insisted, is the denial of due process of the law as well as the denial of the equal protection of the laws. We shall not follow the somewhat round about argument to establish the identity of those two rights. If we should yield to the argument it would necessarily follow that if defendant has not been denied due process he has not been denied the equal protection of the law, and this court has decided that the right of appeal is not essential to due process of law. *Reetz* v. *Michigan*, 188 U. S. 505, 508. The provisions have definite application, and even if the explicit clause of the Fourteenth Amendment, forbidding a State to deny to any person within its jurisdiction the equal protection of its laws, can be said to apply to the United States, it can have no broader meaning when so applied than when applied to the States. Assuming, therefore, and assuming only, not deciding (see *District of Columbia* v. *Brooke*, 214 U. S. 138, 149) that Congress may not discriminate in its legislation, it certainly has the power of classification, and the act of March 2 is well within such power.

Reversed and remanded for further proceedings in conformity with this opinion.

UNITED STATES *v.* HEINZE, NO. 2.

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

No. 671. Argued November 3, 1910.—Decided December 5, 1910.

United States v. *Heinze*, *ante*, p. 532, followed as to sufficiency of indictment charging an officer of a national bank with violating the provisions of § 5209, Rev. Stat., and as to the jurisdiction of this court under the act of March 2, 1907, c. 2564, 34 Stat. 1246.

If the decision of the Circuit Court quashing an indictment is based upon invalidity or construction of the statute upon which the indictment is founded, an appeal lies to this court under the act of March 2, 1907, even if the motion to quash be granted as an exercise of the discretion of the court.

THE facts, which involve the validity of an indictment for misapplication of funds of a national bank, are stated in the opinion.

Mr. Assistant Attorney-General Fowler for the United States.

Mr. John C. Tomlinson and *Mr. Aldis B. Browne*, with whom *Mr. John B. Stanchfield* was on the brief, for defendant in error:

The trial court dismissed counts numbered 1–7 in the exercise of its discretion. Its action is, therefore, not reviewable here under the act of March 2, 1907. The act of March 2, 1907, as it is explained in *United States* v. *Keitel*, 211 U. S. 370, gives this court authority to review the decision below, only provided that decision was based upon the construction of a statute.

The decision of the court below did not involve a discussion of § 5209, Rev. Stat., but if the decision be re-

garded as construing that section and as basing its decision upon such construction, the construction was correct. The insertion of the words "converting" and "converted" did not strengthen them.

The act of March 2, 1907, is not applicable to this case.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case is brought here under the act of March 2, 1907, c. 2564 (34 Stat. 1246), and was advanced to be heard with and was heard with No. 380, just decided.

It involves substantially the same questions as No. 380. The indictment consists of fourteen counts, seven numbered and seven numbered and lettered. The court quashed the numbered counts, and its action as to six of them this writ of error is prosecuted to review.

The Circuit Court in its opinion expressed the similarity of this case and No. 380 as follows:

"From an examination of them which I recently made it appears, or would appear to me, that six out of the seven numbered counts in the indictment of 1910 there is exactly the same story as was contained in the corresponding number of counts in the indictment of 1909, with this difference: that the transaction which was said to have been evidenced by a demand note of 1909 is called in 1910 a demand loan, and it is then asserted, after stating the same facts in substance as those set forth in 1909, that there was a conversion."

And the view was expressed that if the indictment "had stopped there it might be good on demurrer." But special words followed, it was said, which defeated this effect, and made the statements of the indictment the same as the "corresponding statements of 1909, except that they have a label put on them and they are called 'conversion.'" And finding no "magic" in that word, the court further said, "the allegations set forth specially" did "not, even

prima facie, amount to a conversion." And that calling them such did not "help the matter."

We might assume the identity of the questions in the cases on this statement and rest the decision of this case on the opinion in No. 380, but it may be well to examine the indictment. The averment is that Heinze, with the intent to injure the Mercantile National Bank, did willfully misapply $60,000 of its moneys, funds and credits, "by unlawfully, knowingly, fraudulently and willfully, and not for any use, benefit or advantage of the said banking association, converting and applying the said moneys, funds and credits to the use, benefit and advantage of certain persons . . ." which said conversion and application of the said moneys, &c., were then and there accomplished by him by virtue of his power as president over such moneys, &c., and that he, at the time and place, and with the intent and to the use mentioned, willfully applied the said sum "to the making of a certain demand loan" to Otto Heinze & Co., "and which said loan, when so made as aforesaid, was not then and there well secured, which fact he . . . then and there well knew;" and did cause the proceeds of said loan to be paid out of the moneys, &c., of the bank, "and applied and converted to the use and benefit" of that firm, whereby the sum of $60,000 "then and there was wholly lost to the bank, and that its moneys, &c., were and are depleted in that amount."

Stripped of its repetitions, it charges that Heinze used his power and control as president of the bank to lend the sum of $60,000 of its moneys to Otto Heinze & Co. without taking any security whatever for it, and that this was done, not for the use of the bank, but for the use of such firm, and with the intent to defraud the bank and to convert and apply that sum to the use, benefit and advantage of such firm. And it is averred that it was wholly lost to the bank.

The other numbered counts contain the same allegations as count 1, except that they relate to different transactions, and with like exception the subsequent lettered counts relate to the same transactions as count 1 A. The latter count relates to the same transaction as count 1, except it alleges that the misapplication was for the benefit of Fritz Augustus Heinze and Otto Heinze & Co., while in the first count it is alleged that the misapplication was alone for the benefit of Otto Heinze & Co., and with the further exception that the inducement and purpose of the loan is set out with a detail of circumstances.

It is insisted, as it was in No. 380, that this court has not the right of review of the order of the Circuit Court, because it only passed upon the sufficiency of the indictment and did not construe the statute. Upon what ground the court proceeded is not very clear. As we have seen, the court said that in the six counts passed upon "there is exactly the same story as was contained in the corresponding number of counts in the indictment of 1909," the only difference being that in the indictment now under consideration the statements "have a label put on them, and they are called 'conversion.'" The court found no "magic" in the word, and said that "the allegations set forth specially did not even *prima facie* amount to a conversion." The question naturally occurs, why the court thought so? And the answer must be from the conception it had of the requirements of the statute which it expressed when passing on the indictment of 1909, and which we considered in No. 380. In other words, that the counts had the same defect which the indictment of 1909 had, and the motion to quash was granted as to them for the same reason which the court gave in passing on the indictment of 1909. This court, therefore, has jurisdiction.

It is further contended that the Circuit Court granted the motion to quash in the exercise of its discretion, and,

therefore, its action is not reviewable under the act of March 2, 1907. The contention is untenable. The act of March 2, 1907, expressly provides that a writ of error may be taken by the United States "from a decision or judgment . . . quashing any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." *United States* v. *Stevenson*, 215 U. S. 190. And we have pointed out the decision of the Circuit Court in this case was so based.

On the merits the case is determined by the opinion in No. 380, *ante*, p. 532.

Reversed and remanded for further proceedings in conformity with this opinion.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* COMMONWEALTH OF KENTUCKY.

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

No. 16. Argued October 26, 27, 1910.—Decided December 5, 1910.

If the law of the State permits it, the fact that the making of an assessment is delayed does not detract from the authority or the duty of the assessing power to make it.

The fact that the assessment is made by memoranda on the assessment envelope or jacket, does not render it ineffectual as lacking in due process of law because not recorded in a permanent book, and where the state court has held that an assessment so made is good under the law of the State, this court will not hold that it denied the party assessed due process of law or equal protection of the law.

A construction by the state court that an assessment made by the board of assessors cannot enter into an arrangement with the parties assessed contemplating the non-payment of the tax based thereon

does not deprive those parties of any constitutional rights where no ground is shown for impugning the assessment so made.

The Federal Constitution does not preclude a State from requiring a corporation actually controlling and exercising a franchise to pay the tax legally assessed thereon, although not the actual owner of the franchise.

When the record does not show that others similarly situated escaped the taxation imposed on the plaintiff in error, and the state court has declared that if any escaped they are still liable, this court regards the contention of denial of equal protection of the law as without merit.

128 Kentucky, 628, affirmed.

THE facts, which involve the validity of an assessment, are stated in the opinion.

Mr. Edmund F. Trabue, with whom *Mr. Blewett Lee*, *Mr. John C. Doolan* and *Mr. Attilla Cox, Jr.*, were on the brief, for plaintiff in error:

This court has jurisdiction if the state court decided the Federal questions, although first appearing in the petition for rehearing. *Mallett* v. *North Carolina*, 181 U. S. 589, 592; *Leigh* v. *Green*, 193 U. S. 79, 85; *Sullivan* v. *Texas*, 207 U. S. 416, 422.

Even if the envelope indorsement were a record of assessment, the assessment would, nevertheless, deny due process and equal protection because all other railroads of the State were assessed and paid franchise taxes upon a different basis, or method of assessment. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20.

There is nothing to indicate that the State proposes or ever intends to attempt to undo as to the other companies its action of 1899, and both cannot stand. The case is one of spoliation pure and simple, of an arbitrary exaction without justice or reason. *Railroad Co.* v. *Board*, 85 Fed. Rep. 302, 303; *Nashville &c. Co.* v. *Taylor*, 86 Fed. Rep. 168; *Louisiana Trust Co.* v. *Stone*, 107 Fed. Rep. 305; *National Bank* v. *Kimball*, 103 U. S. 732, 735; *Stanley* v.

Supervisors, 121 U. S. 535, 550; *San Francisco Bank* v. *Dodge*, 197 U. S. 70, 81; *Coulter* v. *Railway Co.*, 196 U. S. 599, distinguished; and see *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337.

An assessment is the first element of due process in tax proceedings. Taxation is taking property *in invitum*. It is an exercise of sovereignty. It involves the power to destroy. It must, therefore, be according to due process.

Plaintiff in error was not assessed by the jacket memoranda relied on for the amount sued for, and it is not claimed that there was any assessment against it, or any record of such an assessment. There was no assessment, however, against anyone. The jacket memoranda were simply memoranda for the Board's convenience. It does not appear who made the memoranda, nor for what purpose. A record must have permanency. The Memoranda indorsed upon envelopes have none. Permanency is essential to a tax record as the foundation of title.

Not only is permanency essential to the conception of a record, but every essential proceeding must appear in some written and permanent form in the records of the bodies authorized to act upon them. *Moses* v. *White*, 29 Michigan, 59, 60; 1 Cooley on Taxation, 3d ed., 576, 597; *Clegg* v. *State*, 42 Texas, 610; *Roberts* v. *First National Bank*, 8 N. D. 504; *State* v. *C. & D. Ry. Co.*, 54 S. Car. 564; *Commonwealth* v. *Railroad Co.*, 104 Pa. St. 89; *Wells* v. *McHenry*, 7 N. D. 246.

This defect of jurisdiction cannot be remedied by curative statute. *McReynolds* v. *Longenberger*, 57 Pa. St. 13; *Flannagan* v. *Dunne*, 105 Fed. Rep. 828; *Slaughter* v. *City*, 89 Kentucky, 112, 121; see *Powers* v. *Fuller*, 30 Iowa, 476, 477; *Cassidy* v. *Young*, 92 Kentucky, 227, 232; *Turner* v. *Pewee Valley*, 100 Kentucky, 288, 291; *Pratt* v. *Breckinridge*, 112 Kentucky, 15; *Alexander* v. *Aud*, 120 Kentucky, 105; *Wildharber* v. *Lunkenheimer*, 128 Kentucky, 344, 349.

If a tax liability can be established upon such a basis as this the fortunes of all men are in jeopardy. *Western*

Union Telegraph Co. v. *Howe*, 180 Fed. Rep. 44, 52; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585, 593.

Where a tax is levied on property in proportion to its value as determined by a board of assessors, due process of law requires that there be a listing of the property and its valuation as assessed upon a public record. *Allen* v. *McKay*, 139 California, 94; *Thurston* v. *Little*, 3 Massachusetts, 429; *People* v. *Hagadorn*, 104 N. Y. 516; *State* v. *Wabash Ry. Co.*, 114 Missouri, 1; *Kelly* v. *Herrell*, 20 Fed. Rep. 364, 369; *Perkins* v. *Longmaid*, 36 N. H. 507; *People* v. *Weaver*, 100 U. S. 545. As to what is a record see 34 Cyc. 585; 24 Am. & Eng. Ency. of Law, 172; *State* v. *Anderson*, 30 La. Ann. 557, 567; *Heintz* v. *Thayer*, 92 Tex. Sup. Ct. Rep. 658, 50 S. W. Rep. 929.

The entries on the envelopes were not records. Cooley on Taxation, 600. This tax is invalid because it was not made to appear that this board of assessment ever actually assessed the property now charged with the tax. *Pennsylvania R. R. Co.* v. *Montgomery County Pass. Ry. Co.*, 167 Pa. St. 62; *McReynolds* v. *Longenberger*, 57 Pa. St. 13; *Howes* v. *Gillett*, 23 Minnesota, 231; *Hopper* v. *Malleson*, 16 N. J. Eq. 382.

In order for property of a person to be taken from him for the purposes of taxation, a record showing that he has been assessed is just as necessary as a record showing that there was a tax to assess against him.

As to the history of the rule requiring a record, see Art. 37 of Magna Charta in Stat. at L. in the form made in the ninth year of Henry III, confirmed by Edward I, twenty-fifth year of his reign. Dowell's Hist. of Taxation, Eng.; Domesday Book and Beyond; chap. 33, Geo. III, p. 26, Statutes at Large of England, and numerous state statutes in this country.

Due process of law forbids holding the agent for the principal's franchise taxes. Barbour & Carroll's Statutes,

§ 4077. The assessment, if any, is against the Chesapeake Company. The Illinois Company was never the agent of this company so far as operating the property was concerned. *Carstairs* v. *Cochran*, 193 U. S. 10; *Thompson* v. *Kentucky*, 209 U. S. 340; *Hannis Dist. Co.* v. *Baltimore*, 217 U. S. 285, do not apply.

Judgment *in personam* is beyond the Commonwealth's jurisdiction, and, consequently, a deprival of due process. 1 Black, Judg., § 242; *Munday* v. *Vail*, 34 N. J. L. 418; *Reynolds* v. *Stockton*, 43 N. J. Eq. 211.

There are cases in the state courts denying the right to a judgment which is outside the issues, where the question arose upon appeal, and where, therefore, the Federal question of jurisdiction and due process did not arise. *Husted* v. *Vanness*, 158 N. Y. 154; 52 N. E. Rep. 645; *Burns &c. Co.* v. *Doyle*, 71 Connecticut, 742; 71 Am. St. Rep. 237; *Lincoln Bank* v. *Virgin*, 36 Nebraska, 735; 55 N. W. Rep. 218; 38 Am. St. Rep. 747; *Carter* v. *Gibson*, 47 Nebraska, 655; 66 N. W. Rep. 631; *Seamster* v. *Blackstock*, 83 Virginia, 232; *Wade* v. *Hancock*, 76 Virginia, 620; *Ex parte Lange*, 18 Wall. 163, 175; *Windsor* v. *McVeigh*, 93 U. S. 274; *Hovey* v. *Elliott*, 167 U. S. 409; *Reynolds* v. *Stockton*, 140 U. S. 254; *Wetmore* v. *Karrick*, 205 U. S. 141; *Lumber Co.* v. *Knight*, 217 U. S. 257.

Mr. T. L. Edelin, with whom *Mr. James Breathitt*, Attorney General of the State of Kentucky, *Mr. Robert B. Franklin* and *Mr. Clem J. Whittemore* were on the brief, for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

The Commonwealth of Kentucky recovered judgment in this suit against the Illinois Central Railroad Company for the amount of the tax, for the year 1897, upon the franchise formerly belonging to the Chesapeake, Ohio and Southwestern Railroad Company. The recovery

was based upon the fact that the Illinois Central Railroad Company was, at the time to which the tax related, in possession of the railroad, and was operating it under a power of attorney from the purchaser at a judicial sale, and had made the report which was required by the statute relating to the taxation of franchises. The judgment was affirmed by the Court of Appeals of Kentucky. 128 Kentucky, 268. The Illinois Central Company petitioned for a rehearing, and presented the Federal questions now urged under the Fourteenth Amendment of the Constitution of the United States. The court entertained the petition and extended its opinion, holding that no right of the appellant under the Fourteenth Amendment had been violated by the decision. Thereupon this writ of error was brought, and, as the state court passed upon the Federal questions, this court has jurisdiction. *Mallett* v. *North Carolina*, 181 U. S. 589; *Leigh* v. *Green*, 193 U. S. 79.

The validity of the statutes of Kentucky providing for the taxation of franchises is not assailed and nothing is shown which would open to dispute the taxable character of the particular franchise here involved. The plaintiff in error, the Illinois Central Railroad Company, contends that by virtue of the judgment it has been deprived of property without due process of law, *first*, in that there was no assessment upon which to base the recovery of the tax; and *second*, in that it has been held personally liable to pay a tax upon a franchise of which it was not the owner. The plaintiff in error also contends that it has been denied the equal protection of the laws, as it insists that all other railroad corporations were assessed for the purpose of franchise taxation upon a different basis and by a different method, and that, as to other railroad corporations, the assessments similar to the one in question were abandoned.

The gist of the first contention—that there was no

assessment—is that an assessment implies a record and that there was no record but only a memorandum; that an assessment must be a definitive act and that here it was only tentative.

It appears that the railroad of the Chesapeake, Ohio and Southwestern Railroad Company was sold at a judicial sale in the summer of 1896, to Edward H. Harriman, who thereupon, under date of August 19, 1896, executed a power of attorney to the Illinois Central Railroad Company authorizing it "to take charge of the business maintenance and operation of the railroad, . . . together with all the land, real estate, leaseholds easements, . . . and all other corporate property, real and personal lately belonging to the said Chesapeake, Ohio and Southwestern Railroad Company, included in the said sale and conveyance and all the rights, privileges, immunities and franchises whatsoever" which he had acquired. It was expressly authorized to receive "all the earnings of the said railroad," to apply the same to the expenses incurred in its "management, maintenance and operation," and to take all proceedings necessary or expedient for these purposes.

On September 15, 1896, the Illinois Central Company made a report to the Auditor of Public Accounts of Kentucky with respect to the railroad formerly the property of the Chesapeake, Ohio and Southwestern Railroad Company, in accordance with the statute governing the assessment of franchises. This report came before the Board of Valuation and Assessment which was charged under the statute with the duty of making the assessment. It was placed in an envelope, or jacket, on the outside of which a proper form was provided for the entry of the amount of capital, surplus, undivided profits, all other assets, total capital, the amount to be deducted for tangible property, the value of the franchise and the amount of the tax. Below this there were blank spaces for the

insertion of the dates of the first and final notices to the corporation, of the notice to the county clerk and of the payment of the tax. The form upon the jacket was filled out by the insertion of the name of the "Chesapeake, Ohio & Southwestern R. R. Co., Louisville, Ky.," and the date of the report. In the columns provided for the purpose entries were made setting forth the "Total Capital, $6,700,000," "Less Tangible Property, &c., $4,753,339," "Franchise $1,946,661," and "Tax $10,219.97." This is the amount of the tax sued for and recovered in this action.

These entries were made early in the year 1898. The fact that the making of the assessment for the year 1897 was delayed did not detract from the authority and duty to make it. *Southern Railway in Kentucky &c.* v. *Coulter*, 113 Kentucky, 657. That the Board of Valuation and Assessment was authorized to fix the value of the franchise and to make the entries setting forth their determination, and that the entries upon the jacket were in fact made by the Board in the discharge of its duty, do not admit of question. The Commonwealth of Kentucky filed as a part of its petition in the suit a copy of the endorsement on the jacket as a correct copy of the assessment. This was introduced in evidence on the Commonwealth's behalf. The testimony presented in defense did not in any way challenge the authenticity or official character of the jacket entries. On the contrary, the testimony of the former state auditor, who as such was chairman of the Board of Valuation and Assessment, leaves no room for doubt on this point. It also sufficiently appears upon this record, and it is not open to dispute here, that due notice of the assessment was given.

The point urged, in substance, is that the constitutional right of the plaintiff in error has been violated, because the state court has treated the entry on the jacket as a sufficient record of the assessment. It is said that this

cannot be regarded as a record, because it lacks permanency. But this, of course, depends upon the means of preservation and the nature of the filing system adopted. There is no inherent reason why such a record should not be suitably preserved. It is unnecessary to review the numerous authorities which the industry of counsel has collated, for it may be assumed that an assessment should be recorded. It is obvious, however, that the State cannot be denied the right to collect its taxes, and the assessment cannot be held to have been in violation of the Constitution of the United States because for convenience it was recorded—in the form provided for the purpose—upon the jacket inclosing the report of the railroad company, instead of in a separate book. If the Board did not proceed properly to make the assessment according to the statute, the corporation aggrieved had its remedy; if the assessment was otherwise properly made it cannot be defeated because the determination was set forth in the manner described.

The fact that the assessment was entered under the heading "Chesapeake, Ohio & Southwestern R. R. Co., Louisville, Ky.," does not invalidate it. The franchise which was the subject of the assessment had belonged to the Chesapeake, Ohio and Southwestern Railroad Company and the entry suitably identified it. The report which was made by the Illinois Central Company used the same description. The information given by this report, prefacing the amount of capital, value of assets, earnings, etc., is as follows:

"Name of corporation—Chesapeake, Ohio & Southwestern Railroad company.

"Name the principal place of business of the corporation, company or association you represent—Louisville, Kentucky.

"Give the name and official position of the officer making the report.

"Name, J. C. Welling. Position, Vice President, I. C. R. R. Co.—Agt.

"The kind of business in which the said corporation, company or association is engaged.

"Operating Railroad from Louisville, Ky. to Memphis, Tennessee."

The conclusion that the assessment entered in this manner was made in accordance with the law of the State of Kentucky was necessarily involved in the decision of the Court of Appeals. And the fact that, upon the report made by the plaintiff in error in the circumstances stated, the assessment was entered under the name of the company which had formerly owned the franchise furnishes no ground for the contention here that there has been an absence of due process of law. *Castillo* v. *McConnico*, 168 U. S. 674, 682–684; *Witherspoon* v. *Duncan*, 4 Wall. 210.

But it is said that the assessment was only tentative and that the entry was merely a memorandum. It does not appear to be tentative upon its face. That it was such in fact is a conclusion sought to be derived from the testimony of the former state auditor. His testimony was to the effect that he "did not expect any tax to be paid" on the assessment; that the franchise assessments, which were made in 1898, were opposed, that there was considerable discussion of the matter with the railroads, and that finally in 1899 an agreement was reached by which the assessments of 1898 were abandoned. He says that "in the matter of the Illinois Central Railroad Company, we agreed not to assess the C. & O. S. W. for the first two years, we agreed that,—in other words, that the amount we assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years, for the first years, —two years, I think. In other words, the agreement of

the Board was to reconsider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon." The question is at once presented whether after making the assessment in 1898 the Board had any authority to deal with it in this manner or to enter into such a bargain with the railroad. This is a matter of state law and the Court of Appeals of Kentucky has held that the Board had no such power and that the first assessment stood. In its opinion the court said:

"The board made the assessment in the way that all other assessments were made. It gave notice of the assessment to the railroad company as required by statute and at the end of thirty days it gave notice, as provided by the statute, that the assessment had become final. When this had been done, the matter passed beyond the control of the board. A final assessment had been had as provided by law, and if any injustice was done the taxpayer it was due entirely to his failure to appear before the board and ask a reduction of the assessment. No reliance could be placed in such proceedings if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of their actions depends upon what they do and not upon their undisclosed purposes. When the assessment had become final and the Railroad Company owed the State the amount of taxes thus fixed, the assessing officers were without authority afterward to make any agreement with the railroad to the effect that if the railroad would pay the taxes for 1899, they would forego collecting the taxes for the previous years."

And on the petition for rehearing the court added this statement:

"When the board made an assessment and sent out the preliminary and the final notices as provided by the statute that the assessment had been made its action was final

and the legal effect of its action must depend on what they did and not on the secret intentions of the Auditor."

This construction of the powers of the state officers under the statutes of the State relating to franchise assessments—this determination with regard to the finality of the assessment in question—does not violate any constitutional right of the plaintiff in error. The assessment was made in accordance with the law of the State; it was, under that law, a final assessment and no ground is shown here for impugning it.

It is insisted further that the enforcement of the tax by a judgment *in personam* against the plaintiff in error constitutes an unconstitutional deprivation of property, that is, assuming that under the statutes of the State, as construed by its highest court, the plaintiff in error was liable for the tax, nevertheless it could not properly be held because it was not the owner of the franchise upon which the tax was laid. But by virtue of the arrangement with the purchaser at the judicial sale the plaintiff in error was operating the railroad and was in possession and full control of the railroad property and its earnings. It cannot be doubted that under the Federal Constitution the State is not precluded from fixing liability for the payment of the tax, to which the franchise is subject, upon the corporation actually exercising the franchise within the State and in control of the railroad property and its earnings. There is no constitutional obligation requiring it to look further in order to secure payment of the tax which it is entitled to levy. *Carstairs* v. *Cochran*, 193 U. S. 10, 16; *National Bank* v. *Commonwealth*, 9 Wall. 353.

It is also contended that plaintiff in error has been denied the equal protection of the laws upon the ground that other railroad corporations have not been assessed upon the same basis or by the same method, or have not been held to the payment of taxes upon such an assessment. This defense was not pleaded in the answer of the

Illinois Central company, and, in any event, the meager testimony introduced at the hearing is utterly insufficient to afford a basis for the argument. It does not satisfactorily appear that other railroad corporations were not assessed in the same way and at the same time, or, assuming that they were so assessed, that they are not liable to pay taxes accordingly. The Court of Appeals of the Commonwealth in denying the petition for a rehearing said: "As shown by the opinions of this court cited in the opinion herein, taxes have been imposed based on the assessments in controversy. All other tax-payers than railroads were taxed and if some railroads escaped, it is no reason that others should go free while all tax-payers of other classes paid their taxes. If any railroads escaped they are still liable for their taxes unless barred by limitation."

No conclusion to the contrary is justified by the record and the contention that the plaintiff in error has been denied the equal protection of the laws, as the case lies before us, is without merit.

Judgment affirmed.

GRIFFITH *v.* STATE OF CONNECTICUT.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 514. Motion to dismiss or affirm. Submitted November 28, 1910.—Decided December 12, 1910.

Fixing maximum rates of interest on money loaned within the State by persons subject to its jurisdiction is clearly within the police power of the State, and the details are within legislative discretion if not unreasonably and arbitrarily exercised.

Classification, on a reasonable basis of subjects, within the police power,

is within legislative discretion and a reasonable selection which is not merely arbitrary and without real difference does not deny equal protection of the laws within the meaning of the Fourteenth Amendment.

The statute of Connecticut of 1907, limiting interest on loans, is not unconstitutional as denying equal protection of the laws because it excepts loans made by national and state banks and trust companies and *bona fide* mortgages, on real and personal property: the classification is a reasonable one.

The contract clause of the Federal Constitution does not give validity to contracts that are properly prohibited by statute.

If the validity of the particular subject of classification assailed has not been so foreclosed by prior decisions as to render discussion frivolous the motion to dismiss will be denied, but if, as in this case, it is manifest that the contention is, in view of prior decisions, without merit, the motion to affirm will prevail.

83 Connecticut, 1, affirmed.

UPON a prosecution originating in the Police Court of the city of Hartford, in Hartford County, Connecticut, the plaintiff in error was tried and convicted in the Superior Court of the county upon an information alleging, in six counts, the commission of offenses against chapter 238 of the Public Acts of Connecticut of 1907. The offenses charged were the exacting on certain loans of money a rate of interest greater than fifteen per cent per annum, contrary to the provisions of the first section of the act, and in accepting notes for an amount greater than that actually loaned with intent to evade the provisions of said first section, contrary to the provisions of the second section of the act. During the course of the trial the accused, in various forms, assailed the validity of the statute referred to because of repugnancy to the contract clause of the Constitution of the United States and to the equal protection clause of the Fourteenth Amendment. From a judgment imposing a fine as to the conviction upon each count an appeal was taken to the Supreme Court of Errors. The judgment of the Superior Court was affirmed (83 Connecticut, 1), and the case was then brought here.

Since the filing of the record the State of Connecticut has moved that the writ of error be dismissed, or, in the alternative, that the judgment be affirmed.

Mr. I. Henry Harris, in opposition to motion to dismiss or affirm, for plaintiff in error:

The statute cannot be upheld upon the ground of public interest. It is not a police regulation; there is no care imposed or restriction in the loan of money by the favored few—simply an arbitrary, unreasonable limitation upon all except those privileged under the statute. Conceding that reasonable and necessary classification is not offensive to the Constitution a palpably arbitrary selection cannot be justified by calling it classification. *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96; *Cotting* v. *Goddard*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 539.

None of the cases cited for the defendant in error is in point.

While the regulation of interest charges is undoubtedly the proper subject of state legislation, this statute is not a regulation of interest charges. It is in effect a special statute permitting only certain favored individuals or corporations to do an act or conduct a business. There is no fair reason for the law that would not require with equal force its extension to others it leaves untouched. *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 269.

Legislation of the kind here in question is a violation of the Fourteenth Amendment. *Cotter* v. *Kansas City Stock Yard Co.*, 183 U. S. 79. The writ is not obviously frivolous or plainly unsubstantial. It is not devoid of merit. A careful analysis of the previous cases is necessary before it can be determined that the plaintiff in error must fail here and the motion to dismiss should be denied.

Mr. Hugh M. Alcorn, in support of motion to dismiss or affirm, for defendant in error:

For the first prosecution under this act see *State* v.

Hurlburt, 82 Connecticut, 232, and for opinion in this case see 83 Connecticut, 1.

The act has already been twice construed. The writ of error does not present a substantial Federal question which is now open to discussion. It appears from the face of the record that the determination by the state court is so plainly right as not to require further argument. *Fay* v. *Crozier*, 217 U. S. 455; *Kidd, Dater Co.* v. *Musselman Co.*, 217 U. S. 461; *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413; *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285; *Williams* v. *First National Bank*, 216 U. S. 582; *Barrington* v. *Missouri*, 205 U. S. 483; *Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Ornstine* v. *Cary*, 204 U. S. 669; *Thomas* v. *Iowa*, 209 U. S. 258.

The regulation of interest charges has been universally recognized as a proper subject of state legislation, and the question of the constitutionality of this kindred legislation has invariably been held by this court to be within the exclusive province of the state courts. *Missouri, Kansas & Texas Trust Co.* v. *Krumseig*, 172 U. S. 355, 359, and cases cited.

The enactment of this statute is clearly within the police power of the State, and the validity of such legislation is to be determined solely by the state court. *Watson* v. *Maryland*, 218 U. S. 173; *Franklin* v. *South Carolina*, 218 U. S. 161; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Welch* v. *Swasey*, 214 U. S. 91; *Muller* v. *Oregon*, 208 U. S. 412.

There is nothing in the legislation complained of which offends § 10, Art. I, of the Constitution of the United States. *Bishop's Fund* v. *Rider*, 13 Connecticut, 93, 94; *State* v. *Griffith*, 83 Connecticut, 3.

The contracts in this case were prohibited by the act of 1907. Therefore no legal obligation exists, and the case does not come within the purview of this clause of the Constitution. *Dartmouth College* v. *Woodward*, 4 Wheat.

639; *Hunt* v. *Hunt*, 131 U. S. 165; *Stone* v. *Mississippi*, 101 U. S. 814.

That the statute does not violate the Fourteenth Amendment has been repeatedly decided by this court. *District of Columbia* v. *Brooke*, 214 U. S. 150; *Barbier* v. *Connolly*, 113 U. S. 31; *Atchison, Topeka &c. R. R. Co.* v. *Matthews*, 174 U. S. 96; *Cotting* v. *Kansas City Stock Yard Co.*, 183 U. S. 79; *Tracy* v. *Ginzberg*, 205 U. S. 178; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36.

The power to regulate interest charges has been exercised by every civilized nation, ancient or modern, whose laws survive in history, and this power has so long been recognized as a constitutional exercise of legislative authority, and has been so uniformly sustained by the courts upon grounds of public policy that it is now too late to ask this court to consider it an open question. *Dunham* v. *Gould*, 16 Johns. (N. Y.) 367.

In view of the repeated decisions of this court upholding the right of the States under the Federal Constitution to make and enforce laws of this character, the writ of error has no merit in it.

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

The motion to dismiss or affirm is in effect based upon the claim that the assignments of error present no substantial Federal question. As the contentions urged required for their elucidation a consideration of the provisions of the statute charged to have been violated, we excerpt the first and second sections of the act. They are as follows:

"Sec. 1. No person, firm, or corporation, or any agent thereof, other than a national bank or a bank or trust company duly incorporated under the laws of this State, or a pawnbroker as provided in chapter 235 of the Public Acts

of 1905, shall directly or indirectly loan money to any person and directly or indirectly charge, demand, accept or make an agreement to receive therefor interest at a greater rate than fifteen per centum per annum. The provisions of this section shall not apply to loans made to any national bank or any bank or trust company duly incorporated under the laws of this State or to any *bona fide* mortgage of real or personal property.

"SEC. 2. No person, firm, or corporation, with intent to evade section one hereof, shall accept a note for a greater amount than that actually loaned."

The claim that the statute operates to deny the equal protection of the laws is based upon the provision exempting from the operation of the terms of § 1 "any national bank or any bank or trust company duly incorporated under the laws of this State" and "any *bona fide* mortgage of real or personal property." The contentions elaborated in the assignments of error find succinct expression in the following proposition set out in the brief filed in opposition to the motion to dismiss:

"It is claimed by the plaintiff in error that the statute in question is an arbitrary, unjust and unreasonable selection, favoring a class, is detrimental to the public, stifles competition and that no good reason exists for the granting of the privilege of loaning money at any rate of interest without taking a mortgage on real or personal property to the favored class to the exclusion of all others.

* * * * * * * *

"It is not a police regulation; there is no care imposed or restriction in the loan of money by the favored few—simply an arbitrary, unreasonable limitation upon all except those privileged under the statute.

* * * * * * * *

"The regulation of interest charges is undoubtedly the proper subject of State legislation, but in the first place this statute is not a regulation of interest charges. It is

in effect a special statute permitting only certain favored individuals or corporations to do an act or conduct a business.

* * * * * * * *

"There is 'no fair reason for the law that would not require with equal force its extension to others it leaves untouched.' "

It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a State for the use of money loaned within the jurisdiction of the State is one within the police power of such State. The power to regulate existing, the details of the legislation and the exceptions proper to be made rest primarily within the discretion of the state legislature, and "unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the State; and the classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws." *Watson* v. *Maryland, ante,* p. 173, and cases cited. In the case at bar the Supreme Court of Errors ruled that the statute was not repugnant to the Fourteenth Amendment, following a prior ruling to that effect made in *State* v. *Hurlburt,* 82 Connecticut, 232.

In the *Hurlburt case,* discussing contentions similar to those here urged against the validity of the Connecticut statute of 1907, based upon the exemption clause in question, the court said:

"The exception from its operation of loans by national banks was merely a recognition of the legal effect, in excluding state legislation on the same subject, of the statutes of the United States which regulate their right to

make such contracts. The further exception in favor of loans by trust companies chartered by this State was fully justified by the peculiar character of these institutions, each created by a special act of legislation, and subject to the inspection of the bank commissioners. Gen. St. 1902, cc. 199, 202. There was also reasonable cause for the exception as to pawnbrokers. Their business can only be carried on by those found by public authority to be suitable persons to engage in it, and its character is such as to make it not improper to allow a charge of interest beyond the limit of 15 per cent a year. Pub. Acts 1905, p. 438, c. 235. There was also sufficient reason for restricting the statute so that it should not apply to loans made to any bank or to any trust company chartered by this State. Such institutions, managed by those accustomed to financial operations and familiar with the worth of money in the market from day to day, might well be deemed to require no statutory protection against being forced by their financial necessities to pay excessive interest for moneys borrowed. Nor is the act invalidated by the exception of mortgages.

"Publicity is one of the best safeguards against the making of unconscionable contracts. Under our recording system, it is rare that any *bona fide* mortgage, either of real or personal property, fails to be promptly spread upon the records of the town in which is situated the property which is its subject. So far as concerns chattel mortgages, also, our General Statutes of 1902 (sections 4132, 4134) had already made other and reasonable provision as to the rate of interest which might be charged, or which, in case of foreclosure, could be allowed. The general assembly, in respect to the matter of usury, had the right to deal with different classes of money lenders or money borrowers in a different way, provided there were nothing apparently unreasonable in creating such distinctions, and all the members of each class were treated

in the same manner. *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338, 354; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 281. The enactment of the statute now in question fell within this right. *Norwich Gas & Electric Co.* v. *Norwich*, 76 Connecticut, 565, 573."

In the argument on behalf of the plaintiff in error no attempt is made to meet the force of the foregoing statements of the court below; and, clearly, in the light of such declarations, it is impossible to conclude otherwise than that the classification complained of has a reasonable basis, and that the exemption of national banks, etc., was not a mere arbitrary selection.

In the argument for plaintiff in error no reference is made to the claim urged below of the protection of the contract clause of the Constitution. The claim appears to have had reference to a provision contained in § 5 of the act of 1907, forbidding the enforcement of contracts made in violation of the act, thereby operating to deny validity to such contracts when made by those not within the exempted classes. There was power to enact the provision (*Missouri, Kansas &c. Trust Co.* v. *Krumseig*, 172 U. S. 351, 358–9), and, as said by the court below, the contract clause of the Constitution of the United States "does not give validity to contracts which are properly prohibited by statute."

The Supreme Court of Errors of Connecticut did not err in its judgment of affirmance. As, however, the particular classification here assailed has not been the subject of express consideration in any prior decision of this court, and hence the power to make it cannot be said to have been so explicitly foreclosed as to cause contention on the subject to be obviously frivolous, the motion to dismiss cannot prevail. *Louisville & N. R. R. Co.* v. *Melton*, *ante*, p. 36. It is, however, manifest from the analysis which has been made of prior decisions that applying the principles settled by the cases which have

gone before, the contentions now advanced against the correctness of the judgment are so wholly without merit as not to require further argument. The motion to affirm must therefore prevail.

Affirmed.

GRIFFITH, *alias* GRIFFIN *v.* STATE OF CONNECTICUT.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 515. Motion to dismiss or affirm. Submitted November 28, 1910.—Decided December 12, 1910.

Decided on authority of *Griffith* v. *Connecticut*, *ante*, p. 563.

THE facts are stated in the opinion.

Mr. I. Henry Harris for plaintiff in error.

Mr. Hugh M. Alcorn for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The parties to this record are the same as in No. 514, just decided, *ante*, p. 563, and the questions involved are the same, the prosecution being for similar offenses against the Connecticut act of 1907. Both cases were tried together. Upon the conviction in this, however, the trial court imposed the penalty of imprisonment. The two cases were disposed of by the Supreme Court of Errors in one opinion. As the decision in No. 514 is necessarily controlling, it follows that the judgment of the Supreme Court of Errors of Connecticut must be and it is

Affirmed.

HUNTER *v.* MUTUAL RESERVE LIFE INSURANCE COMPANY.

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

No. 39. Argued November 7, 1910.—Decided December 12, 1910.

A few separate and disconnected transactions by a foreign corporation after its withdrawal from a State, all relating to matters existing before such withdrawal do not constitute doing business in that State so as to preclude such a corporation from revoking the power of attorney to accept process given by it to a state officer as required by statute of the State to enable it to enter and do business in the State. *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Mutual Reserve Fund Life Association* v. *Phelps*, 190 U. S. 147; *Mutual Reserve Ins. Co.* v. *Birch*, 200 U. S. 612; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, distinguished.

A power of attorney to a state officer to accept process required by statute to be given by a foreign corporation as a condition for doing business in the State although irrevocable in form, may be revocable, on the withdrawal of such corporation from the State, as to matters not connected with business transacted in such State or with residents thereof; and the courts of one State are not required to give full faith and credit, under the Federal Constitution, to a judgment of another State against a corporation based on service on a state officer of that State, in which said corporation had done business but from which it had in good faith withdrawn after revoking the power of attorney which it had given to such officer as a condition for doing business in the State, and where the cause of action did not arise in, or was not connected with a transaction arising in such State, or in favor of a citizen thereof.

184 N. Y. 136, affirmed.

THE facts are stated in the opinion.

Mr. Paul Armitage for plaintiff in error:

A State has the arbitrary power to exclude foreign in-

surance companies altogether from her territory. *Hooper* v. *California*, 155 U. S. 648, 655. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. Issuing a policy of insurance is not a transaction of commerce. Such contracts are not interstate transactions though the parties may be domiciled in different States. They do not constitute a part of the commerce between the States. *Paul* v. *Virginia*, 8 Wall. 168; *Phila. Fire Association* v. *New York*, 119 U. S. 110; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Hooper* v. *California*, 155 U. S. 648.

A State has the power, if she allow any such insurance company to enter her confines, to determine the conditions on which the entry shall be made and the right to enforce any conditions so imposed. The power to exclude embraces the power to regulate and the power to enact and to enforce such regulations.

When a foreign insurance corporation undertakes to transact business in a State other than that in which it is incorporated, it submits itself to the authority of the courts of such other State, and is bound, so long as that business continues, by the statutory provisions respecting the method of such courts obtaining jurisdiction over it. *Pringle* v. *Woolworth*, 90 N. Y. 509; *People* v. *Life Insurance Co.*, 7 App. Div. 297; *Gibbs* v. *Queens Ins. Co.*, 63 N. Y. 120. It becomes bound by judgments rendered upon service on the designated agent, because it has consented so to be bound. *Douglass* v. *Ins. Co.*, 138 N. Y. 220; *Mutual Reserve Assn.* v. *Phelps*, 190 U. S. 147; *Gibson* v. *Mfg. Ins. Co.*, 144 Massachusetts, 81; *Aldrich* v. *Blatchford*, 175 Massachusetts, 369; *Vose* v. *Cockroft*, 44 N. Y. 415; *Sherman* v. *McKeon*, 38 N. Y. 266; *Phyfe* v. *Eimer*, 45 N. Y. 102. The service on the insurance commissioner was not effectual. *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 610; *Mutual Reserve Assn.* v. *Phelps*, 190 U. S. 147.

Upon the facts herein, the defendant company con-

tinued to do business in North Carolina, after the attempted revocation of the power of attorney given to the insurance commissioner, and was actually doing business within the State on the date when service of process was made in each of the suits resulting in the four judgments. *Paul* v. *Virginia*, 8 Wall. 168; *Phila. Association* v. *New York*, 119 U. S. 110; *Crutcher* v. *Kentucky*, 141 U. S. 47.

The business of insurance is not within the protection of the commerce clause of the Federal Constitution. A foreign insurance corporation has no right to do any part of its insurance within the borders of a State, except by its express permission and under the conditions imposed.

It is only when a corporation undertakes to engage in a local business elsewhere than in the State of its creation that it comes within the grasp and control of other state sovereignty. The case of a foreign insurance company is wholly different. It is not engaged in interstate commerce. No portion of its business is of that character.

The Court of Appeals held that the defendant insurance company did not continue to do any business within the State of North Carolina after May 18, 1899, and was not doing business therein at the time of service of process in the suits in question, but this was grave error. The Mutual Reserve Insurance Company continued to do and was at the time of service of process doing insurance business within the State and subject to the jurisdiction of its courts. *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Goldey* v. *Morning News*, 156 U. S. 519; *Merchants' Mfg. Co.* v. *Railway*, 13 Fed. Rep. 358; *Birch* v. *Mutual Reserve Ins. Co.*, 200 U. S. 612.

Where an insurance company goes into a State and makes contracts of insurance, it does not cease to do business simply because it withdraws its agents and solicits no new business.

The court of North Carolina had jurisdiction in ac-

tions brought against foreign corporations by residents of that State "for any cause of action." *Shields* v. *Life Ins. Co.*, 119 N. C. 380.

The attempted revocation was not effective to revoke the insurance commissioner's power to receive process in any lawful action.

Even if it be assumed (arguendo) that the defendant company in good faith withdrew from North Carolina and ceased to do any business therein after May 18, 1899, it was still liable to be sued in the courts of North Carolina in any action or legal proceeding, and the insurance commissioner was, at the time of the service of process therein, the agent of the defendant for the purpose of service in any action or legal proceeding of every nature of which the courts of North Carolina had jurisdiction.

North Carolina had the right to prescribe such conditions as it saw fit before allowing a foreign corporation to do business within its borders. *Anglo-American Prov. Co.* v. *Prov. Co.*, 169 N. Y. 506, 510; *Hooper* v. *California*, 155 U. S. 648; *Aldrich* v. *Blatchford*, 175 Massachusetts, 371, and cases cited; *Youmans* v. *Title Ins. Co.*, 67 Fed. Rep. 282; *Johnson* v. *Ins. Co.*, 132 Massachusetts, 432; *Wilson* v. *Fire Alarm Co.*, 149 Massachusetts, 24; *Mooney* v. *Buford Mfg. Co.*, 72 Fed. Rep. 32; *Darlington* v. *Rogers*, 36 Legal Int. 115.

The power of attorney is not subject to the application of the old doctrine that one not coupled with an interest is revocable, but is one between a sovereign State, acting as the representative of all its citizens, and a corporation, by which the corporation has obtained a lucrative business. This alone is sufficient to sustain the power of attorney and forbid its revocation.

The other authorities establish the same doctrine, that a power of attorney given for a valuable consideration or as security is irrevocable. *McGregor* v. *Gardner*, 14 Iowa, 326; Ewel's Evans Agency, p. 110, note 1; 2 Kent's

Commentaries, 643; Story on Agency (9th ed.), p. 587; *Terwilliger* v. *Railroad Co.*, 149 N. Y. 87.

Mr. William Beverly Winslow, *Mr. Wm. Hepburn Russell* and *Mr. Frank H. Platt* for defendant in error:

The judgments rendered by the Superior Court of North Carolina were not enforceable in New York unless that court had jurisdiction of the person of the defendant. To obtain such jurisdiction it was necessary that process be served upon an authorized agent of the defendant corporation. Art. IV., § 1, Fed. Const.; *Thompson* v. *Whitman*, 18 Wall. 457; *Huntington* v. *Attrill*, 146 U. S. 657, 685; *Germania Savings & Loan Society* v. *Dormitzer*, 192 U. S. 125; *National Exchange Bank of Tiffin* v. *Wiley*, 195 U. S. 257, 269–270.

To confer jurisdiction upon the courts of a State to render a judgment against a foreign corporation it is essential that service be made upon an agent of the company whom the law will imply is authorized to receive service, and the corporation must be engaged in doing business in such State. *Pennoyer* v. *Neff*, 95 U. S. 714; *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 518; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 111; *Conn. Mutual Ins. Co.* v. *Spratley*, 172 U. S. 602; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428.

The North Carolina court when it rendered these judgments did not have jurisdiction of the defendant corporation. There was no service of process except upon the insurance commissioner, who was not the agent of the defendant to receive service of process in such actions. *Smithsonian Institution* v. *St. John*, 214 U. S. 19; *St. Louis, K. C. & Col. R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247.

A power of attorney, although irrevocable in terms, is revocable unless coupled with an interest or given for a consideration. *Hunt* v. *Rousmanier's Adm.*, 8 Wheat. 174;

Knapp v. *Alvord*, 10 Paige, 205; Story on Agency (9th ed.), 587, § 476.

The power of attorney in this case was not given for a consideration. Such a power of attorney as this cannot be kept alive by reason of such statute, except as to such persons as acquired vested rights thereunder prior to the revocation of the power of attorney. *Johnson* v. *Ins. Co.*, 132 Massachusetts, 432; *Wilson* v. *Fire Alarm Co.*, 149 Massachusetts, 24; *Mooney* v. *Buford Mfg. Co.*, 72 Fed. Rep. 32; *Youmans* v. *Title Ins. Co.*, 67 Fed. Rep. 282.

As service was not made upon an agent of the company, it is immaterial whether or not defendant was doing business in North Carolina. Defendant was not in fact doing business in North Carolina. *Connecticut Mutual Ins. Co.* v. *Spratley*, 172 U. S. 602, and *Mutual Reserve Assn.* v. *Phelps*, 190 U. S. 147, do not apply. They simply show, that in the absence of the power of attorney to the insurance commissioner, the corporation could be sued by any policy-holder in North Carolina, who obtained service upon an agent of the corporation because the corporation in continuing its dealings with the policy-holders would be held to be so far doing business in the State as to support such service. We are not dealing here with such a case. This is a case where a stranger to all the transactions conducted by the defendant in North Carolina instituted an action in that State against the defendant.

While the State can forbid the corporation coming into the State to make a contract, it cannot forbid its citizens from lawfully making a contract with the corporation at its domicil and thereafter performing the contract through the mail. *Allgeyer* v. *Louisiana*, 165 U. S. 578. Nor can it impair the obligation of its contracts any more than it can an individual's. *Bedford* v. *Eastern Building & Loan Assn.*, 181 U. S. 227, 240.

Before it revoked the appointment of the insurance

commissioner of North Carolina as its attorney upon whom process could be served in that State, the Mutual Reserve Fund Life Association was licensed to do business in that State; after such revocation it would have been, as to any new business which it might have done in the State, violating the North Carolina law, but not subjecting itself to the jurisdiction of the North Carolina courts over its person by so "doing business." Any provision in the statutes of North Carolina making it subject to such jurisdiction merely because it was "doing business" in violation of law, without service upon a then authorized agent in the State, is in violation of the Constitution of the United States and a judgment *in personam* against it, not based on personal service on an authorized agent, is void. *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444; *Wetmore* v. *Karrick*, 205 U. S. 141; *Cella Commission Co.* v. *Bohlinger* (C. C. A.), 147 Fed. Rep. 419.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error is prosecuted to review a judgment of the Court of Appeals of the State of New York, modifying a judgment of the Supreme Court of that State. The judgment of the Court of Appeals was remitted to and made the judgment of the latter court.

The action was brought by Hunter, whom we shall call plaintiff, against the insurance company, which we shall refer to as defendant, upon five judgments obtained in the State of North Carolina, recovered by one Emrick Wadsworth, a citizen of North Carolina, and owned by plaintiff. The judgments were recovered upon policies of insurance issued by defendant, one of which was issued to a citizen of North Carolina while defendant was doing business there, the others to citizens of New York and New Jersey. They were assigned to Wadsworth long after

defendant had attempted to remove from North Carolina. Judgment was rendered for their full amount with interest and costs, to wit, the sum of $9,965, by direction of the Appellate Division of the court to which the case was submitted upon an agreed statement of facts. The Court of Appeals reduced the same by the amount of the four judgments recovered on the policies issued in New York and New Jersey. The Federal question presented is whether due faith and credit was refused to the judgments, in violation of the Constitution of the United States.

The judgments were obtained by default after service made upon the insurance commissioner of the State. The decision of the case turns upon the validity of the service.

The defendant is a life insurance company, organized under the laws of New York. Prior to March 13, 1899, it was duly admitted to do business in the State of North Carolina, it complying with the laws of the State successively passed, which required insurance companies to appoint agents upon whom service of process could be made.

On March 6, 1899, the legislature passed a law known as the Willard law. The law prescribed that no foreign insurance company should do business in the State until it had, by a duly executed instrument filed in the office of the secretary of state, constituted and appointed the insurance commissioner its true and lawful attorney, upon whom all lawful process in any action or legal proceedings might be served, and agreed that such service should have the same force and validity as if served on the company, and that "the authority thereof" should "continue in force irrevocable so long as any liability of the company" should "remain outstanding in this Commonwealth." Chapter 54 of the Laws of 1899.

On or about the thirteenth of April defendant executed the power of attorney required, and thereupon a license

was issued to it to do business, as provided by law, under which it did business in the State for a time.

The legislature which passed the Willard law passed also a law called the Craig act, by which it was provided that any foreign insurance company desiring to do business in the State after June 1 then ensuing must become a domestic corporation of the State. There were severe penalties prescribed for the violation of the act. The company was subjected to a penalty of $200 a day for every day it "continued to operate or do business without having complied with the requirements of the act," and it was deprived of the right of suing in the state courts or to enter into any new contracts or enforce those it had made. In addition to the penalty of $200 it was subjected to a penalty of $500 for each day that it did business after the first day of June, 1899, "without first becoming a domestic corporation."

The act took effect on the tenth of February, 1899. In May of that year the board of directors of defendant passed a resolution to withdraw from the State and to dispense with and terminate the services of all of its agents. It also revoked the authority of the insurance commissioner to act as its attorney to receive service of process. A certified copy of the resolution was served on the commissioner, and the agents of the company were withdrawn from the State, the premiums upon the policies theretofore issued by it being remitted by mail to its home office, where the policies and premiums were payable, and losses upon policies being paid by check from its office. Outside of this the record shows four transactions: (1) the rewriting of a policy of insurance in 1899, originally issued in 1886, which was mailed from its office in New York; (2) sending a check in payment of a policy issued prior to May 17, 1899, to be delivered upon receipt of certain unpaid assessments; (3) the adjustment in North Carolina, in June, 1902, of a loss upon a policy issued in Washing-

ton, D. C., the beneficiary having removed to North Carolina; (4) the adjustment, by an attorney employed for the purpose, of a claim upon a policy written in North Carolina prior to May 17, 1899. The first two transactions were prior to the beginning of the actions in which the judgments were recovered, and the last two were subsequent to that time. These are the transactions upon which plaintiff relies to establish that defendant was doing business at that time in the State.

Three of the policies upon which judgments were recovered were issued in the State of New York long prior to the year 1899. The fourth policy was issued in New Jersey, also prior to 1899. The assignments to Wadsworth were made in December, 1901, and January, 1902, and the suits were begun on January 20, 1902.

There is no controversy over the power of the State to pass the Willard and Craig acts so called, or to make their provisions conditions upon which foreign insurance corporations could do business in the State. The controversy is over the duration of the conditions. The decision upon that, plaintiff contends, depends upon the question whether the insurance company was doing business in the State at the time the actions on the policies were brought and process served, and, insisting that it was, cites *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Mutual Reserve Association* v. *Phelps*, 190 U. S. 147. Plaintiff further insists that, even it be assumed that defendant had withdrawn from the State in good faith and had ceased to do business therein after May 18, 1899, it was still liable to be sued in the courts of the State "in any action or local proceeding of every nature of which the courts of North Carolina had jurisdiction," and that the insurance commissioner was its agent to receive service of process. This contention is based on the provision of the statute which continues the authority of the commissioner "in force and irrevocable so long as any

liability of said company remains outstanding in said State."

If the situation of defendant, regarding what it had done and its obligations, was exactly expressed by the contentions of plaintiff, they might be irresistible. But not only the Willard act but the Craig act must be considered in determining defendant's conduct. It had done business in the State and the former act became a part of its obligations to its policy-holders. The latter act imposed new conditions upon it, and as an alternative to compliance with them required it to remove from the State. An evasion of the requirement was, as we have seen, severely penalized. Money penalties, one of $200 and one of $500, for every day it should do business after the first of June, 1899, were imposed upon it and no contract it should make or had made could be enforced in the courts of the State. Such were the alternatives presented by the Craig act. In other words, defendant was given the choice to become a domestic corporation or go out of the State. It chose to go out of the State, and adopted the only way it could to do so. We think such course was open to it and we see no reason to question its good faith.

It is, however, contended that defendant "persisted in doing business in the State and was so found at the time of the service of process in question." Four instances are adduced to sustain the contention, two of which occurred in 1899 and two in 1902. These instances have no relation to one another and no relation to the transactions upon which the judgments were based. Between the first two and the last two there was an interval of three years, and yet it is insisted that there was such connection between them that they constituted doing business continuously in the State, and the defendant was hence precluded from revoking its power of attorney to the insurance commissioner. The contention of plaintiff, so far as based on the

instances adduced, encounters a great difficulty. They were not new business. They related to old transactions, and were intended only to fulfill their obligations. This was the plain duty of defendant, a duty which it could not evade nor could the State even prevent it. *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227. Between doing business for such purposes and doing business generally there is quite a difference. If not, the consequences are somewhat serious. The Craig act, as we have seen, imposes a penalty of $700 a day for each day after the first day of June, 1899, that a foreign corporation shall do business in the State without conforming to the provisions of the act.

Plaintiff, however, presses with earnestness, in support of his contention, the following cases: *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Mutual Reserve Fund Life Association* v. *Phelps*, 190 U. S. 147; *Mutual Reserve Ins. Co.* v. *Birch*, 200 U. S. 612; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245.

In the *Spratley case* the life insurance policy, which was the subject of the suit, was issued by the insurance company when it was concededly present and doing business in the State of Tennessee. The service was upon an agent by the name of Chaffee, sent to investigate into the circumstances of the death of Spratley and the claims of his widow. These facts distinguish the case from the one at bar. But certain language of the court is quoted to establish, not only was the insurance company so doing business in the State as to justify service of process upon the agent appointed by the company, but doing business generally. The court, through Mr. Justice Peckham, said:

"We think the evidence in this case shows that the company was doing business within the State at the time of this service of process. From 1870 until 1894 it had done an active business throughout the State by its agents

therein, and had issued policies of insurance upon the lives of citizens of the State. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the State was simply a recall of its agents doing business therein, the giving of a notice to the State insurance commissioner, and a refusal to take any new risks or to issue any new policies within the State. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent."

And further:

"It cannot be said with truth, as we think, that an insurance company does no business within a State unless it has agents therein who are continuously seeking new risks, and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the State through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another State, and who was once agent in the State where the policy holders resided. This action on the part of the company constitutes doing business within the State, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis."

This reference to the law in the State must be considered. A statute of the State provided that process might be served upon any agent of a corporation doing business in the State found within the county where the suit was brought, no matter what character of agent such person might be, and in the absence of such an agent it

should be sufficient to serve process upon any person found in the county who represented the corporation at the time of the transaction out of which the suit arose took place. It was under this statute that service was made upon Chaffee. This service was held good, this court saying, in addition to what has been quoted above: "Even though we might be unprepared to say that a service of process upon 'any agent,' found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation."

Further explanation of the language of the court is contained in the following passage:

"A vast mass of business is now done throughout the country by corporations which are chartered by States other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the State where the business was done, *out of which the dispute arises.*" (Italics ours.)

Mutual Reserve Association v. *Phelps* is distinguished from the case at bar by the same features that distinguish the *Spratley case* from it. The suit was brought by a citizen of the State of Kentucky upon a policy issued when the association was doing a general business in the State through regular agents under a license from the State. The commissioner subsequently cancelled its license, and it withdrew its agents from the State. The service of process in the action was nevertheless made upon the commissioner and sustained. It was stipulated by the parties that outstanding policies were continued in force after the action of the commissioner on which the association had collected and was collecting dues, premiums and assessments, and this court held, on the au-

thority of the *Spratley case*, that the association was doing business in the State. These general words must be qualified, as we have seen, like words in the cited case should be qualified, to protect transactions which had been entered into and to give them the benefit of the law in view of which they were made. This court said: "The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the State of Kentucky under license from the State." And it was said of the statute that it and "other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen for such a controversy to seek for the purpose of enforcing his claims the State in which the corporation had its home."

Mutual Reserve Life Insurance Company v. *Birch* was a like case. Certain judgments which were sued on in New York were obtained in actions upon policies issued when the insurance company was doing its regular business in the State of North Carolina, and antedated its resolution to withdraw from the State. The case was rested in the Court of Appeals of New York on *Woodward* v. *Mutual Life Ins. Co.*, 178 N. Y. 485, 490. It was said in that case that the stipulation of the company in regard to service of process became an obligation of the company precisely as though it "had been incorporated in the policies, and thereafter, whether the company continued to do business in the State or not, policy holders could commence action by service of process upon the Secretary of State," subsequently changed to the insurance commissioner. *Woodward* v. *Mutual Life Ins. Co.* was cited by this court in its opinion sustaining the judgment in the *Birch case*.

Commercial Mutual Accident Co. v. *Davis* has the same

characteristics as the cases which we have reviewed and needs no other comment than that it repeated the doctrine of the other cases.

The first contention of plaintiff is, therefore, untenable. The next contention is that even if defendant did withdraw from the State in good faith the authority to the insurance commissioner to receive service of process continued as long as the company had outstanding liabilities in the State. And this, it is insisted, constituted the duration of the authority not only for causes of action arising in the State, but for causes of action arising in other States. In other words, that the language of the statute is not limited by its purpose to protect the resident policy-holders of the company, but for the benefit of every litigant upon any cause of action, and, to use the graphic language of the Court of Appeals, to "perpetuate a local forum to which under the guise of an assignment to some resident, non-residents of far distant States might flock for the purpose of instituting litigation upon contracts issued to them at their homes, against a corporation there readily subject to service and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out."

This is certainly the logical consequence of plaintiff's contention, and to sustain it he relies upon *Johnston* v. *Trade Ins. Co.*, 132 Massachusetts, 432; *Wilson* v. *Martin*, 149 *Id.* 24; *Biggs* v. *Life Association*, 128 N. C. 5. A statute like that of North Carolina was construed in the Massachusetts cases, and, therefore, the construction given to it is instructive. In all of the cases the corporation had "a domicil of business in the Commonwealth," to use the language of the Supreme Judicial Court of Massachusetts, and the court recognized that the right to sue upon cause of action arising in another State was not within "the main purpose" of the statute passed on, indeed, that it "was not framed for that purpose," but decided that

"the words 'all lawful processes in any action or proceeding' must be held to include all actions which might lawfully be brought against a company thus having a domicil of business in this Commonwealth." In *Wilson* v. *Martin* the contract sued on was made in the State and was to be performed there.

In *Biggs* v. *Mutual Reserve Life Association* the policy on which the action was based was issued to a resident of the State. The language of the court was quite general. The court did not discuss whether it was "'ceasing to do business in this State' to transact that business through agents located outside of the State, by means of the mail," though it may be said that the court expressed doubt of it by referring to the *Spratley case*. It was said:

"It is sufficient to point out that the statute requires the power of attorney to be irrevocable, not 'as long as the company continues to do business' in this State, but as long as 'any liability of the company remains outstanding' in this State, and the contract with the State, as expressed in the power of attorney filed by the company, so specifies. No amount of authorities having a more or less fancied analogy can overcome these plain words of the statute and of the power of attorney drawn and filed in conformity thereto. *Green* v. *Life Association*, 105 Iowa, 628; *Insurance Co.* v. *Gillett*, 54 Maryland, 213."

This general language must be considered in reference to the case, a conclusion which is justified by the decision of the court in *Moore* v. *Mutual Reserve*, 129 N. C. 31, where it is said that the State, having the right to prescribe the terms upon which the insurance company might carry on its business in the State, and the company, "being permitted, proceeded to make contracts with the citizens of the State, and became liable to them under these contracts. One of the provisions upon which the defendant was allowed to do business here was that James R. Young, insurance commissioner, and his successors in office

should be constituted its agent, upon whom service of process might be made, and that said agency should continue so long as the defendant had any liabilities remaining unsatisfied in this State arising from or out of its said business of insurance." As to the revocation of the authority of the commissioner the court said:

"It is conceded that, as a general rule, a principal has the right to revoke a power of attorney at any time, whether it is in terms irrevocable or not. But to this general rule there are well-established exceptions as where it is coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of some one, or some interest. In our opinion this power falls under this exception to the general rule. It was contractual in its nature; was given upon consideration that defendant should have the right to carry on its business in this State and for the protection 'of those who should deal with the' defendant."

Manifestly, this means who should deal with the defendant in the State. The facts in the case at bar are different from the cited cases. The policies upon which the four judgments were recovered were not issued in North Carolina, and not having been issued under the faith of its laws are not entitled to their remedial sanction. The facts in this case are also different from those in the Massachusetts cases. Defendant did not have "a domicil of business" in the State, nor were the contracts to be performed there. It in good faith withdrew from the State—withdrew indeed under the compulsion of law. We say under compulsion of law, for clearly the Craig act required that as an alternative to compliance with its provisions. It presented a choice to defendant of one of two courses. Defendant accepted one of them, that is, withdrew from the State, and revoked the power which it had given to the insurance commissioner to accept service for it. Revoked it as far as it could do so. It

could not revoke it as to any "interest or right founded or created upon faith thereof" and which "required its perpetuation and continuance," as the Court of Appeals has correctly said, and we think with that learned court, that it would be extremely inequitable to regard it as irrevocable to plaintiff and those in his situation. Indeed, it is not within the contemplation of the statute that the authority to the commissioner is to be available to those in the situation of plaintiff.

Judgment affirmed.

CALDER *v.* THE STATE OF MICHIGAN, *Ex rel.* ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 58. Argued November 29, 30, 1910.—Decided December 12, 1910.

This court does not inquire into the knowledge, negligence, methods or motives of the legislation if, as in this case, the statute is passed in due form; and where the statute repeals the charter of a corporation under the reserved power of repeal, the only question here is whether the statute goes beyond the power expressly reserved.

A corporation contracts subject, and not paramount, to reservations in its charter and cannot, by making contracts or incurring obligations, remove or affect such reservations.

A franchise given by a city to a public service corporation does not enlarge the right of the corporation to exist as against an expressly reserved power to repeal the charter, even if the corporation has mortgaged such franchise.

In this case, *held* that the question of parties is not open in this court.

153 Michigan, 724, affirmed.

THE facts are stated in the opinion.

Mr. Henry A. Forster and *Mr. Willard Kingsley,* with whom *Mr. John E. More* was on the brief, for plaintiffs in error:

The franchise of a public corporation to operate its

plant or works is separate and distinct from its franchise to be a corporation, and is transferable as such independently of the life of the original corporation. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 394, 395; *Minneapolis* v. *Street Ry. Co.*, 215 U. S. 417, 430; *People* v. *O'Brien*, 111 N. Y. 2, 36–38, 40, 47; *Suburban Rapid Transit Co.* v. *Mayor*, 128 N. Y. 510, 520; *Miner* v. *New York Central & H. R. R. R. Co.*, 123 N. Y. 242, 250; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 12 C. C. A. 365, 370; *S. C.*, 64 Fed. Rep. 628, 633; *Lord* v. *Equitable Life Assurance Society*, 194 N. Y. 212, 225, 228.

A corporate franchise cannot be separated from the lands or works essential to its enjoyment by the sale of the latter; because to separate its tangible property from its intangible property, would impair its creditors' rights. *Gue* v. *Tide Water Canal Co.*, 24 How. 257, 263; *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 89, 90; *People* v. *O'Brien*, 111 N. Y. 2, 47.

Upon the dissolution of a corporation its property becomes a trust fund for the benefit of its creditors. *Citizens' Savings Co.* v. *Ill. Cent. R. R. Co.*, 205 U. S. 46, 55; *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 366, 367.

Under the law of Michigan, public service corporations are authorized to mortgage their franchises, hydrants, pipes, poles, wires and rails in the public streets. The purchaser of the franchise may operate it in accordance with its provisions. *Telephone Co.* v. *St. Joseph*, 121 Michigan, 502, 508; *Detroit* v. *Mutual Gas Light Co.*, 43 Michigan, 594, 599, 605; *Joy* v. *Plank Road Co.*, 11 Michigan, 155, 165; Michigan Rev. Stat., 1846, c. 55, §§ 9–16, 212; *Railroad Comm.* v. *Grand Rapids*, 130 Michigan, 248.

The right of a public service corporation to mortgage its franchise and privileges (though not its right to be a corporation) necessarily includes the power to bring the franchise and privileges to sale to make the mortgage

effectual. The purchaser at the sale acquires a good and valid title to the franchise, although the corporate right to exist may not be sold. *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453, 464; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 106; *New Orleans R. R. Co.* v. *Delamore*, 114 U. S. 501, 507; *Memphis R. R. Co.* v. *Commissioners*, 112 U. S. 610, 619.

Franchises of public service corporations are property and cannot be taken or used by others without compensation. *Willcox* v. *Gas Co.*, 212 U. S. 22; *Wilmington R. R. Co.* v. *Reid*, 13 Wall. 264.

A statute separating the tangible property of a corporation from its franchise, and taking the former for public use while forbidding any compensation for the latter, is unconstitutional. The legislature may determine what private property is needed for public use, but the question of compensation is a judicial one. The legislature may neither say what compensation shall be made nor fix the rule of compensation. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327; *Vanhorne* v. *Dorrance*, 2 Dall. 304, 316; *Matter of New York*, 190 N. Y. 350.

The dissolution of a corporation cannot impair the obligation of its contracts or the claims of its creditors; they still remain in full force and unimpaired by virtue of the Constitution. *Mumma* v. *Potomac Co.*, 8 Pet. 281, 285, 286; *People* v. *O'Brien*, 111 N. Y. 2, 47, 48.

The so-called repealing acts are unconstitutional because they deprive the Hydraulic Company, its bondholders and other creditors of their property without due process of law, and deny to them the equal protection of the laws.

A reserved power to repeal or amend the charter of a corporation does not permit the invalidation or annulment of a lawfully executed mortgage, or of coupon bonds issued thereunder, or of any other valid debt incurred or lawful contract made before the passage of the repealing

act. Cases *supra* and *Sinking Fund Cases*, 99 U. S. 700, 721; *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 558, 566; *Commonwealth* v. *Essex Co.*, 13 Gray, 239, 252; *Detroit* v. *Howell Plank Road Co.*, 43 Michigan, 141, 147.

An act repealing or amending the charter or powers of a corporation in order to abolish valid preëxisting debts or to abrogate lawful prior contracts, is unconstitutional, because as to the holders of those debts or contracts it is a denial of due process of law and a deprival of the equal protection of the laws. *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684; *Commonwealth* v. *Essex Company*, 13 Gray, 239; *Fletcher* v. *Peck*, 6 Cranch, 87.

To take private property for public use without making just compensation therefor is a denial of due process of law. *United States* v. *Lynah*, 188 U. S. 446, 470; *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *People ex rel. Harvey* v. *Loew*, 102 N. Y. 471, 476.

The cases holding that the property and charter of a corporation may be taken for public use, upon payment of "due compensation therefor" are not in point.

Even if the Hydraulic Company had elected to present a claim against the city under and pursuant to the repealing acts, by the very terms of those acts such action would have estopped it from setting up that the prohibition of any compensation for its franchise was unconstitutional. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Grand Rapids Ry. Co.* v. *Osborn*, 193 U. S. 17, 29; *New York* v. *Manhattan Ry. Co.*, 143 N. Y. 2, 26, 29; *Matter of Cooper*, 93 N. Y. 507, 511; *Embury* v. *Conner*, 3 N. Y. 511, 516; 1 Lewis, Eminent Domain, 3d ed., § 311.

While there is a reasonable presumption of validity of the repealing acts, the court will not make violent presumptions in favor of such validity. The killing of a corporation by the legislature is not a trivial action. *People* v. *North River Sugar Co.*, 121 N. Y. 582. If the

statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed. *Greenwood* v. *Freight Co.*, 105 U. S. 13, 22; *Sweet* v. *Rechel*, 159 U. S. 380, 392; *Willcox* v. *Gas Co.*, 212 U. S. 22; *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *Sinking Fund Cases*, 99 U. S. 700, 718.

While there is a strong presumption that the journals of a legislative body are correct, Federal courts, under proper pleadings, have the power when contract rights are involved, to go behind the face of legislative acts and, also, of the journals, when a State claims it has annulled a private charter. *New Jersey* v. *Yard*, 95 U. S. 104, 113; *State* v. *Cincinnati Gas Light Co.*, 18 Ohio St. 262; *Cronise* v. *Cronise*, 54 Pa. St. 255.

Incorrect and defective legislative journals if made conclusive might have the indirect effect of nullifying a Federal power granted to the Supreme Court of the United States, and be constitutional inhibitions and restrictions against a State impairing the obligations of contracts or depriving one of property without due process of law. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Fairbank* v. *United States*, 181 U. S. 283, 294; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 698; *Smith* v. *St. Louis Ry. Co.*, 181 U. S. 248, 257.

The franchise right of the mortgagor to maintain, operate and extend its system as a going concern was valuable property; it could be separated from the company's franchise to live; it could be mortgaged to secure bondholders, and while the legislature might take away the charter life of the company, it could not do away with that part of the trust mortgage covering the franchise to run the system. *Railroad Commissioners* v. *G. R. & I. Ry. Co.*, 130 Michigan, 248, 253; *Vicksburg* v. *Water Works Co.*, 202 U. S. 453, 464; *New Orleans Ry. Co.* v. *Delamore*, 114 U. S. 501; *People* v. *O'Brien*, 111 N. Y. 2.

Mr. Ganson Taggart and *Mr. Moses Taggart*, with whom *Mr. Franz Kuhn*, Attorney General of the State of Michigan, was on the brief, for defendants in error:

The legislative journals are conclusive and are the only legitimate evidence of action taken. Sutherland, Stat. Const., §§ 30, 47, 50, 85; *Ches. & Pot. Tel. Co.* v. *Manning*, 186 U. S. 245; *Brewer* v. *Blougher*, 14 Pet. 178; *Burrows* v. *Delta Trans. Co.*, 106 Michigan, 603; Cooley on Const. Lim., 7th ed., §§ 240, 257; *Am. Coal Co.* v. *Consolidated Coal Co.*, 46 Maryland, 15; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Flint &c. Co.* v. *Woodhull*, 25 Michigan, 99; *State* v. *Gerhardt*, 145 Indiana, 434.

The legislative journals are the only evidence of the enactment of statutes and cannot be aided or contradicted by parol evidence. *Speer* v. *Mayor of Athens*, 85 Georgia, 49; *S. C.*, 9 L. R. A. 402; *Richie* v. *Richards*, 14 Utah, 371; *People* v. *Dettenthaler*, 118 Michigan, 599; *Attorney General* v. *Supervisors*, 89 Michigan, 552; *People ex rel. Hart* v. *McElroy*, 72 Michigan, 446; *S. C.*, 23 L. R. A. 340; Cooley on Const. Lim., 7th ed., 193; *Attorney General* v. *Rice*, 64 Michigan, 385.

A company cannot avoid the reserved right of repeal under its franchise, by mortgage or otherwise, so as to destroy that reservation, any more than a landowner can add to the title of which he may be seized by a conveyance of a larger interest than that actually owned, or by the transfer of the same to another party. Cooley on Const. Lim., 7th ed., 285, 391, 298; *Attorney General* v. *Looker*, 111 Michigan, 498; *Detroit* v. *Plank Road Co.*, 43 Michigan, 140; *Portland R. R. Co.* v. *Deering*, 78 Michigan, 61; *Commr. of Railroads* v. *G. R. & I. Ry. Co.*, 130 Michigan, 248; *Highland Park* v. *Plank Road Co.*, 95 Michigan, 489; *Smith* v. *Lake Shore Ry. Co.*, 114 Michigan, 460, 472; *Bissell* v. *Heath*, 98 Michigan, 472; *Grand Rapids* v. *Hydraulic Co.*, 66 Michigan, 606, 610; *Commonwealth* v.

Essex Co., 13 Gray, 239; *Gardner* v. *Hope Insurance Co.*, 9 R. I. 194; *Parker* v. *Railroad Co.*, 109 Massachusetts, 506; *Commissioners* v. *Holyoke*, 104 Massachusetts, 446; *State* v. *Maine Central R. R. Co.*, 66 Maine, 488; *Sprigg* v. *Western Union Tel. Co.*, 46 Maryland, 67; *Union Improv. Co.* v. *Commonwealth*, 69 Pa. St. 140; *State* v. *Commissioners*, 37 N. J. L. 228; *Illinois Cent. R. R. Co.* v. *People*, 95 Illinois, 313; *Rodemacher* v. *Mil. & St. Paul Ry. Co.*, 41 Iowa, 297; *Yeaton* v. *Bank of Old Dominion*, 21 Gratt. 593; *Ashuelot* v. *Elliott*, 58 N. E. Rep. 451; *S. C.*, 45 L. R. A. 647; Thompson on Corporations, § 89; *Henley* v. *State*, 98 Tennessee, 665; *Market St. Ry. Co.* v. *Hellman*, 109 California, 571; *State* v. *North. Cent. Ry. Co.*, 44 Maryland, 131, 165; *People* v. *O'Brien*, 111 N. Y. 152; *Wisconsin R. R. Co.* v. *Supervisors*, 35 Wisconsin, 257; *Gorman* v. *Pac. R. R. Co.*, 26 Missouri, 441.

The Federal courts recognize the same rule and the same right on the part of state legislatures to repeal charters of companies, where the right is reserved in the original franchise granted. *Tomlinson* v. *Jessup*, 15 Wall. 454; *Railroad Co.* v. *Maine*, 96 U. S. 499, 511; *Miller* v. *State*, 15 Wall. 478; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Sinking Fund Cases*, 99 U. S. 700; *Munn* v. *Illinois*, 94 U. S. 113; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258, 270; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Wisconsin Ry. Co.* v. *Powers*, 191 U. S. 379; *Lake Shore R. R. Co.* v. *Smith*, 173 U. S. 684; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Merriwether* v. *Gerritt*, 102 U. S. 472; *G. R. & I. Ry. Co.* v. *Osborn*, 193 U. S. 17.

Mr. Justice Holmes delivered the opinion of the court.

The judgment upon which this writ of error is based ousts the defendants (plaintiffs in error) from acting as a body corporate under the name of the Grand Rapids

Hydraulic Company. It was rendered, upon an information in the nature of *quo warranto*, by a County Court, and was affirmed by the Supreme Court of the State. 153 Michigan, 724. The case was heard on demurrer. The defendants pleaded that in 1849 the legislature incorporated the Grand Rapids Hydraulic Company, and that they were directors of the company; that the company had constructed and was maintaining an elaborate system of water supply; that in 1905 the legislature purported to repeal this charter, but that, owing to the manner in which the repeal was passed, as well as to the contents of the act purporting to effect it, the repeal was void under Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States. Seemingly in aid of this contention, the defendants alleged the issue of bonds and a mortgage of the company's plant, including its franchise to own and operate the same, that still are outstanding. To this plea the State demurred.

As to the manner in which the repeal was obtained and passed, the plea alleged that the city of Grand Rapids was a rival of the company in furnishing water, and that the mayor and city authorities carried out an unfair scheme for getting the repeal hurried through the legislature without notice to the company. It set out the particulars with much detail. The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations. But we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form. *United States* v. *Des Moines Navigation & Railway Co.*, 142 U. S. 510, 544. The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

The charter provides that "The legislature may at any

time hereafter amend or repeal this act." Act No. 223, Laws of 1849, § 11. Now, in the first place, with regard to the reference in argument to the bondholders, it is enough to say that they are not before the court. The defendants do not represent them; the defendants represent the debtors, not the creditors. By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject not paramount to the proviso for repeal, as is shown by a long line of cases. *Greenwood* v. *Freight Co.*, 105 U. S. 13. *Bridge Co.* v. *United States*, 105 U. S. 470. *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 313, 338, 340. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 353, 354. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, 438. *Manigault* v. *Springs*, 199 U. S. 473, 480. It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal.

But the legislature did not content itself with a bare repeal and leave the consequences to the law. Act No. 492 of the Local Acts of 1905, after repealing the charter, provides that the company, at any time before January, 1906, may present a claim to the city of Grand Rapids for the value of its real and tangible estate, 'not including franchise,' and transfer the property to the city. If the parties do not agree an action of assumpsit may be brought, with the usual incidents, and the amount of the final judgment is made a claim against the city, to be paid like other claims. If the company does not elect this course, it may remove the property, first giving bond, to be approved by the common council, to protect the city from any damages caused thereby, and is to leave the streets in as good condition as before. It is argued that these provisions are void, and the argument may perhaps be abridged

as follows: Corporations with existence limited in time may take a fee simple or a franchise of longer duration than themselves. *Minneapolis* v. *Minneapolis Street Ry. Co.*, 215 U. S. 417, 430. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 394, 395. There is a distinction between the franchise to be a corporation and that to operate its plant. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453, 464. As the corporation had been authorized to lay its pipes, and lawfully had mortgaged not only its pipes but its franchise to own and operate them, it must be taken to have given a security not limited or terminable by anything short of payment. The attempt to extinguish the corporation, if successful, would render the security and continuing franchise unavailable and is void. It is argued further that the exclusion of 'franchise' (assumed to embrace the supposed franchise to operate the works) from the valuation is unconstitutional.

We express no opinion as to whether the premises of the foregoing argument are justified by anything appearing in the present record. In any event the conclusion cannot be maintained. If the city gave the privilege of using the streets to the corporation forever it could not enlarge the right of the corporation to continue in existence as against the sovereign power, as sufficiently appears from the cases already cited. See also *Arkansas Southern Ry. Co.* v. *Louisiana & Arkansas Ry. Co.*, *ante*, p. 431. The only question before us now is the validity of the judgment ousting the defendants from "assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company." This really is too plain to require the argument that we have spent upon it. We may add that it is a matter upon which the bondholders have nothing to say. Moreover the question of parties is not open here. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 353, 354. *Commonwealth* v. *Tenth Massachusetts Turnpike Cor-*

poration, 5 Cush. 509, 511. Also, whether the provisions as to valuation do the bondholders or members of the corporation wrong is not before the court.

Judgment affirmed.

UNITED STATES *v.* KISSEL AND HARNED.

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

No. 390. Argued November 10, 11, 1910.—Decided December 12, 1910.

Under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, when the indictment is quashed this court is confined to a consideration of the grounds of decision mentioned in such statute, *United States* v. *Keitel*, 211 U. S. 370, and there is a similar limit when the case comes up from a judgment sustaining a special plea in bar.

Although mere continuance of result of a crime does not continue the crime itself, if such continuance of result depends upon continuous coöperation of the conspirators, the conspiracy continues until the time of its abandonment or success.

A conspiracy in restraint of trade is more than a contract in restraint of trade; the latter is instantaneous, but the former is a partnership in criminal purposes and as such may have continuance in time; and so held in regard to a conspiracy made criminal by the Anti-trust Act of July 2, 1890.

Whether the indictment in this case charges a continuing conspiracy with technical sufficiency is not before the court on the appeal taken under the Criminal Appeals Act of March 2, 1907, from a judgment sustaining special pleas of limitation in bar.

Allegations in the indictment consistent with other facts alleged that a conspiracy continued until the date of filing must be denied under the general issue and cannot be met by special plea in bar.

This court, having on an appeal under the Criminal Appeals Act of March 2, 1907, held that allegations as to continuance of a conspiracy cannot be met by special plea in bar, all defenses, including that of limitations by the ending of the conspiracy more than three

years before the finding of the indictment, will be open under the general issue and unaffected by this decision.

173 Fed. Rep. 823, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Fowler for the United States. A brief which had been prepared by the late *Mr. Solicitor General Bowers* was filed for the United States.

Mr. Leavitt J. Hunt and *Mr. Geo. W. Betts, Jr.*, filed a brief for defendant in error, Harned. *Mr. Joseph H. Choate* and *Mr. William D. Guthrie*, with whom *Mr. Howard S. Gans* and *Mr. William C. Osborn* were on the brief, for the defendant, Kissel, in error:

Conspiracy is a non-continuous crime, and an indictment which charges its commission on a date barred by the statute of limitations charges an outlawed offense and is not saved by an allegation of continuance within the limitation. *United States* v. *Irvine*, 98 U. S. 450.

Where an indictment charges a crime which is not essentially continuous with a *continuando*, the *continuando* may be disregarded and the indictment treated as charging no more than the commission of the offense on the first day. Wharton's Crim. Pl. & Pr., 9th ed., § 125; 1 Bishop's New Crim. Proc., § 388; Starkey's Crim. Pl., 1st Am. ed., 60, 61; *King* v. *Dixon*, 10 Mod. 335, 337; *United States* v. *La Coste*, 2 Mason, 129; *People* v. *Adams*, 17 Wend. 475, 476; *Wells* v. *Commonwealth*, 12 Gray, 326; *State* v. *Nichols*, 58 N. H. 41; *Cook* v. *State*, 11 Georgia, 53, 56; *State* v. *Briggs*, 68 Iowa, 416; *State* v. *Thompson*, 31 Utah, 228; *State* v. *Jasper*, 15 N. Car. 323.

At common law and under the Sherman Act, the offense of conspiracy is complete; the crime is actually committed when the design or intent is followed by the

act of agreeing or confederating; it is the bare act of agreeing alone that constitutes the crime. Archibold's Crim. Pl., 22d ed., 1209; 2 Bishop's New Crim. Law, §§ 171; *United States* v. *Hirsch*, 100 U. S. 33; *United States* v. *Britton*, 108 U. S. 199, 204; and see *Pettibone* v. *United States*, 148 U. S. 197, 202; *Dealy* v. *United States*, 152 U. S. 539, 547; *Bannon* v. *United States*, 156 U. S. 464, 468; *Williams* v. *United States*, 207 U. S. 425, 447; *United States* v. *Donau*, 11 Blatchf. 168; *State* v. *Buchanan*, 5 H. & J. (Md.) 317, 355; *People* v. *Mather*, 4 Wend. 229, 264; *O'Connell* v. *The Queen*, 11 C. & F. 155, 233; *Mulcahy* v. *Reg.*, L. R. 3 H. L. Cas. 306, 317; *Commonwealth* v. *Judd*, 2 Massachusetts, 329, 337; *People* v. *Flack*, 125 N. Y. 324, 332.

But many crimes, which are non-continuous, are by their nature subject to renewal, and in such case, each renewal of the act constituting the gravamen of the offense constitutes a new crime. It is the nature of the act constituting the offense that determines its continuous or non-continuous nature. *State* v. *Poyner*, 134 N. Car. 609; Wharton's Crim. Law, 10th ed., § 27; *State* v. *Prescott*, 33 N. H. 212, 214; *State* v. *Thompson*, 31 Utah, 228, 231; *State* v. *Briggs*, 68 Iowa, 416, 419; *Matter of Neilsen*, 131 U. S. 176; *In re Snow*, 120 U. S. 274; *Gise* v. *Commonwealth*, 31 P. F. Smith (Pa.), 428; *Cook* v. *State*, 11 Georgia, 53, 56; *People* v. *Flatherty*, 162 N. Y. 532, 538.

The results which flow from conspiracy, *i. e.*, the acts done in pursuance of it, form no part of the offense; but a compact which does not contain within itself all the elements of wrong will not be rendered indictable by the criminality of acts done in furtherance of it. *United States* v. *Britton*, 108 U. S. 199; *McKenna* v. *United States*, 127 Fed. Rep. 88; *Salla* v. *United States*, 104 Fed. Rep. 544; *Conrad* v. *United States*, 127 Fed. Rep. 798.

Acts done in pursuance of a conspiracy, and in furtherance of it, are so far from being a part of the offense that

if criminal they constitute separate crimes, and a conviction or acquittal on either the conspiracy or the separate crime is no bar to a prosecution for the other offense. *Berkowitz* v. *United States*, 93 Fed. Rep. 452, 457; *Davis* v. *People*, 22 Colorado, 1, 3; *State* v. *Sias*, 17 N. H. 558; *Bailey* v. *State*, 42 Tex. Crim. Rep. 289, 291; *Whitford* v. *State*, 24 Tex. Ct. of App. Rep. 489, 493; *Wallace* v. *State*, 41 Florida, 547, 557; *Wilcox* v. *United States*, 103 S. W. Rep. 774, 776; *Matter of Neilsen*, 131 U. S. 176, 186.

A conspiracy is a renewable offense, and it is renewed whenever two or more persons animated by a corrupt intent consciously participate in any act in furtherance of that intent. While those who enter upon a conspiracy may secure immunity for their criminal acts after a lapse of three years if they do nothing further within the three years, those who persist in their original purpose and seek by coöperative action to carry it into effect incur a liability each time they commit the offense of conspiring. The Government's theory that conspiracy is a continuous crime, would have every incentive to cause the conspirator who had once embarked to continue in his criminal course and not to desist or abstain therefrom. *Matter of Neilsen*, 131 U. S. 176; *In re Snow*, 120 U. S. 274.

That the offense is renewable and not continuing, see *Ware* v. *United States*, 154 Fed. Rep. 577; *S. C.*, 207 U. S. 588; *United States* v. *Jones*, 162 Fed. Rep. 417; *Jones* v. *United States*, 179 Fed. Rep. 584, 610; *United States* v. *Biggs*, 157 Fed. Rep. 264; *United States* v. *Bradford*, 148 Fed. Rep. 413; *S. C.*, 152 Fed. Rep. 616; *United States* v. *Greene*, 115 Fed. Rep. 343, 349, 350; *S. C.*, 154 Fed. Rep. 401; *Lorenz* v. *United States*, 24 App. D. C. 337, 387; *S. C.*, 196 U. S. 640; *Arnold* v. *Weil*, 157 Fed. Rep. 429, 430; *Ex parte Black*, 147 Fed. Rep. 832, 838; *S. C.*, 160 Fed. Rep. 431; *United States* v. *Greene*, 100 Fed. Rep. 941, 946; *United States* v. *Barber*, 157 Fed. Rep. 889, 890; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S.

290, and *United States* v. *McAndrews & Forbes Co.*, 149 Fed. Rep. 823, are not incompatible with this view. *Northern Securities Co.* v. *United States*, 193 U. S. 197, and *Loewe* v. *Lawlor*, 208 U. S. 274, do not sustain the proposition that parties can render themselves liable to be punished criminally under the Sherman Act without doing any act whatever. And see *People* v. *Mather*, 4 Wend. 229; *Ochs* v. *The People*, 25 Ill. App. 379; aff'd 124 Illinois, 399; *Noyes* v. *State*, 41 N. J. L. 418; *Commonwealth* v. *Bartilson*, 85 Pa. St. 482, 486.

In the light of these authorities, it is submitted that the sound doctrine is that the crime of conspiracy is not an essentially continuous offense, but that it is subject to renewal and that the renewal may be evidenced by the conscious participation of any of the conspirators in acts done for the purpose of effecting the object of the original conspiracy.

Mr. Joseph H. Choate, Mr. DeLancy Nicoll, Mr. John M. Bowers and *Mr. John D. Lindsay* submitted a brief by leave of the court on behalf of certain parties joined with defendants in error in this prosecution.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error brought by the United States to reverse a judgment of the Circuit Court sustaining pleas in bar pleaded to an indictment by the defendants in error. 173 Fed. Rep. 823. The first count of the indictment alleges that the defendants in error and others named, on December 30, 1903, and from that day until the day of presenting the indictment (July 1, 1909), have engaged in an unlawful conspiracy in restraint of trade in refined sugar among the several States of the Union, that is to say, to eliminate free competition and prevent all competition with the American Sugar Refining Company,

one of the defendants, by a would-be competitor, the Pennsylvania Sugar Refining Company. It then sets forth, at length, the means by which the alleged purpose was to be accomplished, and what are put forward as overt acts done in pursuance of the plan. In other counts, referring to the first, the defendants are alleged to have conspired to monopolize the trade in refined sugar among the States. They are similar counts as to the trade in raw sugar and molasses, and as to trade with foreign nations. The offenses aimed at, of course, are the conspiracies punished by the act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Act.

There are other counts in the indictment, but the argument was devoted mainly to these. The defendants severally pleaded to all of them the limitation of three years fixed by Rev. Stat., § 1044, alleging that for more than three years before the finding of the indictment on July 1, 1909, they did not engage in, or do any act in aid of, such conspiracies. The defendant Kissel added averments that all the overt acts alleged to have been done within three years before July 1, 1906, were done without his participation, consent or knowledge. He also pleaded that since October 6, 1906, the Pennsylvania Sugar Refining Company had been in the hands of a duly appointed receiver.

We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the

indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged. The indictment charges a conspiracy beginning in 1903, but continuing down to the date of filing. It pretty nearly was conceded that if a conspiracy of this kind can be continuous, then the pleas in bar are bad. Therefore we first will consider whether a conspiracy can have continuance in time.

The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States* v. *Irvine*, 98 U. S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates

that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

The means contemplated for the exclusion of the Pennsylvania Sugar Refining Company were the making of a large loan by the American Sugar Refining Company through Kissel to one Segal and the receiving from him of more than half the stock of the Pennsylvania Company with a power of attorney to vote upon it, Segal not knowing that the American Company was behind Kissel. The loan was to be for a year, but the American Company was to use the power of voting to prevent the Pennsylvania Company from going on with its business, and, as Segal was dependent largely upon the returns from that company for means of repaying the loan, he was to be prevented from repaying it and the control of the Pennsylvania Company retained until it should be ruined and finally driven from business. It is alleged that the loan was made and that a vote was passed that the Pennsylvania Company refrain from business until further order of the board of directors. Now of course it well may be that the object was so far accomplished by this vote that

the conspiracy was at an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result. The allegation that the conspiracy continued down to the date of the indictment is not contradicted by the vote. Furthermore, as we have said, the only question here is whether the plea of the statute of limitations is good.

Taking it that the conspiracies made criminal by the act of July 2, 1890, may have continuance, we are of opinion that the pleas are bad. To be sure, it still might be argued that the general rule that time need not be proved as laid applies to continuing offenses, that therefore the allegation in the indictment, so far as it specifies the time in which the conspiracy was maintained, is immaterial, and that a plea traversing only that is, in substance, a plea in confession and avoidance and good. Whether in a charge of a continuing offense even such specific earmarks of time as those in this indictment make it enter into the essence of the offense we shall not discuss. Time is held to be of the essence in Massachusetts and some other States; *Commonwealth* v. *Pray*, 13 Pick. 359, 364; *Commonwealth* v. *Briggs*, 11 Met. 573; *State* v. *Small*, 80 Maine, 452; *Fleming* v. *State*, 28 Tex. App. 234; while this has been thought to be a local peculiarity, and the contrary has been decided elsewhere. *State* v. *Reno*, 41 Kansas, 674, 682, 683. *State* v. *Arnold*, 98 Iowa, 253. Bishop, New Criminal Procedure, §§ 397, 402. However this may be, if the plea of the statute of limitations is good where it confesses and avoids all that the indictment avers, still, as was pointed out in an able brief by the late lamented Solicitor General, it is open to too many objections and difficulties to be encouraged or allowed except in clear cases. Apart from technical rules the averments of time in the indictment are expected and intended to be proved as laid. The overt acts relied upon coming down

to within three years of the indictment are alleged to have been done in pursuance of the conspiracy, and the pleas must be taken to deny that allegation, unless they rely upon the supposed impossibility of the acts having the character alleged. It is only by an artificial rule, if at all, that the plea can be treated as not traversing the indictment, and we are not prepared to give that supposed rule such an effect.

The discussion at the bar took a wider range than is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be. We deal only with a naked and highly technical question, when once the possibility of continuation is established, and as to that we cannot bring ourselves to doubt.

To sum up and repeat. The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise more than three years before July 1, 1906, will be open and unaffected by what we now decide.

Judgment reversed.

THOMPSON *v.* THOMPSON.

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

No. 17. Argued October 27, 1910.—Decided December 12, 1910.

At common law husband and wife were regarded as one, the legal existence of the latter during coverture being merged in that of the former.

Statutes passed in pursuance of a more liberal and general policy of emancipation of the wife from the husband's control differ in terms and each must be construed with a view to effectuate the legislative intent leading to its enactment.

In construing a statute the courts must have in mind the old law and the change intended to be effected by the passage of the new.

While by § 1155 and other sections of the Code of the District of Columbia the common law was changed by conferring additional rights on married women and the right to sue separately for redress of wrongs concerning the same, it was not the intention of Congress to revolutionize the law governing the relation of husband and wife between themselves.

Under the existing statutes, a wife cannot maintain an action in the District of Columbia against the husband to recover damages for an assault and battery by him upon her person.

While the wife may resort to the Chancery Court to protect her separate property rights, *quære*, and not decided, whether she alone may bring an action against the husband to protect such rights.

31 App. D. C. 557, affirmed.

THE facts, which involve the right of a wife to maintain an action in the District of Columbia against her husband to recover damages for an assault and battery, are stated in the opinion.

Mr. Wm. M. Lewin for plaintiff in error:

Prior to the enactment of the Code it was a tort for a man to assault his wife. The provisions of the Code remove a common-law obstacle to the remedy. *Stewart* v. *Railroad Co.*, 168 U. S. 445.

These provisions will be liberally construed, for it is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; if there be a civil right there must be a legal remedy. *Railway Co.* v. *Humes*, 115 U. S. 512, 521; *Bank* v. *Owens*, 2 Pet. 527, 539. And protection against tort is as necessary as the enforcement of contract. *Wills* v. *Jones*, 13 App. D. C. 482, 497.

As redress cannot be obtained in equity, because of the essential character of the case, the rule is settled that the remedy must be by a suit at law. *Van Norden* v. *Morton*, 99 U. S. 378, 380. The reasoning of the New York case upon which the Court of Appeals relies has long since been repudiated. *Freethy* v. *Freethy*, 42 Barb. (N. Y.) 641; see *Bronson* v. *Bradey*, 28 App. D. C. 250, 262; *Stickney* v. *Stickney*, 131 U. S. 227, 237.

A statute will not be so construed that remote inferences withdraw a case from its general provisions which is clearly within its words and perfectly consistent with its intent. *Railroad Co.* v. *Church*, 19 Wall. 62, 65; *Bryan* v. *Kennett*, 113 U. S. 179, 196; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115, 116.

As to the wife's general right to convey, see *Luhrs* v. *Hancock*, 181 U. S. 567, 571. Construction broadens with legislation and as to broadening rights of a married woman, see 16 Stat. 45; Rev. Stat. Dist. of Col., §§ 727, 729; *Seitz* v. *Mitchell*, 94 U. S. 580, 584.

By the Code not only are her earnings her own property absolutely, §§ 1151, 1154, but she is permitted to hold them as fully as if she were unmarried, and, § 1155, to sue for their recovery, security, or protection, but, § 1155, she is also empowered to sue for torts committed against her as fully and freely as if she were unmarried.

A change in phraseology creates a presumption of a change in intent, and no word of the change should be held insignificant. *Crawford* v. *Burke*, 195 U. S. 176, 190; *Market Co.* v. *Hoffman*, 101 U. S. 115, 116.

Even under the act of 1869 a wife could contract with her husband. *Sykes* v. *Chadwick*, 18 Wall. 141, 143, 148.

And now she may sue him, even in tort, for that construction will be followed which commends itself to the judgment of the court. *May* v. *May*, 9 Nebraska, 16, 25; *Rice* v. *Sally*, 176 Missouri, 107, 130, 131; *Covlam* v. *Doull*, 133 U. S. 216, 233.

The right to her earnings necessarily implies the right to maintain her capacity to earn. The right to sue anyone, the husband not excepted, for impairment of that capacity is incidental thereto. *Traer* v. *Clews*, 115 U. S. 528, 540; *Seybert* v. *Pittsburg*, 1 Wall. 272.

This would follow from the construction of § 1151 in *pari materia* with § 1155. *Tel. Co.* v. *Lipscomb*, 22 App. D. C. 104, 113, 114; *Asphalt Co.* v. *Mackey*, 15 App. D. C. 410, 417; *Stickney* v. *Stickney*, 131 U. S. 227, 237.

Her capacity to earn is her own, and for its impairment she may recover. Evidence of such impairment is admissible under the declaration in this case. She is therefore entitled to a trial upon the merits. *Railway Co.* v. *Humble*, 181 U. S. 57, 63; *Hamilton* v. *Railroad Co.*, 17 Montana, 334, 352; *Railway Co.* v. *Harris*, 122 U. S. 597, 608; *Harmon* v. *Railroad Co.*, 165 Massachusetts, 100, 104; *Pomerene* v. *White*, 70 Nebraska, 171, 176; *Railroad Co.* v. *Kremple*, 103 Ill. App. 1; *Brooks* v. *Schwerin*, 54 N. Y. 343, 349; *Wade* v. *Leroy*, 20 How. 34, 44; *Railroad Co.* v. *Dick*, 78 S. W. Rep. (Ky.) 914; *Samuels* v. *Railway Co.*, 124 California, 294; *Railroad Co.* v. *Hecht*, 115 Indiana, 443, 446.

The Court of Appeals bases its conclusion upon the proposition that the parties are one in law. The court had previously said that that was the feudal notion and not the Christian notion. *Carroll* v. *Reidy*, 5 App. D. C. 59, 62; and see also *Bronson* v. *Brady*, 28 App. D. C. 250, 263.

Mr. A. E. I. Leckie, *Mr. Creed M. Fulton*, *Mr. Joseph W. Cox* and *Mr. John A. Kratz*, submitted for defendants in error and cited: 21 Cyc. 1517, 1518; § 450, N. Y. Code of Civ. Pro.; § 3, N. Y. Stat. of 1862; *Alward* v. *Alward*, 2 N. Y. Supp. 42; *Smith* v. *Gorman*, 41 Maine, 405, 408; *Small* v. *Small*, 129 Pa. St. 366; *Larison* v. *Larison*, 9 Ill. App. 27, 31; *Jones* v. *Jones*, 19 Iowa, 236; *Greer* v. *Greer*, 24 Kansas, 101; *Manning* v. *Manning*, 79 N. Car. 293; Iowa Code, 1873, §§ 2204, 2211; *Peters* v. *Peters*, 42 Iowa, 182; *Heacock* v. *Heacock*, 108 Iowa, 540; *Decker* v. *Kedley*, 148 Fed. Rep. 681; *Main* v. *Main*, 46 Ill. App. 106; *Libbey* v. *Berry*, 74 Maine, 286; *Abbott* v. *Abbott*, 67 Maine, 304; *Freethy* v. *Freethy*, 42 Barb. (N. Y.) 641; *Abbe* v. *Abbe*, 22 App. Div. 483; *Strom* v. *Strom*, 98 Minnesota, 427.

Mr. Justice Day delivered the opinion of the court.

This case presents a single question, which is involved in the construction of the statutes governing the District of Columbia. That question is, Under those statutes may a wife bring an action to recover damages for an assault and battery upon her person by the husband?

The declaration of the plaintiff is in the ordinary form, and in seven counts charges divers assaults upon her person by her husband, the defendant, for which the wife seeks to recover damages in the sum of $70,000. An issue of law being made by demurrer to the defendant's pleas, the Supreme Court of the District of Columbia held that such action would not lie under the statute. Upon writ of error to the Court of Appeals of the District of Columbia the judgment of the Supreme Court was affirmed. 31 App. D. C. 557.

At the common law the husband and wife were regarded as one. The legal existence of the wife during coverture was merged in that of the husband, and, generally speaking, the wife was incapable of making contracts, of ac-

quiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other. In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the States looking to the relief of a married woman from the disabilities imposed upon her as a femme covert by the common law. Under these laws she has been empowered to control and dispose of her own property free from the constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as though she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property and to protect the security of her person against the wrongs and assaults of others.

It is unnecessary to review these statutes in detail. Their obvious purpose is, in some respects, to treat the wife as a femme sole, and to a large extent to alter the common law theory of the unity of husband and wife. These statutes, passed in pursuance of the general policy of emancipation of the wife from the husband's control, differ in terms and are to be construed with a view to effectuate the legislative purpose which led to their enactment.

It is insisted that the Code of the District of Columbia has gone so far in the direction of modifying the common law relation of husband and wife as to give to her an action against him for torts committed by him upon her person or property. The answer to this contention depends upon a construction of § 1155 of the District of Columbia Code, 31 Stat. 1189, 1374, March 3, 1901. That section provides:

"SEC. 1155. Power of Wife to Trade and Sue and be Sued.—Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also

to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried, and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, acceptor, maker, or indorser."

In construing a statute the courts are to have in mind the old law and the change intended to be effected by the passage of the new. Reading this section, it is apparent that its purposes, among others, were to enable a married woman to engage in business and to make contracts free from the intervention or control of the husband, and to maintain actions separately for the recovery, security and protection of her property. At the common law, with certain exceptions not necessary to notice in this connection, the wife could not maintain an action at law except she be joined by her husband. *Barber* v. *Barber*, 21 How. 582, 589. For injuries suffered by the wife in her person or property, such as would give rise to a cause of action in favor of a femme sole, a suit could be instituted only in the joint name of herself and husband. 1 Cooley on Torts, 3d edition, 472, and cases cited in the note.

By this District of Columbia statute the common law was changed, and, in view of the additional rights conferred upon married women in § 1155 and other sections of the Code, she is given the right to sue *separately* for

redress of wrongs concerning the same. That this was the purpose of the statute, when attention is given to the very question under consideration, is apparent from the consideration of its terms. Married women are authorized to sue separately for "the recovery, security or protection of their property, and for torts committed against her as fully and freely as if she were unmarried." That is, the limitation upon her right of action imposed in the requirement of the common law that the husband should join her was removed by the statute, and she was permitted to recover separately for such torts, as freely as if she were still unmarried. The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband.

This construction we think is obvious from a reading of the statute in the light of the purpose sought to be accomplished. It gives a reasonable effect to the terms used, and accomplishes, as we believe, the legislative intent, which is the primary object of all construction of statutes.

It is suggested that the liberal construction insisted for in behalf of the defendant in error in this case might well be given, in view of the legislative intent to provide remedies for grievous wrongs to the wife; and an instance is suggested in the wrong to a wife rendered unable to follow the avocation of a seamstress by a cruel assault which might destroy the use of hand or arm; and the justice is suggested of giving a remedy to an artist who might be maimed and suffer great pecuniary damages as the result of injuries inflicted by a brutal husband.

Apart from the consideration that the perpetration of such atrocious wrongs affords adequate grounds for relief under the statutes of divorce and alimony, this construction would at the same time open the doors of the courts to accusations of all sorts of one spouse against the other,

and bring into public notice complaints for assault, slander and libel, and alleged injuries to property of the one or the other, by husband against wife or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it. But these and kindred considerations are addressed to the legislative, not the judicial branch of the Government. In cases like the present, interpretation of the law is the only function of the courts.

An examination of this class of legislation will show that it has gone much further in the direction of giving rights to the wife in the management and control of her separate property than it has in giving rights of action directly against the husband. In no act called to our attention has the right of the wife been carried to the extent of opening the courts to complaints of the character of the one here involved.

It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.

We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law not declared in the terms of the legislation under consideration.

Some of the cases of that character are: *Bandfield* v. *Bandfield*, 117 Michigan, 80; *Abbott* v. *Abbott*, 67 Maine, 304; *Schultz* v. *Schultz*, 89 N. Y. 644; *Freethy* v. *Freethy*, 42 Barbour, 641; *Peters* v. *Peters*, 42 Iowa, 182.

Nor is the wife left without remedy for such wrongs. She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed. She may sue for divorce or separation and for alimony. The court in protecting her rights and awarding relief in such cases may consider, and, so far as possible, redress her wrongs and protect her rights.

She may resort to the chancery court for the protection of her separate property rights. 21 How. 582, 590. Whether the wife alone may now bring actions against the husband to protect her separate property, such as are cognizable in a suit in equity when brought through the medium of a next friend (21 How., *supra*), is a question not made or decided in this case.

We do not believe it was the intention of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves. We think the construction we have given the statute is in harmony with its language and is the only one consistent with its purpose.

The judgment of the Court of Appeals of the District of Columbia will be

Affirmed.

MR. JUSTICE HARLAN, with whom concur MR. JUSTICE HOLMES and MR. JUSTICE HUGHES, dissenting.

This is an action by a wife against her husband to recover damages for assault and battery. The declaration

contains seven counts. The first, second and third charge assault by the husband upon the wife on three several days. The remaining counts charge assaults by him upon her on different days named—she being at the time pregnant, as the husband then well knew.

The defendant filed two pleas—the first that he was not guilty, the second that, at the time of the causes of action mentioned, the plaintiff and defendant were husband and wife and living together as such.

The plaintiff demurred to the second plea, and the demurrer was overruled. She stood by the demurrer, and the action was dismissed.

The action is based upon §§ 1151 and 1155 of the Code of the District, which are as follows:

"SEC. 1151. All the property, real, personal, and mixed, belonging to a woman at the time of her marriage, and all such property which she may acquire or receive after her marriage from any person whomsoever, by purchase, gift, grant, devise, bequest, descent, in the course of distribution, by her own skill, labor, or personal exertions, or as proceeds of a judgment at law or decree in equity, or in any other manner, shall be *her own property as absolutely as if she were unmarried,* and shall be protected from the debts of the husband and shall not in any way be liable for the payment thereof: *Provided,* That no acquisition of property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors.

"SEC. 1155. Married women shall have power to engage in *any* business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and *also* to sue separately for the recovery, security or protection of their property, *and* for torts committed against them, *as fully and freely as if they were unmarried;* contracts may also be made with them, and they may

also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried, and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction: *Provided*, That no married woman shall have power to make any contract as surety or as guarantor, or as accommodation drawer, acceptor, maker or indorser."

The court below held that these provisions did not authorize an action for *tort* committed by the husband against the wife.

In my opinion these statutory provisions, properly construed, embrace such a case as the present one. If the words used by Congress lead to such a result, and if, as suggested, that result be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly-expressed will of the legislative department. With the mere policy, expediency or justice of legislation the courts, in our system of government, have no rightful concern. Their duty is only to declare what the law is, not what, in their judgment, it ought to be—leaving the responsibility for legislation where it exclusively belongs, that is, with the legislative department, so long as it keeps within constitutional limits. Now, there is not here, as I think, any room whatever for mere construction—so explicit are the words of Congress. Let us follow the clauses of the statute in their order. The statute enables the married woman to take, as her own, property of any kind, no matter how acquired by her, as well as the avails of

her skill, labor or personal exertions, "as absolutely *as if she were unmarried.*" It then confers upon married women the power to engage in any business, no matter what, and to enter into contracts, whether engaged in business or not, and to sue separately upon those contracts. If the statute stopped here, there would be ground for holding that it did not authorize this suit. But the statute goes much farther. It proceeds to authorize married women "also" to sue separately for the recovery, security or protection of their property; still more, they may sue, separately, "for *torts* committed against *them*, as fully and freely *as if they were unmarried.*" No discrimination is made, in either case, between the persons charged with committing the tort. No exception is made in reference to the husband, if he happens to be the party charged with transgressing the rights conferred upon the wife by the statute. In other words, Congress, by these statutory provisions, destroys the unity of the marriage association as it had previously existed. It makes a radical change in the relations of man and wife as those relations were at common law in this District. In respect of business and property the married woman is given absolute control; in respect of the recovery, security and protection of her property, she may sue, separately, in *tort*, as if she was unmarried; and in respect of herself, that is, of her person, she may sue, separately, as fully and freely, as if she were unmarried, "for *torts* committed *against her.*" So the statute expressly reads. But my brethren think that notwithstanding the destruction by the statute of the unity of the married relation, it could not have been intended to open the doors of the courts to accusations of all sorts by husband and wife against each other; and, therefore, they are moved to add, by construction, to the provision that married women may "sue separately . . . for torts committed against them as fully and freely as if they were unmarried" these words: "Provided, however, that

the wife shall *not* be entitled, in any case, to sue her husband separately for a tort committed *against her person.*" If the husband violently takes possession of his wife's property and withholds it from her she may, *under the statute,* sue him, separately, for its recovery. But such a civil action will be one in tort. If he injures or destroys her property she may, *under the statute,* sue him, separately, for damages. That action would also be one in tort. If these propositions are disputed, what becomes of the words in the statute to the effect that she may "sue separately for the recovery, security and protection" of her property? But if they are conceded—as I think they must be—then Congress, under the construction now placed by the court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention, of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person.

I repeat that with the policy, wisdom or justice of the legislation in question this court can have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot, in any legal sense, make law, but only declare what the law is, as established by competent authority.

My brethren feel constrained to say that the present case illustrates the attempt, often made, to effect radical changes in the common law by mere construction. On the contrary, the judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of

the legislature by a construction of its words that cannot be reconciled with their ordinary meaning.

I dissent from the opinion and judgment of the court, and am authorized to say that MR. JUSTICE HOLMES and MR. JUSTICE HUGHES concur in this dissent.

CITY OF MEMPHIS *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

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

No. 42. Argued November 8, 9, 1910.—Decided December 12, 1910.

The right of the Circuit Court to take jurisdiction of a case as one arising under the Constitution and laws of the United States must distinctly appear in the allegations of the bill; but this court may take jurisdiction of direct appeal from the Circuit Court under § 5 of the Court of Appeals Act if it properly appears that a right under the Constitution and laws of the United States was duly claimed during the case. *Loeb* v. *Columbia Township*, 179 U. S. 472.

While the opinion of the Circuit Court may not be examined to ascertain what should, under proper practice, appear in the pleadings or bill of exceptions, it may be looked to, when annexed and forming part of the record, to ascertain whether either party claimed, and was denied, a Federal right.

Municipal legislation passed without authority of the State does not lay the foundation of Federal jurisdiction; and statements in the bill to the effect that the ordinances complained of were unauthorized and illegal will be held to refer to the state, rather than to the Federal, constitution, in the absence of distinct references to the latter.

Quære, whether a bill within the jurisdiction of the Circuit Court can be construed as charging that the action of a municipality was without authority from the State and also that such action denied plaintiff his constitutional rights under the Fourteenth Amendment.

Where diverse citizenship exists and the bill alleges, and the Circuit

Court holds, that the defendant municipality had no authority to pass the ordinance complained of, the case is not one arising under the Constitution and laws of the United States; and, although the judge may have declared in his opinion that the ordinance violated complainant's Federal rights, this court has not jurisdiction on a direct appeal under § 5 of the Court of Appeals Act.

THE facts, which involve the jurisdiction of this court of a direct appeal from the Circuit Court of the United States, are stated in the opinion.

Mr. Charles M. Bryan, with whom *Mr. Marion G. Evans* was on the brief, for appellant.

Mr. William L. Granbery, with whom *Mr. Luke E. Wright* and *Mr. Eldridge E. Wright* were on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

We are met at the threshold of this case with a challenge of the appellate jurisdiction of this court. The case was begun in the Circuit Court of the United States for the Western District of Tennessee by a bill filed by the Cumberland Telephone and Telegraph Company against the city of Memphis, seeking to enjoin the enforcement of the provisions of an ordinance of that city passed September 24, 1907, regulating charges by telephone companies in the city.

The bill averred that the complainant was a corporation organized and existing under the laws of the State of Kentucky, and that the respondent, the city of Memphis, was a municipal corporation created and existing under the laws of Tennessee. The jurisdiction of the Circuit Court, therefore, might rest upon diverse citizenship. Concerning the ordinance regulating the charges of telephone rates, the enforcement of which it was the object of the suit to enjoin, it was averred to be null and

void, for the reason that the city of Memphis was incorporated under a legislative act of the State of Tennessee, with certain powers and authority which nowhere included, either by express terms or necessary implication, a power to fix and regulate telephone charges, and that the attempt to do so was an abuse of power and an attempt to exercise a power which the city wholly lacked.

The bill also charged that the ordinance was null and void because it was unjust, inequitable and unreasonable, because the tariff rates fixed were so low that complainant could not operate its exchange without actual loss of money; that said ordinance was in truth and effect confiscatory; and that it totally destroyed the value of the complainant's plant in the city of Memphis for profitable use as a telephone exchange. The prayer of the bill was for an injunction against the enforcement of the ordinance in question.

A preliminary injunction was granted, the judge holding the Circuit Court at that time delivering an opinion announcing the conclusion that the ordinance in question was passed by the city without legislative authority, the court saying that was all which was necessary to decide at that time, but beyond that he thought the city estopped by a certain contract which was set up in the bill from adopting the ordinance in question, and a preliminary injunction was granted.

The answer took issue upon the allegations of the bill, a considerable amount of testimony was taken as to the reasonableness of the rates fixed in the ordinance, and the judge who heard the case upon the merits reached the conclusion that the rates fixed in the ordinance were confiscatory, and said: "That result seems to us to be destructive of the complainant's rights under the Constitution of the United States."

Adverting to the opinion delivered upon the granting of the temporary injunction, the court rendering the final

decree stated that the former decision was based upon a want of authority in the city to pass the ordinance and the estoppel of the contract set up in the bill, adding: "We are not to be considered as dissenting from either of these views. We have not had time to examine either proposition, or inclination to do so, because we are entirely content to decide the case upon final hearing upon the one ground herein discussed."

As was said by Mr. Justice Moody, speaking for the court in *Macfadden* v. *United States*, 213 U. S. 288, a right to review the judgments of the Circuit Courts of Appeals and of the Circuit and District Courts of the United States rests upon different grounds, and that unless this fact is borne in mind confusion is liable to result. The appellate jurisdiction from the Circuit Court of Appeals to this court, as Mr. Justice Moody pointed out, is determined by the sources of jurisdiction of the trial court, and depends upon the finality of the judgment of the Circuit Court of Appeals, as under § 6 of the Court of Appeals Act in all other cases there is a right of review in this court if the amount in controversy exceeds one thousand dollars. The right to come directly to this court by appeal or writ of error from the District or Circuit Courts of the United States arises under § 5 of the Court of Appeals Act, and so far as the case now under consideration is concerned, depends upon the case being within the class of cases mentioned in that section, namely, "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

The right to take jurisdiction of a case in the Circuit Court of the United States arising under the Constitution or laws of the United States must appear in the allegations of the bill or petition with such distinct averments as to show that it is such. Under § 5 of the Court of Appeals Act the right to come to this court by direct

appeal is given in any case in which it is "claimed" that a constitution or law of a State is in contravention of the Constitution of the United States. It is thus apparent that the claim to give a right of appeal under this section need not necessarily be in the pleading of the party invoking the jurisdiction of the court. It is sufficient if such right is duly claimed in the case. The statute is silent as to how this claim shall be made. The subject was under consideration in *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 485, and the distinctions between the requirements of jurisdiction in an appeal to the Circuit Court of Appeals and an appeal direct to this court were pointed out. In that case it was held that where the defendant brought the constitutional question into the record by demurrer, and the opinion of the Circuit Court showed that it had considered and determined that question, the proper basis for jurisdiction by direct appeal to this court was shown.

In saying that the opinion of the Circuit Court might be looked to when annexed and transmitted as part of the record, to ascertain whether either party claimed that a state statute was in contravention of the Constitution of the United States, this court, in the *Loeb case*, added: "By this however we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions or by an agreed statement of facts or by the pleadings."

In *Lampasas* v. *Bell*, 180 U. S. 276, a suit was brought against the city of Lampasas to recover upon certain bonds, and the jurisdiction rested upon diverse citizenship. The defendant sought to introduce a constitutional question into the record in the contention set up in the answer, that the residents of certain territory incorporated into the city had not been given an opportunity to be heard as to whether they should be included in and

be subject to taxation in the proposed incorporation. It was therefore contended that the bonds were void, and an attempt to levy and collect taxes to pay them was in violation of § 1 of the Fourteenth Amendment of the Constitution of the United States. This court dismissed the writ of error, saying:

"This court has only jurisdiction by appeal or writ of error directly from the Circuit Court in certain cases, one of which is when 'the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.' Sec. 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828. But the claim must be real and substantial. A mere claim in words is not enough. We said by the Chief Justice in *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239: 'When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws.' And it must appear on the record by a statement, in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground. *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571."

In this case a perusal of the bill, answer and testimony in the case makes it apparent that if brought into the record at all, the alleged claim of a violation of the Federal Constitution by a state law must be found in the bill itself. It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the State, and its attempted passage

it is alleged was an abuse of power by the city. There is no reference in the bill to any provision of the Federal Constitution. If any can be said to be violated, it must be the Fourteenth Amendment. It is hardly necessary to say that that Amendment is aimed at state action, in the provision that no State shall deprive any person of life, liberty or property without due process of law. The bill, therefore, so far from charging a violation of the Fourteenth Amendment by an authorized action of the State, distinctly and in terms avers that the ordinance was passed without state authority. That such municipal legislation does not lay the foundation of Federal jurisdiction has been repeatedly held in this court. *Hamilton Gas Light Company* v. *Hamilton*, 146 U. S. 258, in which many of the previous cases in this court are cited. In that case Mr. Justice Harlan, speaking for the court, said of an ordinance passed without legislative authority: "A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

In *Barney* v. *City of New York*, 193 U. S. 430, the bill invoked the jurisdiction of the Circuit Court of the United States upon the ground that the plaintiff was deprived of his property without due process of law; other allegations of the bill showed that the matters complained of were not only not authorized, but were forbidden by the legislation of the State, hence the action did not invoke the protection of the Fourteenth Amendment because of action by the State of New York, and therefore it was held the bill was properly dismissed for want of jurisdiction. In that case some of the previous cases in this court, to the same effect, are reviewed by Mr. Chief Justice Fuller, who delivered the opinion of the court.

A question closely analogous to the one at bar came before the Court of Appeals of the Sixth Circuit, Judge Lurton delivering the opinion of the court. *City of Louisville*

v. *Cumberland Telephone & Telegraph Co.*, 155 Fed. Rep. 725. In that case the jurisdiction of the Circuit Court was invoked on the ground that the ordinance of the city of Louisville regulating rates was in violation of a contract between the complainant and the city; also on the ground that the rates were unreasonable, unjust and confiscatory, depriving the complainant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution. In that case the bill was dismissed upon the ground that the allegations of the complaint showed that the case was not one arising under the Constitution and laws of the United States. This was held to be so because of other statements of the bill, which it was held negatived state action, which alone could lay the foundation of jurisdiction, in that it averred that no power to regulate the rates charged by the complainant had been granted by the State of Kentucky to the municipality which had undertaken to pass the regulating ordinance, and that the attempt to pass such ordinance was an unwarranted and unfounded assumption of power upon the part of the city.

The claim that the jurisdiction should be sustained because the common council of the city of Louisville had assumed to act under authority of the legislature of the Commonwealth of Kentucky, which was averred in the bill, was answered by the court saying that the existence of such regulating power was distinctly negatived by the allegation of the bill that the city had acted in the premises wholly without authority.

So, in the present case, the statements of the bill are clear and distinct that the passage of the ordinance was without power, and a usurpation on the part of the city; and the allegations of the bill as to the confiscatory character of the ordinance can, consistently with the other averments of the bill, be referred only to the state constitution, which, as well as the Federal Constitution, in-

hibits attempts to take property without due process of law. *Harbinson* v. *Knoxville Iron Co.*, 103 Tennessee, 421.

It is suggested that the bill, when properly construed, may have a two-fold aspect, one of which charges that the city acted without authority of law and the other that, conceding the city to act with authority, the rates fixed were confiscatory, in violation of the Federal Constitution. Assuming that a bill might be framed in this manner, it is sufficient to say of the present bill that it is not one of that character. There is nothing in it qualifying the allegation as to the action of the city without authority of the State, and as we have said, the allegations as to the confiscatory character of the ordinance are to be referred, as they can be consistently with the other allegations of the bill, to the state constitution, which would be violated if such allegations were true. This construction harmonizes the bill and does violence to none of its averments.

The case then is this: The first and only reference to the Federal Constitution is in the final opinion of the Circuit Judge who heard the case upon the merits, in the part of the opinion above quoted, to the effect that the rates fixed are in violation of the complainant's rights under the Federal Constitution. This observation was doubtless made by the learned judge as the equivalent of saying that the rates were confiscatory, and therefore unlawful; but, whether so or not, so far as it makes the Fourteenth Amendment a ground of decision, it is inconsistent with the position taken in the bill, and as there is no basis for a claim of denial of rights under that Amendment in the case, it cannot be made the ground of direct appeal to this court under the fifth section of the Court of Appeals Act.

We are of opinion that this case must be dismissed for want of jurisdiction in this court, and

It is so ordered.

MR. JUSTICE WHITE, with whom concur MR. JUSTICE MCKENNA and MR. JUSTICE HUGHES, dissenting.

As I cannot concur in the judgment of dismissal, in view of what seems to me to be the importance of the subject, the reasons for my dissent are expressed.

Let me restate the case. In September, 1907, the city of Memphis passed an ordinance fixing maximum telephone rates. The telephone company filed its bill to enjoin the enforcement of the ordinance. Diversity of citizenship was alleged. The relief prayed was based upon substantially the following grounds: *a*, that as the legislature of Tennessee had conferred no power upon the city of Memphis to fix rates, the city was wholly lacking in authority to pass the ordinance, and the same was therefore void; *b*, that the ordinance was void "because it is unjust, inequitable and unreasonable, in that it fixes the maximum tariff or rate of charges beyond which your orator is forbidden to go, under severe penalties, which is so low that your orator could not operate its exchange without actual loss of money to it; and, indeed, is in truth and effect confiscatory, in that it totally destroys the value of your orator's plant in the city of Memphis for profitable use as a telephone exchange." The paragraph of the bill containing the foregoing concluded as follows: "Your orator further states that said ordinance was passed by the legislative council of said city, not only without making any investigation whatever, but in ignorance of what was a reasonable rate (assuming that it had the power to deal with the subject at all, which is denied), and without the least regard to the vested rights of your orator, or to equity and justice, and it is, for the reasons set forth in this paragraph, null and void;" *c*, that the ordinance was moreover void because it was unequal and discriminatory in consequence of a proviso to the first section exempting from its operation telephone com-

panies whose rates were fixed by contract with the city of Memphis.

By its answer the city asserted the power to pass the ordinance and traversed the averments of the bill as to confiscation and discrimination. A final decree was awarded adjudging the ordinance to be null and void and permanently enjoining its enforcement. The court, premising by "assuming that the city of Memphis, notwithstanding any contract it may have with the complainant, has the right and power to fix the rates which the latter may charge its customers in Memphis," came to consider the constitutional limitations to which the exertion of that power was subjected. Dealing with that subject, it was pointed out that the power to fix rates could not be so unreasonably exerted as to amount to confiscation, and, examining the proof as to the operation and effect of the rates established by the ordinance, it was found that they were of that character. The court said:

"The holders of stock in the complainant company are entitled to a fair return upon their investment if the company can earn it, but the testimony leaves no doubt that the rates prescribed by the ordinance would leave practically nothing to the stockholders.

* * * * * * * *

"If to large taxation and other enforced expenditures already properly exacted, the city (now that complainant's plant is fully installed) can add the burden of rates fixed arbitrarily that would so diminish earnings (though not expenses) as to leave no dividends whatever for stockholders, manifestly the money invested by them would be used for the benefit alone of the people of Memphis and not at all for the profit of those who made the investment under inducements offered by the city.

* * * * * * * *

"That result seems to us to be destructive of complainant's rights under the Constitution of the United States.

"In Judge Clark's opinion upon the motion for the temporary injunction it is clearly indicated that that learned and lamented judge thought that the city had no power or authority to enact the ordinance for two reasons, viz: 1st, because the State had never given the city such authority, and, 2d, because the city had a contract with the complainant which could not be thus impaired.

"We are not to be considered as dissenting from either of these views. We have not had time to examine either proposition, nor inclination to do so, because we are entirely content to decide the case on final hearing upon the one ground herein discussed."

The city appealed directly to this court upon the ground that the case is one where a constitutional right was claimed below and hence is susceptible of being directly reviewed here under § 5 of the Judiciary Act of 1891. On the hearing at bar it was suggested on behalf of the telephone company that the record did not disclose that the protection of the Constitution of the United States was claimed by the telephone company, and therefore the bill should be dismissed, and the court gives effect to that suggestion by its decree of dismissal.

Before ascertaining whether the record establishes that there is a claim of Federal right authorizing a direct review, it is necessary to fix definitely what constitutes the record. The contention on this subject involves the inquiry whether the opinion of the court below is part of the record, and if it is a part of the record and it be conceded that a question of Federal right was decided below, does that fact establish the existence of a claim of constitutional right justifying the direct review within the meaning of the act of 1891? To my mind an affirmative answer to both these propositions is required if previous decisions of this court be now applied.

In *Loeb* v. *Columbia Township Trustees*, 179 U. S 472, the case was this: Loeb, a citizen of Indiana, sued the

trustees of Columbia Township in Hamilton County, Ohio, in a Circuit Court of the United States, to recover the amount of certain bonds issued by the township. The defendant filed a general demurrer. This demurrer was sustained, and the plaintiff electing not to plead further, judgment was rendered for the defendant. The court, in the opinion by it delivered, declared that it had sustained the demurrer because it had concluded, as claimed by the defendant on the argument of the demurrer, that the law under which the bonds were issued was repugnant to the Constitution of the United States. A writ of error having been prosecuted directly from this court, the right to prosecute the same was challenged, and came to be disposed of when the case was considered. The court said (p. 477): "The petition shows that the parties are citizens of different States. It states no other ground of Federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the Circuit Court." The court then proceeded to consider whether it was "sufficiently informed by the record that the defendant township, under its general demurrer, 'claimed' in the Circuit Court that the statute of Ohio by the authority of which the bonds were issued was in contravention of the Constitution of the United States?" It was held (p. 481) that although the demurrer was general, and did not make reference to any claim of the protection of the Constitution of the United States, "it was certainly competent for the township to claim at the hearing of the demurrer" that the state enactment under which the bonds were issued "upon its face was repugnant to the Constitution of the United States, and therefore void." The court, after pointing out that there was nothing in the record outside of the opinion of the court showing that a claim of Federal right had been made and decided, was brought to consider whether it had a right to look

at and was controlled by the result of the opinion showing that the Federal right had been claimed. The previous decisions of this court relating to that subject were then fully and carefully reviewed. The difficulty which had existed in ascertaining whether a Federal question had been specially set up or claimed on writs of error to state courts during the prevalence of the conception that the opinion of the state court formed no part of the record and could not be looked at, was adverted to, the rule adopted by this court to correct that situation and by which it had become established that the opinion of the state court could be referred to in order to ascertain whether a Federal right had been specially set up and claimed was stated, and it was observed (p. 483):

"The rule of our court referred to does not apply alone to cases brought here from the highest court of a State. It applies, in terms, to all cases brought to this court by writ of error or appeal. What, therefore, was said in the above cases as to the object and effect of the rule applies to records from a Circuit Court of the United States."

Applying the rule settled in the *Loeb case*, and hence treating the opinion in this case as a part of the record, it is not subject to question that it affirmatively shows that the decree rendered in favor of the telephone company, adjudging the ordinance to be null and void, was placed upon the express conclusion that the ordinance was repugnant to the Constitution of the United States. Is this then sufficient to establish for the purposes of the jurisdiction of this court that a Federal question was claimed? This is to be determined, as held in the *Loeb case*, by the principles applied by this court in testing its jurisdiction to review the judgments or decrees of a state court under § 709 of the Revised Statutes. That is to say, the fact that the court below expressly decided a Federal question must be given the same weight as would be given the express determination by a state court in its opinion of a

Federal question for the purpose of ascertaining whether a Federal right was specially set up and claimed in the state court. The rule upon this latter subject was thus stated in *Missouri, Kansas &c. Ry. Co.* v. *Elliott*, 184 U. S. 531, 533, as follows:

"The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court intended to and did assert such a Federal right in the state court. But it is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then, a Federal controversy having been actually decided, the right of this court to review obtains. *Oxley Stave Co.* v. *Butler*, 166 U. S. 648, 660. All that is essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226. And of course, where it is shown by the record that the state court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a Federal question in a petition for rehearing in the highest court of the State is too late, yet when a question is thus raised, and it is actually considered and decided by the state court the right to review exists. *Mallett* v. *North Carolina*, 181 U. S. 589, 592."

And the *Elliott case* has been repeatedly approvingly referred to and the doctrine which it announced expressly reiterated. *Burt* v. *Smith*, 203 U. S. 129, 134; *Smithsonian Institution* v. *St. John*, 214 U. S. 19, 28, and cases cited.

Consistently with these rulings I am unable to conclude that the case made upon the record does not affirmatively establish a claim of constitutional right authorizing the direct review of the action of the court below in deciding a question of that character.

Even at the risk of repetition let me briefly consider the grounds by which it is insisted that this case is not controlled by the authorities above referred to. They may be thus resumed: First, because the bill, it is insisted, did not complain of any action by the State of Tennessee against the rights of complainant, but simply alleged that the city of Memphis had, without authority, attempted to destroy the complainant's rights, thus, it is urged, excluding power in the court to decide that a violation of the Constitution of the United States had been brought about. Second, because even if the complainant did not in express terms exclude all claim of Federal right, nevertheless there was no right in the court to decide a constitutional question, since, taking the complaint as a whole, it clearly appears that its purpose was to assert only rights under the laws of the State of Tennessee, and to exclusively invoke protection of the state constitution. Aside from the abnormal limitation on the judicial function which must arise from holding that without the consent of a litigant a judge, in a case over which he has jurisdiction, may not apply and enforce the Constitution if he deems the facts justify or require him to do so, the propositions, it seems to me, misconceive the averments of the bill. I say this, since they disregard the fact that in substance, while denying the want of power to pass the ordinance, the bill moreover proceeded upon the alternative that if there was power the ordinance was void because of the confiscatory char-

acter of the rates fixed. In any event, in view of the fact that the court below expressly considered and decided the constitutional question, the case is brought directly within the statement in the *Elliott case*, which I again quote, that (184 U. S. 534) "It is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court, in deciding the case, has actually considered and determined a Federal question, although arising on ambiguous averments, then, a Federal controversy having been actually decided, the right of this court to review obtains." Passing, however, further consideration of the correctness of these propositions as applied to the case made by the record and conceding them only for sake of argument to be sound, they are irrelevant to the question of dismissal, since they address themselves to the merits of the cause. In other words, if the propositions be accepted as sound, they only demonstrate that error was committed by the court below in undertaking to decide a question of constitutional right. But error in this particular, if found to exist, requires a correction of the wrong done, that is, a reversal, and not in substance the upholding of the wrong committed by refusing to review. If it be true, as announced in the previous decisions of this court, that the requirement of the statute as to the existence of a claim of Federal right for the purpose of review is subserved where the court below has expressly decided the question of Federal right, it must also be true that in such a case the duty exists to review and correct the error committed by the court below, whether such error arose from a mistake committed by the court in undertaking to decide a Federal question or from a mistake committed in deciding the question which was expressly passed upon. In other words, where the court

below has expressly decided a question of Federal right and made it the basis of its decree, such decision, for the purpose of review of the merits, in the very nature of things, engenders a conclusive presumption as to the making below of a claim of Federal right. The necessity of this rule cannot be more clearly demonstrated than by the case on this record, as it persuasively appears that the telephone company since the decree below has continuously claimed and enjoyed the right to be relieved from the charges fixed in the ordinance of the city of Memphis, a right possessed as the result of accepting the benefits of the decree and the relief awarded by the injunction therein issued. That is to say, it being certain that the telephone company has up to this very moment claimed the rights awarded to it by the decree, it in my opinion ought not now to be allowed to successfully assert that it made no claim to the constitutional right upon the existence of which alone the decree went in its favor. To claim the benefits of the decree amounts necessarily to claiming the existence of the constitutional right upon which alone the decree was based.

The misconception which underlies the theory upon which the judgment of dismissal now rendered is said to be sustained seems to me to be destructive of the power to directly review a decision passing on a claim of constitutional right for which the statute expressly provides. I say this because, in my opinion, the propositions relied on in reason come to this, that the authority which is conferred upon this court to directly review the actions of trial courts in deciding constitutional questions will not be exerted wherever it is found that a trial court has erroneously undertaken to decide such a question. That is to say, that the right to directly review only authorizes the correction of the lesser wrong resulting from having decided a Federal question mistakenly, and does not embrace the greater of having expressly decided a constitu-

tional question when there was no power to do so. The duty to review by direct appeal provided by the act of 1891 to be made efficacious in the very nature of things must embrace, not only the case where the court has erroneously decided a constitutional question, but also must extend to the case where a court has undertaken to expressly decide a constitutional question which it had no right to pass upon.

Considered from another point of view, the confusion which is involved in the propositions upon which the decree of dismissal must rest, if I correctly understand them, is equally demonstrable. As I have said, the denial of authority to review by direct appeal the action of the trial court in expressly deciding a constitutional question and awarding rights to the complainants solely upon the theory that they were guaranteed by the Constitution of the United States can only rest upon the assumption that although the court had general jurisdiction of the cause, it had not power, under the circumstances, to decide the constitutional questions which it did decide. But if this premise be true, then there is presented by the direct appeal a question which in its essence is embraced within the power which the statute confers to review by direct appeal decisions involving the jurisdiction of trial courts. The distribution of appellate jurisdiction which the act of 1891 effected was stated, and the apparent conflict between some of the adjudged cases on that subject was cleared up in *Macfadden* v. *United States*, 213 U. S. 288. It was reindubitably established that where the jurisdiction of a trial court was invoked on the ground of diversity of citizenship, and during the trial a question of constitutional or Federal right arose or emerged and was decided, the parties were put to the election of determining whether they would prosecute error from or appeal to the proper Circuit Court of Appeals or pursue the same course directly to or from this court. If the former course was

adopted it was declared the right to come directly to this court was waived and the judgment or decree of the Circuit Court of Appeals on the constitutional question would be final. As the result of the ruling now made it must follow that the right of election under the circumstances here disclosed would be difficult, if not impossible of exercise, since if the election were made to bring the case directly to this court the right to review might be lost upon the theory that the lower court wrongfully undertook to decide the constitutional question which it expressly passed upon. If on the other hand the party elected to seek a review in the Circuit Court of Appeals, and the conclusion of that court was that the trial court not only had power to decide the Federal question which it had passed upon, but had rightfully decided it, the right to review in this court would be lost.

Let me come, then, to the question of authority; that is, the cases relied upon to sustain the decree of dismissal. As it is given me to understand them, none of them sustain the proposition in support of which they are cited. In view of the statement which I have previously made as to the ruling in the *Loeb case* and the matter in that case decided, it is unnecessary to extendedly notice a reference to a general expression found in the opinion in that case as to the duty of bringing into a record, by way of a formal bill of exceptions, agreed facts, etc., since the expressions relied upon cannot be given the effect now attributed to them without virtually holding that the *Loeb case* overruled itself. This is also true of certain general expressions found in the opinion in *Lampasas* v. *Bell*, 180 U. S. 276, decided at the same term as the *Loeb case*, and which directly affirmed the ruling there made. Of course nothing I have said, in the slightest degree, is intended to controvert the elementary doctrine that where the existence of a Federal question is essential to confer jurisdiction upon a trial court over a cause,

the jurisdictional facts must be clearly and unambiguously alleged and not be left to surmise or conjecture. And this is all, I submit, that can rightfully be said to have been decided in *Hamilton Gas Light Company* v. *Hamilton*, 146 U. S. 258; *Barney* v. *The City of New York*, 193 U. S. 430; *City of Louisville* v. *Cumberland Telephone & Telegraph Co.*, 155 Fed. Rep. 725. But that doctrine has no application here, since the jurisdiction of the court below existed, as diversity of citizenship was alleged. This being true, it is apparent that the cases cited can only be made here applicable by failing to distinguish between the test for determining whether sufficient foundation has been laid to justify the bringing of the powers of a trial court into play and the duty of an appellate tribunal to review the action of the trial court had in a case within its jurisdiction and authority. After patient research I am of the opinion that it is accurate to say that no case can be found in the books holding that where a trial court has expressly considered and passed upon a question of constitutional rights and awarded affirmative relief to a party before it, upon the theory that such right was involved in the cause which was within its jurisdiction, that the right to review by this court has been denied because there was no claim of right under the Constitution, since the court in passing upon the case before it erroneously based its conclusion upon the mistaken conception that stated propositions of constitutional law were claimed to be applicable.

I am authorized to say that MR. JUSTICE MCKENNA and MR. JUSTICE HUGHES join in this dissent.

CITY OF COLUMBUS *v.* MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE.

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

No. 41. Argued November 7, 8, 1910.—Decided December 12, 1910.

To furnish an ample supply of pure and wholesome water is the highest police duty resting on a municipality.

One contracting to furnish a municipality with an ample supply of pure water must at all times maintain his ability to meet the requirements of the contract, and a continuous supply of water is a vital part of the contract.

The maxim that he who seeks equity must do equity applies to one affirmatively seeking relief. It does not vest a court of equity with power to impose on a defendant terms as a condition for dismissing the bill where plaintiff wholly fails to prove his case, even if defendant has filed a cross bill for defensive relief.

Where a water company has wholly failed to live up to its contract and the municipality has determined by ordinance to erect its own plant, a court of equity cannot, in a suit brought by the water company to restrain the municipality on the ground of impairment of contract, require the municipality to purchase any part of the plaintiff's plant as a condition for dismissing the bill.

The enforcement of a municipal ordinance will not be enjoined as impairing the obligations of an existing contract at the instance of a complainant who fails to show that the contract has been complied with.

A mortgagee of contract rights has no greater right to restrain the enforcement of an ordinance on the ground that it impairs the obligation of the contract than has the contracting party himself.

Where the breach justifies the abrogation of a contract otherwise protected by the contract clause of the Federal Constitution, considerations of hardship, and the interests of creditors cannot prevail to set up and enforce that contract against the party having the right to treat the contract as ended.

Where the contractor under a municipal water supply contract wholly fails to furnish an adequate supply of pure water according to the

contract, the municipality has no adequate remedy at law; it may treat the contract as ended and a court of equity may enforce such rescission.

THE facts, which involve the constitutionality of certain ordinances of the city of Columbus, Georgia, are stated in the opinion.

Mr. William A. Wimbish and *Mr. T. T. Miller*, with whom *Mr. J. H. Martin* was on the brief, for appellant:

The contract conferred upon the Water Works Company no exclusive right to furnish the city and its inhabitants with water; and hence the construction by the city of its own water system would offend no constitutional principle.

The source of supply selected having proven deficient, and having been practically abandoned, the Water Company has no exclusive right to supply the city with water derived from another source. The city was therefore at liberty to seek another source in order to remedy these deficiencies. *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67.

Even if the contract was in all respects valid and binding the city has been absolved from its obligations thereunder by reason of the failures and defaults on the part of the Water Company.

Under conditions existing at the time, the city not only had the right, but was under the imperative duty in the exercise of its police power to make provision for an adequate supply of wholesome water. *Walla Walla* v. *Water Co.*, 172 U. S. 1; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 28; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746.

In this exercise of the police power of the city there was no injustice to the stockholders of the Water Company. *Nor. Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583.

The opinion and order of the court that the decree in favor of the city should be made conditional upon the purchase of any part of the present water system is not founded upon the pleadings, and is beyond the jurisdiction of the

court, as being in violation of the right of private contract. *Burke* v. *Davis*, 81 Fed. Rep. 907; *Rejall* v. *Greenhood*, 92 Fed. Rep. 945.

The inconvenience or loss to the bondholders which may result from the decree to which the city is entitled cannot be considered by the court. *Woodruff* v. *Gravel Co.*, 18 Fed. Rep. 753; *Attorney General* v. *Birmingham*, 4 Kay & J. 539; *Weaver* v. *Ureka Lake Co.*, 15 California, 274; *Hamilton Gas Light Co.* v. *Hamilton*, 146 U. S. 258; *In re Brooklyn*, 143 N. Y. 596; *S. C.*, 166 U. S. 681.

It is only when the relief sought is discretionary that the court may impose conditions. *Fosdick* v. *Schall*, 99 U. S. 235; *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89. The city was not under obligations to purchase, and the mere fact that it had an option to do so gives no equity to the other party if it refuses to exercise such option. *Farmers' Loan & Trust Co.* v. *Galesburg*, 133 U. S. 156, does not apply.

There is no contractual relation or privity of contract between the city and the bondholders; so far as the city is concerned they are mere volunteers seeking to protect their own interests, and to preserve the value of their security. If the city had the legal right to a rescission of the contract as against the Water Company there is no superior equity of the bondholders. *Farmers' L. & T. Co.* v. *Galesburg*, 133 U. S. 159.

There is no such diversity of citizenship as will support the jurisdiction on that ground. *Dawson* v. *Columbia Ave. &c. Co.*, 197 U. S. 178; *Mercantile Trust & Deposit Co.* v. *Columbus*, 203 U. S. 198. Whenever the want of jurisdiction becomes apparent in the progress of the cause, the bill should be dismissed. *Morris* v. *Gilmer*, 129 U. S. 315.

Mr. Joseph Packard, with whom *Mr. A. Morris Tyson* was on the brief, for appellee:

The contract in this case has been violated by the city

of Columbus rather than by the Water Company; but the whole question is settled by the acceptance by the city of the modifications of the contract. *Gas Co.* v. *San Francisco*, 9 California, 453, 475; *Allegheny City* v. *McClurkan*, 14 Pa. St. 81; *Water Co.* v. *Neosho*, 136 Missouri, 498; *Waterworks Co.* v. *Creston*, 101 Iowa, 687; *Water Supply Co.* v. *Ludington*, 119 Michigan, 480; *Waterworks Co.* v. *Joplin*, 76 S. W. Rep. 969; *Owensboro Water Co.* v. *Duncan*, 32 S. W. Rep. 478; *National Waterworks Co.* v. *Kansas City*, 62 Fed. Rep. 853, 866; *Illinois Trust and Savings Bank* v. *Arkansas City*, 76 Fed. Rep. 271; *Beadles* v. *Smyser*, 209 U. S. 403.

The police power of a municipality cannot be invoked to modify or abrogate its contractual obligations; nor can it contravene the Constitution of the United States or infringe any right granted or secured by that instrument. *Jacobson* v. *Massachusetts*, 197 U. S. 25; Russell's Police Power of the State, §§ 53, 54, 66, 71, 86. *Hume* v. *Laurel Hill Cemetery*, 142 Fed. Rep. 552; *West Street R. R. Co.* v. *Chicago*, 201 U. S. 506; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 567; *Nor. Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583, 596; *C., B. & Q. Ry.* v. *Drainage Commrs.*, 200 U. S. 561; *St. Paul, Minneapolis &c. Ry. Co.* v. *Minnesota*, 214 U. S. 497, do not apply to this case.

Police power cannot be exercised unless it has some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which that power can be used. *Welch* v. *Swasey et al.*, 214 U. S. 91.

A court of equity has power to so mould its decree as to grant relief upon such terms as in its judgment satisfy the equities of the particular case. The equitable character of an option to purchase in a contract of this kind has been distinctly recognized. *Indianapolis* v. *Consumers' Gas Trust Co.*, 144 Fed. Rep. 640; and see, where a similar option to purchase was upheld in favor of the city as against the water company, *Fayetteville* v. *Water*,

L. & P. Co., 135 Fed. Rep. 400; *Castle Creek Water Co.* v. *Aspen*, 146 Fed. Rep. 8; *Bristol* v. *Waterworks Co.*, 19 R. I. 413; *Water Supply Co.* v. *Braintree*, 146 Massachusetts, 482; *Water Co.* v. *Cherryvale*, 65 Kansas, 219; *Los Angeles* v. *Water Co.*, 177 U. S. 558, 583.

Where a case for relief is made in the bill, it may be given by imposing conditions on the complainant consistently with the rules of equity, in the discretion of the court. *Walden* v. *Bodley*, 14 Pet. 164; *Buchannon* v. *Upshaw*, 1 How. 56, 84; *Kneeland* v. *American Loan &c. Co.*, 136 U. S. 89; *Thomas* v. *Brownville &c. R. R. Co.*, 109 U. S. 522; *Bourke* v. *Hefter*, 202 Illinois, 321; *Lockhart* v. *Leeds*, 195 U. S. 437; *Knoxville* v. *Water Co.*, 212 U. S. 1, 18.

The legislation impaired the obligation of the contract in this case; see 203 U. S. 311. *Water Co.* v. *Defiance*, 191 U. S. 184; *Dawson* v. *Columbia Ave. &c. Co.*, 197 U. S. 178, have no application to this case.

Mr. Justice Lurton delivered the opinion of the court.

This is a bill by the trustee under a mortgage made by the Columbus Water Works Company upon its plant and franchise to secure an issue of bonds, to enjoin the municipal authorities of Columbus, Georgia, from constructing and operating a municipal water system, thereby impairing the obligation of a contract between the city and the water works company granting to the latter for a term of thirty years an exclusive right to maintain a water works system in the streets of the city.

The bill, in substance, avers, and the answer admits, that the city has procured from the legislature of Georgia authority to construct and operate a municipal water plant and to issue the bonds of the city for that purpose, and that in pursuance of this legislative authority ordinances have been passed providing for the construction

of such water works and for the issuance of bonds to provide the means, and that notice of that purpose, and that the city no longer regards the contract with the Columbus Water Works Company as binding or obligatory, has been given.

The material defenses are, first, that the city had no power to make an exclusive contract; second, that the contract for rental of hydrants created an aggregate indebtedness prohibited by the constitution of the State; and, third, that the water works company had not kept its contract in respect of the character or capacity of the plant it was to provide and maintain, and has failed in its obligation to furnish an abundant and constant supply of pure and wholesome water, thus compelling the municipality to construct a system of its own for the protection of the health and property of its inhabitants.

These defenses were relied upon in the answer of the city as a defense against the injunction sought by the complainant and were made the subject of a cross bill against the complainant and the water works company, praying relief against the contract as having been first broken by the company.

Prior to the filing of this bill the same complainant had filed its original bill in the same court against the Columbus Water Works Company, praying a foreclosure of its mortgage, a default having occurred. The bill referred to was filed December 22, 1902. The present bill was not filed until July 30, 1903. One of the allegations of the foreclosure bill was "that during the continuance of this deed of trust the said party of the first part will not do or suffer to be done any act or acts whereby the security of the said bondholders shall be in any way or manner or in any amount impaired, and that the said party of the first part will at all times preserve, maintain and keep its waterworks, pumps, machinery, reservoirs, piping, hydrants and equipments in good repair, working order and condition

and supplied with all the machinery, equipments and appliances for providing water to the city of Columbus and vicinity and shall and will from time to time make all needful and proper repairs, renewals and replacements and useful and proper alterations, additions, betterments and improvements.

"3. That your orator is informed that for more than six months last past the Columbus Water Works Company has suffered the security of the bondholders to become impaired by not maintaining and keeping its water works supplied with all the machinery, equipments and appliances for providing water to the city of Columbus and vicinity, and by not making useful and proper additions, betterments and improvements to said water works. Further explaining the foregoing allegation your orator states that, owing to an unprecedented and protracted drought the sources of supply of water for the said water works have to a large extent failed for the time being; that it is within the power of the said water works company to provide for such a contingency by seeking and availing itself of other sources of supply, but that, as your orator is informed, owing to the attitude of the city of Columbus, which now is taking steps to provide a water supply of its own, the Columbus Water Works Company is unable to sell its bonds reserved in its treasury for such purposes and which could have been sold except for the attitude of the said city and therefore is unable to carry out the betterments and improvements in its water supply above mentioned."

Under that bill, which was unopposed, a receiver was appointed, who has ever since been in possession and is still operating said works. Upon application of the mortgage trustee and by consent of the bondholders and of the company, receiver's certificates have been issued to the extent of $50,000, and expended in repairing and improving the supply of water and the distributing system.

There has never been any consolidation of the two suits, but by an amended bill in the present case filed October 15, 1903, the fact of the pendency of the aforementioned foreclosure bill and the action had thereunder was stated. It was also averred in this amendment that by means of the receiver's certificates issued in the foreclosure case such improvements and enlargements had been made in the plant of the company that the receiver was then supplying an abundance of wholesome water, and that the trustee by direction of the bondholders was willing to expend such other sums as should be found necessary to enable the mortgagor company to carry out its contract.

Upon the bill as thus amended, the answer and cross bill and the answer thereto, and upon *ex parte* affidavits the court heard a motion for an injunction *pendente lite*. Upon that hearing the court disposed of two legal defenses arising upon the face of the contract, namely, whether a contract extending over thirty years for the rental of hydrants was the creation of an indebtedness for the aggregate of the rental, and second, whether the city had power to make an exclusive contract. Both of these questions were decided by Judge Newman against the city. On November 19, 1903, an injunction pending the suit was allowed, and the cause referred to a special master to take proof and report his findings of law and fact in respect of the issues with reference to the failure of the water works company to comply with its contract. See 130 Fed. Rep. 180.

On January 23, 1904, the city filed its petition praying a dissolution of this injunction, alleging that a great amount of evidence had been taken by the special master, and that the reservoir had again failed, and that water was now being taken from the Chattahooche River, and that the water at the intake was polluted by reason of the fact that one of the city's sewers emptied into the stream

a short distance above the intake, and also that a polluted branch which drained a suburb of the city emptied into the river a short distance above the river intake. Thereupon, on January 25, 1904, the preliminary injunction was dissolved.

The special master, on November 19, 1904, filed a full, elaborate and able report with findings of fact and law. Upon the material questions he found in favor of the contentions of the city in respect to both fact and law. His findings of fact, as condensed by him, which are material to be here set out, are as follows:

"I have found that acceptance by the city was based on statement of the water company that the system had been completed in compliance with the contract, and upon assurances by the company that the water would be wholesome, abundant and lasting.

"I have found that the system as accepted by the city in 1882 had not met the general requirements of the contract, and that on complaints to the company the system had been improved to such an extent that in 1889 the service was at that time accepted as satisfactory to the city.

"That from 1889 to May, 1900, there was dissatisfaction and complaints on the part of the city because of insufficiency of water supply, and especially with the unsupplied needs of the city for water in its newly acquired territory; that the company had notice of this and recognized the necessity of increased water supply; that during this period the city through its council twice made an effort to repudiate the contract, but were not sustained by the requisite popular vote on submission of the question to the people; that the company in good faith endeavored to adjust the differences by offer to arbitrate and the city declined the offer; and that finally the city accepted the existing conditions and concluded a supplemental agreement by which the company was given an opportunity to test its ability to carry out the requirements of the contract; that

the company failed in this, and that in 1902 both the council and the people determined to no longer depend upon the water company.

"That the water company has at no time complied with section III, requiring a reservoir of 125 million gallons available supply, and from 1884 it has failed to comply with the requirements of section XII as to the construction and maintenance of the reservoir.

"That paragraph XI as to filtration has not been complied with on the part of the company.

"That the company has failed to comply with section V of the contract as to distribution in not connecting together the ends of its system and placing mains sufficiently large to at all times give full supply of water.

"With reference to the supply of water, I have found that the company has failed to comply with sections I and X in that sufficient supply of wholesome, constant and ample water has not and cannot be furnished from the source of supply as selected, nor is the same sufficient to meet the wants of the city and private consumers for present and future requirements.

"I have found that the company has not complied with section IV as to supply main.

"That as to pressure from 1893 to 1902, the pressure was variable and uncertain; that the gravity plan could not sustain it to the requirements of the contract, and that the standpipe and pumping devices adopted to assist it, while practically beneficial, were not at all times satisfactory; that the company has not met the requirements of section XXVII in maintaining pressure at 32 pounds, nor supplemental contract requirement of 40 pounds, and that in fires of any magnitude the pressure and water supply is insufficient, and that the supply is not ample for fire protection, as required by section IX, and that the receiver by improvement of the pumping station has greatly bettered conditions.

"With reference to the wholesomeness of the water as required by section X, I have found that the reservoir water, when available, is, under normal conditions, a wholesome water, but when the water is low it is not wholesome; that prior to July, 1902, the water furnished by the company was, with few exceptions, within the requirements of the contract, and in these exceptions the city has not availed itself of the provisions of section XIII of the contract to correct impurities; that since July, 1902, the company has not furnished a constant supply of wholesome water, nor has the receiver been able to do so; that the Chattahooche River cannot be relied on as a constant source of supply for wholesome water, but only so when, on a normal flow of the river, water is taken from points above all possibility of contamination and properly filtered.

"That the company has not been able, for want of available funds, to maintain and improve its system as the growth of the city demanded, and that extensions since 1891 have, from time to time, been, with the exception of a small amount, paid for by a necessary increase of a bonded indebtedness originally out of proportion to the earning capacity of the system, and constantly growing further beyond the ability of the system to maintain; that the system has not been reinforced and strengthened as its needs require, and that the owners of the bonds of the company recognized this fact.

"That the actual amount expended by the receiver to January, 1904, on betterments is $42,220.85."

To the findings of fact the complainants excepted.

Upon a final hearing the court, while not fully agreeing with the master as to the effect of the original acceptance of the works as constructed and as to the effect of subsequent acceptance of enlargements, repairs and improvements made by the company, from time to time, to meet complaints as to quantity and quality of water, concurred fully in the master's report that the company had not

complied with its obligation to construct and maintain adequate means for continuously furnishing an ample and wholesome supply of water for public and domestic purposes. Among other things upon this vital aspect of the case Judge Newman said:

"In my judgment the facts in evidence were sufficient to justify the master in finding that there was a failure on the part of the company to furnish a sufficient supply of pure and wholesome water as provided in the contract, and finding the company had failed in this respect. It is a serious matter to undertake to supply the inhabitants of a city with an ample supply of good and wholesome water, and persons entering into a contract to do this necessarily must do so with an understanding of the important character of the undertaking. This is particularly true of a growing city. Taking this whole record together and considering all the evidence, the master, as has been stated, was justified in reaching the conclusion that there was a failure to comply with the contract in this respect."

Although there was a concensus of finding by master and court that there was an obligation upon the water works company to furnish an adequate and continuous supply of pure water and that the water works company had therefore broken this vital part of its agreement, yet the court ruled that the city should be denied rescission under its cross bill and affirmatively restrained from establishing its own system, unless it "should do equity to the bondholders," by whose money the plant had been constructed, by purchasing "so much of the water works plant as may be hereafter determined, at a fair valuation as a condition of and before entering a decree in its favor finally denying an injunction in the case against the issuance by the city of its water works bonds." Time was given the city to determine whether it would accept the conditions imposed by purchasing at a fair valuation

such parts of the system as the court should determine were usable by the city at a price to be fixed by a subsequent decree. The city declining to assent to such a condition, an injunction was granted permanently restraining the city from the construction of its own plant and dismissing the cross bill, and taxing all of the costs to the city.

Pretermitting any opinion as to whether the contract for rental of hydrants for a term of thirty years constituted an aggregate indebtedness prohibited by the constitution of the State of Georgia, as well as the question of the power of the city to obligate itself by a contract excluding it from constructing and operating its own water works, and assuming, for the purposes of this case, that the contract between the city and the water works company was perfectly valid, we come at once to the question of whether the court below was right in denying relief under the cross bill, and in granting the relief prayed by the original bill, because the city declined to purchase at a price fixed by the court or by arbitration the usable parts of the water works system.

The primary and vital obligation of the company was to furnish an adequate and constant supply of water for both public and private use, which should be pure and wholesome. By the first and second clauses of the contract the company obligated itself to provide "all the real estate, rights of way, water rights and water, that shall be found requisite for the successful prosecution and operation of the water works," and to supply "dams and embankments of ample size and strength, good and durable quality, that may be required for the works." By the third clause it bound itself to construct "a storage reservoir having an available capacity for the storage and supply of not less than 125 million gallons." This, in passing we may observe, was never done, and the insufficiency of the reservoir capacity was one of the fac-

tors in the subsequent failure to furnish at all times an adequate supply of water. By the tenth clause of the contract it was provided that "the source of water supply shall be determined by Thos. R. White (who assigned to the Columbus Water Works Company), he guaranteeing, however, that the supply of water, both in quality and amount, shall be wholesome, constant and amply sufficient to meet the wants of the city, and private consumers for future and present requirements." The eleventh and twelfth clauses related to the construction and maintenance of a filter and to the maintenance of wholesome conditions at the storage reservoir.

The single object of the agreement was to obtain a constant and adequate supply of wholesome water. This was guaranteed in express terms, to say nothing of the necessary implication from the character of the contract. This guarantee was a continuing one, and dominated every other detail of the agreement. The company selected its own source of supply, and was under the highest obligation to continuously furnish an ample supply for all purposes of water, which should be wholesome, that is, clean, pure and fit for domestic use. This supply was to be adequate not only for the demands of the present, but ample to meet the demands of the future.

No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life. If a municipality elect to contract with another for the discharge of this function, it is under the greatest obligation to require that the contractor shall engage to construct and maintain adequate means and furnish an adequate supply, in quality and quantity, to at all times meet the public ne-

cessity. So, too, the contractor must satisfy himself as to the sufficiency and quality of the source of supply, and maintain adequate storage and distributing instrumentalities to meet conditions. That his source of supply is at times adequate and wholesome is not enough. The wants of the public must, under all conditions, be supplied. We do not take account of temporary and unusual conditions which cannot be reasonably foreseen. But that which can be and should be foreseen must be taken into account by a private contractor who undertakes so vital a function as that of supplying water to a growing community.

The continuing character of the obligation to furnish an adequate supply of wholesome water, as we have before suggested, is not met by showing that such a supply has been furnished at times, nor is the non-performance of the agreement excused by the occurrence of conditions which are likely to occur in a climate of long dry summers. Nor is such a contract fulfilled by showing that at the time of completion of the works the company was able to carry out the contract. Ability to carry out the agreement must be maintained. From time to time during the operation of the works specific complaints were made by the city in consequence of the failure of the water company to furnish an adequate supply of water, or on account of the quality of the water or insufficient pressure. These complaints generally resulted in an effort to remedy the matter, and more than one change and improvement made seemed to produce good results, leading the municipality to accept for the time the repair, or enlargement, or change as meeting the necessities of the particular exigency, and giving promises of ability to carry out the contract. In consequence of such efforts to improve the service in quantity and quality of water supplied, the electorate of the municipality twice voted against a bond issue to construct a municipal plant, manifesting thereby

a willingness that further opportunity should be given the company to show its ability to bring its plant up to the requirements of the contract. Indeed, the attitude of the city and its people toward the water company as shown by the record seems to have been forbearing and generous. This acceptance of improved conditions resulting from complaints has been relied upon as estopping the city. But no such result may rightfully follow, unless such improved conditions resulted in the maintenance thereafter of a continuous, adequate supply of wholesome water. This was not the case. Want of capital may have been the cause for adoption by the company of expedients to meet a particular exigency which were inadequate to permanently overcome a radically insufficient source of supply, as well as insufficient storage and filtration instrumentalities. The relief resulting from all that was done by the company or its receiver was not abiding nor the character of the water permanently improved. That the works were not able to come up to the requirements of the contract and not able to meet the reasonable necessities of the city was a question of fact, upon which the master and the court have agreed. The contract to furnish an adequate supply of water of good, usable quality was, as we have already said, a continuing and vital part of the contract. Touching a similar contract this court, in *Farmers Loan and Trust Co.* v. *Galesburg*, 133 U. S. 156, 170, said:

"Whether or not the water company was able to furnish the required quantity of water every twenty-four hours, and whether or not its quality as to purity and goodness for domestic and other uses was in compliance with the ordinance, must rest upon facts as proved to exist. Moreover, the estoppel, so far as it did exist, was not a continuing one. The obligation of the water company to furnish the quantity and quality of water required by the contract was a continuing obligation, and was not

met once for all by a compliance with the fire test of December 6, 1883. The right of the company to enjoy the consideration of the contract was thereafter to depend upon its continuing to perform it. There was not and could not be a final and absolute acceptance of the water works by the city, without regard to a future compliance on the part of the water company with the requirements of the contract. The case was not one of works constructed for the city, and to become its property upon acceptance; and the acceptance related merely to the sufficiency of the structures for fire service at the time."

There remains then the simple question as to whether the Circuit Court was justified, upon a finding that the water company had not and was not able to do what it agreed to do, in restraining the city from meeting the plain necessities of the case by constructing and operating its own plant, because the city would not accept as a condition the purchase at a price fixed by the court of so much of the water works plant as the court should be of opinion it could use in its own system. If, as is manifestly the case, the water works company has not complied with its contract in vital particulars, the city had the legal right to say, as it did in substance say, "you have failed to maintain a continuous and adequate supply of water fit for domestic purposes, as you were bound to do. Public considerations of the highest obligation require that the city and its inhabitants shall have a continuous water service adequate to the preservation of the public health and the public safety. We therefore shall treat the contract as at an end and undertake this function by means of a municipal plant."

However serious the result to the water company, or its creditors, the plain law of the case was with the city. The bondholders had neither legal nor equitable rights superior to the contract between the city and the water company. If the latter had not complied with the con-

tract after repeated experiments and much indulgence by the city, what is the equitable foundation for the enforcement of a broken and continuing obligation by enjoining the city from doing what it had a plain legal right to do if the water company was unable to carry out the contract upon its part? Nevertheless, the learned judge, after reaching and announcing the conclusions already stated as to the facts of the case, granted to the complainant the full equitable relief sought, because the city declined to agree to conditions imposed. The court justified the imposition of conditions under the maxim that he who seeks equity must do equity. But this maxim is one which applies to him who affirmatively seeks equitable relief.

The complainant had, beyond serious doubt, failed to make a case entitling it to relief. But the court in substance said to the city, that unless the city would agree to mitigate the injury and loss which must come to the creditors of the defaulting company by buying so much of the company's plant as the court should think adapted to use in the plant to be constructed by the city, that a decree should go for the complainant, although it had failed to make a case entitling it to the enforcement of the contract between the company and the city. Manifestly the maxim cannot vest in the chancellor the power which has been exercised. It is true that the city by a cross bill asked to have the contract declared at an end for non-performance. But this was defensive relief. If the complainant had shown a valid contract which was impaired by the legislation providing for a construction of rival water works, it was clearly entitled to a decree enjoining the city from proceeding with the construction of a municipal system. In that event the cross bill would be dismissed as a necessary result of such decree upon the original bill. But if complainant failed to show a state of facts which entitled it to restrain the city from

doing anything in impairment of the contract between it and the mortgagor water company, the only logical result was a decree dismissing the original bill because the city had not kept its contract, and a decree under the cross bill declaring the contract abrogated rightfully by the city as a consequence of its breach in vital particulars.

A consideration of the consequence to creditors of the contracting company is not an answer to the legal rights of the city. Considerations of hardship cannot prevail to set up and enforce a broken agreement, which in law results in giving to the opposite party a right to treat the agreement as ended. *Hamilton Gas Light Company* v. *City of Hamilton*, 146 U. S. 258; *Atty. Genl.* v. *Council of Birmingham*, 4 Kay & J. 539; *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89. In the case of *Atty. Genl.* v. *Council of Birmingham* the Vice Chancellor said: "I am not sitting here as a committee of public safety, armed with arbitrary power to prevent what it is said will be a great injury not to Birmingham only but to the whole of England; that is not my function."

The city should be left its freedom of contract in respect to buying such parts of the company's plant as it can profitably use.

The remedy by an action for damages was wholly inadequate to the city. The city had a right to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. 133 U. S. 156, 179.

Reverse the decree and remand with direction to dismiss the bill and grant the relief as prayed in the cross bill.

Reversed.

INTERNATIONAL TEXTBOOK COMPANY *v.* PETERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 3. Submitted October 24, 1910.—Decided November 7, 1910.

SAME *v.* LYNCH.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 27. Submitted November 2, 1910.—Decided November 7, 1910.

Decided on authority of *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

Mr. David C. Harrington for plaintiff in error.

No briefs filed for defendants in error.

Per Curiam: Substantially the same question of Federal law involved in these two cases arose under a Kansas statute in *International Textbook Co.* v. *Pigg*, 217 U. S. 91; and the Federal right asserted in that case was sustained. There is no difference in principle between the two cases last named and the *Pigg case*, although the Federal question involved in them arises under the statutes, respectively, of other States—Wisconsin and Vermont. In view of the pleadings and the conceded facts in these cases the judgment in each of them must be reversed on the authority of the *Pigg case*, and the cases are severally remanded for such further proceedings as is required by and is not inconsistent with this opinion.

It is so ordered.

OPINIONS PER CURIAM, ETC., FROM OCTOBER 10 TO DECEMBER 18, 1910.

No. —, Original. *Ex parte:* IN THE MATTER OF PATRICK LANCER, PETITIONER. Submitted October 11, 1910. Decided October 17, 1910. Motion for leave to file a petition for writ of mandamus denied. *Mr. Wilford H. Smith* for the petitioner. No one opposing.

No. 567. FRANK N. HOFFSTOT, APPELLANT, *v.* BERNARD A. FLOOD, A DETECTIVE OF POLICE OF THE CITY OF NEW YORK. Appeal from the Circuit Court of the United States for the Southern District of New York. Motions to dismiss or affirm or to advance submitted October 11, 1910. Decided October 17, 1910. Order affirmed with costs. No further opinion will be delivered. (Mr. Justice Hughes did not participate in the consideration or decision of this case.) *Mr. W. A. Blakeley, Mr. Charles S. Whitman, Mr. Warren I. Seymour, Mr. George Gordon Battle* and *Mr. H. Snowden Marshall* for the appellee, in support of the motions. *Mr. Adrian H. Joline, Mr. John D. Lindsay* and *Mr. Adrian H. Larkin* for the appellant, in opposition thereto.

No. 604. THE MERRIMACK RIVER SAVINGS BANK, APPELLANT, *v.* THE CITY OF CLAY CENTER, KANSAS, ET AL. Appeal from the Circuit Court of the United States for the District of Kansas. Submitted October 17, 1910. Decided October 24, 1910. Dismissed with costs. No further opinion will be delivered. *Mr. D. R. Hite* and *Mr.*

C. C. Coleman for appellant. *Mr. A. A. Godard* and *Mr. F. B. Dawes* for appellees.

No. 688. WILLIAM J. POCHIN, APPELLANT, *v.* THE CITY AND COUNTY OF DENVER, COLO., ET AL. Appeal from the Circuit Court of the United States for the District of Colorado. Submitted October 17, 1910. Decided October 24, 1910. Decree affirmed with costs. No further opinion will be delivered. *Mr. Harvey Riddell* for appellant. *Mr. George Q. Richmond* and *Mr. F. W. Sanborn* for appellees.

No. 26. CHARLES MARTEL, PLAINTIFF IN ERROR, *v.* THE STATE OF MAINE. In error to the Supreme Judicial Court of the State of Maine. November 14, 1910. *Per Curiam:* Dismissed for want of jurisdiction in this court. *Mr. Herbert E. Holmes* for plaintiff in error. *Mr. Warren C. Philbrook* for defendant in error.

No. 30. THEODORE R. CONVERSE, RECEIVER, ETC., PLAINTIFF IN ERROR, *v.* JOHN A. STEWART. In error to the Supreme Court of the State of New York. Argued November 2, 1910. Decided November 14, 1910. *Per Curiam:* Writ of error dismissed for want of jurisdiction in this court. *Beupre* v. *Noyes*, 138 U. S. 397, 401; *Eustis* v. *Bolles*, 150 U. S. 361, 369, 370; *Rutland Railroad* v. *Central Vermont Railroad*, 159 U. S. 630; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556; *Bacon* v. *Texas*, 163 U. S. 207, 227. *Mr. William G. Wilson* and

Mr. C. A. Severance for plaintiff in error. *Mr. Edward W. Sheldon* for defendant in error.

No. 34. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* J. B. BLACHLEY. In error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. Submitted November 2, 1910. Decided November 28, 1910. *Per Curiam:* It is ordered that the writ of error be dismissed for want of jurisdiction, on authority of *Missouri, Kansas & Texas Railway Company* v. *Hollan*, 216 U. S. 615. No further opinion will be delivered in this case. *Mr. James Hagerman* and *Mr. Joseph M. Bryson* for plaintiff in error. *Mr. B. F. Looney* for defendant in error.

No. 520. INDIAN PROTECTIVE ASSOCIATION, APPELLANT, *v.* HUGH H. GORDON AND BENJAMIN MILLER, ADMINISTRATOR. Appeal from the Court of Appeals of the District of Columbia. Motion to dismiss or affirm submitted November 14, 1910. Decided November 28, 1910. Decree affirmed with costs as to Benjamin Miller, Administrator. *Mr. Heber J. May,* for Benjamin Miller, Administrator, one of the appellees, in support of the motion. *Mr. Charles Poe, Mr. Daniel B. Henderson, Mr. Benjamin S. Minor* and *Mr. Hugh B. Rowland* for appellants, in opposition thereto.

No. —, Original. *Ex parte:* IN THE MATTER OF THE MALLORY STEAMSHIP COMPANY, PETITIONER. Submitted November 28, 1910. Decided December 5, 1910. Motion for leave to file petition for a writ of prohibition denied. *Mr. Everett P. Wheeler* for petitioner. *Mr. Frederick M. Brown* for respondent.

No. —, Original. *Ex parte:* IN THE MATTER OF H. A. BRADFORD, PETITIONER. Submitted November 28, 1910. Decided December 5, 1910. Motion for leave to file petition for writs of prohibition and mandamus denied. *Mr. George P. Hoover* and *Mr. William E. Borah* for petitioner. No one opposing.

No. —, Original. *Ex parte:* IN THE MATTER OF SOBRINOS DE EZQUIAGA, PETITIONER. Submitted November 28, 1910. Decided December 5, 1910. Motion for leave to file petition for writ of prohibition or mandamus denied. *Mr. Francis H. Dexter* for petitioner. No one opposing.

No. 8, Original. *Ex parte:* IN THE MATTER OF ATHANASI NICOLA, PETITIONER. Argued November 28, 1910. Decided December 5, 1910. Petition for a writ of mandamus denied, rule discharged, and petition dismissed, on authority of *Tobin, Petitioner*, 214 U. S. 507. *Mr. Lon O. Hocker, Mr. J. J. Darlington* and *Mr. James C. Jones* for petitioner. *Mr. Tyson S. Dines* and *Mr. Millard F. Watts* for respondent.

No. 11, Original. *Ex parte:* IN THE MATTER OF THE CUDAHY PACKING COMPANY, PETITIONER. Argued November 28, 1910. Decided December 5, 1910. Petition for a writ of mandamus denied, rule discharged, and petition dismissed, on the authority of *In re Pennsylvania Company, Petitioner &c.*, 137 U. S. 451. *Mr. Ralph W. Breckenridge* and *Mr. Charles J. Greene* for petitioner.

Mr. Constantine J. Smyth and *Mr. Edward P. Smith* for respondent.

No. 61. Mary R. Trimble et al., Plaintiffs in Error, *v.* Ida V. Klugh et al. In error to the Circuit Court of the United States for the District of South Carolina. Argued December 2, 1910. Decided December 5, 1910. Dismissed for want of jurisdiction, on authority of *Empire State-Idaho Mining and Development Company* v. *Hanley*, 205 U. S. 225. *Mr. William A. Gunter* for plaintiffs in error. *Mr. F. Barron Grier* for defendants in error.

No. 125. Clarence H. Venner, Plaintiff in Error, *v.* The Chicago City Railway Company et al. In error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted December 5, 1910. Decided December 12, 1910. *Per Curiam:* As it does not appear from the record that this court has jurisdiction in this case, the writ of error is dismissed for want of jurisdiction. *Mr. John P. Wilson* for defendants in error, in support of the motion. *Mr. Elijah N. Zoline* for plaintiff in error, in opposition thereto.

Nos. 68 and 69. Julio Aybar, Appellant, *v.* The People of Porto Rico. Appeals from the Supreme Court of Porto Rico. Argued December 7, 1910. Decided December 12, 1910. *Per Curiam:* As jurisdiction in this court does not appear from the records in these cases, the appeal in each case is dismissed for want of jurisdiction. *Mr. Jackson H. Ralston, Mr. F. L. Siddons* and *Mr. Wil-*

liam E. Richardson for appellant. *Mr. Paul Charlton* and *Mr. Foster V. Brown* for appellees.

Decisions on Petitions for Writs of Certiorari from October 10 to December 18, 1910.

No. 562. Bartlett Richards, Petitioner, *v.* The United States. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles J. Hughes, Jr.*, *Mr. R. S. Hall* and *Mr. John W. Lacey* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 563. Will G. Comstock, Petitioner, *v.* The United States. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles J. Hughes, Jr.*, *Mr. R. S. Hall* and *Mr. John W. Lacey* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 564. Charles C. Jameson, Petitioner, *v.* The United States. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles J. Hughes, Jr.*, *Mr. R. S. Hall* and *Mr. John W. Lacey* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 565. AQUILLA TRIPLETT, PETITIONER, *v.* THE UNITED STATES. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles J. Hughes, Jr.*, *Mr. R. S. Hall* and *Mr. John W. Lacey* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 579. LON D. MARRS, PETITIONER, *v.* IDELLA EMRICK. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. I. W. Stephens* and *Mr. George E. Miller* for petitioner. *Mr. Charles Keith Bell* for respondent.

No. 580. JACOB GOLD, PETITIONER, *v.* THE SOUTHSIDE TRUST COMPANY, TRUSTEE, ETC. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrey C. Barton* for petitioner. No appearance for respondent.

No. 595. THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER, *v.* EDWARD WINTERS. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George E. Hamilton* and *Mr. F. A. Durban* for petitioner. No appearance for respondent.

No. 632. THE ROSARIO MINING AND MILLING COMPANY, A CORPORATION, PETITIONER, *v.* CHARLES W.

CLARK. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John A. Goodrich* for petitioner. *Mr. Walter M. Bickford* for respondent.

No. 699. MARY D. GRACE, PETITIONER, *v.* CHARLES C. BURLINGHAM ET AL., TRUSTEES. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic C. Scofield, Mr. Theodore E. Hancock* and *Mr. William J. Grace* for petitioner. *Mr. Charles Stone, Mr. Irving L. Ernst* and *Mr. D. R. Cobb* for respondents.

No. 709. WILLIAM D'ALTON MANN ET AL., PETITIONERS, *v.* SAMUEL DEMPSTER. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert A. Wray* for petitioners. *Mr. Charles O. Maas* and *Mr. James A. Wakefield* for respondent.

No. 533. HERBERT S. HADLEY ET AL., PETITIONERS, *v.* ARTHUR C. HUIDEKOPER. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Elliott W. Major* and *Mr. John M. Atkinson* for petitioners. *Mr. John L. Thomas* for respondent.

No. 581. ANNIE LAPINA, PETITIONER, *v.* WILLIAM WILLIAMS, COMMISSIONER OF IMMIGRATION. October 17,

1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. I. Henry Harris* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 694. THOMAS B. STUART ET AL., PETITIONERS, *v.* UNION PACIFIC RAILROAD COMPANY. October 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. L. T. Michener, Mr. Thomas B. Stuart* and *Mr. Joseph C. Helm* for petitioners. *Mr. Clayton C. Dorsey, Mr. William V. Hodges, Mr. Maxwell Evarts* and *Mr. N. H. Loomis* for respondent.

No. 583. WALTER J. GREGORY, PETITIONER, *v.* THE DISTRICT OF COLUMBIA. October 24, 1910. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. A. S. Worthington* for petitioner. *Mr. Edward H. Thomas* and *Mr. William Henry White* for respondent.

No. 588. WILLIAM B. KRAFT, PETITIONER, *v.* THE DISTRICT OF COLUMBIA. October 24, 1910. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Daniel W. Baker* and *Mr. Frank J. Hogan* for petitioner. *Mr. Edward H. Thomas* and *Mr. William Henry White* for respondent.

No. 652. ABILENE NATIONAL BANK ET AL., PETITIONERS, *v.* JOSEPH N. DOLLEY, BANK COMMISSIONER, ET

AL. October 24, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John Lee Webster, Mr. Chester I. Long, Mr. B. P. Waggener* and *Mr. John W. Gleed* for petitioners. *Mr. F. S. Jackson* for respondents.

No. 661. UNITED STEAMSHIP COMPANY, CLAIMANT, ETC., PETITIONER, *v.* SOCIETE NOUVELLE D'ARMEMENT. October 24, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles Page, Mr. Edward J. McCutchen* and *Mr. Samuel Knight* for petitioner. *Mr. William Denman* for respondent.

No. 697. THE MARITIME INSURANCE COMPANY, LIMITED, PETITIONER, *v.* THE M. S. DOLLAR STEAMSHIP COMPANY. October 24, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William Denman* for petitioner. No appearance for respondent.

No. 710. HATTIE L. JOHNSTON, ADMINISTRATRIX, ETC., ET AL., PETITIONERS, *v.* STATE MUTUAL LIFE INSURANCE COMPANY. October 24, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John G. Capers* and *Mr. W. Boyd Evans* for petitioners. *Mr. J. P. K. Bryan* for respondents.

No. 698. ARTHUR P. HEINZE, PETITIONER, *v.* THE UNITED STATES. October 24, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John Mason Brown* for petitioner. *The Attorney General* and *Mr. Felix Frankfurter* for respondent.

No. 735. THE UNITED STATES, PETITIONER, *v.* TIFFANY & COMPANY. October 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* for petitioner. *Mr. Arthur M. King* for respondent.

No. 725. CHARLES WEST, ATTORNEY GENERAL, ET AL., PETITIONERS, *v.* THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; No. 726. CHARLES WEST, ATTORNEY GENERAL, ET AL., PETITIONERS, *v.* GULF, COLORADO & SANTA FE RAILWAY COMPANY; No. 727. CHARLES WEST, ATTORNEY GENERAL, ET AL., PETITIONERS, *v.* MISSOURI, KANSAS & TEXAS RAILWAY COMPANY; No. 728. CHARLES WEST, ATTORNEY GENERAL, ET AL., PETITIONERS, *v.* MIDLAND VALLEY RAILROAD COMPANY; No. 729. CHARLES WEST, ATTORNEY GENERAL, ET AL., PETITIONERS, *v.* THE KANSAS CITY SOUTHERN RAILWAY COMPANY; No. 730. CHARLES WEST, ATTORNEY GENERAL, ET AL., PETITIONERS, *v.* THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; and No. 731. CHARLES WEST, ATTORNEY GENERAL, ET AL., PETITIONERS, *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. October 31, 1910. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frederick N. Judson* and *Mr. Charles West* for petitioners. *Mr. Robert Dunlap* and *Mr. Frank Hagerman* for respondents.

No. 739. JAMES DEWAR ET AL., PETITIONERS, *v.* J. LUDWIG MOWINCKEL. October 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for petitioners. No appearance for respondent.

No. 744. STUART WOOD, PETITIONER, *v.* BALLARD PRESTON BROWNING ET AL. November 7, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Malcolm Jackson, Mr. C. W. Campbell* and *Mr. William A. Glasgow, Jr.*, for petitioner. No appearance for respondents.

No. 745. THE UNION FERRY COMPANY OF NEW YORK AND BROOKLYN, CLAIMANT, ETC., PETITIONER, *v.* THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY. November 7, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. DeLagnel Berier* and *Mr. James J. Macklin* for petitioner. *Mr. William Greenough* for respondent.

No. 749. MOORE BROTHERS, PETITIONERS, *v.* A. DREHER & COMPANY ET AL. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edwin C. Brandenburg* and *Mr. F. Walter Brandenburg* for petitioners. *Mr. James Trotter* for respondents.

No. 719. THE WABASH RAILROAD COMPANY ET AL., PETITIONERS, *v.* JAMES POLLITZ. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence Greer, Mr. Rush Taggart* and *Mr. F. C. Nicodemus, Jr.*, for petitioners. *Mr. Stephen M. Yeaman* and *Mr. J. Aspinwall Hodge* for respondent.

No. 761. JAMES D. GILL, COLLECTOR, ETC., PETITIONER, *v.* JAMES W. AUSTIN, EXECUTOR, ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *The Attorney General* for petitioner. *Mr. J. L. Thorndike* for respondent.

No. 762. W. FRANK KINNEY, COLLECTOR, ETC., PETITIONER, *v.* SAMUEL MORRIS CONANT ET AL., EXECUTORS, ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *The Attorney General* for petitioner. *Mr. Walter F. Angel* and *Mr. Frank H. Swan* for respondents.

No. 763. JAMES D. GILL, COLLECTOR, ETC., PETITIONER, *v.* J. SCOTT PARRISH, ADMINISTRATOR, ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *The Attorney General* for petitioner. *Mr. J. L. Thorndike* for respondent.

No. 764. FERDINAND EIDMAN, COLLECTOR, ETC., PETITIONER, *v.* HENRY B. SHEPARD, EXECUTOR, ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* for petitioner. No appearance for respondent.

No. 765. FERDINAND EIDMAN, COLLECTOR, ETC., PETITIONER, *v.* ALBERT LEWISOHN ET AL., EXECUTORS, ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* for petitioner. *Mr. Edward Lauterbach* for respondents.

No. 766. ARCHIE D. SANDERS, COLLECTOR, ETC., PETITIONER, *v.* LAWRENCE D. RUMSEY ET AL., EXECUTORS, ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* for petitioner. *Mr. Ansley Wilcox* for respondents.

No. 767. THE UNITED STATES, PETITIONER, *v.* PETER W. ROUSS, EXECUTOR, ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* for petitioner. *Mr. John Jerome Rooney* for respondent.

No. 768. WILLIAM MCCOACH, COLLECTOR, ETC., PETITIONER, *v.* ALBERTINE BAMBERGER ET AL., EXECUTORS,

ETC. November 14, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *The Attorney General* for petitioner. *Mr. William Y. C. Anderson* for respondents.

No. 747. P. A. WILLCOX, RECEIVER, ETC., PETITIONER, *v.* LEILA A. JONES, ADMINISTRATRIX, ETC. November 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry E. Davis* for petitioner. *Mr. Walter Hazard* for respondent.

No. 755. E. F. SWIFT ET AL., PETITIONERS, *v.* LESTER M. DAVID. November 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William T. S. Curtis* for petitioners. *Mr. James A. Kerr* for respondent.

No. 769. E. M. HERR ET AL., RECEIVERS, ETC., PETITIONERS, *v.* THE TWEEDIE TRADING COMPANY. November 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for petitioners. *Mr. Frederick M. Brown* for respondent.

No. 771. ZOE AGNES SEMPLE ET AL., EXECUTORS, ETC., PETITIONERS, *v.* LEWIS CONSTRUCTION COMPANY. November 28, 1910. Petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Twyman O. Abbott* for petitioners. No appearance for respondent.

Nos. 773 and 774. THE J. M. GUFFEY PETROLEUM COMPANY, PETITIONER, *v.* THE COASTWISE TRANSPORTATION COMPANY. November 28, 1910. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. D. T. Watson, Mr. C. C. Burlingham* and *Mr. James H. Beal* for petitioner. *Mr. Edward E. Blodgett* and *Mr. J. Parker Kirlin* for respondent.

No. 778. O. P. HALLIGAN, WARDEN, ETC., PETITIONER, *v.* FRANK WAYNE. November 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *The Attorney General* for petitioner. *Mr. E. C. Brandenburg* for respondent.

No. 748. HENRY FRIEND ET AL., PETITIONERS, *v.* JAMES TALCOTT. November 28, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Jacob Newman, Mr. S. O. Levinson, Mr. B. V. Becker* and *Mr. Arthur B. Schaffner* for petitioners. *Mr. Horace Kent Tenney* and *Mr. Roger Sherman* for respondent.

No. 714. JOHN A. RIPPER, PETITIONER, *v.* THE UNITED STATES. December 5, 1910. Petition for a writ of certi-

orari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas T. Fauntleroy, Mr. Shepard Barclay* and *Mr. P. H. Cullen* for petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for respondent.

No. 797. AMANDA C. FOSTER, PETITIONER, *v.* LUCIANO F. BOULO, EXECUTRIX, ETC. December 5, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Blocker Thornton* and *Mr. Frederick G. Bromberg* for petitioner. *Mr. Harry Pillans* for respondent.

No. 798. FREDERICK A. HYDE ET AL., PETITIONERS, *v.* THE UNITED STATES. December 5, 1910. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. A. S. Worthington* for petitioners. *The Attorney General* for respondent.

No. 772. THE STATE OF NEW JERSEY, PETITIONER, *v.* FRANKLIN TRUST COMPANY ET AL. December 12, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Arthur Lord* for petitioner. *Mr. William H. Dunbar* for respondents.

No. 775. THE STANDARD OIL COMPANY OF NEW YORK, PETITIONER, *v.* THE UNITED STATES. December 12, 1910. Petition for a writ of certiorari to the United States Cir-

cuit Court of Appeals for the Second Circuit denied. *Mr. Martin Carey* and *Mr. Daniel J. Kenefick* for petitioner. *The Attorney General, Mr. Assistant to the Attorney General Kenyon, Mr. L. Wallace Dempsey* and *Mr. Barton Corneau* for respondent.

No. 782. National Surety Company, Petitioner, *v.* Kansas City Hydraulic Press Brick Company. December 12, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank Hagerman* for petitioner. *Mr. James S. Botsford* for respondent.

No. 810. Roland F. Quillin, Claimant, etc., Petitioner, *v.* Atlantic Mutual Insurance Company. December 12, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace L. Cheyney* for petitioner. *Mr. Edwin L. Baylies* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 10 TO DECEMBER 18, 1910.

No. 129. The United States, Plaintiff in Error, *v.* George F. Lamson. In error to the Circuit Court of the United States for the District of Rhode Island. October 11, 1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Walter H. Barney,*

Mr. Thomas Z. Lee and *Mr. Francis I. McCanna* for defendant in error.

No. 292. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* JAMES DURIE. In error to the District Court of the United States for the Eastern District of Pennsylvania. October 11, 1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Francis S. Laws* for defendant in error.

No. 293. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* JAMES STOTT. In error to the District Court of the United States for the Eastern District of Pennsylvania. October 11, 1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. J. Parker Kirlin* and *Mr. John M. Woolsey* for defendant in error.

No. 353. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* HUGH E. MONSON. In error to the District Court of the United States for the District of Colorado. October 11, 1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Edwin H. Park* for defendant in error.

No. 354. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* LUIGI CAFARELLI. In error to the District Court of the United States for the District of Colorado. October 11,

1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Edwin H. Park* for defendant in error.

No. 355. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* WILLIAM A. DUNCAN. In error to the District Court of the United States for the District of Colorado. October 11, 1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Edwin H. Park* for defendant in error.

No. 502. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* HENRY BOECKMAN. In error to the Circuit Court of the United States for the Eastern District of New York. October 11, 1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for the plaintiff in error. *The Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 722. JANE M. WHITE ET AL., PLAINTIFFS IN ERROR, *v.* THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY. In error to the Court of Appeals of the District of Columbia. October 11, 1910. Docketed and dismissed with costs, on motion of *Mr. John Ridout*, for the defendant in error. No one opposing.

No. 65. RAMON VALDES Y COBIAN, APPELLANT, *v.* LAWRENCE H. GRAHAME, AS COMMISSIONER OF THE INTERIOR OF PORTO RICO. Appeal from the District Court

of the United States for Porto Rico. October 11, 1910. Dismissed with costs, on motion of counsel for the appellant. *Mr. F. Kingsbury Curtis* for appellant. No appearance for appellee.

No. 97. MARY E. CARTWRIGHT, PLAINTIFF IN ERROR, *v.* I. M. HOLCOMB, ADMINISTRATOR OF THE ESTATE OF D. J. SPENCER, DECEASED, ET AL. In error to the Supreme Court of the State of Oklahoma. October 11, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Marshall Fulton* for plaintiff in error. *Mr. Joe T. Robinson* for defendants in error.

No. 137. LAUREL OIL & GAS COMPANY, APPELLANT, *v.* GALBREATH OIL & GAS COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. October 11, 1910. Dismissed with costs, on motion of counsel for the appellant. *Mr. William T. Hutchings* for appellant. No appearance for appellee.

No. 144. THE JACKSON LUMBER COMPANY, APPELLANT, *v.* CHARLES F. TURNER, TAX COLLECTOR OF WALTON COUNTY, FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed with costs, on authority of counsel for the appellant. *Mr. William W. Flournoy* for appellant. *Mr. S. K. Gillis* for appellees.

No. 145. THE JACKSON LUMBER COMPANY, APPELLANT, *v.* CHARLES F. TURNER, TAX COLLECTOR OF WAL-

TON COUNTY, FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed with costs, on authority of counsel for the appellant. *Mr. William W. Flournoy* for appellant. *Mr. S. K. Gillis* for appellees.

No. 176. PORTLAND RAILWAY, LIGHT & POWER COMPANY ET AL., APPELLANTS, *v.* THE CITY OF PORTLAND ET AL. Appeal from the Circuit Court of the United States for the District of Oregon. October 11, 1910. Dismissed with costs, on motion of counsel for the appellants. *Mr. Frederick V. Holman* for appellants. No appearance for appellees.

No. 198. SOUTHERN STATES LAND & TIMBER COMPANY, APPELLANT, *v.* ALBERT W. GILCHRIST, GOVERNOR OF THE STATE OF FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel. *Mr. J. C. Cooper* and *Mr. E. J. L'Engle* for appellant. *Mr. William S. Jennings* for appellees.

No. 199. FLORIDA LAND & TIMBER COMPANY, APPELLANT, *v.* ALBERT W. GILCHRIST, GOVERNOR OF THE STATE OF FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel. *Mr. J. C. Cooper* and *Mr. E. J. L'Engle* for appellant. *Mr. William S. Jennings* for appellees.

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No. 200. CONSOLIDATED LAND COMPANY, APPELLANT, *v.* ALBERT W. GILCHRIST, GOVERNOR OF THE STATE OF FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel. *Mr. J. C. Cooper* and *Mr. E. J. L'Engle* for appellant. *Mr. William S. Jennings* for appellees.

No. 201. EMPIRE LAND COMPANY, APPELLANT, *v.* ALBERT W. GILCHRIST, GOVERNOR OF THE STATE OF FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel. *Mr. J. C. Cooper* and *Mr. E. J. L'Engle* for appellant. *Mr. William S. Jennings* for appellees.

No. 202. THE MODEL LAND COMPANY, APPELLANT, *v.* ALBERT W. GILCHRIST, GOVERNOR OF THE STATE OF FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel. *Mr. J. C. Cooper* and *Mr. Alex. St. Clair-Abrams* for appellant. *Mr. William S. Jennings* for appellees.

No. 203. THE FLORIDA EAST COAST RAILWAY COMPANY, APPELLANT, *v.* ALBERT W. GILCHRIST, GOVERNOR OF THE STATE OF FLORIDA, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel. *Mr.*

J. C. Cooper and *Mr. Alex. St. Clair-Abrams* for appellant. *Mr. William S. Jennings* for appellees.

No. 240. ST. BENEDICT'S ABBEY, A CORPORATION, PLAINTIFF IN ERROR, *v.* MARION COUNTY, OREGON, ET AL. In error to the Supreme Court of the State of Oregon. October 11, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. John A. Carson* for plaintiff in error. No appearance for defendants in error.

No. 724. MELVILLE D. HENSEY ET AL., APPELLANTS, *v.* CHARLES H. MERILLAT AND MASON N. RICHARDSON, TRUSTEES. Appeal from the Court of Appeals of the District of Columbia. October 12, 1910. Docketed and dismissed with costs, on motion of *Mr. Mason N. Richardson* for the appellee. No one opposing.

No. 653. J. W. GREEN ET AL., APPELLANTS, *v.* HARVEY H. ATHERTON, TRUSTEE, ETC. Appeal from the United States Circuit Court of Appeals for the Seventh Circuit. October 17, 1910. Dismissed with costs, on motion of counsel for appellants. *Mr. Will W. Hammond* for appellants. No appearance for appellee.

No. 665. DELAWARE RIVER FERRY COMPANY, OWNER, ETC., APPELLANT, *v.* JENNIE AMOS. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. October 17, 1910. Dismissed per stip-

ulation. *Charles Heebner* for appellant. *Thomas Leaming* for appellee.

No. 172. THE COLORADO & SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for the District of Colorado. October 24, 1910. Dismissed on authority of counsel for plaintiff in error, on motion of *Mr. Attorney General Wickersham* for the defendant in error. *Mr. E. E. Whitted* for plaintiff in error. *The Attorney General* for defendant in error.

No. 740. JULIO BUSTOS, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. October 24, 1910. Docketed and dismissed, on motion of *Mr. Attorney General Wickersham* for the defendant in error. No one opposing.

No. 368. SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF TEXAS. In error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. October 25, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. A. W. Houston* for plaintiff in error. No appearance for defendant in error.

No. 746. D. W. DINSMORE, APPELLANT, *v.* STEPHEN B. WOOD, AND ALBERT SARTAIN, AGENT OF THE STATE OF

OHIO. Appeal from the District Court of the United States for the Northern District of Illinois. October 31, 1910. Docketed and dismissed with costs, on motion of *Mr. Karl T. Webber* for the appellees. No one opposing.

No. 33. MATTHEW GAGE AND JANE GAGE, APPELLANTS, *v.* RIVERSIDE TRUST COMPANY, LIMITED, ET AL. Appeal from the Circuit Court of the United States for the Southern District of California. November 1, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. William B. Mathews* for appellants. *Mr. John G. North* for appellees.

No. 40. WILLIAM F. COCHRAN, JR., PLAINTIFF IN ERROR, *v.* EDWARD D. PRESTON, INSPECTOR OF PUBLIC BUILDINGS, ET AL. In error to the Court of Appeals of the State of Maryland. November 3, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. Osborne I. Yellott* for plaintiff in error. *Mr. Edgar Allan Poe* and *Mr. Sylvan Hayes Lauchheimer* for defendants in error.

No. 474. POWHATAN COAL & COKE COMPANY, APPELLANT, *v.* NORFOLK & WESTERN RAILWAY COMPANY. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. November 4, 1910. Dismissed with costs, on motion of counsel for appellant. *Mr. William A. Glasgow, Jr.*, for appellant. *Mr. Joseph I. Doran, Mr. Theodore W. Reath, Mr. John H. Holt* and *Mr. Lucian H. Cocke* for appellee.

No. 44. BERNARD CORRIGAN ET AL., PLAINTIFFS IN ERROR, *v.* KANSAS CITY ET AL. In error to the Supreme Court of the State of Missouri. November 4, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. O. H. Dean* for plaintiffs in error. No appearance for defendants in error.

No. 55. RUSSELL P. GOODWIN AND ROBERT M. FULTON, PLAINTIFFS IN ERROR, *v.* THE PEOPLE'S UNITED STATES BANK. In error to the Circuit Court of the United States for the Eastern District of Missouri. November 7, 1910. Dismissed with costs, on motion of *Mr. Attorney General Wickersham* for the plaintiffs in error. *The Attorney General* for plaintiffs in error. No appearance for defendant in error.

No. 52. EAGLE MINING & IMPROVEMENT COMPANY, PLAINTIFF IN ERROR, *v.* ROBERT E. LUND. In error to the Supreme Court of the Territory of New Mexico. November 7, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. Samuel Parker* for plaintiff in error. No appearance for defendant in error.

No. 57. VIOLA LA BARRE, PLAINTIFF IN ERROR, *v.* JOHN F. MARONEY. In error to the Court of Errors and Appeals of the State of New Jersey. November 9, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. Robert Carey* for plaintiff in error. *Mr. Gilbert Collins* for defendant in error.

No. 126. WILLIAM M. BROWN, APPELLANT, *v.* JOHN F. HORR, MARSHAL OF THE UNITED STATES, ETC. Appeal from the District Court of the United States for the Southern District of Florida. November 14, 1910. Dismissed with costs, on motion of *Mr. Frederick C. Bryan* for the appellant. *Mr. Frederick C. Bryan* and *Mr. George M. Robbins* for appellant. *The Attorney General* and *The Solicitor General* for appellee.

Nos. 294, 295, 296, 297 and 298. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* THE PACIFIC MAIL STEAMSHIP COMPANY. In error to the District Court of the United States for the Northern District of California. November 28, 1910. Dismissed, on motion of *Mr. Attorney General Wickersham* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Maxwell Evarts* for defendant in error.

No. 63. THE SAN JUAN LIGHT & TRANSIT COMPANY, PLAINTIFF IN ERROR, *v.* MARIA PLA. In error to the District Court of the United States for Porto Rico. November 28, 1910. Dismissed per stipulation. *Mr. F. Kingsbury Curtis* and *Mr. Hector H. Scoville* for plaintiff in error. *Mr. Francis H. Dexter* for defendant in error.

No. 525. KATCHADOR M. TARPENIAN, APPELLANT, *v.* WILLIAM WILLIAMS, UNITED STATES COMMISSIONER OF IMMIGRATION, ETC. Appeal from the Circuit Court of the United States for the Southern District of New York. November 28, 1910. Dismissed with costs on motion of

counsel for appellant. *Mr. Everett P. Wheeler* for appellant. *The Attorney General* for appellee.

No. 4, Original. *Ex parte:* IN THE MATTER OF WILLIAM W. BIERCE, LIMITED, PETITIONER. December 12, 1910. Petition for a writ of mandamus dismissed, on motion of *Mr. Frederic D. McKenney* for the petitioner. *Mr. Frederic D. McKenney, Mr. Charles H. Aldrich* and *Mr. Henry W. Prouty* for petitioner. *Mr. Aldis B. Browne* and *Mr. Alexander Britton* for respondent.

No. 524. THE FIRST NATIONAL BANK OF PITTSBURGH, PENNSYLVANIA, APPELLANT, *v.* GUARANTEE TITLE & TRUST COMPANY, TRUSTEE, ETC. Appeal from the United States Circuit Court of Appeals for the Third Circuit. December 12, 1910. Dismissed with costs, per stipulation, and on motion of *Mr. Frederic D. McKenney* for the appellant. *Mr. Frederic D. McKenney* and *Mr. William M. Hall* for appellant. *Mr. W. A. Way* for appellee.

CASES DISPOSED OF IN VACATION.

No. 82. FIRST NATIONAL BANK OF RICHMOND, VIRGINIA, ET AL., PLAINTIFFS IN ERROR, *v.* WILLIAM R. TRIGG COMPANY ET AL. In error to the Supreme Court of Appeals of the State of Virginia. June 17, 1910. Dismissed pursuant to the twenty-eighth rule. *Mr. George Bryan* and *Mr. A. W. Patterson* for plaintiffs in error. *Mr. E. Randolph Williams* and *Mr. R. G. Bickford* for defendants in error.

No. 185. THOMAS W. STUBBLEFIELD, APPELLANT, *v.* LEE A. STUBBLEFIELD ET AL. Appeal from the Court of Appeals of the District of Columbia. July 28, 1910. Dismissed pursuant to the twenty-eighth rule. *Mr. James S. Easby-Smith* and *Mr. Howard Boyd* for appellant. *Mr. A. E. L. Leckie* and *Mr. Joseph W. Cox* for appellees.

No. 676. GEORGE MENGEL, PLAINTIFF IN ERROR, *v.* BLANCHE MENGEL ET AL. In error to the Supreme Court of the State of Iowa. August 19, 1910. Docketed and dismissed with costs. *Mr. Andrew Wilson* and *Mr. Noel W. Barksdale* for defendants in error. No one opposing.

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2. *Assignment of; claims not within prohibition of § 3477, Rev. Stat.*

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The protection of the commerce clause of the Federal Constitution extends beyond the strict lines of contract, and inseparable incidents of a transaction of interstate commerce based on contract are also interstate commerce. *Dozier* v. *Alabama*, 124.

2. *Commerce clause; incident of contract within provision of.*

Where, under the contract to purchase a picture, the purchaser has the option to take at a specified price the frame in which the picture shall be delivered, and both picture and frame are manufactured in and delivered from another State and remain the property of the vendor until paid for, the sale of the frame is a part of the original transaction and protected by the commerce clause of the Constitution. *Ib.*

3. *Commerce clause; imposition of license tax as burden on interstate commerce; repugnancy of Alabama statute of March 7, 1907, § 17.*

The imposition of a license tax for soliciting orders for enlargements of photographs and frames on persons not having a permanent place of business in the State and keeping such articles as stock in trade is a regulation of commerce between the States and void under the commerce clause of the Federal Constitution, both as to the orders for the picture itself and as to an optional right to take, at a price specified in the contract, the frame in which the picture is delivered, and so *held* as to the license tax imposed under § 17 of the statute of March 7, 1907, of Alabama. *Ib.*

4. *Commerce clause; burden on interstate commerce; stoppage of trains constituting.*

Where a railroad company has already provided adequate accommodation at any point, a state regulation requiring interstate trains to stop at such point is an unreasonable burden on interstate commerce and void under the commerce clause of the Federal Constitution, and this rule equally applies to junction, as to other, points; and so *held* as to the act of March 19, 1907, amending

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2. *Existence; effect of mortgage of franchise on power to repeal charter.*

A franchise given by a city to a public service corporation does not enlarge the right of the corporation to exist as against an expressly reserved power to repeal the charter, even if the corporation has mortgaged such franchise. *Ib.*

3. *Doing business within State; what constitutes—Right to revoke power of attorney to accept process.*

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Where riparian rights of several parcels of land in different States but on the same river are involved, the courts of both States have concurrent jurisdiction, and the court first seized should proceed to determination without interference. *Ib.*

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1. *Admissibility in civil action of judgment in criminal proceeding.*

The general rule of the common law is that a judgment in a criminal proceeding cannot be read in evidence in a civil action to establish any fact there determined. The parties are not the same and different rules of evidence are applicable. *Chantangco* v. *Abaroa*, 476.

2. *Same.*

Identity of parties will not always operate to make a judgment in a criminal action admissible in a civil action; there must be identity of issue, *Stone* v. *United States*, 167 U. S. 178, although as held in *Coffey* v. *United States*, 116 U. S. 436, when the facts are ascertained in a criminal case as between the United States and the defendant they cannot be again litigated as between him and the United States as the basis of any statutory punishment denounced as a consequence of the existence of the facts. *Ib.*

3. *Same—Considerations in case coming from Philippine Islands.*

In a case coming from the Philippine Islands, however, this court will not apply the common-law rule as to effect to be given in a subsequent civil case to a judgment in a criminal case, but will consider only whether the local law of the Philippine Islands has been rightly applied. *Ib.*

4. *Identification of military reservation; competency of evidence.*

In this case the objections to evidence identifying the military reservation on which a capital crime was alleged to have been committed, including introduction of deeds and condemnation proceedings, were properly overruled, and *quære* whether the United States is called on to try title to a reservation where it is in *de facto* exercise of exclusive jurisdiction. *Holt* v. *United States*, 245.

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2. *Right of mortgagee of contract rights to restrain enforcement of impairing ordinance.*

A mortgagee of contract rights has no greater right to restrain the enforcement of an ordinance on the ground that it impairs the obligation of the contract than has the contracting party himself. *Ib.*

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2. *Effect of substitution of words.*

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Where, as in this case, cross bills are maintainable, jurisdiction in respect to them follows that over the principal bill. *Rickey Land & Cattle Co.* v. *Miller & Lux*, 258.

See Courts, 2;
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JURY AND JURORS.

1. *Exclusion during discussion of admissibility of confession; discretion of court.*

Although the more conservative course is to exclude the jury during discussions of admissibility of confessions, in the absence of statutory provision it is within the discretion of the trial judge to allow the jury to remain; and where, as in this case, he cautions the jury that the preliminary evidence has no bearing on the question to be decided, it is not error to do so. *Holt* v. *United States*, 245.

2. *Challenge for cause; refusal to sustain; when reversible error.*

Unless the error is manifest the reviewing court should not set aside the finding of the trial court refusing to sustain a challenge of a juryman for cause on the ground of partiality or expressed opinions. *Ib.*

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18. *Following state court's construction of state constitution.*

This court follows the state court in determining the extent of a special immunity from taxation granted by the constitution of the State. *Arkansas Southern Ry. Co.* v. *Louisiana & Arkansas Ry. Co.*, 431.

19. *Affirmance without opinion, when.*

It is the practice of this court to affirm without opinion where the judgment under review is not decided to be erroneous by a majority of the court sitting in the cause. *Hertz* v. *Woodman*, 205.

20. *Motions to dismiss or affirm. Frivolous questions. When motion to affirm prevails.*

If the validity of the particular subject of classification assailed has not been so foreclosed by prior decisions as to render discussion frivolous the motion to dismiss will be denied, but if, as in this case, it is manifest that the contention is, in view of prior decisions, without merit, the motion to affirm will prevail. *Griffith* v. *Connecticut*, 563.

21. *Reference to opinion of Circuit Court; for what purpose permitted.*

While the opinion of the Circuit Court may not be examined to ascertain what should, under proper practice, appear in the pleadings or bill of exceptions, it may be looked to, when annexed and forming part of the record, to ascertain whether either party claimed, and was denied, a Federal right. *Memphis* v. *Cumberland Telephone Co.*, 624.

22. *Rulings on questions of evidence; when not considered.*

Rulings on questions of evidence are not properly before this court when the exceptions thereto do not appear in the record, and, even though objections to testimony may have been noted, if it does not appear what the rulings were and whether the testimony was or was not excluded, this court is confined to determining whether the findings support the judgment; and in this case the facts found by the court below unquestionably support the judgment. *Eagle Mining Co.* v. *Hamilton*, 513.

23. *Parties; question of, not open.*

In this case, *held* that the question of parties is not open in this court. *Calder* v. *Michigan*, 591.

24. *Quære as to construction of bill within jurisdiction of Circuit Court.*

Quære, whether a bill within the jurisdiction of the Circuit Court can be construed as charging that the action of a municipality was without authority from the State and also that such action denied

RAILROADS.

1. *Segregation of races; right to make rules and regulations as to.*

As held by the Court of Appeals of Kentucky, a railroad company has the right, in that State, to establish rules and regulations which require white and colored passengers, even though they be interstate, to occupy separate apartments upon the train provided there is no discrimination in the accommodations. *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 71.

2. *Same.*

In this case *held* that an interstate colored passenger was not compelled to occupy a separate apartment on a train in Kentucky from that occupied by white passengers under a state statute but under rules and regulations of the railroad company. *Ib.*

3. *Same.*

Whether interstate passengers of different races must have different apartments or share the same apartment is a question of interstate commerce to be determined by Congress alone, *Louisville & Nashville R. R. Co.* v. *Mississippi*, 133 U. S. 587, and the inaction of Congress in that regard is equivalent to the declaration that carriers can by reasonable regulations separate colored and white passengers. *Ib.*

4. *Reasonableness of regulations based on sentiment of community.*

Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable. *Ib.*

5. *Acceptance of franchise; conditions imposed thereby.*

A railway corporation accepts its franchise from the State subject to the condition that it will conform at its own expense to any regulations as to the opening or use of streets which are reasonable and proper and have for their object public safety and convenience and which may, from time to time, be established by the municipality, within whose limits the company operates, proceeding under legislative authority. *Cincinnati, I. & W. Ry. Co.* v. *Connersville*, 336.

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