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UNITED STATES
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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1911

CHARLES HENRY BUTLER

REPORTER

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1912

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, CHIEF JUSTICE.
JOHN MARSHALL HARLAN, ASSOCIATE JUSTICE.[2]
JOSEPH McKENNA, ASSOCIATE JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIAM R. DAY, ASSOCIATE JUSTICE.[3]
HORACE HARMON LURTON, ASSOCIATE JUSTICE.
CHARLES EVANS HUGHES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JOSEPH RUCKER LAMAR, ASSOCIATE JUSTICE.

GEORGE WOODWARD WICKERSHAM, ATTORNEY GENERAL.
FREDERICK W. LEHMANN, SOLICITOR GENERAL.
JAMES HALL McKENNEY, CLERK.
JOHN MONTGOMERY WRIGHT, MARSHAL.

[1] For allotment of THE CHIEF JUSTICE and Associate Justices among the several circuits see next page.

[2] MR. JUSTICE HARLAN died on October 14, 1911 (see p. v, *post*). He took no part in the decisions of any cases submitted during October Term, 1911, and reported in this volume. On February 19, 1912, President Taft nominated Mahlon Pitney, Chancellor of the State of New Jersey, as Associate Justice to succeed MR. JUSTICE HARLAN. He was confirmed by the Senate on March 13, 1912, commissioned on the same day, and on March 18, 1912, qualified, and immediately took his seat upon the bench.

[3] MR. JUSTICE DAY was necessarily absent during October Term, 1911, until January, 1912 (see page xxix, *post*), and took no part in any of the decisions reported in this volume except those argued and submitted during October Term, 1910.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, JANUARY 9, 1911.

ORDER: There having been a Chief Justice and three Associate Justices of this court appointed since the last allotment of the Chief Justice and Associate Justices among the circuits.

Therefore, in pursuance of Section 606 of the Revised Statutes, it is now here ordered by the court that the following allotment of the Chief Justice and Associate Justices among the circuits be, and the same is hereby, made, and that such allotment be entered of record, viz.:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Charles E. Hughes, Associate Justice.

For the Third Circuit, Horace H. Lurton, Associate Justice.

For the Fourth Circuit, Edward D. White, Chief Justice.

For the Fifth Circuit, Joseph R. Lamar, Associate Justice.

For the Sixth Circuit, John M. Harlan, Associate Justice.

For the Seventh Circuit, William R. Day, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

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PROCEEDINGS ON THE DEATH OF MR. JUSTICE HARLAN.

JOHN MARSHALL HARLAN, Associate Justice of the Supreme Court of the United States, died at his home, in Washington, District of Columbia, on Saturday, October 14, 1911, after an illness of four days. He attended the opening session of October Term, 1911, on Monday, October 9 and the session of the following day. He did not attend any other.

On Monday, October 16, on the opening of court THE CHIEF JUSTICE said:

"Gentlemen of the Bar—It is my painful duty to announce the death of MR. JUSTICE HARLAN. The court will stand adjourned until Wednesday morning next without the transaction of business of any kind to-day."

The funeral of MR. JUSTICE HARLAN took place at the New York Avenue Presbyterian Church on Tuesday, October 17, 1911. The interment was at Rock Creek Cemetery in the District of Columbia.

SATURDAY, DECEMBER 16, 1911.

The Bar of the Supreme Court of the United States and the Officers of the court met in the Court Room in the Capitol at twelve o'clock.

On motion of MR. LOUIS T. MICHENER, MR. AUGUSTUS E. WILLSON was chosen Chairman and MR. JAMES H. MCKENNEY, Secretary.

On motion of *Mr. Solicitor General Lehmann*, the Chair appointed the following members of the Bar, a Committee on Resolutions:

Mr. Frederick W. Lehmann, Missouri, Chairman; Mr. Joseph W. Bailey, Texas; Mr. Elihu Root, New York; Mr. Lawrence Maxwell, Ohio; Mr. William O. Bradley, Kentucky; Mr. Henry E. Davis, District of Columbia; Mr. Swagar Sherley, Kentucky; Mr. William F. Mattingly, District of Columbia; Mr. Blackburn Esterline, Illinois.

Addresses were made by Mr. Solicitor General Lehmann; Mr. Joseph W. Bailey, United States Senator from Texas; Mr. Elihu Root, United States Senator from New York; Mr. William O. Bradley, United States Senator from Kentucky; Mr. Hannis Taylor; Mr. Blackburn Esterline; Mr. Franklin W. Collins.

Mr. Solicitor General Lehmann, for the Committee, presented the following resolutions:

Resolved, That the members of the Bar of the Supreme Court of the United States record their profound appreciation of the life and labors which were brought to a close by the death of MR. JUSTICE HARLAN.

He was dedicated at his birth to the profession of the law by his father, who was himself an honored and distinguished member of that profession, and prophecy of a personal career was never more completely fulfilled than that which spoke in the christening of JOHN MARSHALL HARLAN. He came into an heroic epoch of American history, and, mentally and physically, was cast in an heroic mould. In his earliest manhood he entered upon the practice of his profession and at the same time took part in the political controversies by which the country was then deeply disturbed and which nowhere tried the mettle of American manhood more than in that border-

land of contention of which his native State of Kentucky was a part, and when the discussion of the hustings and of legislative halls proved unequal to the settlement of the problems, he met the full measure of patriotic duty by responding to the call to arms and sharing in the perils and privations which an appeal to the arbitrament of war made necessary. Returning, after distinguished service in the field, to the practice of his profession, he continued his interest and his efforts in behalf of the public welfare, and in the contests of politics was a willing leader of the forces which held his faith alike, whether the prospect was of victory or of defeat.

Disciplined by the experiences of civil and military life and by the duties of public and private station, he came in the full maturity of his powers, to this tribunal, whose broad jurisdiction imposes upon its members responsibilities as serious as can rest upon the conscience of man. For nearly thirty-four years he honored his high position by faithful discharge of its duties. The record of his service is to be found in a hundred and twenty-six volumes of reported cases in the determination of which, with few exceptions, he participated. In seven hundred cases he wrote the opinion of the court, and in many others he wrote opinions, sometimes of concurrence, for reasons separately stated, and sometimes of radical dissent, but whether he spoke for others or only for himself, and whether in assent or in dissent, it was always in the language of honest and earnest conviction.

Personal and property rights, individual and corporate interests, the reciprocal relations of citizen, State and nation, in ever changing phases presented themselves as subjects for adjudication. Indifferent in no instance, there was, however, an especial appeal to him in cases involving those rights of the individual which it was the purpose of the amendments to the Federal Constitution to secure, and he supported the national authority in its fullest scope as the sure means of maintaining those rights.

His style proclaimed the man. It was simple, direct, strong, and rugged. His opinions are supported by abundant authority, but make no vain display of learning, and of their meaning there is no room for doubt.

Virile and masterful, his strength was subdued to a conscience sensitive to right, and his purposes were shaped by a character of perfect integrity. Throughout the many years that fell to his part, as a man, citizen, soldier, and judge, he kept without stain the name he bore and which he cherished as the guide and inspiration of his life.

Resolved, That the Attorney General be requested to present these resolutions to the court for entry upon the record, and that the chairman of the meeting be directed to send to the family of JUSTICE HARLAN a copy of the resolutions with an expression of our sympathy for them in the loss they have sustained.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 29, 1912.

Present: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY, MR. JUSTICE LURTON, MR. JUSTICE HUGHES, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE LAMAR.

Mr. Attorney General Wickersham presented the following resolutions:

Resolved, That the members of the Bar of the Supreme Court of the United States record their profound appreciation of the life and labors which were brought to a close by the death of MR. JUSTICE HARLAN.

He was dedicated at his birth to the profession of the law by his father, who was himself an honored and distinguished member of that profession, and prophecy of a

personal career was never more completely fulfilled than that which spoke in the christening of JOHN MARSHALL HARLAN. He came into an heroic epoch of American history, and, mentally and physically, was cast in an heroic mould. In his earliest manhood he entered upon the practice of his profession and at the same time took part in the political controversies by which the country was then deeply disturbed and which nowhere tried the mettle of American manhood more than in that borderland of contention, of which his native State of Kentucky was a part, and when the discussion of the hustings and of legislative halls proved unequal to the settlement of the problems, he met the full measure of patriotic duty by responding to the call to arms and sharing in the perils and privations which an appeal to the arbitrament of war made necessary. Returning, after distinguished service in the field, to the practice of his profession, he continued his interest and his efforts in behalf of the public welfare, and in the contests of politics was a willing leader of the forces which held his faith, alike whether the prospect was of victory or of defeat.

Disciplined by the experiences of civil and military life and by the duties of public and private station he came, in the full maturity of his powers, to this tribunal, whose broad jurisdiction imposes upon its members responsibilities as serious as can rest upon the conscience of man. For nearly thirty-four years he honored his high position by faithful discharge of its duties. The record of his service is to be found in 126 volumes of reported cases, in the determination of which, with few exceptions, he participated. In 700 cases he wrote the opinion of the court, and in many others he wrote opinions, sometimes of concurrence, for reasons separately stated, and sometimes of radical dissent, but whether he spoke for others or only for himself, and whether in assent or in dissent, it was always in the language of honest and earnest conviction.

Personal and property rights, individual and corporate

interests, the reciprocal relations of citizen, State and nation, in ever-changing phases, presented themselves as subjects for adjudication. Indifferent in no instance, there was, however, an especial appeal to him in cases involving those rights of the individual which it was the purpose of the amendments to the Federal Constitution to secure, and he supported the national authority in its fullest scope as the sure means of maintaining those rights.

His style proclaimed the man. It was simple, direct, strong and rugged. His opinions are supported by abundant authority, but make no vain display of learning, and of their meaning there is no room for doubt.

Virile and masterful, his strength was subdued to a conscience sensitive to right, and his purposes were shaped by a character of perfect integrity. Throughout the many years that fell to his part, as a man, citizen, soldier, and judge, he kept without stain the name he bore, and which he cherished as the guide and inspiration of his life.

Resolved, That the Attorney General be requested to present these resolutions to the court for entry upon the record, and that the chairman of the meeting be directed to send to the family of JUSTICE HARLAN a copy of the resolutions with an expression of our sympathy for them in the loss they have sustained.

The Attorney General then said:

May it please the court, on the first page of the tenth volume of Peters' Reports of the decisions of this court is recorded the fact that JOHN MARSHALL, its Chief Justice, died at Philadelphia on the 6th day of July, 1835, and, in a brief minute, it is added:

"His judgments upon great and important constitutional questions, affecting the safety, the tranquillity, and the permanency of the Government of his beloved country—his decisions on international and general law, distinguished by their learning, integrity and accuracy, are

recorded in the reports of the cases adjudged in the Supreme Court of the United States, in which he presided during a period of thirty-four years."

This simple bald recital of the services of the great expounder of our Constitution concludes with these words:

"As long as the Constitution and laws shall endure and have authority, these will be respected, regarded and maintained."

Perhaps by no other member of this court have these decisions been more highly respected, regarded and maintained than by JOHN MARSHALL HARLAN, the Associate Justice of this court, who departed this life on October 14, 1911, after a length of service nearly coincident with that of the great judge whose name he bore.

MR. JUSTICE HARLAN was born in Boyle County, Ky., on June 1, 1833. His commission as an Associate Justice of this court is dated November 29, 1877, and he took the oath of office on December 10 of that year, being then little more than 44 years of age.

His first recorded opinion is that in *National Bank* v. *Insurance Company* (95 U. S. 673). His last opinion expressing the judgment of the court is that in *Northern Pacific Railway Company* v. *Trodick* (221 U. S. 208), rendered May 15, 1911. In the same volume is recorded his very last written opinion, delivered two weeks later, in the case of *United States* v. *American Tobacco Company*, concurring in part and in part dissenting from the opinion of court.

The records of his activities as a justice of this court during the thirty-four years of his service are, therefore, to be found in the one hundred and twenty-six volumes of its published opinions, from the ninety-fifth to the two hundred and twenty-first, and they cover the entire range of subjects which have come before this court during all those years. From the first to the last, these opinions breathe what Lowell called the "brave old wisdom of sincerity."

JUSTICE HARLAN was born, educated, and came to manhood in Kentucky, then a border State. His father, James Harlan, was a Whig, a devoted friend of Henry Clay, an admirer of Webster, and an earnest believer in the principles of constitutional law as expounded by Marshall. He intended his son to be a lawyer, and, in the expression of his hopes, he named him John Marshall. The future justice was brought up in the school of thought represented by Marshall, Webster and Clay. He began to take part in political affairs when he was but twenty. He was elected county judge of Franklin county when twenty-five. He was an elector on the Bell and Everett ticket, which carried Kentucky in 1860. He threw himself actively into the controversy which developed into civil war in 1861, and, together with James Speed, Attorney General of the United States under Mr. Lincoln, labored successfully to prevent Kentucky from joining the Confederacy. In July, 1861, he was commissioned captain of a company of zouaves. His military service lasted until the death of his father in 1863, when, upon resigning his military commission, he was elected attorney general of his State. He continued active in political affairs and, in 1877, was one of the commissioners charged with settling certain disputes which threatened to disturb the peace of the State of Louisiana. In December of that year President Hayes appointed him an Associate Justice of this court.

Perhaps the fact that his native State was divided in the great contest of 1861–1865, lent a greater intensity to JUSTICE HARLAN'S convictions concerning the true meaning and correct interpretation of the Constitution than he might otherwise have felt, and inclined him to a construction which gave to the National Government the maximum power which the language of the fundamental law would permit. The Constitution and the Bible were the objects of his constant thought and consideration, and if the latter was to him always *vox Dei*, the former, *vox populi*, was no less so. His opinions were expressed in

forceful and vigorous language, and his convictions upon questions of public policy which were involved in the decision of cases in which he wrote, blazed out in language whose meaning admitted of no doubt. When he did not agree with his brethren, he said so in unmistakable terms.

He was impatient of a construction which limited what he believed to be the intention of the people in adopting the war amendments to the Constitution and which thwarted the entire equalization of the negro with the white man in all political and public relations. He expressed the judgment of the court in *Neal* v. *Delaware* (103 U. S. 370), where it was held that the adoption of the Fifteenth Amendment rendered inoperative a provision in the then existing constitution of the State of Delaware, whereby the right of suffrage was limited to the white race, and that a statute of the State, confining the selection of jurors to persons possessing the qualifications of electors was enlarged in its operation so as to embrace all those who, by the constitution of the State as modified by the Fifteenth Amendment, were entitled to vote.

But in the *Civil Rights Cases* (109 U. S.) he vigorously dissented from the view taken by the majority of the court respecting the Civil Rights Act of March 1, 1875, contending that their opinion proceeded "upon grounds entirely too narrow and artificial."

"I cannot resist," he said, "the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul. Constitutional provisions adopted in the interest of liberty and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom and belonging to American citizenship have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which

they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency of policy; I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."

Again, in *Plessy* v. *Ferguson* (163 U. S. 537) he dissented, with equal vigor, from the decision which sustained the constitutionality of an act of the legislature of Louisiana requiring railway companies carrying passengers in their coaches in that State to provide equal, but separate, accommodations for the white and colored races.

"The sure guarantee of the peace and security of each race," he wrote, "is the clear, distinct, unconditional recognition by our Governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing the equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can properly be regarded as one, is scarcely worthy of consideration, for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the

purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting."

In *Hodges* v. *United States* (203 U. S. 1) he dissented from the decision of the majority that the Fourteenth and Fifteenth Amendments to the Constitution operate solely on state action and not on individual action, and that the remedy for wrongs committed by individuals on persons of African descent is through state action and state tribunals, subject to supervision of this court by writ of error in proper cases; and that, consequently, the United States District Courts have no jurisdiction under the Thirteenth Amendment or §§ 1978, 1979, 5508 or 5510, Revised Statutes, of a charge of conspiracy made and carried out in a State to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor.

He protested against the decision in *Hurtado* v. *People of California* (110 U. S. 516), that the words "due process of law" in the Fourteenth Amendment do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, contending that "due process of law," within the meaning of the National Constitution, does not import one thing with reference to the powers of the State and another with reference to the powers of the general Government.

"My brethren concede," he wrote, "that there are principles of liberty and justice lying at the foundation of our civil and political institutions which no State can violate consistently with that due process of law required by the Fourteenth Amendment in proceedings involving life, liberty or property. Some of these principles are enumerated in the opinion of the court. But for reasons which do not impress my mind as satisfactory they exclude from that enumeration the exemption from prosecution, by information, for a public offense involving life. . . .

"It is said by the court that the Constitution of the

United States was made for an undefined and expanding future, and that its requirement of due process of law in proceedings involving life, liberty, and property must be so interpreted as not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure. It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives by information, which suggests that the State which adopts it has entered upon an era of progress and improvement in the law of criminal procedure."

He concurred with the majority of the court in *De Lima* v. *Bidwell* (182 U. S. 1), in holding that territory (in this case Porto Rico) acquired by the United States by cession from a foreign power is not "foreign country" within the meaning of the tariff laws. But in *Downes* v. *Bidwell* (182 U. S. 245) he was one of the justices who agreed with the Chief Justice in dissenting from the conclusion that, after its cession to the United States by Spain, the island of Porto Rico was not a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States."

In *Hawaii* v. *Mankichi* (190 U. S. 197), again dissenting from the majority of the court, he maintained that, after the annexation of Hawaii and before the passage of the act of Congress providing a government for that territory, a conviction for manslaughter upon an indictment not found by a grand jury and by the verdict of nine only out of twelve jurors, in accordance with the laws of Hawaii in force at the time of annexation, could not be legal.

But if he was strong and vigorous in dissent, he was equally so in voicing the conclusions of the majority of the court. The vigorous line of opinions dealing with the power of the Federal Government over interstate

commerce are the best examples of the strength of his convictions and the lucidity of his reasoning in constitutional exposition. In them the principles of Marshall's interpretation of the Constitution were fully recognized and applied. In the *Lottery Case* (188 U. S. 321), he demonstrated the proposition that legislation, under the power to regulate commerce among the several States, may sometimes properly assume the form or have the effect of prohibition, and that Congress, under this power, might prohibit the carriage of lottery tickets from one State to another. In *Minnesota* v. *Barber* (136 U. S. 313), he wrote the decision holding to be unconstitutional a statute of the State of Minnesota which prohibited the sale in that State of fresh beef, veal, pork, etc., for human food, unless the animals from which taken should have been inspected within that State before being slaughtered. In a series of forceful opinions, the last of which was written at the very close of his life, he upheld the right of corporations to engage in interstate commerce without interference or restriction by state authority. These opinions illustrate the surprising freshness and vigor of JUSTICE HARLAN'S mind. In *Western Union Telegraph Company* v. *Kansas* (216 U. S. 1), and in *Pullman Company* v. *Kansas* (216 U. S. 56), it was held that the right to carry on interstate commerce is not a privilege granted by the States, but a constitutional right of every citizen of the United States; that the Congress alone can limit the right of corporations to engage therein, and that no State may impose, as a condition of carrying on interstate commerce within its borders, a tax of a given percentage of all the capital of a corporation, represented by its business interests and property, everywhere, within and outside of the State; that a corporation organized in one State and doing an interstate business, is not bound to obtain the permission of another State to transact business within its limits, but can go into the latter for the purpose of interstate business, although subject to reasonable legal

regulations for the safety, comfort, and convenience of the people, which do not, in a real substantial sense, burden or regulate its interstate business, nor subject its other property and interests, outside of the State, to taxation. In the case of the *International Textbook Company* v. *Pigg* (217 U. S. 91), he applied these principles, in a most interesting and lucid manner, to the case of a Pennsylvania corporation engaged in furnishing instruction, by correspondence with students in various States.

"It is true," he said, "that the business in which the International Textbook Co. is engaged is of a somewhat exceptional character, but, in our judgment, it was in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Textbook Co., located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. . . . Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—'a new species of commerce,' to use the words of this court in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9."

While always asserting with vigor the supremacy of Federal control over interstate commerce, he yet wrote the opinion of the court in the case of *Hennington* v. *Georgia* (163 U. S. 299), holding valid statutes of the State of Georgia which forbade the running of freight trains on any railroad in that State on Sunday, upon the ground that, while such legislation affected interstate commerce

in a limited degree, it was not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, and would be respected by the Federal courts until superseded and displaced by some act of Congress, passed in exclusion of the power to regulate commerce granted by the Constitution. Where the people of a State deem it necessary to their peace, comfort, and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on within the limits of that State shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute rest and quiet, that result, he said, speaking for the court, was obtainable by state legislation, which would be valid until Congress should occupy the field by some inconsistent provision of law.

In an opinion remarkable for learning and research, in the case of *Sparf and Hansen* v. *United States* (156 U. S. 51), he expressed the judgment of the court that, in the courts of the United States, it is the duty of the jury, in criminal cases, to receive the law from the court and to apply it as given by the court, subject to the condition that, by a general verdict, a jury, of necessity, determines both law and fact as compounded in the issues submitted to them in a particular case. He summed up the argument in these words:

"We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury the responsibility of applying the law so declared to the facts as they upon their conscience believe them to be. Under any other system the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection

equally of society and of individuals in their essential rights. When that occurs our Government will cease to be a government of laws and become a government of men. Liberty regulated by law is the underlying principle of our institutions."

It would prolong this address far beyond the proper limits of this occasion to continue much further the review of JUSTICE HARLAN'S many contributions to the records of the court during his service of more than one-third of a century. Yet no review of his services would be adequate which failed to refer to his participation in the construction and enforcement of the law against unlawful restraints upon interstate commerce and monopolies. Strongly individual in his views and in his characteristics, he was keenly sympathetic with the widespread public dread of the effect upon individualism of the tendencies toward concentration of control over great industries, and the creation of monopolistic combinations which found expression in the now famous Sherman Act of 1890. When the court upon the presentation of the facts in the *Knight Case* (156 U. S. 1), held that act to be ineffective in checking monopoly at its inception, and powerless in the face of the acquisition by a great corporation of ninety-eight per cent of all the manufactories in the United States of a commodity of common necessity, his dissent was expressed in vigorous language.

"If this combination," he wrote, "so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the National Government with power to deal with gigantic monopolies, holding in their grasp and injuriously controlling in their own interest the entire trade among the States in food products that are essential to the comfort of every household in the land. . . .

"Undoubtedly the preservation of the just authority of the States is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished. . . . But it is equally true that the preservation of the just authority of the General Government is essential as well to the safety of the States as to the attainment of the important ends for which that Government was ordained by the people of the United States, and the destruction of that authority would be fatal to the peace and well-being of the American people (p. 19).

* * * * * * * *

"There is no dispute here as to the lawfulness of the business of refining sugar, apart from the undue restraint which the promoters of such business who have combined to control prices seek to put upon the freedom of interstate traffic in that article.

"It may be admitted that an act which did nothing more than forbid, and which had no other object than to forbid, the mere refining of sugar in any State would be in excess of any power granted to Congress. But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at combinations that unduly restrain, because they monopolize the buying and selling of articles which are to go into interstate commerce." (p. 34).

He summed up the discussion in these words:

"Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States in all recognized articles of commerce absolutely free from unreasonable or illegal restrictions imposed by combinations

is justified by an express grant of power to Congress, and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

"Undue restrictions or burdens upon the purchasing of goods in the market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a State within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar to be transported to other States, how comes it that combinations of corporations or individuals within the same State may not be prevented by the National Government from putting unlawful restraints upon the purchasing of that article to be carried from the State in which such purchases are made" (pp. 37–38).

MR. JUSTICE HARLAN wrote the opinion in the *Northern Securities Case* (193 U. S. 197), which was concurred in by three other justices, and in which the conclusions reached were agreed to by Mr. Justice Brewer in an opinion expressing his dissent from the statement of some of the propositions set forth by MR. JUSTICE HARLAN with his accustomed vigor. The case presented was the acquisition by a New Jersey corporation of the control of the capital stocks of two competing trans-continental railroad systems. The majority of the court held that the acquisition by the Securities Company, through such stock ownership, of the power to prevent or restrain competition between the companies brought the case within the statute. JUSTICE HARLAN, in the argument to sustain the conclusion reached, contended that every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act which em-

braces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce, and was not limited in its effect to restraints that are unreasonable in their nature.

Justice Brewer, on the other hand, maintained that the correct ruling in the case would have been that the contracts under consideration were unreasonable restraints of interstate trade and as such, within the prohibition of the anti-trust act.

JUSTICE HARLAN wrote the opinion in *Continental Wall-Paper Co.* v. *Voight* (212 U. S. 227), which involved the right of a purchaser of goods from a combination unlawful under the anti-trust act to plead such illegality in defense of his failure to pay for goods. Holding that upon the facts admitted by the demurrer the plaintiff in effect was seeking the aid of the court to enforce a contract for the sale and purchase of goods which was in fact, and was intended to be, based upon agreements that were parts of an illegal scheme—a scheme based upon a combination intended and which would have the effect directly to restrain and monopolize trade and commerce among the several States and with foreign nations—JUSTICE HARLAN, speaking for the majority of the court, held that the plaintiff could not have judgment for the account sued on, because such judgment would in effect aid the execution of the agreements which constituted the illegal combination.

In the decisions in the cases against the *Standard Oil Company* (221 U. S. 1), and the *Tobacco Combination* (221 U. S. 106), JUSTICE HARLAN, while concurring in the decisions, read opinions expressing dissent from opinions which were concurred in by the other members of the court, with respect to a part of the reasoning advanced in support of the conclusions reached.

JUSTICE HARLAN'S individuality and his mental characteristics were the results of heredity and early environment. Another Kentuckian who attained fame in a very different line, writing in his autobiography of experiences

gained during three months' adventurous voyage in Canadian waters, and speaking of the Canadian sailors whose courage and fortitude in the face of hardship and danger had greatly impressed him, says:

"These men taught me much of human nature. I found in them the value of the common man as I probably should have found it nowhere else; for it is so well hidden in our more organized societies that many persons far more discerning than myself fail for all of their lives to see the meaning of ordinary life, and so fail to get the most important teaching the world has to give. In a way, I had been prepared for this coming revelation by my contact with the frontier type of man in Kentucky. But at his best, the man of the forests and plains cannot compare with the seaman in the even, rounded culture of human quality. As I had known him in Kentucky, he was a fine fellow of the conquering type. He had beaten his brute and human enemies and subjugated the wilderness; but he had never well learned what it was to follow a leader, to put his life in his chief's hands in a ceaseless war with a mastering deep." (Autobiography of Nathaniel Southgate Shaler, p. 165.)

JUSTICE HARLAN was a refined example of the type of Kentuckian referred to by Prof. Shaler. He had learned, in the fierce warfare of personal strife during the Civil War, and in the intensity of political contests after the war, to beat his brute and human enemies as his fathers had learned to subjugate the wilderness. But he never well learned what it was to follow a leader—at least, not a living one. He was a student and disciple of Marshall, but among living men he could lead but he could not follow. Where others agreed with his views he would march with them, but when they differed he marched on alone. His was not the temper of the negotiator. Strong, vigorous, self-confident, he stands out as the representative of a type which has made the American character dominant among the nations.

THE CHIEF JUSTICE responded:

Mr. Attorney General, your words go home to our hearts and the resolutions of our brethren of the Bar move us, since they show both the confidence which the Bar reposed in and the affection they bore MR. JUSTICE HARLAN, as well as the veneration they cherish for his memory. The depth with which these feelings are by us shared and the greatness of the sorrow which has come to us by the death of our brother, cannot be appreciated without understanding how completely the discharge of judicial duty in a court of last resort necessitates an effort by all to efface every merely incidental mental and moral tendency to difference of opinion in order that by the perfect equipoise of mind with mind and the union of heart with heart, a composite, wise and just judgment may result.

The disintegration by death of the union resulting from such ties of intimate and affectionate association brings with it not only bereavement, but a sense of despondency, because of the fleeting and perishable result of all human efforts which it apparently exemplifies. The contemplation, however, of the great life which we commemorate dispels the miasma of despondency and calls us to the onward and upward struggle for higher and holier things, since, when rightly measured, the lessons of that life point to the continuing and enduring result for good of duty conscientiously performed. Through the mists of parting and the shadows of death itself, clearing our vision by the light which that life affords, we are enabled to see how greatly the dedication of the life of our Brother HARLAN to the service of his country, during his more than thirty-three years of judicial labor, serves to sustain and to make fruitful for the benefit of all his countrymen the power for good of that ideal and undying personality, the Supreme Court of the United States, the offspring of the devotion of our forefathers to

human liberty and their genius to creating institutions for its perpetuation. So noble in conception and yet so simple in execution; so ordinary in its incidents and yet so majestic as the servant of the whole people; so weak and yet so strong, because founded upon the affection of all the people and depending for its existence upon their continued support.

It would not be appropriate on this occasion, nor is there presently time, Mr. Attorney General, to afford the opportunity to add to the condensed statement which you have made of the career of MR. JUSTICE HARLAN by giving an outline of his services in peace and in war. I shall, therefore, leaving the general subject to some more appropriate occasion, seek only now to depict in the briefest manner some of the most dominant of the moral and mental forces which characterized MR. JUSTICE HARLAN'S discharge of judicial duty, as seen from the angle of vision of those engaged with him in such duty, thus, perhaps, speaking from a point of observation which, if not stated now, might possibly pass out of view.

In the first place, there was ever manifested the supreme importance which he attached to the performance of his judicial work and the consequent dedication which followed of every mental and moral faculty of his being to the doing of that work. In the second place, there was likewise consequently manifested a purpose to do justice as it was given him to see it, a justice not resting upon mere metaphysical conceptions or distinctions of casuistry concerning the lines of separation between right and wrong, but a justice based upon what seemed to him to be a common sense of justice, begetting an ever-present and vivid purpose to uphold the right and to frustrate the wrong, and ever to see to it that the weak were not overmastered by the strong. In the third place—and this was the most prominent of all—he possessed a reverence for and an implicit faith in our constitutional institutions, a faith which knew no doubt, and caused him to

believe that the power of adaptability of those institutions was adequate to meet and provide for any possible condition, however complex or novel. And as these dominant qualities were potential in giving shape and form to his mental attributes, the latter in substance were but the reflex of the former. His methods of thought, in disregard of mere subtleties or refined distinctions, led him to the broadest lines of conviction, and as those lines were by him discerned, and differences between himself and others became impossible of reconciliation, the warfare of mind with mind was by him carried on, not with adroit fence or subtle play of reason, but with a directness and entire disregard of all narrower points of view. This was particularly observable with reference to his conclusions on questions concerning powers of government arising from constitutional limitations and the consideration of asserted violations of the rights of individuals protected by such limitations. Once his convictions were definitely formed, so complete was his faith, so ardent was his devotion, so unalterable was his purpose to maintain and perpetuate in each and every particular, as he understood it, the Government under the Constitution which he so much loved, that sometimes the very ardor and zeal with which, when he differed from others, the reasons for his differences were expounded, produced upon the merely superficial observer the impression that there was doubt on his part as to the power of the Constitution, if interpreted in conflict with the views which he held, to successfully continue to accomplish the great purpose which it was ordained to secure; but this was indeed a singularly mistaken view, since it engendered doubt and weakness merely because of the forms in which supreme and perfect faith had found their expression.

It being true, as I have said, that the lessons afforded by the life of the great American whose loss we commemorate and deplore afford a correction of despondency and constitute an incentive, calling upon all to dedicate their

lives to a higher and completer fulfillment of duty, why is it not also true that a right contemplation of that life and its results will serve in some measure to assuage the feeling of sorrow begotten by his death? It was given him to exceed the allotted span of mortal existence, and during his long and useful career to faithfully serve, in war and in peace, his country; to win the affection of all his countrymen, and to afford an elevating and noble example of duty well and faithfully performed. Ah! contemplating that life, its simplicity, its courage, its devotion to duty, its love of country, does not the faith come to us that in the transition from things finite to things infinite it has been given to him to hear the ineffable melody of those words of benediction, the hope of hearing which has led so many millions to consecrate their lives to the performance of duty and the service of God and their country—"Well done, thou good and faithful servant."

Mr. Attorney General, the resolutions which you present will be ordered spread upon the records along with such other tributes concerning the life and character of MR. JUSTICE HARLAN which were evoked by his death.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 8, 1912.

Present: MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE LURTON, MR. JUSTICE HUGHES, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE LAMAR.

Mr. Justice McKenna said:

"I will say to the gentlemen of the Bar that the Chief Justice is detained at home, and I will read a statement prepared by him:

" 'MRS. DAY, wife of MR. JUSTICE DAY, died on Friday afternoon at their home in Canton, Ohio.

" 'When we assembled for the commencement of the term, MR. JUSTICE DAY was absent, and we learned that he was prevented from coming by the illness of MRS. DAY. We soon came further to know the serious character of that illness and the ever-present dread which existed that any moment it might terminate fatally. Indeed, during the time which has elapsed our sympathy has gone out to our brother in the cruel and relentless anguish with which he has been incessantly encompassed, ending in the dread bereavement which has come to him.

" 'The funeral services take place at Canton this afternoon. Were it possible, we should attend the ceremonies in a body, and to enable us to do so would adjourn for the day. Unable to be present, however, we shall yet in spirit be there. As a manifestation of our participation in spirit in the ceremonies, and as a mark of our sorrow and affection for the living and respect and tenderness for the memory of the dead, we shall transact no business to-day, but will adjourn until to-morrow morning.' "

Adjourned until to-morrow at 12 o'clock.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1911

BLINN, RECEIVER OF ALLEN, AN ABSENTEE, *v.* NELSON.

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

No. 5. Argued April 10, 1911.—Decided October 23, 1911.

A state statute of limitations allowing only a little more than a year for the institution of a suit to recover his personal property by a party who has not been heard from for fourteen years and for whose property a receiver has been appointed is not unconstitutional as depriving him of his property without due process of law; and so held as to the provisions to that effect of the Revised Laws of Massachusetts, c. 144, for distribution of estates of persons not heard of for fourteen years and presumably dead.

Constitutional law, like other mortal contrivances, has to take some chances of occasionally inflicting injustice in extraordinary cases.

197 Massachusetts, 279, affirmed.

THE facts are stated in the opinion.

Mr. George R. Blinn, receiver, plaintiff in error, *pro se*, submitted:

Even if the statute is constitutional as to provisions

for receivership and care of property of an absentee under *Cunnius* v. *Reading School District*, 198 U. S. 458, it is unconstitutional as to the provisions barring the absentee from recovering property after the expiration of fourteen years from the disappearance; the provisions as to the disposition of such property are unconstitutional, in that the notice which is required as the prerequisite to the proceedings is inadequate; the safeguards affecting the rights of the absentee in the distribution of the property are inadequate; and the time within which distribution may be made is arbitrary and unreasonable.

The statute, which is the subject of construction in this case, is different in many essentials from the Pennsylvania statute sustained in *Cunnius* v. *Reading School District, supra.*

A minimum constructive notice of thirty days is all that is required by the Massachusetts statute—only one-fifth as long as the notice required by the Pennsylvania statute.

The rights of absentees are not properly safeguarded by the Massachusetts statute in case of a distribution. They are absolutely barred at the expiration of fourteen years from the date of disappearance or at the expiration of one year after the appointment of a receiver in the event that such appointment is made more than thirteen years after the date of disappearance. The Pennsylvania statute leaves a discretion with the court which may carefully protect the rights of the absentee regardless of length of absence.

The Massachusetts statute can only be defended as a statute of limitations, and if the time within which the statute is to take effect is unreasonably short, it is unconstitutional. The consideration of what constitutes a reasonable or unreasonable length of time for such a statute to operate depends upon the circumstances of the class

of cases which it affects. The time which is reasonable for one class of cases may be unreasonable for another class of cases and all classes of cases may be affected in times of a public emergency, *Am. Land Co.* v. *Zeiss*, 219 U. S. 47; *Wilson* v. *Iseminger*, 185 U. S. 55; in that event it would not be a statute of limitations but an unlawful attempt to arbitrarily extinguish rights. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 207; *In re Brown*, 135 U. S. 701, 707.

The time within which distribution may be made is arbitrary and unreasonable. That portion of the statute which provides for the distribution of the property of an absentee is unconstitutional and void, because it operates as a statute of limitations, the time of which is unreasonably short and is measured by the wrong standard, to wit: the duration of the absence instead of the duration of the abandonment of the property to be distributed.

Although that part of the statute providing for final distribution of the property is void, the provisions for appointment of the receiver and care and management of the property, etc., are valid. These two parts are entirely distinct and separable, and in no way dependent upon each other. Each part might well have been enacted alone without any provision for distribution. *Commonwealth* v. *Hitchings*, 5 Gray, 482, 485; *Commonwealth* v. *Petranich*, 183 Massachusetts, 217, 220; *Edwards* v. *Bruorton*, 185 Massachusetts, 529, 530; *Commonwealth* v. *Anselvich*, 186 Massachusetts, 376, 379; *Commonwealth* v. *Cadwell*, 190 Massachusetts, 355, 358; Cooley's Const. Lim. (7th ed.), p. 246, etc.

Mr. Amos L. Taylor, with whom *Mr. Hollis R. Bailey* was on the brief, for defendants in error:

All the provisions of the statute as to receivership and care of property are constitutional. *Cunnius* v. *Reading School District*, 198 U. S. 458; *Nelson* v. *Blinn*, 197 Mas-

sachusetts, 279; *Attorney General* v. *Provident Institution*, 201 Massachusetts, 23.

The provisions of the statute as to final distribution after fourteen years are also constitutional.

The only material difference between the Pennsylvania statute and the Massachusetts statute is that the former seems to leave the matter of final distribution to the discretion of the court and provides for security for its repayment unless the court decrees its ultimate distribution to the persons entitled thereto, while the latter statute provides that the property shall never be repaid after the expiration of fourteen years and creates a new statute of limitations.

It is within the power of a State to enact reasonable statutes of limitations and establish a time after which no action can be brought. This power is legislative and not judicial. *Am. Land Co.* v. *Zeiss*, 219 U. S. 47, 70; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 156; *Missouri* v. *Illinois*, 200 U. S. 496; *Davis* v. *Mills*, 194 U. S. 451; *Soper* v. *Lawrence Bros. Co.*, 201 U. S. 359, aff'g 98 Maine, 268; *Tioga Railroad* v. *Blossburg & Corning Railroad*, 20 Wall. 137, 150; *Metcalf* v. *Watertown*, 153 U. S. 671. For specific instances, see *McElmoyle* v. *Cohen*, 13 Pet. 312, 327 (five years allowed); *Wheeler* v. *Jackson*, 137 U. S. 245 (six months allowed); *Turner* v. *New York*, 168 U. S. 90, aff'g 145 N. Y. 451 (six months allowed). See also *Saranac Land & Timber Co.* v. *New York*, 177 U. S. 318; *Terry* v. *Anderson*, 95 U. S. 628 (nine months and seven days allowed); *Jackson* v. *Lamphire*, 3 Pet. 280 (two years allowed); *Sohn* v. *Waterson*, 17 Wall. 596 (two years allowed); *Hawkins* v. *Barney*, 5 Pet. 456, holding Kentucky's Seven Years' Possession Law valid.

Local conditions must govern.

The fact that there may be a distribution one year after the appointment of a receiver is not unreasonable, especially when taken in connection with the absence of

the party for over fourteen years; nor is it unreasonable to provide that the time shall be reckoned from the date of the disappearance rather than from the date of the right of the absentee to possession of any property in question. That has always been the rule in case of presumption of death after seven years' absence and important rights are determined by it. *Loring* v. *Steineman*, 1 Met. 204; *George* v. *Clark*, 186 Massachusetts, 426; *Butrick* v. *Tilton*, 155 Massachusetts, 461; *Marden* v. *Boston*, 155 Massachusetts, 359; *Stockbridge, Pet'r*, 145 Massachusetts, 517; *Bowditch* v. *Jordan*, 131 Massachusetts, 321; *Kelly* v. *Drew*, 12 Allen, 107; *King* v. *Fowler*, 11 Pick. 302. Any statute of limitations which may have run while the owner is ignorant of his rights may work hardship but that is the penalty for absence without leaving an address, notifying friends or appointing an agent. *Hurling* v. *Caw Valley Railway*, 130 U. S. 559.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition by the next of kin of an absentee for the distribution of her property in the hands of the receiver; the appointment of the receiver, the taking of the property into his hands, and the present petition all being under Massachusetts Revised Laws, c. 144, and amendments to the same. The general scheme of the law is that in case of a person disappearing from Massachusetts to parts unknown, leaving no known agent in the State, but having an interest in property there, any one who would be entitled to administration may apply to the Probate Court for the appointment of the receiver. After due notice, a warrant to the sheriff to take possession of the property, and his return, a receiver may be appointed of the property scheduled in the sheriff's return, and the court is to find and record the date of the disappearance. By § 10, if the absentee does not appear and claim the property

within fourteen years after the recorded date, his title is barred; and by § 11 if, after the fourteen years, the property has not been accounted for or paid over, it is to be distributed to those who would have taken it on the day fourteen years after the said date. By § 12 if the receiver is not appointed within thirteen years after said date, the time for distribution and for barring actions relative to the property shall be one year after the date of the appointment instead of the fourteen years provided in §§ 11, 12.

On July 20, 1905, the plaintiff in error was appointed receiver of the property of Mabel E. Allen, and the date of the disappearance of the latter was found and recorded as 'within or prior to the year 1892.' The present petition was filed on March 18, 1907. The property in question was an interest of the absentee under the residuary clause of the will of Jonathan Merry, allowed and proved on December 8, 1828. Long after the estate was settled an administrator *de bonis non* was appointed in 1885 and in or about 1899 collected on account of French Spoliation Claims a sum in which Mabel Allen's share was $1633 and $22. This, with accumulations from interest, is the fund in controversy. The Probate Court made a decree of distribution, which was affirmed by the Supreme Judicial Court of the Commonwealth. 197 Massachusetts, 279. The receiver, having duly set up that the above mentioned §§ 10, 11 and 12 were contrary to the Fourteenth Amendment, brought the case to this court.

The plaintiff in error does not deny that the provisions for the appointment of a receiver are valid. *Cunnius* v. *Reading School District*, 198 U. S. 458. But he argues that the attempt to bar the absentee's title and to distribute his property is void for want of sufficient notice and other safeguards and because the time within which distribution may be made is arbitrary and unreasonable. There is reasonably careful provision for notice by publication before the appointment and the whole proceeding begins

with a seizure by the sheriff of the property mentioned in the original petition. *American Land Co.* v. *Zeiss*, 219 U. S. 47, 67. *Tyler* v. *Judges of the Court of Registration*, 175 Massachusetts, 71, 75. So the question put in the way most favorable for the plaintiff in error is whether a statute of limitations that possibly may allow little more than one year, is too short when the property is held in the quasi adverse hand of the receiver for that time, (what the court would do and how it would interpret the statute if other property fell in after the receiver was appointed is not material in this case). We cannot doubt as to the answer. If the legislature thinks that a year is long enough to allow a party to recover his property from a third hand, and establishes that time in cases where he has not been heard of for fourteen years and presumably is dead, it acts within its constitutional discretion. Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done. See *American Land Co.* v. *Zeiss*, 219 U. S. 47, 67. Shorter time than one year has been upheld. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 156. *Turner* v. *New York*, 168 U. S. 90. *Terry* v. *Anderson*, 95 U. S. 628. See *Soper* v. *Lawrence Brothers Company*, 201 U. S. 359, 369.

Decree affirmed.

UNITED STATES *v.* BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 464. Argued October 19, 1911.—Decided October 30, 1911.

Courts are not inclined to make constructive crimes, and in this case the general rule that penal statutes must be strictly construed applies.

If there be ambiguity, the character of the statute determines for strict or liberal construction, but where there is no ambiguity the words of the statute are the measure of its meaning.

A penal statute should not be construed as confounding unwillful with willful acts by uniting in criminality and penalties parties to whom no notice need be given with those to whom notice must be given.

The provisions of § 2 of the act of March 3, 1905, 33 Stat. 1264, c. 1496, forbidding receipt for transportation of live stock from quarantined points in any State or Territory into any other State or Territory, do not apply to the receipt of live stock by a connecting carrier for transportation wholly within the State in which it is received, even though the shipment originated at a quarantined point in another State.

THE facts, which involve the construction of the Cattle Quarantine Act of March 3, 1905, 33 Stat. 1264, are stated in the opinion.

The Solicitor General for the United States:

The statute applies to the shipment of sheep from a quarantined State or Territory into any other State or Territory of the Union and to every carrier participating in such shipment, not alone the initial carrier who takes up the sheep in the quarantined district and carries them without, but as well to every succeeding connecting carrier doing any part of the work of transportation neces-

sary to bring the shipment from its place of beginning to its place of destination.

Considering the statute in its entirety and the purposes for which it was enacted, it is applicable to interstate shipments of live stock from place of origin to place of destination.

As a part of the statute, too, the regulations made under it, which apply of course only to interstate shipments, must be taken into consideration. Certainly it was competent for Congress to authorize a regulation which was operative from the beginning to the end of the shipment. *Leisy* v. *Hardin*, 135 U. S. 100; *Kelley* v. *Rhoads*, 188 U. S. 1.

The intention of the framers of the law was to authorize such a regulation; see the report of House Committee, No. 4200, 58th Cong., 3d Session, February 3, 1905, recommending the law in question as tending to control and eradicate the contagious diseases of animals in the United States; see also Regulations of Secretary of Agriculture of April 15, 1907, and August 16, 1909.

The act accomplishes what Congress intended and what its efficiency requires and it should be interpreted and enforced by the light of the fundamental rule for carrying out its purposes. *Rhodes* v. *Iowa*, 170 U. S. 412. The act deals with the shipment always as an entirety.

Mr. George Hoadly, with whom *Mr. Judson Harmon*, *Mr. Edward Colston* and *Mr. A. W. Goldsmith* were on the brief, for defendant in error:

The statute is penal. *United States* v. *Southern Railway Co.*, 187 Fed. Rep. 209, holding the statute to be remedial and not penal was error; and see *St. L. Terminal Co.* v. *United States*, 188 Fed. Rep. 191.

Not only does the statute impose a money penalty in favor of the United States, not of a party aggrieved, but

it declares that the violation of its provisions is a misdemeanor punishable by fine or imprisonment or both. The fact that this defendant being a corporation cannot be imprisoned does not make the statute any the less penal. As to strict construction of penal statutes, see *Huntington* v. *Attrill*, 146 U. S., p. 667; 3 Bl. Comm. 2; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Reese*, 92 U. S. 214; *Elliott* v. *Railroad Co.*, 99 U. S. 573, 576; *Trade-Mark Cases*, 100 U. S. 82; *France* v. *United States*, 164 U. S. 676; *Bolles* v. *Outing Co.*, 175 U. S. 262, 265; *United States* v. *Harris*, 177 U. S. 305, 310; *Werckmeister* v. *Am. Tobacco Co.*, 207 U. S. 381.

The defendant did not transport the live stock from the State of Kentucky to the State of Ohio. Still less did it receive them for such transportation. The transportation from Kentucky to Ohio was complete when it received them and its receipt of them was from, not for, such transportation, as a result, not with the purpose, of such transportation.

It may have been within the power of Congress to make what the defendant did an offense, but Congress has not done so.

The meaning of the statute is clear and needs no construction. "From," when used in any context resembling this, means "from within"; and the word "into" is of so simple a meaning that, so far as we have been able to discover, no court has ever been compelled to define it. *Commonwealth* v. *Erie & N. E. R. R.*, 27 Pa. St. 339; *West. Penna. R. R. Co.'s Appeal*, 99 Pa. St. 155; *Tenn. & Ala. R. R.* v. *Adams*, 3 Head, 596; *McCartney* v. *Chi. & Evanston R. R. Co.*, 112 Illinois, 611, 626; and see also *B. & O. R. R. Co.* v. *P., C. & St. L. Ry. Co.*, 55 Fed. Rep. 701; *Commonwealth* v. *Ill. Cent. R. R. Co.*, 90 S. W. Rep. 273; *Mohawk Bridge Co.* v. *Utica &c. R. R. Co.*, 6 Paige, 554.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The defendant in error, called herein defendant, was indicted for violations of the act of March 3, 1905 (33 Stat. 1264, c. 1496), entitled "An Act To enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes."

Defendant entered a plea of not guilty, but subsequently the court quashed the indictment, following the ruling in certain other cases, and this writ of error was sued out to determine the validity of the ruling.

The efficient words of the statute are in § 2 (presently to be given), and prohibit receiving stock for transportation or to transport it from a quarantined State into any other State or Territory. A summary of the indictment is as follows:

The Secretary of Agriculture, in pursuance of the act of Congress, having determined the fact that a contagious and communicable disease, known as scabies, existed among the sheep in the State of Kentucky, as required by said act, promulgated an order and regulation establishing a quarantine in Kentucky, and gave public notice thereof, as required by the statute. And the indictment charges that he gave notice of the quarantine and of the rules and regulations established by him by sending printed copies of the same to defendant, and that the receipt of notice was acknowledged by the general manager.

There were three separate shipments (each of which is made a count in the indictment), of sheep from Kentucky upon different dates, and the cars containing the sheep were delivered to the Cincinnati, New Orleans & Texas Pacific Railway Company, and transported by it over its line of railroad to a point within the city of Cincinnati,

State of Ohio, and were delivered at such point to defendant, and by it conveyed over its line of railroad to the Union Stock Yards in Cincinnati, "being a place," as the indictment avers, "en route to the destination" of the shipments.

The cars in which the shipments were made did not have upon their sides, or at all, placards bearing the words "Dipped scabby sheep" or the words "Exposed sheep for slaughter," as provided in the orders and regulations of the Secretary of Agriculture, nor did the waybills, conductors' manifests, memoranda, and bills of lading have written or stamped upon their face those words, as was also required by such orders and regulations.

Section 1 of the act of Congress authorizes the Secretary of Agriculture to quarantine any State or Territory, or any portion of any State or Territory, when he shall determine the fact that there exists therein live stock affected with any contagious, infectious or communicable disease, and of such quarantine he is directed to publish notice.

Section 2 forbids railroad companies and others engaged in transportation to "receive for transportation or transport . . . *from any quarantined portion of any State or Territory or the District of Columbia into any other State or Territory or the District of Columbia*, any cattle or other live stock." The statute also forbids the delivery for transportation, or the driving on foot or transporting by private conveyance, of such stock "from a quarantined State or Territory or the District of Columbia," or from any portion of either, "into any other State or Territory or the District of Columbia." And these words are repeated in other sections as descriptive of the transportation to which the statute applies.

An offender against the statute is declared (§ 6) to be guilty of a misdemeanor and punishable by a fine or imprisonment, or by both.

The question in the case is, What did Congress intend

by the words we have italicized? Did the defendant receive the sheep for transportation from Kentucky, the quarantined State, for delivery in a State by receiving them in Ohio for delivery in Ohio?

The Government urges an answer in the affirmative and contends that not only an initial carrier, but a connecting carrier, though it receive the stock in a State other than the quarantined State (in the case at bar, Ohio), transports, within the meaning of the statute, stock "from" one State "into" another. The argument is that necessarily such connecting carrier is instrumental in the transportation of the stock from the place of shipment to its ultimate destination, and therefore within the reason and purpose of the law.

The contention is untenable. To receive a thing in Ohio is not receiving it in Kentucky, nor is transporting it in Ohio transporting it from Kentucky into Ohio. To sustain the indictment, therefore, we must disregard the plain and only direct signification of the words of the statute. Such extreme liberty with the words of a penal statute may not be taken. We are not unmindful that our function is to seek the intention of the lawmaker and that illustrations may be found where the literal meaning of words has been extended beyond their absolute sense. But the general rule is that penal statutes must be strictly construed. It is a familiar rule and need not be illustrated. The words of the statute, certainly when they have a sensible meaning and a definite and unmistakable signification, as the words of the statute under review have, mark its extent. We do not mean to say that ambiguity in words may not be resolved by the clear purpose of the statute.

If, however, there be no ambiguity, the words of the statute are the measure of its meaning. If there be ambiguity, the character of the statute determines for a strict or liberal construction. A criminal statute is strictly

construed. Courts are not inclined to make "constructive crimes." We therefore might have to decide against the indictment, even if there were more ambiguity in the statute under review than we find in it. It manifests care and a studied purpose to define the extent of the quarantine and of what shall constitute violations of it. Within its limits there shall be no delivery of stock for transportation beyond them "into any other State or Territory" by public or private conveyance or by driving. There is no obscurity whatever. A sensible, definite meaning is expressed. There must be a delivery for or a receiving for transportation "from the quarantined portion of any State or Territory . . . into any other State or Territory . . ." That reception and that transportation are the elements of the crime and must exist to constitute it. None of these elements are charged against the defendant. It did not receive the sheep for transportation in Kentucky or transport them "from" Kentucky "into" Ohio. It received them in Ohio and transported them in Ohio, and the statute thus construed adapts the remedy to the mischief. In other words, if the breaking of quarantine is prevented, the purpose of the statute is fulfilled without subjecting to criminal accusation and penalties distant carriers who, it may be, are ignorant of the existence of the quarantine; and ignorant they may be, for the statute (§ 1) requires the Secretary of Agriculture to give notice of the establishment of quarantine only to the "transportation companies doing business in or through" the quarantined State. It would be strange indeed if the statute intends to confound unwillful with willful acts by uniting in criminality and penalties the companies to which no notice of quarantine is required to be given with those to which notice is required.

We do not, of course, mean to say that the movement of sheep in Ohio, did not tend to spread the contagion, but it is certain there could have been no movement of

them in Ohio if they had not been transported "from" Kentucky "into" Ohio.

In *United States* v. *El Paso & N. E. Railroad Co.*, 178 Fed. Rep. 846, and in *United States* v. *Chicago, Burlington & Quincy R. R.*, 181 Fed. Rep. 882, the same construction was given to the statute that we have given it. Also by the Circuit Court of Appeals for the Eighth Circuit in St. Louis. *St. Louis Merchants' Bridge Terminal Ry. Co.* v. *United States*, 188 Fed. Rep. 191. In *United States* v. *Southern Railway Co.* (Circuit Court Dist. S. C.), 187 Fed. Rep. 209, a contrary ruling was made, and a connecting carrier which received stock outside of the limits of the quarantined State was held to be liable.

Judgment affirmed.

UNITED STATES *v.* PLYLER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 440. Argued October 19, 1911.—Decided October 30, 1911.

It is not essential to charge or prove an actual financial or property loss to make a case of defrauding the United States.

Section 5418, Rev. Stat., prohibits the forging of written vouchers required upon examination by the Civil Service Commission of the United States, and presenting such vouchers to the Commissioners.

THE facts are stated in the opinion.

The Solicitor General for the United States:

Section 5418, Rev. Stat., prohibits the false making of any writing which would work a fraud upon the United States in its pecuniary or property rights or in the exercise of its governmental powers and duties. *United States*

v. *Lawrence*, 13 Blatchf. C. C. 211; *State* v. *Kimball*, 50 Maine, 409; *State* v. *Boasso*, 38 La. Ann. 202; *Cross* v. *North Carolina*, 132 U. S. 131; *United States* v. *Bunting*, 82 Fed. Rep. 883; *Palmer* v. *Colladay*, 18 App. D. C. 426; *Curley* v. *United States*, 130 Fed. Rep. 1; *Haas* v. *Henkel*, 216 U. S. 462; *Hyde* v. *Shine*, 199 U. S. 62.

Property rights of the Government are the very least of its rights. They are mere incidents, although necessary ones, to the discharge of those functions for which the Government was established, and the proper discharge of which is its paramount concern. The civil service laws of the United States and the regulations pursuant to them were enacted as part of the public policy of the United States to secure the appointment of honest and capable men to office, and integrity and efficiency in the administration of public affairs. The forgery of the voucher and the medical certificate was intended and calculated to deceive the Civil Service Commission and to injure and defraud the United States, by bringing into a position of trust and confidence a man who, by the very means of getting into that position, demonstrated his utter unfitness for it.

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

Memorandum opinion by direction of the court. By Mr. Justice Holmes.

This is an indictment for forging vouchers required upon examination by the Civil Service Commission of the United States, certifying to the character, physical capacity, etc., of the applicant, the defendant, and for presenting the same to the Commission. The District Court held that the acts were not frauds against the United States within the contemplation of R. S., § 5418, and dis-

charged the defendant. The Government excepted and brought the case to this court. It now must be regarded as established that "it is not essential to charge or prove an actual financial or property loss to make a case under the statute." The section covers this case. *Haas* v. *Henkel*, 216 U. S. 462, 480; *Curley* v. *United States*, 130 Fed. Rep. 1; *United States* v. *Bunting*, 82 Fed. Rep. 883.

Judgment reversed.

VIRGINIA *v.* WEST VIRGINIA.

IN EQUITY.

No. 3. Original. Motion to proceed with the further hearing and determination of the case. Submitted October 10, 1911.—Motion overruled October 30, 1911.

Even if the question in litigation is important and should be disposed of without undue delay, a State cannot be expected to move with the celerity of an individual; a motion made in this case by complainant that the court proceed to determine all questions left open by the decision in 220 U. S. 1, denied without prejudice.

The conference suggested by this court, 220 U. S. 36, is one in the cause to settle the decree and not to effect an independent compromise out of court.

THE facts are stated in the opinion.

Mr. Samuel W. Williams, Attorney General of the State of Virginia, for the complainant in support of the motion.

Mr. W. G. Conley, Attorney General of the State of West Virginia, for the defendant in response to motion.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a motion on behalf of the Commonwealth of Virginia that the court proceed to determine all questions

left open by the decision of March 6, 1911. 220 U. S. 1. The grounds of the motion are these: On April 20, 1911, the Virginia Debt Commission wrote to the Governor of West Virginia, referring to the suggestion of a conference between the parties in the decision, and requested that he would take steps that would lead to such a conference at an early date. At that time the Governor of West Virginia had called an extra session of the Legislature upon another matter. The constitution forbad the Legislature, when so convened, entering upon any business except that stated in the call, but as there were twenty-six days between the call and the session that followed it, there was time for the Governor to issue a further proclamation on the subject of the debt. The Governor in his message to the Legislature referred to the matter, and put, as questions to be considered, whether the appointment of the Virginia Debt Commission was enough to require West Virginia now 'to take the initiative,' and whether a Commission should be appointed to meet the Virginia Commission. He also stated that if, without formal action of three-fifths of the body under the Constitution, a majority should express to him the opinion that the Legislature ought to be called into extraordinary session to consider the matter, he should deem it sufficient reason for a call. But it seems that he did not use his power of his own motion or receive such an expression as induced him to use it, and the Legislature does not meet in regular session until January, 1913. The Commonwealth of Virginia concludes from these facts that there is no likelihood of a conference with any satisfactory results.

The Attorney General of West Virginia answered that the members of the Legislature convened in May, 1911, were elected before this cause had been argued and under conditions that left them uncertain as to the wishes of their constituents; that the Governor was of opinion that he could not constitutionally amend his proclamation so

as to embody consideration of the debt, and that there is no one in West Virginia except the Legislature that has power to deal with the matter. He then suggested a doubt whether the Virginia Debt Commission was empowered to deal with the case in its present phase, in view of the provision in the Resolution creating it that it should not negotiate except upon the basis that Virginia is bound only for the two-thirds of the debt that she had provided for, and concluded that this court ought not to act before the West Virginia Legislature at its next regular session can consider the case in the spirit anticipated by the opinion of the court.

With regard to the doubt implied by the Governor of West Virginia whether it now is incumbent upon that State to take the initiative, and that suggested by its Attorney General whether the Virginia Debt Commission has the necessary power, we are of opinion that neither of them furnishes a just ground for delay. The conference suggested by the court is a conference in the cause. The body that directed the institution of the suit has taken the proper step on behalf of the plaintiff, and it is for the defendant to say whether it will leave the court to enter a decree irrespective of its assent or will try to reach a result that the court will accept. The conference is not for an independent compromise out of court, but an attempt to settle a decree. The provision as to negotiations, in the Virginia Resolution preceding the statute authorizing this suit, refers, we presume, to a settlement out of court and has nothing to do with the conduct of the cause. If the parties in charge of the suit consent, this court is not likely to inquire very curiously into questions of power, if, on its part, it is satisfied that they have consented to a proper decree.

A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if

it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace.

Motion overruled without prejudice.

SOUTHERN RAILWAY COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 28. Argued March 9, 10, 1911—Decided October 30, 1911.

The Safety Appliance Act of March 2, 1893, 27 Stat. 531, c. 196, as amended March 2, 1903, 32 Stat. 943, c. 976, embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce.

The power of Congress under the commerce clause of the Constitution is plenary and competent to protect persons and property moving in interstate commerce from all danger, no matter what the source may be; to that end, Congress may require all vehicles moving on highways of interstate commerce to be so equipped as to avoid danger to persons and property moving in interstate commerce.

As between opposing views in regard to the construction of a statute the court in this case accepts the one in accord with the manifest purpose of Congress.

It is of common knowledge that interstate and intrastate commerce are commingled in transportation over highways of interstate commerce, that trains and cars on the same railroad, whether engaged

in one form of traffic or the other, are interdependent and that absence of safety appliance from any part of a train is a menace not only to that train but to others.

164 Fed. Rep. 347, affirmed.

THE facts, which involve the construction and constitutionality of certain sections of the Safety Appliance Acts, are stated in the opinion.

Mr. Alfred P. Thom, for plaintiff in error, submitted on the record.

Mr. Assistant Attorney General Fowler, with whom *Mr. Henry E. Colton*, Special Assistant to the Attorney General, was on the brief, for the United States.

There is a real and substantial relationship between interstate commerce and the equipping with safety appliances of all cars operated on a line of road engaged in carrying such commerce. *Adair* v. *United States*, 208 U. S. 161, 178.

The fact that the act of March 2, 1893, purports to have been enacted for the purpose of protecting travelers and employés, cannot affect the constitutionality of either that or of any subsequent safety appliance act. *Johnson* v. *Southern Pacific R. R. Co.*, 196 U. S. 1.

The decisions of this court upon analogous questions clearly show that the required relationship exists between interstate commerce, and the things required by the act of March 2, 1903, to be done by those operating railroads engaged in interstate commerce.

Congress has power even to construct roads to be used in interstate commerce, and to grant charters authorizing the construction of highways for that purpose, *e. g.*, the Cumberland National Road; and see *California* v. *Pacific Railroad Co.*, 127 U. S. 1; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529.

This court has never hesitated to declare the power of the United States to remove obstructions of every char-

acter from every avenue of commerce that may directly or indirectly interfere with interstate traffic. *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 214; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; *In re Debs*, 158 U. S. 565.

Congress has power to provide, by the method adopted, against conditions which thus interfere with and impede the flow of interstate commerce.

The United States may even prevent interference with a stream not navigable, but which is tributary to a navigable stream, in order to preserve the navigability of the stream to which it is tributary. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 699, 709.

In order to facilitate and hasten the transportation of interstate commerce, the several States are not permitted to enact any law or adopt any regulation which will materially interfere with or impede interstate transportation. *Ill. Cent. R. R. Co.* v. *Illinois*, 163 U. S. 142, 153; *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Mississippi R. R. Comm.* v. *Ill. Cent. R. R.*, 203 U. S. 335.

Congress may enact laws regulating the qualifications of those actually engaged in the carrying of interstate commerce, although such persons may at times in the pursuit of their avocation, be solely engaged in handling intrastate commerce. *The Daniel Ball*, 10 Wall. 557; *Smith* v. *Alabama*, 124 U. S. 465, 479; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628.

State statutes relating to commerce have been held to be valid where they do not adversely affect but aid interstate commerce or where they have no relationship thereto; but when such statutes have substantially affected interstate or foreign commerce adversely they have been universally held to be invalid. *County of Mobile* v. *Kimball*, 102 U. S. 691, 698; *State Freight Tax*, 15 Wall. 232; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Ratterman* v.

West Un. Tel. Co., 127 U. S. 411; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

For other cases bearing materially upon the power of Congress to pass laws remotely affecting interstate commerce, see *United States* v. *Coombs*, 12 Pet. 71, 77; *L. & N. R. R. Co.* v. *Eubank*, 184 U. S. 27; *Employers' Liability Cases*, 207 U. S. 463, 495, 529; *Gibbons* v. *Ogden*, 9 Wheat. 1, 194; *Int. Comm. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452, 474.

This act has been sustained by the lower Federal courts. *Wabash R. Co.* v. *United States*, 168 Fed. Rep. 1; *United States* v. *Int. & Gt. Nor. R. R. Co.*, 174 Fed. Rep. 638.

If necessary to sustain the constitutionality of the act of March 2, 1903, it might with reason be construed to apply solely to trains, locomotive, tenders, cars, and other vehicles actually engaged in carrying interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith. *United States* v. *Coombs*, 12 Pet. 71, 76.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a civil action to recover penalties for the violation in specified instances of the Safety Appliance Acts of Congress. 27 Stat. 531, c. 196; 32 Stat. 943, c. 976. The Government prevailed in the District Court and the defendant sued out this direct writ of error.

Briefly stated, the case is this: The defendant, while operating a railroad which was "a part of a through highway" over which traffic was continually being moved from one State to another, hauled over a part of its railroad, during the month of February, 1907, five cars, the couplers upon which were defective and inoperative. Two of the cars were used at the time in moving interstate traffic and the other three in moving intrastate traffic; but it

does not appear that the use of the three was in connection with any car or cars used in interstate commerce. The defendant particularly objected to the assessment of any penalty for the hauling of the three cars, and insisted, first, that such a hauling in intrastate commerce, although upon a railroad over which traffic was continually being moved from one State to another, was not within the prohibition of the Safety Appliance Acts of Congress, and, second, that, if it was, those acts should be pronounced invalid as being in excess of the power of Congress under the commerce clause of the Constitution. But the objection was overruled, 164 Fed. Rep. 347, and error is assigned upon that ruling.

The original act of March 2, 1893, 27 Stat. 531, c. 196, imposed upon every common carrier "engaged in interstate commerce by railroad" the duty of equipping all trains, locomotives and cars, used on its line of railroad in moving interstate traffic, with designated appliances calculated to promote the safety of that traffic and of the employés engaged in its movement; and the second section of that act made it unlawful for "any such common carrier" to haul or permit to be hauled or used on its line of railroad any car, "used in moving interstate traffic," not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars. The act of March 2, 1903, 32 Stat. 943, c. 976, amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should "apply to all trains, locomotives, tenders, cars, and similar vehicles used *on any railroad engaged* in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." Both acts contained some minor exceptions, but they have no bearing here.

The real controversy is over the true significance of

the words "on any railroad engaged" in the first clause of the amendatory provision. But for them the true test of the application of that clause to a locomotive, car or similar vehicle would be, as it was under the original act, the use of the vehicle in moving interstate traffic. On the other hand, when they are given their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic. And so certain is this that we think there would be no contention to the contrary were it not for the presence in the amendatory provision of the third clause "and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." In this there is a suggestion that what precedes does not cover the entire field, but at most it is only a suggestion and gives no warrant for disregarding the plain words "on any railroad engaged" in the first clause. True, if they were rejected, the two clauses, in the instance of a train composed of many cars, some moving interstate traffic and others moving intrastate traffic, would by their concurrent operation bring the entire train within the statute. But it is not necessary to reject them to accomplish this result, for the first clause, with those words in it, does even more, that is to say, it embraces every train on a railroad which is a highway of interstate commerce without regard to the class of traffic which the cars are moving. The two clauses are in no wise antagonistic, but, at most only redundant, and we perceive no reason for believing that Congress intended that less than full effect should be given to the more comprehensive one, but, on the contrary, good reason for believing otherwise. As between the two opposing views, one rejecting the words "on any railroad engaged" in the first clause and the other treating the third clause as redundant, the latter is to be preferred, first, because it is

in accord with the manifest purpose, shown throughout the amendatory act, to enlarge the scope of the earlier one and to make it more effective, and, second, because the words which it would be necessary to reject to give effect to the other view were not originally in the amendatory act, but were inserted in it by way of amendment while it was in process of adoption (Cong. Rec., 57th Cong., 1st Sess., vol. 35, pt. 7, p. 7300; *Id.*, 2d sess., vol. 36, pt. 3, p. 2268), thus making it certain that without them the act would not express the will of Congress.

For these reasons it must be held that the original act as enlarged by the amendatory one is intended to embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce.

We come then to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way. Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is

so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employés, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others.

These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative.

Affirmed.

FINLEY *v.* PEOPLE OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 15. Argued October 26, 1911.—Decided November 6, 1911.

Whether a state statute denies equal protection of the laws by reason of classification depends upon whether there is a basis for the classification.

There is a proper basis for classification of punishment for crimes between convicts serving life terms in the state prison and convicts serving lesser terms.

Section 246 of the Penal Code of California inflicting the death penalty for assaults with intent to kill committed by life term convicts in the state prison is not unconstitutional under the equal protection clause of the Fourteenth Amendment because its provisions are not applicable to convicts serving lesser terms.

153 California, 59, affirmed.

THE facts, which involve the constitutionality under the equal protection clause of the Fourteenth Amendment of § 246 of the Penal Code of the State of California, are stated in the opinion.

Mr. C. C. Calhoun, Mr. James M. Sharp, Mr. H. G. W. Dinkelspiel, Mr. Samuel T. Bush and *Mr. G. C. Ringolsky* for plaintiff in error, submitted:

While the law with reference to classification within the constitutional meaning is well settled, the application thereof gives rise to question. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Barbier* v. *Connolly*, 113 U. S. 27; *Board of Education* v. *Alliance Assurance Co.*, 159 Fed. Rep. 994.

It is necessary to ascertain the reason and purpose of the statute to determine its validity. The rapid and be-

neficent advance of penal reform necessitates the conclusion that no trivial reason prompted or should be held to have prompted the statute. Boies, Science of Penology, 119.

The legislature did not base the statute upon the ground that life termers are more dangerous than other prisoners. *People* v. *Finley*, 153 California, 59, *contra*.

The term of imprisonment is determined by influences other than personal character. Drahms, The Criminal, 364; *Ex parte Mallon*, 16 Idaho, 737; 102 Pac. Rep. 374.

Life termers are not desperate because of the loss of all hope of freedom, since the parole law of California supplies ample relief.

Permanent loss of civil rights as compared with a temporary loss thereof does not make the life termer more dangerous than his fellow convict.

A law predicated on length of term is unconstitutional. *Ex parte Mallon*, 16 Idaho, 737; 102 Pac. Rep. 374; *State* v. *Lewin*, 53 Kansas, 679; 37 Pac. Rep. 168.

The only possible reason for the enactment of the statute is a seeming lack of adequate punishment for life termers.

The classification necessary to support a statute must be based upon real differences in the situation, condition and tendencies of things. *Ho Ah Kow* v. *Nunan*, 5 Sawyer, 552; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Board of Education* v. *Alliance Assurance Co.*, 159 Fed. Rep. 994; *State* v. *Loomis*, 115 Missouri, 307; 22 S. W. Rep. 350; *State* v. *Miksicek*, 125 S. W. Rep. 506 (Missouri, 1910); *State* v. *Mitchell*, 97 Maine, 66, 73; *State* v. *Julow*, 129 Missouri, 163; 31 S. W. Rep. 781, 783; *State* v. *Thomas*, 138 Missouri, 95; 39 S. W. Rep. 481; *Murray* v. *Board of Commissioners*, 81 Minnesota, 359; 84 N. W. Rep. 103; *Nichols* v. *Walter*, 37 Minnesota, 264; 33 N. W. Rep. 800; *People* v. *Van*

De Carr, 86 N. Y. Supp. 644; *Jones* v. *C. R. Railway Co.*, 231 Illinois, 302, 308; *State* v. *Wright*, 53 Oregon, 344; 100 Pac. Rep. 296; *State* v. *Hammer*, 42 N. J. L. 435; *In re Van Horne*, 74 N. J. Eq. 600; 70 Atl. Rep. 986; *Gillespie* v. *People*, 197 Illinois, 501; 64 N. E. Rep. 533; *Phipps* v. *Wis. Cent. Ry. Co.*, 133 Wisconsin, 153; 143 N. W. Rep. 456; *Johnson* v. *City of Milwaukee*, 88 Wisconsin, 383; 60 N. W. Rep. 270; *Sutton* v. *State*, 96 Tennessee, 694; 36 S. W. Rep. 697; *State* v. *Goodwill*, 33 W. Va. 179.

The statute does not meet constitutional tests. There is no inherent difference between the life termer and the middle-aged long termer. See Report State Board Prison Directors, 1909–1910, 69 and 185; 70 and 184.

Owing to the condition of the California law, certain prisoners are, with reference to immunity from punishment, in the same position as life termers. Code Civ. Proc., § 669; Penal Code, § 245; *Ex parte Morton*, 132 California, 346; Penal Code, § 667.

The statute should be viewed from a broad position. It is unequal, special and discriminatory and unconstitutional.

Mr. E. B. Power, with whom *Mr. U. S. Webb*, Attorney General of the State of California, was on the brief, for defendant in error.

Memorandum opinion, by direction of the court, by Mr. Justice McKenna.

Section 246 of the Penal Code of the State of California provides as follows: "Every person undergoing a life sentence in a state prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

Plaintiff in error was indicted under this section, tried, found guilty and the death penalty imposed. To the judgment of the Supreme Court of the State affirming the sentence against him he prosecutes this writ of error and urges as ground thereof that § 246 is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies to him the equal protection of the laws because it provides an exceptional punishment for life prisoners.

The Supreme Court sustained the law on the ground that there was a proper basis for classification between convicts serving life sentences in the state prison, as defendant was when he committed the crime for which he was indicted and found guilty, and convicts serving lesser terms.

It is elementary that the contention is to be tested by considering whether there is a basis for the classification made by the statute. Applying that test we see no error in the ruling. As said by Mr. Justice Henshaw, delivering the opinion of the court, "The classification [of the statute] in question is not arbitrary but is based upon valid reasons and distinctions." And pointing out the distinction between life prisoners and other convicts, he said that "The 'life termers,' as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual." Manifestly there could be no extension of the term of imprisonment as a punishment for crimes they might commit, and whatever other punishment should be imposed was for the legislature to determine. The power of classification which the law-making power possesses has been illustrated by many cases which need not be cited. They demonstrate that the legislature of California did not transcend its power in the enactment of § 246.

Judgment affirmed.

HELM *v.* ZARECOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 395. Submitted October 9, 1911.—Decided November 6, 1911.

In determining whether diversity of citizenship exists to give jurisdiction it is the duty of the Circuit Court to arrange the parties with respect to the actual controversy looking beyond the formal arrangement made by the bill.

Where, as in this case, the controversy over the control of a corporation transcends the rivalry of those claiming to be members of its board of control and the corporation itself is a mere instrumentality or title holder, it is properly made a party defendant and should not be aligned as a party plaintiff merely because the plaintiffs belong to the same faction that claims the power to appoint the members of the board of control.

THE facts, which involve the jurisdiction of the Circuit Court of the United States in this case, are stated in the opinion.

Mr. John M. Gaut and *Mr. Alexander P. Humphrey* for the appellants.

Mr. W. C. Caldwell, Mr. Frank Slemons and *Mr. W. B. Lamb* for the appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

The sole question presented by this appeal is with respect to the jurisdiction of the Circuit Court.

The bill, as amended, was brought by certain ministers, ruling elders and laymen of the Presbyterian Church in the United States of America, citizens of States other than

Tennessee, suing for themselves and for all the members of said church, against individuals, citizens of Tennessee, described as representing not only their own interests but also those of all the members of the Cumberland Presbyterian Church, and "The Board of Publication of the Cumberland Presbyterian Church," a Tennessee corporation.

The controversy disclosed by the bill arose from the proceedings, taken in 1906, to effect the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, both voluntary religious associations, and relates to the property and management of the defendant corporation. The Board of Publication had been incorporated in 1860, under the direction of the General Assembly of the Cumberland Presbyterian Church, for the purpose of conducting its publishing work, and had acquired valuable property consisting of a publishing house and its equipment in Nashville, Tennessee. The original members of the corporation were the committee of publication of the Church, and their successors under the charter were appointed by the General Assembly to which was committed its regulation and control.

The bill alleged that the two Churches had been legally united and that as a result the property in question was held by the corporation in trust "for the entire reunited denomination;" and, further, that "the Board and its officers and managers were advised and believed and still believe" that the union was valid, that "thereby the Board of Publication became a corporation and institution of the reunited Church," and that the managers of the corporation "could do nothing else than recognize the General Assembly of the united Church by reporting to it and otherwise recognizing its authority." It was also alleged that a minority of the members of the Cumberland Presbyterian Church, and of its ministers, who

were opposed to the consolidation, repudiated it and effected a separate organization under the former name, and that thereupon a body assuming to be the General Assembly of the Cumberland Presbyterian Church declared the offices of all the members of the Board of Publication vacant and proceeded to elect persons of their own organization to fill the supposed vacancies. These persons had made demand for the possession of the corporate property, claiming to be the rightful members of the corporation and that its property was held in trust for the religious association by whose General Assembly they had been elected. It was stated that this claim cast a cloud upon the equitable title to the property. After reviewing at length the history of the Cumberland Presbyterian Church, the action of the representatives of the two Churches which culminated in the alleged consolidation, and the subsequent antagonistic proceedings, the bill prayed for decree that the property in question is held in trust by the corporation for the benefit of the Presbyterian Church in the United States of America or the members thereof, and that the members of the Board elected by the reunited Church are the true and lawful members of said Board; that the defendants be enjoined from interfering with the control and management of the corporation by those members or with the corporate property, and that if mistaken with respect to the relief prayed for as to the persons who constitute the Board and have the right of management the court should decree that "whoever may be the members of the Board and whoever may be entitled to such management, they shall manage the corporation and administer the trust for the use and benefit of said reunited Church."

The defendants filed two pleas to the jurisdiction. In the first plea it was alleged that the complainants had collusively made and omitted both complainants and defendants for the purpose of showing the requisite diversity

of citizenship. The second plea set up the pendency of a suit in the Chancery Court of Davidson County, Tennessee, in the nature of a *quo warranto* proceeding, brought on the relation of J. H. Zarecor and other individual defendants herein to oust those named as defendants in that suit from membership in the Board of Publication, and from the control and management of its property and to install the relators in their stead. These pleas the court below overruled. As to the ground of the first plea, that certain persons had been omitted as parties, the court held that § 5 of the Judiciary Act of March 3, 1875, c. 137, 18 Stat. 472, relates solely to the collusive making of the actual parties plaintiff or the collusive joinder of the actual parties defendant, and that if the parties before the court are properly aligned as plaintiffs and defendants, it is not a ground of dismissal, in so far as the jurisdictional question is concerned, that necessary parties are omitted, either as plaintiffs or defendants, whose presence would defeat the jurisdiction of the court. While the omission of indispensable parties, if any, said the court, would be a ground for dismissal on the merits if they were not joined, or if joined and on proper alignment their citizenship was such as to defeat the Federal jurisdiction, a plea to the jurisdiction would then lie, their omission in the meantime could not defeat the jurisdiction of the court in a controversy between the parties who were before the court. And so far as the first plea was based upon the ground that the complainants had collusively made parties plaintiffs and defendants for the purpose of showing a diversity of citizenship, the plea was held to be insufficient in law in that it did not specify what parties are alleged to have been collusively made. The second plea was overruled because it did not reach the whole case made by the bill, as the bill did not merely ask a determination as to the persons who were the true and lawful members of the corporation, which was the only

matter involved in the *quo warranto* proceeding in the state court, but sought a decree declaring the trust upon which the property of the corporation is held and the uses and purposes for which it is to be administered, whoever might be found to be the true and lawful members of the corporation. We need add nothing to what was said by the court below upon these points.

But the court of its own motion dismissed the bill for want of jurisdiction, for the reason that the defendant corporation, the Board of Publication, was not antagonistic to the complainants, and should be aligned upon the same side of the controversy with the complainants; and that, therefore, upon such alignment, some of the defendants and one of the complainants being citizens of the same State, the Circuit Court had no jurisdiction. In this we think the court erred.

It was, undoubtedly, the duty of the court in determining whether there was the requisite diversity of citizenship to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill. *Removal Cases*, 100 U. S. 457; *Detroit* v. *Dean*, 106 U. S. 537; *Dawson* v. *Columbia Avenue Trust Company*, 197 U. S. 178; *Steele* v. *Culver*, 211 U. S. 26. What then is the controversy?

The suit cannot properly be said to be brought to enforce a right inhering in the Board of Publication or by the complainants as members of that corporation. And the question whether the Board may be assigned a place on the other side of the controversy is not to be answered by applying the rule which governs suits by shareholders on behalf of a corporation or by beneficiaries in the right of a trustee. *Hawes* v. *Oakland*, 104 U. S. 450, 461; *Doctor* v. *Harrington*, 196 U. S. 579, 587; *Pacific Railroad Co.* v. *Ketchum*, 101 U. S. 289, 299. The complainants sue for themselves and on behalf of all members of the Presbyterian Church in the United States of America,

and the object of their suit is to enforce the right of the members of that Church as it was constituted after the alleged union. The Board of Publication was incorporated merely as a convenient agency for the publishing work of the Cumberland Presbyterian Church. The charter clearly discloses its character. The representative assembly of the Church was to fill the vacancies in its membership and control its conduct. It was an incorporated committee of publication, which lost none of its essential qualities as an agent of denominational service when it became an artificial person, clothed with power to hold property in a corporate capacity. The language of the charter is that "said Board shall be subject to the regulation and control of the General Assembly of said Church under its past and future actions on the subject; the number of the Board may be increased or diminished and all vacancies filled as the said authority has or may direct; the General Assembly of the Church shall also have power to locate the Board and change the same at pleasure; and also at any time to alter the name of said corporation or dissolve the same, but not so as to prejudice the rights of others." The contention of the complainants is that, after the union, the Cumberland Presbyterian Church continued in the united Church and that the General Assembly of the latter succeeded to the authority formerly possessed by the General Assembly of the separate denomination. The defendants are sued as the representatives of the religious association which insists that it is still the original Cumberland Presbyterian Church, continuing with all its separate powers unimpaired.

It is thus evident that the controversy transcends the rivalries of those claiming membership in the Board and the assertion of rights inhering in that corporation itself. It embraces the fundamental question of the rights of these religious associations, said to be represented by the respective parties, to use and control the corporate agency and

to have the benefit in their denominational work of the corporate property. Viewed in this aspect, the relation of the corporation to the controversy is not to be determined by the attitude of alleged members of the Board who believed the union to have been consummated, nor by the fact that it does not appear that they have surrendered possession. These do not suffice to identify the interest of the corporation with that of the complainants. And the individual defendants actually joined it with themselves in filing the pleas to the jurisdiction, and in this way, it may be assumed, they sought to emphasize the contention that the Board was under the exclusive direction of the separate association to which they adhered and should be employed solely for its benefit.

To align the corporation itself with the complainants is virtually to decide the merits in their favor. The Board is simply a title holder, *Watson* v. *Jones*, 13 Wall. 679, 720; an instrumentality, the mastery of which is in dispute. But, as it is the holder of the legal title, the complainants seek a decree defining, in the light of the proceedings alleged in the bill, the equitable obligations arising from the nature and purpose of the corporate organization.

We are therefore of opinion that the corporation was properly made a party defendant and that the court erred in dismissing the bill for want of jurisdiction.

Decree reversed.

TROY BANK *v.* G. A. WHITEHEAD & COMPANY (INCORPORATED).

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

No. 566. Submitted October 9, 1911.—Decided November 6, 1911.

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

The Circuit Court has jurisdiction of a suit brought by several plaintiffs to enforce a vendor's lien equally securing notes aggregating more than $2,000 held by them and which neither can enforce in the absence of the other, even though the claim of each plaintiff is less than $2,000.

184 Fed. Rep. 932, reversed.

THE facts, which involve the question of whether the sum or value of the matter in dispute was sufficient to give the Circuit Court jurisdiction, are stated in the opinion.

Mr. George W. Jolly and *Mr. B. F. Huffman* for the appellants.

Mr. Ben D. Ringo for the appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit in equity wherein the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship, and the sole question now presented for decision

is whether the sum or value of the matter in dispute exceeded two thousand dollars, exclusive of interest and costs, as required by the act of August 13, 1888, c. 866, § 1, 25 Stat. 433. The facts are these:

Upon a sale of land situate in the western district of Kentucky, the vendor lawfully reserved a vendor's lien for the unpaid portion of the purchase price, for which he took two promissory notes of $1,200 each, payable in one and two years. Shortly thereafter the notes were assigned to the present appellants, one to each; and by the law of Kentucky the vendor's lien passed to the assignees, as a common security for the payment of both notes, without any priority of right in either assignee. After the maturity of the notes, both remaining wholly unpaid, the assignees jointly brought this suit to enforce the vendor's lien. They and their assignor were citizens of Indiana, and the defendant, who acquired the land with notice of the lien, was a citizen of Kentucky.

By a demurrer to the bill the defendant challenged the jurisdiction of the Circuit Court, upon the ground that the matter in dispute was not of the requisite jurisdictional value; and the court, being of opinion that such value was not to be measured by the extent to which the plaintiffs collectively were seeking to enforce the lien as a common security, but by the extent to which each was interested in its enforcement, sustained the demurrer and dismissed the bill for want of jurisdiction. 184 Fed. Rep. 932. The plaintiffs then appealed directly to this court, and the Circuit Court appropriately certified the question of jurisdiction. Act of March 3, 1891, c. 517, § 5, 26 Stat. 826.

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which

they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Shields* v. *Thomas*, 17 How. 3; *Rodd* v. *Heartt*, 17 Wall. 354; *Davies* v. *Corbin*, 112 U. S. 36, 40; *Gibson* v. *Shufeldt*, 122 U. S. 27; *New Orleans Pacific Railway Co.* v. *Parker*, 143 U. S. 42; *Walter* v. *Northeastern Railroad Co.*, 147 U. S. 370, 373; *Davis* v. *Schwartz*, 155 U. S. 631, 647; *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28.

The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the vendor's lien, which is a single thing or entity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. Thus, while their claims under the notes were separate and distinct, their claim under the vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes.

It follows that the Circuit Court erred in holding that it was without jurisdiction; and its decree is accordingly

Reversed, with directions to overrule the demurrer to the bill and to take such further proceedings in the case as may be appropriate.

INTERSTATE COMMERCE COMMISSION *v.* DIFFENBAUGH.

INTERSTATE COMMERCE COMMISSION *v.* F. H. PEAVEY & COMPANY.

UNION PACIFIC RAILROAD COMPANY *v.* SAME.

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

Nos. 285, 286, 287. Argued October 13, 18, 1911.—Decided November 13, 1911.

The Interstate Commerce Act does not attempt to equalize fortune, opportunities or abilities; it contemplates payment of reasonable compensation by carriers for services rendered, and instrumentalities furnished, by owners of property transported, the only power of the Commission being to determine the maximum of such compensation.

Contracts made by various railroads for elevation expenses of grain at points of transshipment at rates not exceeding those fixed by the Commission as reasonable, *held* not to be illegal discriminations or rebates when paid to owners of elevators on their own grain although such owners performed services other than those paid for at the same time to their own advantage.

176 Fed. Rep. 409, modified and affirmed.

THE facts are stated in the opinion.

Mr. P. J. Farrell and *The Solicitor General*, for appellant in Nos. 285 and 286.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* and *Mr. Henry W. Clark* were on the brief, for appellant in No. 287.

Mr. Frank Hagerman and *Mr. John Barton Payne*, with whom *Mr. M. B. Koon* was on the brief, for appellees.

Mr. Robert Dunlap and *Mr. Gardiner Lathrop*, by leave of court, filed a brief for The Atchison, Topeka & Santa Fe Railway Company.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are appeals from injunctions issued upon bills brought by the appellees against the enforcement of two orders made by the Interstate Commerce Commission. 176 Fed. Rep. 409. The stages by which the Commission came to its present conclusion, against its earlier view, will be found reported in 10 I. C. C. Rep. 309, 12 *id.* 85, 14 *id.* 315. See 14 *id.* 317, 510, 551. In the Circuit Court these cases were tried upon the same evidence and they raise the same question; but as the Peavey suit presents that question in its initial and simplest form we will state the facts of that case first.

The Union Pacific Railroad, after passing through a grain country, has its eastern termini at Omaha and Kansas City, on the Missouri River. Much the greater part, nine-tenths, more or less, of the grain gathered and carried by the road passes beyond the termini, especially to points farther east. During the season the Union Pacific needs all its cars to collect the grain, and therefore wants to get them back as quickly as possible from the end of its line. Furthermore, the shipments eastward are made more profitably in heavier loads than can be collected from the local stations. For these reasons the Union Pacific sought to prevent its own cars being carried beyond the termini, over connecting lines, and to have the grain shifted to other cars. To make the change it is commercially necessary to pass the grain through an elevator, where also it is weighed, another necessary step in the transportation. See 14 I. C. C. Rep. 317, 318. An additional consideration is that Omaha and Kansas City are great grain markets where there are sales largely in excess

of local needs, and this also requires the grain to pass through elevators at these points. If the Union Pacific could not use these instruments of transfer it could not compete with other roads that have through lines from the grain fields across the Missouri River to the East. See 14 I. C. C. Rep. 317, 327.

Acting on these motives, the railroad company in 1899 made a contract in good faith with Peavey under which he built an elevator at Council Bluffs on the other side of the river from Omaha. He was to receive not exceeding 1¼ cents per hundred pounds for the first ten years, and one cent for the next ten, for grain transferred through his elevator. Later another elevator was brought into the arrangement, now with Peavey & Co., a corporation. Peavey & Co. is a large dealer in grain and receives the same allowance for its own grain that it receives for that of others. It is important to remark that in no case is any additional charge made to the shipper for the elevator service. In 1904 the Interstate Commerce Commission investigated the matter and upheld the contract, including the allowance for Peavey & Co's own grain. 10 I. C. C. Rep. 309.

The Commission also made a report to Congress, and after further investigation, notwithstanding the fact that the incidental advantages to grain owners from such allowances had been made apparent, Congress passed the act of June 29, 1906, c. 3591, 34 Stat. 584. By this it was provided in § 1, amending the earlier statute, that "the term 'transportation' shall include . . . all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to

provide and furnish such transportation upon reasonable request therefor, and to establish through routes," etc. By § 6 the carrier was required to state separately in its schedules all terminal charges and all privileges or facilities granted or allowed, and by § 15 "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished." Thus Congress clearly recognized that services such as those rendered by Peavey & Co. were services in transportation and were to be paid for notwithstanding the possibility that some advantage might be gained as a result. Meantime other elevators had sprung up, and in 1906 the Union Pacific extended the allowance made to Peavey & Co. to all elevators in Omaha, Council Bluffs and Kansas City.

But the Interstate Commerce Commission had begun to change its view upon further reflection. In 1907, upon rehearing, it cut down the allowance to Peavey & Co. to three-quarters of a cent, estimating that to be the actual cost, and being of opinion that to allow any profit would be in effect to permit a rebate. 12 I. C. C. Rep. 85. The order made required the railroad company to desist from paying more than three-fourths of a cent per hundred pounds, for service rendered in the transfer or elevation of grain at Council Bluffs or Kansas City, to any one interested in the buying, selling or shipment of grain at those places, especially naming the appellees. This is one of the orders complained of. The chief object of complaint, however, is an order made in the following year, on June 29, 1908. In that the Commission took the last

step and ordered the Union Pacific to desist from paying any allowance to Peavey & Co. on grain in which they have any interest that is not reshipped from their elevators within 10 days, or that has been mixed, treated, weighed or inspected in any of their elevators at the above named points. 14 I. C. C. Rep. 315.

The ground on which the payment to owners of grain finally was held to be a rebate had been considered from the beginning and, as we have said, had been brought to the mind of Congress. It is that when the owners of the elevators own the grain put into them they have the opportunity to perform other services to the grain in the way of treatment, or cleaning, clipping, and mixing the grain, which although not included under the term elevation or paid for by the railroad, it is an advantage to them to be able to perform at the same time. This advantage is thought to create an undue preference and unjust discrimination. Of course the opportunities for fraud are adverted to, but the ground of the decision is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain. As was pointed out by the court below the final order is confined to grain that has been treated, weighed, inspected, or mixed.

We agree with the court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221. The law does not attempt to equalize fortune, opportunities or abilities. On the contrary the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is

taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable, and it is admitted that three-quarters of a cent barely would pay the cost of the service rendered without any reasonable profit to Peavey & Co. for the work. See *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.

In the Diffenbaugh case the order of the Commission bore the same date, June 29, 1908, as that against Peavey & Co. and the Union Pacific. It was directed against the Chicago, Burlington & Quincy Railroad Company and other competitors of the Union Pacific, and forbade their paying any sum as compensation for service rendered in the elevation of grain at Kansas City, Missouri, and other Missouri River points upon their lines. Competition, which was an element in the motives of the Union Pacific, led these other roads to make a similar arrangement. Probably, being through lines, they would not object to the Commission's order if that to the Union Pacific could be sustained. The opinion of Mr. Commissioner Prouty in this case takes somewhat different ground from that on which the orders in the Peavey case are based. 14 I. C. C. Rep. 317. See 15 *id.* 90, 93. See also *H. Gund & Co.* v. *Chicago, Burlington & Quincy R. R. Co.*, 18 I. C. C. Rep. 364. Especially it throws doubt upon the allowance being properly a transfer allowance at this present day. As the contract with Peavey & Co. purports to be only for grain transferred, it is not necessary to consider

whether elevation could be allowed for as practically necessary under modern conditions even if the grain did not go on. For the purposes of this case so much of the order as meets the above-mentioned doubt by confining payments to grain reshipped within ten days seems proper enough and not open to review on the matter of fact. But when the grain has been treated the prohibition of an allowance is universal, and therefore the question that we have answered is raised by the record; the question, that is, of the power of the Commission to prohibit such allowances to grain owners in general terms. In this order it was stated expressly that the purpose of the Commission was to prohibit and stop the payment of the elevator allowances everywhere. 14 I. C. C. Rep. 510. *Ibid.* 551.

The Union Pacific made the allowances in question to elevators at its termini; it had no motive to make them anywhere else. The competitors of the Union Pacific concerned in the Diffenbaugh case were compelled by competition to make the same allowance at Missouri River points, but they also make it nowhere else. The Traffic Bureau, Merchants' Exchange of St. Louis, complained to the Commission that the result was a discrimination against St. Louis of ¾ of a cent per 100 pounds. But the principle of the decision is that the allowance to elevators upon their own grain is to be stopped everywhere unless they are prevented from using the opportunity for treating their grain. Therefore this question of preference between cities does not need to be discussed. But, as remarked below, the Union Pacific could not be complained of on this ground, 176 Fed. Rep. 424, and it would be impossible to deny the same right to competing roads, merely because as the result of the conditions one city would gain and another lose. *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648.

Although the order cutting down the allowance to

Peavey & Co. to the estimated cost may have been influenced by erroneous views touching the powers of the Commission and the elements proper for consideration (see *Southern Railway Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297), we are of opinion that no sufficient reason appears for disturbing that. The Commission has decided what compensation is reasonable, and we infer that Peavey & Co. would be content under the circumstances to render the service for three-quarters of a cent per hundred pounds rather than give it up.

The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point as it wishes a final decision. We are content to leave that matter on the statement of the court below. 176 Fed. Rep. 416, 417. The plaintiffs are affected by the order and it is just that they should have a chance to be heard, although not parties before the Commission.

The result is that the decree of the Circuit Court must be affirmed in its main point, but that the Commission's order of 1907, diminishing the allowance to three-quarters of a cent, and so much of the Peavey order of 1908 as confines allowances to grain reshipped within ten days, should be allowed to stand.

Decree of Circuit Court modified and affirmed.

MR. JUSTICE MCKENNA, with whom concurred MR. JUSTICE HUGHES, dissenting.

I am unable to concur in the opinion of the court.

The Commission did not hold that elevation may not properly be furnished by a railroad or be allowed for to a shipper, but held that "such elevation must be charged for at what it is reasonably worth," and without discrimination. And I understand elevation to mean "the transfer of the grain from the car of the inbound carrier, through an elevator to the car of the outbound carrier" within a

given period. "In such elevation," Mr. Commissioner Harlan said, and his language I adopt, "there is nothing either preferential or discriminatory, whether done in an elevator operated by the carrier or in an elevator operated for it by the owner," but "any allowance by the carrier to the owner of an elevator on grain belonging to him that has been weighed, inspected, cleaned, mixed or otherwise treated in the process of elevation, is unlawful. As a facility for the convenience of the carrier free elevation is unobjectionable, but when the owner is permitted to and does use the elevation as a transit privilege for himself, by means of which to secure commercial advantages on his own grain, the result is an unlawful preference and discrimination."

The conclusion is not a misconstruction of the statute. Transportation simply is the business of the railroad company. Weighing, inspecting, cleaning and mixing, that is, raising the quality of the grain to suit the demand of the market, is the business of the grain dealer or others, and the two businesses are not to be confounded, and it was not, I think, the purpose of the statute to confound them. The statute makes the term "transportation" include "all instrumentalities and facilities of shipment or carriage," and it is only when the owner of property renders services "connected with such transportation, or furnishes any instrumentality used therein," that he may be compensated by the railroad. What goes beyond that transcends the statute and becomes, as the Commission held, a discrimination.

I am authorized to say that MR. JUSTICE HUGHES concurs in this dissent.

LENMAN *v.* JONES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 19. Argued October 27, 1911.—Decided November 13, 1911.

In the absence of fraud, ignorance of who the real vendee is does not relieve the vendor from specific performance of a contract to sell real estate.

The vendor is not relieved of a contract to sell, absolute as to him, because he thought it gave the purchaser an option, but did not require him, to purchase.

One who purchases from the vendee before completion of the contract to sell, not only the property but all rights of the vendee connected therewith, becomes the equitable owner of the property to the same extent as the original vendee and can compel specific performance of the original contract.

The original vendee against whom no relief is asked and who has to the extent of his interest complied with the contract is not a necessary party to a suit brought by the subvendee against the original vendor to compel specific performance.

The contract to sell involved in this case being clear enough to indicate to lawyer and layman the purchaser, the seller, the land and the terms, it satisfies the statute of frauds, Code, District of Columbia, § 1117.

33 App. D. C. 7, affirmed.

THE facts, which involve the construction and validity of a contract for the sale of real estate in the District of Columbia, are stated in the opinion.

Mr. A. S. Worthington for appellant.

Mr. Hugh H. Obear and *Mr. J. J. Darlington* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Su-

preme Court for the specific performance of a contract for the sale of land. 33 App. D. C. 7. The appellant was the owner of the land by inheritance, subject to the dower of her mother, who has died pending this cause. After some previous offers, Early & Lampton, real estate brokers in Washington, understanding that the defendant would take $200,000, prepared a document which the defendant, after some consultation with others, signed. So far as material it is as follows: "Office of Early & Lampton, Real Estate & Loan Brokers, 615 14th Street N. W.— Washington, D. C., May 2nd, 1905. Received of Fannie E. Wilhoite a deposit of One hundred ($100.00) Dollars, to be applied to part payment of purchase of sub Lots 4, 5, 6 and 7, square 222 known as the Lenman Building, sold her for Two hundred thousand dollars net on following terms [with details as to payment, title, time, &c.] Early & Lampton, Agents for Fannie E. Wilhoite. Confirmed, ratified, and approved: Isobel H. Lenman (*Owner*). Fannie E. Wilhoite. Fannie E. Wilhoite (*Purchaser*), Per E. & L." Mrs. Wilhoite seems to have been a figurehead used by the brokers, and to have played merely a formal part.

The next day Mrs. Wilhoite signed an instrument in similar form acknowledging the receipt of five hundred dollars from the appellee, part payment for the same land, sold to him for $213,250, cash, the purchaser to make full settlement within five days from date. The terms varied from those in the first paper, by which $150,000, payable in three years, was to be secured by deed of trust. But there is no trouble on that score, as the appellee simply is trying to hold the appellant to her own terms. Mrs. Wilhoite subsequently executed a deed to the appellee, although it never was acknowledged or recorded. Demand and tender have been made, but the appellant has refused and refuses to perform, and the appellee brought this bill.

We will deal with the grounds for the refusal in the order in which they were presented. In the first place it was said that the conduct of the appellee and those under whom he claims precludes him from equitable relief. This needs no discussion. Even if it were true, as suggested but not found or proved, that when the bargain with the defendant was made, the appellee, Jones, was behind the brokers, and a trust company of which he was president was behind him, and that the defendant was not informed of the facts, she could not complain. It is apparent from her own testimony that she knew that Mrs. Wilhoite was only a figurehead, and the most that can be contended is that she thought that another person, not the appellee, most probably was the real man. It does not matter that she did. She suffered no loss, and moreover Mr. Jones and his company were under no obligation to disclose their interest in the absence of fraud, which there is not the slightest ground to suggest. It also is urged that the defendant, when she signed the instrument, thought that it merely gave an option. This is an immaterial afterthought. If she did not know what she was doing she had only herself to thank, but no even one-sided mistake is proved.

Some slight support for the preceding objection is sought also in the second ground upon which it is argued that the court erred. The bill alleges that Mrs. Wilhoite sold to the plaintiff, the appellee, all her rights under her contract with the appellant, and it now is urged that Jones was not an assignee but a subpurchaser and cannot recover on the allegations of the bill as they stand. There is a suggestion as little warranted as those that we have mentioned that the form of the bill also manifests bad faith. But the argument is mainly on the technical point that the proofs fail to sustain the allegations. We do not see the failure. When Mrs. Wilhoite contracted to sell the land, she contracted to transfer all the rights she got

by her contract with the owners of the land. As she in popular legal language became the equitable owner by her contract, she made the appellee the equitable owner by her contract with him—that is she gave him the right to insist in her place that the legal owner should give up the legal estate upon fulfillment of the conditions agreed. The deed from Mrs. Wilhoite although purporting to be made by Miss Lenman and her, reciting the transactions on which it is founded, would be sufficient to satisfy the allegations of the bill in the strictest sense. True, it purports to convey the land, but thereby it conveys all of Mrs. Wilhoite's rights in and to the land. It was executed by Mrs. Wilhoite in aid of the enforcement of Miss Lenman's agreement, and therefore is not to be read as conditional upon the signature of Miss Lenman. See *Buchannon* v. *Upshaw*, 1 How. 56.

The foregoing considerations afford an answer to the third objection: that Mrs. Wilhoite is not made a party to the suit; in view of the fact that it was not taken in the pleadings, or, so far as appears, before the argument in the Court of Appeals. Mrs. Wilhoite has no real interest, and it is clear that the appellant is put in no danger by the decree. The point is urged as an afterthought, and no end of justice would be served by allowing it to prevail.

Finally it is said that the instrument sued upon does not satisfy the statute of frauds. Code, D. C., § 1117. This is a desperate contention, like the rest. There are certain formal absurdities in the document, but it leaves no doubt in the mind of either lawyer or layman as to who was purchaser, who seller, what the land or what the terms. Upon the whole case, without further discussion, we are of opinion that the plaintiff is entitled to prevail.

Decree affirmed.

KALEM COMPANY *v.* HARPER BROTHERS.

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

No. 26. Argued October 31, November 1, 1911.—Decided November 13, 1911.

An exhibition of a series of photographs of persons and things, arranged on films as moving pictures and so depicting the principal scenes of an author's work as to tell the story is a dramatization of such work, and the person producing the films and offering them for sale for exhibitions, even if not himself exhibiting them, infringes the copyright of the author under Rev. Stat., § 4952, as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106.

Quære whether there would be infringement if the illusion of motion were produced from paintings instead of photographs of real persons, and also *quære* whether such photographs can be copyrighted.

Rev. Stat., § 4952, as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, confines itself to a well-known form of reproduction and does not exceed the power given to Congress under Art. I, § 8, cl. 8 of the Constitution, to secure to authors the exclusive right to their writings for a limited period.

169 Fed. Rep. 61, affirmed.

THE facts are stated in the opinion.

Mr. John W. Griggs and *Mr. Drury W. Cooper* for appellant:

The Court of Appeals was right in affirming the proposition that the making and publication of a series of pictures of the incidents described in a book is not an infringement of a copyright in the book.

Copyright does not monopolize the intellectual conception, but only the form of expression, *i. e.*, the "arrangement of words," *Holmes* v. *Hurst*, 174 U. S. 86, adopted by the author. It is the writings of the author that are protected, and the statute cannot extend the

monopoly to his ideas. *White-Smith* v. *Apollo*, 209 U. S. 17; *Stowe* v. *Thomas*, 2 Wall. Jr. 547; 23 Fed. Cas. 201, 206; *Baker* v. *Selden*, 101 U. S. 99; *Johnson* v. *Donaldson*, 3 Fed. Rep. 22; *Perris* v. *Hexamer*, 99 U. S. 674, 676; *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 347.

A moving picture film, whether made by a modern rapid-fire camera, or by the ancient and laborious process of taking, or drawing, and collating pictures of objects in successive positions, is a picture. *Edison* v. *Lubin*, 122 Fed. Rep. 240; *Am. Mutoscope Co.* v. *Edison*, 137 Fed. Rep. 262; *United States* v. *Berst*, 175 Fed. Rep. 121. And see *Edison* v. *Mutoscope Co.*, 114 Fed. Rep. 926.

Copyright law differs from the law of patents; in the former there may be two concurrent copyrights in what is identically the same creation, in the latter there can only be one patent, the first inventor being entitled. MacGillivray on Copyrights, 243. And see *Baker* v. *Selden*, 101 U. S. 99.

Termination of the author's common-law rights upon voluntary publication, *Millar* v. *Taylor*, 4 Burr. 2331, has been recognized frequently by this court, and was known to the framers of the Constitution. *Stephens* v. *Cady*, 14 How. 528, 530; *Lithograph Co.* v. *Sarony*, 111 U. S. 53, 58; *Holmes* v. *Hurst*, 174 U. S. 82, 86; *Wheaton* v. *Peters*, 8 Pet. 591, 676, and cases *passim*.

If one, by copyrighting a book, can prevent an artist from picturing the scenes described, reason cannot afford room for the orator to use, in his flights of fancy, the author's created characters or figures of speech, for the idea is not open to appropriation or use in one case more than in the other. But it is the writing only, and not the idea, that is monopolized; the mode of expression and not the thought conveyed. Books and pictures are essentially different.

As to whether a painting is a manuscript, see *Parton* v. *Prang*, 18 Fed. Cas. 1273.

A series of moving pictures is not a copy of the book, *Perforated Music Roll Case*, 209 U. S. 1, nor are defendants' photographs copies of the book as the word copy is understood. *Bennett* v. *Carr*, 96 Fed. Rep. 213.

The statutory monopoly to make copies does not cover the plates and other tools with which they are made and does not pass with their ownership. *Stephens* v. *Cady*, 14 How. 530. Being a creature of the statute, this species of property is legally distinct from the underlying ideas upon which it is, after all, predicated, just as from the paper and metal without which it would have no commercial value.

A person may utilize the ideas portrayed in a copyrighted publication, provided he bestows upon his own writings such skill and labor as to produce an original result. *Folsom* v. *Marsh*, 2 Story, 100, 115; *S. C.*, 9 Fed. Cas. 342. Utilizing ideas without copyrighting their expression is lawful. *Dun Co.* v. *Lumbermen's Credit Assn.*, 209 U. S. 20; *Morris* v. *Wright* (1870), L. R. 5 Ch. 279; *West Pub. Co.* v. *Lawyers' Co.*, 64 Fed. Rep. 360; 79 Fed. Rep. 756; *Edward Thompson Co.* v. *American Co.*, 130 Fed. Rep. 369; 157 Fed. Rep. 1003.

Not only is there no evidence here that the copyright proprietors were injured even in the slightest degree; but, on the contrary, the defendant asserted by letter that its films would benefit the complainants, and this they did not deny, but stood upon their naked assertion of legal right.

To transcribe a musical composition by making a record upon a phonograph blank, or by perforating a sheet of paper, requires neither creative nor artistic power, but merely the common skill of the artisan. Yet, to make such record, is not to copy the composition, as has been held in every reported case that has come to our special knowledge. *Kennedy* v. *McTammany*, 33 Fed. Rep. 584; *White-Smith Co.* v. *Apollo Co.*, 77 C. C. A. 368; 147 Fed.

Rep. 226; 209 U. S. 1; *Boosey* v. *Wright*, 1 Ch. 122; *Stern* v. *Rosey*, 17 App. D. C. 562.

Under *Lithograph Co.* v. *Sarony*, 111 U. S. 53, and *Bleistein* v. *Donaldson*, 188 U. S. 250, the films were legally copyrightable as they were the result of original conception, posing and artistic skill.

A photograph cannot be an infringement of a copyrighted book. See *Littleton* v. *Ditson Co.*, 62 Fed. Rep. 597; 67 Fed. Rep. 905, holding that "book" is distinct from "musical composition"; *Woods* v. *Abbott*, Fed. Cas. No. 17,938, holding that "photograph" is not a "print"; *Stowe* v. *Thomas*, 2 Wall. Jr. 547, holding that "translation" is not a "copy"; *Hills* v. *Austrich*, 120 Fed. Rep. 862, holding that "stone" does not include "metal plate."

All the marks of literary property that distinguish the book or the drama are lacking from the picture, save in so far as both involve the same underlying ideas.

The exhibition of the pictures, arranged upon a film which is, during all the time of its use, a part of a machine, is not an infringement of the book copyright.

The complainants' creation was not copied in the making of the pictures, but they are realizations, in a different art, of some of the ideas to which Gen. Wallace gave a written portrayal. Their exhibition by machine does not approach more nearly the writing of the book than did their making and selling.

Such exhibition of the pictures is not a "public performance or representation" in violation of the Dramatic Copyright Act. *Daly* v. *Palmer*, 6 Blatchf. 256; *Daly* v. *Webster*, 56 Fed. Rep. 483, distinguished. And see *Chatterton* v. *Cave*, 10 C. P. 572; *Hanststængel* v. *Baynes*, 1895, App. Cas. 20.

There are no cases in which an exhibition has been declared to be a dramatic performance or representation unless human actors are present, and either performing

themselves or at least causing dummies or puppets to move and act. Drone on Copyrights, 587–589; *Russell* v. *Smith*, 12 Q. B. 236, 237; Brackett on Theatrical Law, p. 54; *Lee* v. *Simpson*, 3 C. B. 871; *Day* v. *Simpson*, 18 C. B. (N. S.) 680; *Turner* v. *Robinson*, 10 Irish Ch. 121, 510, distinguished.

For cases where the courts have distinguished mechanical arrangements from dramatic performances, see *Harris* v. *Commonwealth*, 81 Virginia, 240; *Jacko* v. *The State*, 22 Alabama, 73; *Fuller* v. *Bemis*, 50 Fed. Rep. 926; *Carte* v. *Duff*, 23 Blatchf. 347; 25 Fed. Rep. 183; *Serrana* v. *Jefferson*, 33 Fed. Rep. 347.

The copyright statutes are to be construed strictly, and not stretched by resort to equitable considerations. *Banks* v. *Manchester*, 128 U. S. 244; *Bolles* v. *Outing Co.*, 175 U S. 262, 268; *Higgins* v. *Keuffel*, 140 U. S. 428; *Thompson* v. *Hubbard*, 131 U. S. 123. See, generally, *Oregon Ry.* v. *Oregonian Co.*, 130 U. S. 1, 26.

In any event, defendant is not an infringer, direct or contributory. It does not give any performance in, nor does it manage, any theatre. Dramatizing is entirely distinct from public performance or representation. As an act of infringement, it is defined, Rev. Stat., § 4965, and is punishable by forfeiture of plates; as a penal statute it must be strictly construed. *Thornton* v. *Schreiber*, 124 U. S. 612; *Bolles* v. *Outing Co.*, 175 U. S. 262. Section 4966 provides damages against public performances.

Defendant derives no profit from the exhibition, and hence is not within the class against which § 4966 is directed, for that operates against the actual wrongdoer, *Brady* v. *Daly*, 175 U. S. 174, not the indirect participant therein.

The defendant is not concerned with the ultimate use to which its films are put, and they are manifestly susceptible of many uses which complainants do not contend to be within the purview of a dramatic copyright.

Russell v. *Briant*, 8 C. B. 836, 848; *Harper* v. *Shoppell*, 26 Fed. Rep. 519.

If the act protects copyright in a drama against any exhibition of pictures, it is stretched to cover that which was not the work of the author, but of another, and therefore it is unconstitutional; since that instrument limits the author's monopoly to his writings.

Mr. John Larkin for appellee Harper Brothers.

Mr. David Gerber for appellees Klaw & Erlanger.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree restraining an alleged infringement of the copyright upon the late General Lew Wallace's book 'Ben Hur.' 169 Fed. Rep. 61. 94 C. C. A. 429. The case was heard on the pleadings and an agreed statement of facts, and the only issue is whether those facts constitute an infringement of the copyright upon the book. So far as they need to be stated here they are as follows. The appellant and defendant, the Kalem Company, is engaged in the production of moving picture films, the operation and effect of which are too well known to require description. By means of them anything of general interest from a coronation to a prize fight is presented to the public with almost the illusion of reality—latterly even color being more or less reproduced. The defendant employed a man to read Ben Hur and to write out such a description or scenario of certain portions that it could be followed in action; these portions giving enough of the story to be identified with ease. It then caused the described action to be performed and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell for

use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title Ben Hur. 'Scenery and Supers by Pain's Fireworks Co. Costumes from Metropolitan Opera House. Chariot Race by 3d Battery, Brooklyn. Positively the Most Superb Moving Picture Spectacle ever Produced in America in Sixteen Magnificent Scenes,' etc., with taking titles, culminating in 'Ben Hur Victor.' It sold the films and public exhibitions from them took place.

The subdivision of the question that has the most general importance is whether the public exhibition of these moving pictures infringed any rights under the copyright law. By Rev. Stat., § 4952, as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, authors have the exclusive right to dramatize any of their works. So, if the exhibition was or was founded on a dramatizing of Ben Hur this copyright was infringed. We are of opinion that Ben Hur was dramatized by what was done. Whether we consider the purpose of this clause of the statute, or the etymological history and present usages of language, drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of the art. *Daly* v. *Palmer*, 6 Blatchf. 256, 264. But if a pantomime of Ben Hur would be a dramatizing of Ben Hur, it would be none the less so that it was exhibited to the audience by reflection from a glass and not by direct vision of the figures—as sometimes has been done in order to produce ghostly or inexplicable effects. The essence of the matter in the case last supposed is not the mechanism employed but that we see the event or story lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter our visual impression—what we see—is caused by the real pan-

tomime of real men through the medium of natural forces, although the machinery is different and more complex. How it would be if the illusion of motion were produced from paintings instead of from photographs of the real thing may be left open until the question shall arise.

It is said that pictures of scenes in a novel may be made and exhibited without infringing the copyright and that they may be copyrighted themselves. Indeed it was conceded by the Circuit Court of Appeals that these films could be copyrighted and, we may assume, could be exhibited as photographs. Whether this concession is correct or not, in view of the fact that they are photographs of an unlawful dramatization of the novel, we need not decide. We will assume that it is. But it does not follow that the use of them in motion does not infringe the author's rights. The most innocent objects, such as the mirror in the other case that we have supposed, may be used for unlawful purposes. And if, as we have tried to show, moving pictures may be used for dramatizing a novel, when the photographs are used in that way they are used to infringe a right which the statute reserves.

But again it is said that the defendant did not produce the representations, but merely sold the films to jobbers, and on that ground ought not to be held. In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer. It has been held that mere indifferent supposition or knowledge on the part of the seller that the buyer of spirituous liquor is contemplating such unlawful use is not enough to connect him with the possible unlawful consequences, *Graves* v. *Johnson*, 179 Massachusetts, 53, but that if the sale was made with a view to the illegal resale the price could not be recovered. *Graves* v. *Johnson*, 156 Massachusetts, 211. But no such niceties are involved here. The defendant not only expected but invoked by ad-

vertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act. It is liable on principles recognized in every part of the law. *Rupp & Wittgenfeld Co.* v. *Elliott*, 131 Fed. Rep. 730, 732. *Harper* v. *Shoppell*, 28 Fed. Rep. 613. *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 433.

It is argued that the law construed as we have construed it goes beyond the power conferred upon Congress by the Constitution, to secure to authors for a limited time the exclusive right to their writings. Art. I, § 8, cl. 8. It is suggested that to extend the copyright to a case like this is to extend it to the ideas as distinguished from the words in which those ideas are clothed. But there is no attempt to make a monopoly of the ideas expressed. The law confines itself to a particular, cognate and well known form of reproduction. If to that extent a grant of monopoly is thought a proper way to secure the right to the writings this court cannot say that Congress was wrong.

Decree affirmed.

SOUTHERN PACIFIC CO. *v.* COMMONWEALTH OF KENTUCKY.

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

No. 247. Argued October 11, 12, 1911.—Decided November 13, 1911.

An artificial situs for purposes of taxation is not acquired by the enrollment of a vessel at a port or the marking of that port on the stern, under §§ 4141 and 4178, Rev. Stat., as amended by the act of June 23, 1874, 18 Stat. 252, c. 467.

The taxable situs of a vessel which has no permanent location within

another jurisdiction is the domicile of the owner. *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, followed, and *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299, distinguished.

A vessel is built to navigate the seas and not to stay in port and it does not acquire a situs in one port rather than another by reason of frequently visiting the former. *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596.

Although equality of burdens be the general standard sought to be obtained in taxation, the legality of the tax is not to be measured by the benefit received by the taxpayer, nor are protection and taxation necessarily correlative obligations.

The taxing power can only be interfered with on the grounds of unjustness where the abuse is flagrant and can be remedied by some affirmative principle of constitutional law.

A corporation organized under the law of a State and having its general office and holding its corporate meetings therein, receives such protection from that State as affords a basis for taxing its intangible property which has not acquired a situs for taxation elsewhere.

The taxable situs of a vessel not permanently located within another jurisdiction does not depend upon whether the State which is the domicile of the owner possesses a port which such vessel could reach. Such a test would introduce elements of uncertainty dependent upon draft of the vessel and depth of the water.

Vessels engaged in coastwise trade belonging to a Kentucky corporation held to be taxable in Kentucky although enrolled in the port of New York, having the name of New York painted on their sterns and never were at any port in Kentucky.

134 Kentucky, 417, affirmed.

THE facts, which involve the power of the State of Kentucky to tax steamships belonging to a corporation of that State but enrolled at the port of New York, are stated in the opinion.

Mr. Alexander Pope Humphrey and *Mr. Maxwell Evarts* for plaintiff in error:

Kentucky is the artificial situs of the ships of the Southern Pacific Company, New York their actual situs. They are therefore not rightfully subject to taxation in Kentucky.

Taxation is imposed by a State in return for protection

given. Unless a State gives some return for a tax imposed there is no ground for the tax.

To tax personal property where it has no situs is to take property without due process of law, and is prohibited by the Fourteenth Amendment.

As to real estate it was never doubted that the taxing laws of a State could have no extraterritorial force. It has now come to be settled law that the same is true as to personal property. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *D., L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 342; *Union Transit Co.* v. *Kentucky*, 199 U. S. 195.

Six cases have been decided by this court in reference to the taxation of ships. *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis* v. *The Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; *Transportation Co.* v. *Wheeling*, 99 U. S. 273; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299; *Ayer & Lord Co.* v. *Kentucky*, 202 U. S. 409.

This court having held that the protection given by the taxing sovereignty to the thing taxed is the true basis of taxation, and that this principle should be applied in the case of personal property, as well as to real estate, it is not plain why ships alone of all personal property should be excepted from the rule.

The Court of Appeals of Kentucky declined to hold that the State which furnished protection to the thing taxed alone had the right of taxation, upon the ground that it was prevented from so doing by the decisions of this court in reference to the taxation of ships.

The decisions cited do not so hold. There is no case decided by this court which holds that a ship in the coastwise trade can be taxed by an inland State within whose jurisdiction it is a physical impossibility for it ever to come. Further than that, in its later decisions this court has favored the rule of reason and common sense, viz., that ships should not be taxed in the artificial situs

of the domicile of the owner, but in their actual situs—where they receive the protection of the taxing power.

In every case in this court where the principle that the domicile of the owner was to be regarded as the situs of the vessel for the purpose of taxation, it was always a domicile where it was physically possible for that ship to be, and not a domicile where under no circumstances the taxing power could have the ship within its jurisdiction.

The question is: Are these ships to be taxed in a State which does, and can give them, no protection or in a State which can and does do so—in a State where the fiction of the law as to personalty following the owner's domicile must be extended to an extreme, or in one where they have an actual situs, so far as possible for ships engaged in coastwise trade to have a situs, and pay a tax to that State which does something for them in return?

Mr. Matt J. Holt, with whom *Mr. Joseph Selligman* was on the brief, for defendant in error.

Mr. Justice Lurton delivered the opinion of the court.

The question arising upon this writ of error is, whether certain steamships owned by the Southern Pacific Company, a corporation of the State of Kentucky, are taxable in Kentucky as property having a taxable situs there.

The Southern Pacific Company is a corporation organized under a special act of the General Assembly of Kentucky of March 17, 1884. Acts of 1883–4, p. 725. Very wide and diverse powers are thereby conferred, among them being the right to own, lease, maintain and operate railroads, telegraphs and steamships, though prohibited from owning, leasing or operating "any railroad within the State of Kentucky." By an act of March 21, 1888, the act of March 17, 1884, was amended by adding thereto the following: "Except subject to and in conformity with the provisions of the laws of the State of Kentucky applicable

to railroads, and acquiring no special rights that may be possessed by any railroads in the State, except the general and ordinary rights of common carriers as possessed by railroads generally." The company is required to keep its principal office in the State, with power to open other offices at places outside of the State, as its business may make convenient.

By virtue of the authority conferred the company has acquired and is operating a line of railway from New Orleans and Galveston to San Francisco and Portland, to say nothing of connecting lines in the same region either owned, leased or controlled through stock domination. It also owns and operates a line of twenty steamships between the ports of New York and New Orleans, New York and Galveston, and New Orleans and Havana, Cuba. Auxiliary to these ships it also owns barges, tugs and ferry-boats, which operate exclusively in the harbors of the ports mentioned. These tugs, barges, etc., were held to have acquired a permanent situs in such ports, under the ruling in *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299, and in this the State of Kentucky acquiesced, leaving open only the question of the taxable situs of the ocean-going steamships.

All of these ships are enrolled at the port of New York and carry on their sterns the words "New York," as required by the statute. Two of them sail between New Orleans and Havana, five between New York and New Orleans exclusively, and thirteen interchangeably between New York and New Orleans, and New York and Galveston, Texas. The enrollment at New York and the marking of the name of that port upon the stern of these vessels is only of importance upon the question of an actual situs at New York. The owner has no power to give his vessel a taxable situs by the arbitrary selection of a home port, which is neither his domicile, nor the domicile of actual situs. *St. Louis* v. *Ferry Co.*, 11 Wall. 423;

Old Dominion Steamship Co. v. *Virginia*, 198 U. S. 299; *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409.

Sections 4141 and 4178, Revised Statutes, as amended by the act of June 23, 1874, 18 Stat. 252, c. 467, give to an owner the right to mark upon the stern of his vessel either the name of the place of enrollment, the place where the vessel was built, or the place where the owner resides.

As the place of enrollment is not of itself determinative of the place of taxation, it is obvious that the right to select a place to be marked upon the stern as a place of hail or home port, does not confer the arbitrary right upon the owner of selecting a place for the taxation of his vessel. To give to the statute this construction, said this court in *Ayer & Lord Tie Co.* v. *Kentucky*, cited above (p. 426), "would be simply to hold that its purpose was to endow the owner with the faculty of arbitrarily selecting a place for the taxation of his vessel in defiance of the law of domicile and in disregard of the principle of actual situs."

Since, therefore, an artificial situs for purposes of taxation is not acquired by enrollment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence, and the exception to the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government. Thus in *St. Louis* v. *Ferry Co.*, 11 Wallace, 423, 430, this court, after referring to the taxing power of a State as extending to all persons and property within its territorial jurisdiction, said:

"In the eye of the law personal property, for most purposes, has no locality. . . . In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual *situs*, and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there. Whether the personal property of a resident of one State situate in another can be taxed in the former, is a question which in this case we are not called upon to decide."

The question thus reserved was decided adversely to the State of domicile in *Union Transit Co.* v. *Kentucky*, 199 U. S. 194.

The persistence with which this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear that the vessels had an actual situs elsewhere, is illustrated by the cases of *Hays* v. *Pacific Mail Steamship Company*, 17 Howard, 596; *Morgan* v. *Parham*, 16 Wallace, 471; *St. Louis* v. *Ferry Co.*, 11 Wallace, 423; *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299, and the case of *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409.

In *Hays* v. *Pacific Mail Steamship Company* it appeared that the ships of the company were the property of a New York corporation, and that they were registered at the port of New York, where the capital represented by them was assessed for taxation. They were regularly and continuously employed on the Pacific coast, and were re-

fitted and repaired from time to time at Benicia, in the State of California. Concerning these ships, which the State of California sought to tax upon the theory that they had an actual situs in that State, this court said (p. 598):

"These ships are engaged in the transportation of passengers, merchandise, &c., between the city of New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and laws of the General Government, to which belongs the regulation of commerce with foreign nations and between the States.

"Now, it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, &c., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the State.

"Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage

or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them, temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port."

In *St. Louis* v. *Ferry Co.*, cited above, the steamboats in question were owned by an Illinois corporation, which had its principal office within that State. They were enrolled at the port of St. Louis, where the principal officers of the company resided, and where an office was maintained, in which the corporate meetings were held and where the corporate seal was kept. That they were enrolled at St. Louis, the court said, "throws no light upon the subject of our inquiry. . . . The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment." The steamers were taxed in Illinois, and were held not subject to taxation in St. Louis. Upon this subject the court said (p. 431):

"The owner was, in the eye of the law, a citizen of that State, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained."

In *Morgan* v. *Parham*, the vessel was owned and registered in New York, but enrolled as a coaster at Mobile,

where her master resided and where there was an office and agent under the control of a superior agent residing at New Orleans, who employed and paid the other officers and men of the ships. There was also a wharf at Mobile controlled and occupied by the vessels of the line. The vessels were engaged in commerce between Mobile and New Orleans and had been so continuously for several years. The court held that "the State of Alabama had no jurisdiction over the vessels for the purpose of taxation, for the reason that they had not become incorporated into the personal property of that State, but were there temporarily only, and that they were engaged in lawful commerce between the States with their situs at the home port of New York, where they belonged and where their owners were liable to be taxed for their value.

The case of *The Old Dominion Steamship Company* v. *Virginia*, affords an instance of where the domicile of the owner as a taxing situs was held to have been lost and a new taxing situs acquired by reason of a permanent location within another jurisdiction. But in that case the judgment was rested upon the fact that the vessels had for years been continuously and exclusively engaged in the navigation of the Virginia waters, which State had thereby acquired jurisdiction for imposing a tax as upon property which had become incorporated into the tangible property within her territory.

Coming now to the last utterance of this court, the case of *Ayer & Lord Tie Company* v. *Kentucky*, we find a complete authority for upholding the assessability of these steamers by the State of Kentucky. The boats there in question were engaged in interstate commerce between the ports of Kentucky, Illinois, Mississippi, Tennessee and Arkansas. They were owned by an Illinois corporation which had its principal office at Chicago, where taxes had been paid under the laws of the State, both to the State and to the city. Brookfield, in the extreme south-

ern part of the State, and upon the Ohio river, was a port of call, and an office was probably maintained there, it being a place where cargoes were often discharged. The general manager of the transportation department of the company resided in Kentucky and the boats of the fleet were enrolled at Paducah in that State, and bore upon their sterns the name "Paducah," as the home port or port of hail under the statute. Paducah was the place where the boats received their supplies and repairs, where seamen were hired and laid up when not in use, though it seems that Paducah was not a point where cargo was either received or discharged. Upon this state of facts it was held that the boats of the company had neither such artificial situs through enrollment or the marking upon their sterns, nor such actual situs by reason of the temporary stoppage at Paducah and other ports of the State, as to draw to it jurisdiction for purposes of taxation. The result of the previous decisions was there summed up, the court saying (p. 421):

"The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

It has been urged that the case of *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, lays down the principle that jurisdiction to impose taxes upon tangible property is, under the Fourteenth Amendment, wholly dependent upon the actual situs of the property taxed, and that the fiction which gives movables the situs of the owner for purposes of taxation is inconsistent with that due process of

law guaranteed under that Amendment. The question for decision in that case, as stated in the forepart of the opinion (p. 201), was, "whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, *permanently located in other States* and employed there in the prosecution of its business." The property in question was railroad cars, a kind of movables obviously capable of acquiring a permanent location other than that of the owner. The judgment of the court was that the taxation of such property so *permanently located* elsewhere by the law of the domicile of the owner would be a denial of due process of law and beyond the power of the State. The principle was not a new one, and was declared to rest upon repeated judgments of this court, the cases of *Railroad Co.* v. *Jackson*, 7 Wallace, 262; *Delaware &c. Railroad* v. *Pennsylvania*, 198 U. S. 341; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, being cited as precedents. That judgment did not deny to the State of the domicile of the owner power to tax tangibles which had not acquired an actual situs elsewhere.

The case presented no such question and the opinion does not refer to the numerous cases holding that the taxable situs of ships engaged in foreign or interstate commerce was that of the owner unless an actual situs had been elsewhere acquired. That no such consequence was attached to the judgment or opinion is evidenced from the opinion in *Ayer & Lord Tie Company* v. *Kentucky*, announced at the same term and concurred in by Mr. Justice Brown, who wrote the opinion in the Transit Company case, in which case it was distinctly affirmed that vessels were subject to taxation only at the domicile of the owner, unless they had acquired an actual situs in another jurisdiction.

To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location, would introduce elements of uncertainty

concerning the situs of such property not presented by other kinds of movable property.

It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular State, and quite another to attribute to a sea-going ship an actual situs at any particular port into which it goes for supplies or repairs or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port, but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation. This court, in *Hays* v. *Pacific Mail Steamship Co.*, *supra*, said upon this subject (p. 599), "whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port."

In *People ex rel. Pacific Mail Steamship Company* v. *Commissioners of Taxes*, 58 N. Y. 242, 246, the New York court said, concerning the necessity of determining the taxable situs of such ships by some more certain standard than by the ports they make and the time they remain, that, "being in port is only a necessary incident in their proper employment. They are not built to be in port, but upon the sea. To determine their *situs*, for purposes of taxation, by their longer or shorter stay in a particular port, or by their more or less frequent resort to it, would intro-

duce perpetual uncertainty; it would, practically, subject them to taxation in every port, or exempt them in all."

The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper situs for purposes of taxation.

The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been such flagrant abuse as may be remedied by some affirmative principle of constitutional law.

Take the case in hand. The Southern Pacific Company is a corporation having much extraordinary power. It only exists and exercises this power by virtue of the law of Kentucky. By the law of its being it resides in Kentucky and there maintains its general office and there holds its corporate meetings. To say that the protection which the corporation receives from the State of its origin and domicile affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law. What is the protection accorded these vessels at any of the ports to which they temporarily go for purposes of business? What protection do they receive from the State or city of New York other than that accorded to every other ship which visits that port, foreign or domestic, for repairs, supplies or other business? Referring to a like claim of protection this court, in *Hays* v. *Pacific Mail Steamship Co.*, 17 Howard, 596, 599, said: "And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of

any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and laws of the General Government, to which belongs the regulation of commerce with foreign nations and between the States."

It has also been urged that the situs of the domicile of the owner of a ship cannot be the situs for purposes of taxation when it appears that the ship cannot go to that situs, and it is here said that the ships of the Southern Pacific Company cannot visit any port in the State of Kentucky. The fact is not shown, nor is it conceded. The State has a port on the Mississippi, a great stream, up which national ships of war have at times gone as high or higher than the southern boundary of the State of Kentucky. But the test proposed is not one for which there is any authority, and would but introduce another grave element of uncertainty dependent upon the draught of the ships and the depth of the water. Such a test might exclude from taxation ships, such great ships as the Olympic, or the Lusitania, while smaller craft might meet the proposed standard.

The facts which have been relied upon to show an actual situs of these ships in the port of New York have been already sufficiently stated. They fall short of the facts relied upon for a like purpose in *Hays* v. *Pacific Mail Steamship Company; St. Louis* v. *Ferry Co.*, and *Morgan* v. *Parham*, already cited, where the judgments were that they were insufficient to create a taxable situs other than that of the owner. The facts shown by no means bring the case under the authority of *Old Dominion Steamship Company* v. *Virginia*, where it was held that the ships had acquired an actual situs.

We find no reason for disturbing the judgment of the Court of Appeals of the Commonwealth of Kentucky, and it is therefore,

Affirmed.

CURTIN *v.* BENSON.

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

No. 1. Argued October 25, 1911.—Decided November 20, 1911.

While one must come into equity with clean hands, a defendant invoking the rule on the ground that plaintiff is praying for relief with an improper object in view must establish that fact.

Even if the United States can exercise over public lands the powers of a sovereign as well the rights of a proprietor, there are limitations; neither can be exercised to destroy essential uses of private property.

To take away an essential use of property is to take the property itself.

Whether a power is within constitutional limits is to be determined by what can be done under it, not what may be done.

It is beyond the power of the Secretary of the Interior or the superintendents of national parks under his control to limit the uses to which lands within the parks held in private ownership may be put; and so held as to regulations prohibiting grazing cattle on private lands within the Yosemite Park until such lands have been defined and marked by an agreed understanding.

Evidence, inadmissible generally but admitted by the court below for a particular purpose, cannot be extended by this court beyond the limited purpose of its introduction.

Quære whether owners of lands within National Park limits can be required to fence their lands, or whether the trespassing of their cattle on other lands can be made a criminal offense.

Quære whether an order of the Secretary of the Interior in regard to park lands can be construed as extending to toll roads constructed under authority of the State.

THE facts, which involve the validity of rules made by the Secretary of the Interior in regard to grazing cattle on private lands within the limits of Yosemite Park, are stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. Marshall B. Woodworth* and *Mr. J. B. Curtin* in *propria personam* were on the brief, for appellants:

The Department of the Interior has no right to make or enforce any rules respecting the use of private property or

public toll roads within the State of California, for that State has not ceded to the United States its political jurisdiction over the Yosemite Park. The United States is simply an ordinary proprietor. *Lowe* v. *Railroad Co.*, 114 U. S. 525; *Chicago &c. Ry. Co.* v. *McGlinn*, 114 U. S. 542; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 167; *Palmer* v. *Barrett*, 162 U. S. 399; *Sharon* v. *Hill*, 24 Fed. Rep. 726, 731; *In re Ladd*, 74 Fed. Rep. 35; *State* v. *Mack*, 23 Nevada, 363; *United States* v. *Meagher*, 37 Fed. Rep. 878; *Crook* v. *Old Point Hotel*, 54 Fed. Rep. 608; *In re Kelly*, 71 Fed. Rep. 549; *United States* v. *Partello*, 48 Fed. Rep. 677; *Benson* v. *United States*, 146 U. S. 330.

However commendable the rules and regulations may be to protect and preserve the Park, and legal as to it, they can have no effect on or as to lands owned by private citizens or as to public roads of the State.

The right of way for the construction of highways over public lands not reserved for public uses is granted by § 2477, Rev. Stat., but every highway leading through the Park was constructed prior to creation of the Park and the lands within the park have not been reserved for public uses. The right to regulate highways is a police power and reserved in the State. *N. O. Gas Co.* v. *Louisiana Lighting Co.*, 115 U. S. 650; *Jones* v. *Brin*, 165 U. S. 182; *Patterson* v. *Kentucky*, 97 U. S. 501.

The police power—the right to administer their own internal affairs—was reserved to the States, *Mugler* v. *Kansas*, 123 U. S. 623; *Railway Co.* v. *Mackey*, 127 U. S. 205; *Holden* v. *Hardy*, 169 U. S. 366; *St. Louis &c. R. Co.* v. *Paul*, 173 U. S. 404; *Tullis* v. *Railway Co.*, 175 U. S. 348; *Gundling* v. *Chicago*, 177 U. S. 183; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Atkins* v. *Kansas*, 191 U. S. 207; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359; nor do the Thirteenth, Fourteenth and Fifteenth Amendments impair the supremacy of this

power. *Barbier* v. *Connolly*, 113 U. S. 27; *Hodges* v. *United States*, 203 U. S. 6.

Parks are not instruments of government; neither can the Federal Government exercise within the limits of a State any power or authority which is not incident to some power delegated to the Federal Government. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Fox*, 94 U. S. 315; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641; *Shoemaker* v. *United States*, 147 U. S. 282.

Even if the Federal Government had authority to make any regulations, they must be police regulations, and cannot be valid unless it appear from their face that their enactment was for the protection of the health, safety, or comfort of the public. These rules are unwarranted and arbitrary prohibitions, and as such are unreasonable and void. *Hume* v. *Laurel Hill Cemetery*, 142 Fed. Rep. 552.

Mr. Assistant Attorney General Harr for appellee:

The regulations and action taken for their enforcement were authorized by law. Act of October 1, 1890, § 2, 26 Stat. 650. They were reasonable, and necessary, and were promulgated to save the Park. *United States* v. *Shannon*, 151 Fed. Rep. 863; Act of June 6, 1900, 31 Stat. 618.

The United States has all the rights that inhere in sovereignty, consistent with the Constitution for its preservation and protection and the furtherance of its ends.

The rights and powers of the United States over the public lands within the limits and general jurisdiction of a State are very different from those of an individual proprietor. The individual must look to the State for the punishment of trespassers upon his property, but the United States is not dependent upon the state governments for such protection. It may itself prohibit and punish trespasses upon the public lands. *Jourdan* v. *Barrett*, 4 How. 168; *Gibson* v. *Chouteau*, 13 Wall. 92, 99.

Congress has made it offenses or trespass against the United States to cut timber on the public lands, §§ 2461, 5388, Rev. Stat., as amended by act of June 4, 1888, 25 Stat. 166; Act of March 3, 1875, c. 151, 18 Stat. 481; *United States* v. *Cleveland Cattle Co.*, 33 Fed. Rep. 323; and see, as to power of the Government, *Debs Case*, 158 U. S. 564; *Ex parte Siebold*, 100 U. S. 371, 395; *In re Neagle*, 135 U. S. 1; *Camfield* v. *United States*, 167 U. S. 518, 525.

The power of the Federal Government with respect to its property in the States is analogous to the police power of the States. *Light* v. *United States*, 220 U. S. 506, 537.

To hold that the Federal Government is without power to protect the Government lands in the Yosemite National Park, by imposing a reasonable restraint upon the action of owners of private lands within the Park, is to make the rights and interests of the United States dependent upon state action, which is contrary to the supremacy of the Federal Government asserted in the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. *422; *United States* v. *Gettysburg Ry. Co.*, 160 U. S. 668.

The Federal Government may condemn land within a State for the purpose of establishing a national park, and also has the power to set aside and reserve its own lands for such a purpose. It has the constitutional authority to regulate the use of private lands within the Park so as to prevent injury to the public lands and the defeat of the objects in view.

There is no difference in principle between the appellant's lands and the toll roads in respect to the authority of the Federal Government to control their use so far as necessary for the proper protection of the park lands. Whether such roads, having been constructed under the authority of Section 2477 of the Revised Statutes are mere easements, as has heretofore been held (21 Land Dec. 351, 354; *Smith* v. *Townsend*, 148 U. S. 490, 498), or

whether the fee has passed out of the United States, is immaterial. The United States has as much, if not greater, right to regulate the use of such roads for the protection of its own lands, as it has lands owned by private individuals within the Park.

Appellant is not entitled to the aid of a court of equity as the record shows that he has willfully permitted his cattle to trespass upon the park lands.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was brought in the Superior Court of Tuolumne County, State of California, against the appellee, Benson, and others, who were soldiers under Benson, to enjoin them from driving appellant's stock from his lands or by any means interfering with them, and from preventing appellant driving his stock to his lands over certain toll roads. The case was removed to the United States Circuit Court for the Northern District of California where, after hearing, final judgment was rendered dismissing the bill of complaint.

The facts as agreed to, and established by evidence supplementing the agreement, are as follows: Appellant is the owner of certain lands within the Yosemite National Park (the Park was regularly and legally established, Act October 1, 1890, 26 St. 650, c. 1263; Joint Res. June 11, 1906, 34 St. 831) and lessee of other lands therein. Leading to the lands there are certain toll roads, which were established many years prior to the creation of the Park.

Appellee Benson is a captain in the United States Army and Superintendent of the Park, and, as such, it was and is his duty to enforce the rules and regulations prescribed by the Secretary of the Interior for the government of the Park, and for this purpose he has a body of troops under his command.

The Secretary established and promulgated the following rules:

"9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.

"10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

Appellant claims the right, without complying with these rules, to drive his cattle over the toll roads and to graze them on his lands. On one occasion appellant placed cattle on his lands, and appellee Benson immediately removed them, and refused to allow them to be grazed thereon until appellant complied with the rules; and, prior to the commencement of the suit, refused to allow appellant to drive his cattle over the toll roads to his lands or to use the lands until he complied with the rules.

The testimony gave some particularity to the facts as agreed to. It appeared that appellant has within the Park a few hundred acres, and, it may be inferred, 23,000 acres in the vicinity. He asserted that he had not complied with the regulations, and did not intend to do so until required. And it was admitted that the largest part of the land was unfenced.

The following from the report of the Superintendent of the Park to the Secretary of the Interior for the year 1901 was put in evidence: "After due consideration, based upon the best evidence I have been able to obtain, I can

see no objection to property owners and those holding leased land within the park limits grazing cattle near their own premises under the supervision of the park authorities."

Testimony was introduced on the part of appellees (their counsel expressing a doubt of its admissibility) "to show [that] the regulation is a reasonable one, and the reason for it, and what effect will be produced if the regulation is not carried out." To the offer counsel for appellant replied that he denied the power of the Secretary. "It is simply a question of his power," he said, and stated that if defeated on that point he could show that the rules were not reasonable under the circumstances. The court, saying that it understood, heard the evidence, which was to the following effect: Appellee Benson had been Superintendent of the Park since April 10, 1905, and on duty there for several years prior to that time. Numerous people claimed land in the park as their ranges, and a number of them had the places surrounded by fences, "sometimes enclosing instead of 160 acres which they had as high as several thousand acres of land." They drove their cattle to the so-called ranges and immediately let them loose, and they strayed throughout the entire reservation. "Senator Curtin's cattle have been in that condition for a great many years." This he (Benson) knew of his personal knowledge, because he was present at the time and had a correspondence with Mr. Curtin as far back as 1895, 1896 and 1897. He further testified that he was detailed on special duty to ascertain private land claims in the Park, the object being to ascertain who owned land "and somewhere about where it lay;" that he did some surveying and found that a great many people—"Mr. Curtin, for instance"—had fenced more land than they were entitled to, had paid no attention to their own lines, had tracts of land inclosed upon which their cattle did not stay for more than three or four

days, "but proceeded out to the rest of the park, so a regulation was ordered that they point out their metes and bounds, for this reason: though we might know absolutely where they were," they would claim the cattle to be on their lands. If the metes and bounds were fixed by an "agreed understanding" it could be definitely known whether they were within or without the claim. He further testified that the whole place had been overrun with cattle, and that the object of the regulations was "to keep people to the use of their own land and keep the Government land from being interfered with." He did not attempt to prevent Curtin from using his land, provided he complied with the regulations, but he did remove cattle from Curtin's land on the ground that he had not complied with the regulations.

He testified further that he permitted Curtin to pasture his cattle on his land after he (Curtin) had it surveyed, but refused Curtin permission to fence according to the survey, the correctness of the survey being disputed.

It is objected by the Government that appellant is not entitled to the relief he prays because he does not come into court with clean hands. It is urged as a ground of the charge that the testimony exhibits his purpose to be to use his lands as a basis, and the toll roads as a means, to make wholesale trespasses upon the park lands. If the fact were established it might be hard to resist its effect, but it is not established. The evidence cited in support of it, and of which we have given the substance, refers to a period anterior to the time when this controversy arose. Indeed, anterior to the time when the regulations were established by the Secretary of the Interior, which was April 22, 1905, and the object of the testimony was to account for the regulations, and not to show the special and immediate justification of Benson's orders. We cannot now extend the evidence beyond the special and limited purpose of its introduction. We do

not think the case, as it was submitted to the Circuit Court, showed the ulterior purpose on the part of appellant to be a wilful trespass upon the lands of the Park, but to be an honest assertion of rights.

On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the Park not only rights of a proprietor but the powers of a sovereign. There are limitations, however, upon both. Neither can be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land and the right of access to it are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? In answering the question we shall assume, for the time being, that Benson has interpreted correctly the regulations of the Secretary of the Interior. His (Benson's) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership, one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.

A law requiring an owner in appellant's situation to fence his land might be within such power, though of that we are not required to express an opinion. A law making the trespass of his cattle on other lands a criminal offense might be within such power. Such laws might be considered as strictly regulations of the use of property, of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land and of making him responsible for a neglect of it.

We have assumed so far that Benson has exercised a

power in accordance with the rules prescribed by the Secretary of the Interior. This, however, may be questioned. The orders of Benson are not that Curtin mark and define his lands, but that he do so "by an agreed understanding" with him (Benson), so that there could be no subsequent controversy about their boundaries. But this gives to Benson power to force a concession to his "understanding" and to require Curtin to submit to a limitation of the area of his land or a limitation of its uses. It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may be done under it.

It may be doubted, too, if the rules prescribed by the Secretary of the Interior warranted Benson's order in regard to the toll roads. The rules did not deal with the toll roads at all. They do deal with "park lands" and authorize stock to be taken over them by the "written permission and under the supervision of the superintendent." But even if it be held to apply to the toll roads, it is manifestly but a regulation of the transit of the stock merely, and not a use of the roads as a condition of the performance of something else.

We, however, rest our decision on the ground of the want of power of the Secretary or the superintendent to limit the uses to which lands in the Park held in private ownership may be put.

Decree reversed and cause remanded for further proceedings in accordance with this opinion.

HUSSEY, ADMINISTRATRIX OF CRANE, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 32. Argued November 2, 1911.—Decided November 20, 1911.

One claiming an interest in property and having knowledge of such claim is charged to consider at the time it is sold by trustees whether he will assert his title or retain a share of the proceeds; both vendor and vendee are entitled to timely disavowal in order to protect and indemnify themselves; acceptance of proceeds and failure to disavow may, as held in this case, amount to ratification.

Even if the state court has decided that the widow of a deceased partner had a community interest in his share of real estate belonging to the partnership, if she does not promptly disavow a sale of the entire property made by surviving partners but accepts part of the proceeds, and makes no attempt for many years to assert title, she is guilty of laches and neither she nor her grantees can recover.

Where the reference to the Court of Claims, as in this case, is not to determine whether the grantor of a claimant of a part interest in real estate purchased by the United States had a valid title at the time the United States took possession, but whether the claimant has acquired a valid title to the property, with provision that the United States may plead any defense, the conduct of claimant's grantor is to be considered; and if such grantor was guilty, as in this case, of gross laches, claimant cannot recover.

THE facts, which involve the validity of a claim of title to property in California purchased and occupied by the United States, are stated in the opinion.

Mr. George A. King for appellants.

Mr. Frederick de C. Faust, with whom *Mr. John Q. Thompson, Assistant Attorney General*, was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellants brought this suit in the Court of Claims

for the sum of $40,000, that amount being, it is alleged, the value of their one-sixth of certain real estate in the city of San Francisco at the time possession was taken of the property by the United States.

Jurisdiction of the suit was given by the act of Congress approved February 25, 1905, 33 Stat. 815, c. 800, which is as follows:

"That jurisdiction be, and the same is hereby, conferred on the Court of Claims to hear the claim of Hannah S. Crane and others for the value of certain real property in the city of San Francisco, in the State of California, in which they claim an undivided one-sixth interest, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said real property as claimed, said court shall award the said parties the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States . . . and any defense, set-off, or counter-claim may be pleaded by the United States, as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases."

There had been a reference of the claim by a committee of Congress under an act of Congress called the "Bowman Act," in which the court made findings substantially as in the present case, and these findings were certified to Congress, which subsequently passed the act to which we have referred.

The facts, summarized, are: that Congress provided (in 1852) for the establishment of a branch mint in the State of California, and for that purpose authorized the Secretary of the Treasury to make a contract for the erection of a building and procuring the necessary machinery at a sum not exceeding $300,000. The Secretary of the Treasury, in execution of the statute, entered into

a contract for the erection and equipment of the mint, on April 15, 1853, with Joseph R. Curtis, for the sum of $239,900. The title to the property was to be satisfactory to the Attorney General of the United States. A supplemental contract was subsequently made for the purchase of an adjoining lot. The contracts were performed by Curtis, and on May 2, 1854, he executed a deed conveying both lots to the United States, which deed and the title were approved by the Attorney General, and all of the sums due under the contracts were paid to Curtis.

On April 15, 1853, the time of the making of the first contract, the property was owned in fee simple by and was in the possession of Curtis, Perry & Ward, a firm composed of Joseph R. Curtis, Philo H. Perry and Samuel H. Ward. The latter died while on a voyage to the Sandwich Islands. This was not known, and Curtis made the contract for the benefit of the firm.

Ward left a will appointing his partners his executors. The will was probated, but Perry alone qualified as executor. The value of the whole lot named in the contract of April 15, 1853, was appraised at $40,000, and after its appraisement Perry conveyed all of Ward's interest in it to Curtis for the sum of $13,333.33, payment for which he received. The sale was made by Perry as executor under the authority given him by the will.

By the terms of Ward's will nine-tenths of his estate was devised to his wife, Emily H. S. Ward, and her proportion of the sum so received for Ward's interest was paid to her and accepted by her with full knowledge of the sale by Perry as executor, but in ignorance of the extent of her estate in the land in dispute, as shown by the decision of the Supreme Court of the State of California. *King* v. *Lagrange,* 50 California, 328. See also 61 California, 221.

She, with her co-legatees under the will, brought suit on the eighteenth of March, 1854, in the District Court of the United States for the Northern District of California

against Curtis and Perry. The bill alleged the partnership between Ward, Curtis and Perry, the ownership by such partners of the lot, the building thereon, and of the machinery, tools and fixtures in the building then used for assaying purposes; that the contract and its execution by Curtis were for the benefit of the partnership. It also alleged the appraisement of the lot and tools and fixtures, respectively, at $40,000 and $15,150, and the sale of the same by Perry, as executor, to Curtis; that the sale was private, without authority therefor from the Probate Court, and was made for the joint benefit of Perry and Curtis "as co-partners in interest in the contract for the sale of the premises known as the 'United States Assay Office,' and the conversion of the same into a branch mint," and was made to deprive the legatees under the will of their just and legal right to participate in the profits of the sale to the United States; that the sum paid by Curtis to Perry was greatly under the value of the property, in view of the profits arising from the sale to the United States, and that by virtue of the sale Curtis and Perry dealt with the partnership property for their individual gain and advantage, and that they conspired to defraud the complainants of their just share of the purchase money. The object of the bill, therefore, was to obtain for Mrs. Ward and her co-legatees the full benefit, jointly with Curtis and Perry, of the contract with the United States.

Notice of the filing of the bill was given to the Secretary of the Treasury by sending him a copy of it, but prior to its receipt the United States had paid Curtis the sum of $100,000, and balance due was paid at subsequent dates.

The bill was dismissed by complainant's counsel in June, 1854.

In 1855, Perry's acts as executor, which included the disposition of all of the real estate here involved, were approved and he was discharged as executor, Mrs. Ward

and the other legatees under the will joining in the petition therefor.

In 1865, Mrs. Ward conveyed all of her interest in the land to one James L. King, and he, in 1867, brought an action in ejectment therefor against Robert B. Swain, the then superintendent of the mint, which action was subsequently continued against his successor, O. H. Lagrange, they being only in possession as such officers, claiming no title in themselves. The United States district attorney appeared, by direction of the Secretary of the Treasury and the Attorney General, on behalf of the United States and conducted the defense.

The case went twice to the Supreme Court of the State, that court ultimately deciding that the property was the community property of Ward and Mrs. Ward and that one-half thereof vested in her, upon his death, as the survivor of the community, and was not subject to his testamentary disposition, and that it was not established that Ward had attempted to dispose of more than his one-half of the community property or that Mrs. Ward knowingly performed any act indicating, or which could be construed to be, a waiver of her rights under the will and a ratification of the sale of her share of the community property.

The controversy in the case turns on the effect to be given to the decisions of the Supreme Court of California in connection with the jurisdictional act.

The Court of Claims did not question the decisions in so far as they declare that the property was community property and that one-half thereof vested in Mrs. Ward upon Ward's death, and was not subject to his testamentary disposal. The court, however, disagreed with the Supreme Court of California as to ratification of the sale by Mrs. Ward.

Such conclusion appellants contend is precluded on two grounds: (1) the judgment of the Supreme Court of Cali-

fornia became a rule of property and conclusive of the validity of the title; (2) the jurisdictional act confines the inquiry of the court to the existence of the title, and that being in appellants they were entitled to a judgment for the market value of property at the time possession was taken of it by the United States.

(1) This ground is not tenable. *Carr* v. *United States*, 98 U. S. 433, is a parallel case. There, as here, a judgment in an action against officers of the United States in possession of property, in which action the district attorney of the United States by direction of the Secretary of the Treasury appeared and defended, was urged in a subsequent action to estop the United States from contesting the title to the property. It was held that the judgment did not constitute an estoppel. To the same effect is *United States* v. *Lee*, 106 U. S. 196, 217.

(2) The act of Congress gives jurisdiction to the Court of Claims to hear the claim, and if it find from the evidence on file and to be "presented on either side" that the claimants "acquired a valid title to said real property as claimed," it "shall award the said parties the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States." It will be observed, therefore, that jurisdiction was conferred not to ascertain if Mrs. Ward had title at the time the United States took possession, but whether the claimants acquired a valid title, and whether they did or did not necessarily depends upon the effect of Mrs. Ward's conduct. And, besides, the act is careful to say that "any defense . . . may be pleaded by the United States, as defendants."

The defense urged by the United States is the ratification by Mrs. Ward of Perry's conveyance to Curtis. And this defense was sustained by the Court of Claims, and properly so, we think.

The decision of *Beard* v. *Knox*, 5 California, 252, which

defined her interest in the community property, was rendered in the summer of 1855. The exact date is not given, but it was at the July term of the court of that year. Knowledge of it must be attributed to her. There is certainly nothing in the record to show a want of knowledge of it, and the circumstances called for action on her part if she had intended to disavow the sale. About contemporaneously with the decision she received upon the settlement of Perry's accounts as executor of her husband's estate, to which she consented through her trustee, the sum of $37,914.58 and the further sum of $18,893.54, partly in cash and partly in securities. And the findings of fact also show, as we have seen, that at the time of the execution of the deed by Perry to Curtis she received as her nine-tenths of her husband's interest in the real estate conveyed (the other one-tenth going to a legatee under the will) the sum of $13,333.33. Nevertheless she did absolutely nothing to assert a claim to the property for ten years, double the limitation of time within which actions for the recovery of real property in the State of California may be barred; and then all that she did was to convey the property, through her attorney in fact, to one James L. King for the consideration of $100. King let two years more elapse before bringing suit. He recovered judgment, as has been stated, but made no effort to enforce it. He conveyed the property to Charles McLaughlin in 1879, $5 being the consideration expressed. He had previously conveyed a one-third interest in the property to William W. Crane, Jr., and James T. Boyd for a nominal consideration.

We think that the time which Mrs. Ward allowed to elapse, under the circumstances shown by the record, precludes her grantees from asserting title to the property against the United States. She had actual knowledge of all that transpired. It is true that at one time she charged Perry and Curtis with fraud to deprive her and her co-

legatees under her husband's will of their "right to participate in the profits of the sale to the United States" of the real property and some other property. In this suit she did not attack Perry's power to convey the property because of her title to it under her community rights. She and the other complainants alleged only a purpose to defraud them "of their just proportion of the purchase money arising from the sale of the property." Notice of the suit, it is true, was given to the Secretary of the Treasury, but the suit was subsequently dismissed—for what reason it does not appear. It may be that there was a complete and satisfactory adjustment between the parties. And this may reasonably be, if not conclusively, inferred from the proceedings resulting in the settlement of Perry's accounts and his discharge from his trust as executor. Indeed, in the receipt given Perry by the legatees under the will other than Mrs. Ward the suit was referred to and authorized to be dismissed, and he, as executor and individually with Curtis, was released "from all claims, debts, dues or demands due . . . by reason of the contract or under said will, or any other matter or thing." The date of this receipt was July, 1855. This and the other transactions were, we repeat, contemporaneous with the decision in *Beard* v. *Knox*, and Mrs. Ward, then knowing her interest in the property, was charged to consider whether she would assert it or retain what she had received from Perry as executor. And Perry and the United States were entitled to a timely disavowal, if disavowal she intended to make. He then might have been able to defend against it, and the United States, against the consequence of the disavowal, could have sought indemnity against Perry and Curtis. She must be deemed to have ratified the sale.

Judgment affirmed.

RICHARDSON *v.* HARMON, RECEIVER OF THE TOLEDO TERMINAL AND RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 10. Argued April 25, 26, 1911.—Decided November 20, 1911.

In construing an act of Congress, the known policy of Congress in regard to the subject-matter of the statute will be considered.

The policy of Congress in enacting statutes in regard to the liability of vessel owners has been to encourage investment in ships and to that end to relieve the owners from liabilities that are not the result of their own fault, negligence or privity.

Section 18 of the act of June 26, 1884, 23 Stat. 57, c. 121, adds to the claims against which vessel owners can limit their liability and includes those arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves them liable for their own faults, neglect and contracts.

The owners of a vessel colliding by its own fault with a structure on land can limit their liability for the damages done to their interest in the vessel although such a collision may not be a maritime tort, and the District Court has jurisdiction to entertain a petition to that effect.

THE facts, which involve the construction of the statutes limiting liability of vessel-owners, are stated in the opinion.

Mr. Harvey D. Goulder and *Mr. Frank S. Masten* for appellants:

The District Court of the United States has jurisdiction to entertain a libel or petition for limitation of liability of the owners of a vessel against claims for non-maritime damages or any claim for any liability or debt, although not within the admiralty and maritime jurisdiction of such court. See act of March 3, 1851, c. 43, 9 Stat. 635,

§§ 4282–87, Rev. Stat.; § 18 of act of June 26, 1884, 23 Stat. 57; Act of June 19, 1886, 24 Stat. 79. These statutes have been construed in *The Republic*, 61 Fed. Rep. 109, 113; *O'Brien* v. *Miller*, 168 U. S. 287, 303.

While under the act of 1851, it has been held that a non-maritime damage, *i. e.*, one not within the admiralty and maritime jurisdiction in a direct proceeding on the claim, could not be limited against, this court has never so held, nor has any court so held where the cause arose subsequent to the enactment of § 18 of the act of 1884, and the question was considered.

The general maritime law gave limitation of liability to owners of vessel property, to the end that merchants might be encouraged to invest in maritime commerce. *The Rebecca*, 1 Ware, 187; *Norwich Co.* v. *Wright*, 13 Wall. 104, 116; *The Scotland*, 105 U. S. 24, 28; *The Lottawanna*, 21 Wall. 558, 576; *Providence & N. Y. S. S. Co.* v. *Hill*, 109 U. S. 578; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 625; *The Maine*, 152 U. S. 122; *N. J. Steam Nav. Co.* v. *Bank*, 6 How. 344.

The language of the act of 1884 is as broad as it can be made, thereby showing that it was the intent of Congress to remove all exceptions save those named in the proviso, whether maritime or non-maritime and whether created with or without the privity or knowledge of the owner.

For legislative history of the act, see 15 Cong. Rec., pt. 1, p. 976; pt. 4, pp. 3650, 3970–74, 5440; H. R. bill, 2248, and Sen. bill 1448, 48th Cong., 1st Sess.

Almost since a merchant marine has existed in any civilized nation, the ship herself has been treated as a sentient thing, liable for her own wrong in whosesoever hands she may be, liable for her own contractural obligations and, under the general maritime law, the liability ended with the loss or surrender of the ship and freight. *Tucker* v. *Alexandroff*, 183 U. S. 438. Congressional records may be referred to to ascertain legislative intent where

the meaning is in controversy. *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, 427; *The Delaware*, 161 U. S. 459, 472; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527, 554.

The statute being an adoption of the general maritime law, the nationality of the vessel or the place of injury is immaterial where the courts of the United States are resorted to. *The Scotland*, 105 U. S. 24; *The Scotland*, 118 U. S. 507; *The Great Western*, 118 U. S. 520.

The District Court of the United States has authority to give the benefit of the limitation of maritime and non-maritime liabilities alike. *Schuchardt* v. *Angelique*, 19 How. 239, 241; *The J. E. Rumbell*, 148 U. S. 1; *Davis* v. *Child*, 2 Ware, 78; *The H. E. Willard*, 52 Fed. Rep. 387; *The Hamilton*, 207 U. S. 398, 406; *N. J. Steam Nav. Co.* v. *Bank*, 6 How. 319.

Mr. George L. Canfield, with whom *Mr. Frank H. Canfield* was on the brief, for appellee:

This case is controlled by *Ex parte Phenix Ins. Co.*, 118 U. S. 610, and the District Court has no jurisdiction.

The injury done by the "Crete" to the railway bridge was not a maritime tort but a trespass to realty of which there is no jurisdiction in the American admiralty. *The Troy*, 208 U. S. 321; *Railroad* v. *Steamship Co.*, 208 U. S. 316; *The Phœnix Co.* v. *The Poughkeepsie*, 212 U. S. 558.

Section 18 of the act of June 26, 1884, 23 Stat. 57, does not enlarge the jurisdiction of the District Courts nor bring non-maritime liabilities within the scope of the limited liability statutes. Rev. Stat., §§ 4282–89; 24 Stat. 79.

The argument of appellants requires such an interpretation of § 18 as not only repeals, as of its date, all laws in respect of the liability and non-liability of ship-owners, but also destroys the settled limits of admiralty jurisdiction.

Section 18 applies to contract liabilities only and does not affect the original law of 1851. This has been the

conclusion of nearly, if not quite all, of the courts which have considered the question. The consensus of judicial opinion is against the effect which appellants ascribe to the later law and it is significant that, although it has been frequently before our admiralty courts, no authority appears to sustain their position. *Towing Co.* v. *Trans. Co.*, 155 Fed. Rep. 11; *S. C.* (certiorari denied), 207 U. S. 596; *Force* v. *Ins. Co.*, 35 Fed. Rep. 767, 778; *Miller* v. *O'Brien*, 35 Fed. Rep. 779, 783; *The Carver*, 35 Fed. Rep. 665, 669; *McPhail* v. *Williams*, 41 Fed. Rep. 61; *Douse* v. *Sargent*, 48 Fed. Rep. 695; *Whitcomb* v. *Emerson*, 50 Fed. Rep. 128; *The Republic*, 64 Fed. Rep. 109, 113; *The Faxon*, 75 Fed. Rep. 312, 318; *Gilchrist* v. *Ins. Co.*, 104 Fed. Rep. 566, 573; *The Puritan*, 94 Fed. Rep. 365; *Rudolf* v. *Brown*, 137 Fed. Rep. 106.

Congress intended to preserve the act of 1851 as to torts and to cover contract liabilities by § 18 of the act of 1884.

The legislative history of § 18, so far as it appears in the Congressional Records, cited by appellants, indicates that Congress was satisfied with the earlier law and intended it to remain in respect of torts: this view is supported by the subsequent legislation of 1886; that it desired to give a further limitation against liabilities arising out of contract and so make the law as a whole afford protection against both classes of liabilities. And see *The Ella*, 8 Am. Law Reg. 206 (1858).

The law of limited liability of ship-owners is confined to the subject-matter of admiralty and maritime jurisdiction and does not extend to liabilities beyond. *Goodrich Transportation Co.* v. *Gagnon*, 36 Fed. Rep. 123; *Re Gauntt*, 141 U. S. 1, 12.

MR. JUSTICE LURTON delivered the opinion of the court.

The steam barge "Crete" while proceeding up the Maumee River from Lake Erie collided with the abutment

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of a railway draw-bridge, resulting in great damage to both barge and bridge. For the damage sustained by the bridge an action was brought against two of the owners of the barge in a common-law court of the State at Toledo, Ohio. Thereupon the owners of the barge, three in number, filed their petition and libel in the District Court of the United States at Cleveland, Ohio, where two of them resided and where the "Crete" was lying, for a limitation of liability under §§ 4283–4285, Revised Statutes and § 18 of the act of June 26, 1884, 23 Stat. 57, c. 121.

This petition duly averred that the said collision was without fault upon the part of the "Crete;" but, if there was any, it was without the privity or knowledge of the owners, or either of them. It stated that the damages claimed in the pending action at law were thirty-five thousand dollars, and that they apprehended other actions of like kind, and if liable as claimed, the aggregate would greatly exceed the value of the interests of the owners in the vessel and her freight. Therefore, the petition sought the benefit of the limited liability act of Congress and the right to defend against any liability as provided by general law and admiralty rule 56 of the Supreme Court.

Under this petition an appraisement was made of the value of the "Crete" on the termination of her voyage, and the value of each separate one-third interest of each owner in the vessel, and her pending freight was appraised at $4,171.50, for which value bond was made to stand in the room and place of the boat and her freight. Monition issued in usual form requiring every one claiming any loss or damage "by reason of the premises," to appear and make proof of their respective claims.

The appellees were also enjoined from proceeding with the action pending in the said common-law court, and they, together with all the world, were admonished to bring no other or further actions, and to file their claims against the "Crete," or her owners, in the court below, that they

might share in the distribution of the appraised value of the said vessel and her pending freight.

The appellee, Judson Harmon, as receiver of the Toledo Terminal Railway Company, owner of the bridge damaged by the collision mentioned, appeared and excepted to the jurisdiction of the court. This exception was sustained and the injunction dissolved, the court holding that the cause of action asserted in the common-law court of Ohio by said receiver against the owners of the colliding barge was for a non-maritime tort, not cognizable in a court of admiralty, and that the limited liability act of Congress did not extend to any such right of action

Prior to the eighteenth section of the act of June 26, 1884, 23 Stat. at Large, pp. 53–57, it had been the settled law that the District Court, sitting as a court of admiralty, had no jurisdiction to try an action for damages against a ship-owner arising from a fire on land communicated by the ship, or from a collision between the ship and a structure on land, such as a bridge or pier. The tort in both cases would have been a non-maritime tort and as such not within the cognizance of an admiralty court. *The Plymouth*, 3 Wall. 20; *The Troy*, 208 U. S. 321.

Inasmuch as the owner's liability was not limited by the statutes providing for a limited liability, the pendency of a petition to obtain the benefits of the limitation did not operate to draw into such a proceeding actions for a liability which could in no wise be affected by it. *Ex parte Phenix Insurance Co.*, 118 U. S. 610. Such was the law and so it still is unless changed by the eighteenth section of the act of June 26, 1884. That section is found in a chapter, the title of which is "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes." The eighteenth section reads as follows:

"That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities

that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

That the provision is not as definite as desirable may be conceded. The contention upon the one hand is that the limitation is extended only to obligations *ex contractu*, while upon the other, that every kind of liability which might fall upon an owner on account of the ship incurred without his knowledge or privity is given the benefit of the provision. That it was intended to limit the owner's liability in respect of debts contracted on account of the ship is plain. But if that was the only purpose why add the significant words, "and liabilities"? The limited liability act, as it stood, did not include the owner's individual liability for obligations *ex contractu* incurred without his knowledge or privity. Neither did it extend to his individual liability for non-maritime torts by the master or crew. Was it the purpose of Congress to exclude this kind of an individual responsibility from the benefits of the limited liability statute, while including every other class and kind of individual liability, except seamen's wages? Is no significance to be attached to the fact that the provision does not stop by adding to the former kind of claims against an owner "any and all debts," but terminates the clause by inserting, "and liabilities," a perfectly unnecessary statement, if it was only meant to extend the limitation to obligations *ex contractu?* The meagre debate which occurred upon this section of the act,—an act which included many other matters concerning the shipping interests of the country,—if competent

at all, throws little or no light as to the meaning which was supposed to be attached to liabilities, as distinguished from claims arising out of contract. There does appear, however, a broad general purpose to put a ship-owner in the status of one whose risk on account of obligations arising from the conduct of the master and crew is confined to his proportionate interest in the ship and her freight. No purpose to repeal or qualify any of the terms of the existing liability law is declared, nor is this section declared, in words, to be an amendment of that law. But neither fact is of any marked importance. If the necessary effect be to repeal any part of the former law because of repugnance, that consequence must be declared. So, too, if it be in effect an amendment of the law as it stood, by extending that law to cases not before within it, that effect must be given to it, without any unnecessary disturbance of the qualifications or procedure under the former law.

The legislation is in *pari materia* with the act of March 3, 1851, 9 Stat. 635, c. 43, as carried into the Revised Statutes as §§ 4283 *et seq.*, and must be read in connection with that law, and so read, should be given such an effect not incongruous with that law so far as consistent with the terms of the later legislation. The former law embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts. The section under consideration includes debts, save wages of seamen and liabilities of an owner incurred prior to the passage of the law. The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. The same public policy is declared to be the motive of the act of which this section is a part. True, a liability may arise out of a contract as well as from a tort. But a liability *ex contractu* is included *ex vi termini*, and the addition of the words "and liabilities"

would be tautology unless meant to embrace liabilities not arising from "debts."

In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the Government was to confine the risk of an owner not personally at fault to his interest in the ship. To say that Congress meant no more by extending the limitation to any and all debts and liabilities than to include obligations arising *ex contractu*, would be to utterly ignore the fact that such a construction would leave an owner subject to a large class of obligations arising from non-maritime torts, and leave nothing to which the words, "any and all . . . liabilities" could apply. In *Butler* v. *Steamship Company*, 130 U. S. 527, 549, 553, the words "the liability of the owner . . . shall in no case exceed," etc., were construed as extending to any liability "for any act, matter, loss, damage or forfeiture whatever, done or incurred," and as therefore providing that the "owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge." Upon this interpretation of § 4283, it was held that liabilities of the owner for injuries to persons were included in the limitation, as well as injuries to goods. Referring to the eighteenth section of the act of 1884, which did not apply in that case because the injury occurred before its passage, the court said (p. 553), it "seems to have been intended as explanatory of the intent of Congress in this class of legislation. It declares that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. The language is somewhat vague, it is true; but it is possible that it was

intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the privity or knowledge of the owner. But it is unnecessary to decide this point in the present case. The pendency of the proceedings in the limited liability cause was a sufficient answer to the libel of the appellants."

Touching the wide purpose of Congress as indicated by the various provisions limiting the ship-owner's liability, the court, in the same case, said (p. 549):

"If we look at the ground of the law of limited responsibility of ship-owners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. It extends to liability for every kind of loss, damage and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law."

Neither is it necessary to conclude that the section in question is a repealing act as to any of the qualifications of the preceding limitations found in §§ 4283 *et seq.*, of the Revised Statutes. To so hold would be to attribute to Congress a wider purpose than we have any reason to suppose—that of extending the benefits of §§ 4283 *et seq.*, regardless of the owner's knowledge or privity.

That would be to throw the section out of correspondence with the existing limitations.

We therefore conclude that the section in question was intended to add to the enumerated claims of the old law "any and all debts and liabilities" not theretofore included. This is the interpretation suggested in *Butler* v. *Steamship Co.*, *supra*. That the section operates as such an amendment of the existing law and not as a repeal of

the qualifications found in that law, is the view adopted by three Circuit Courts of Appeal, in the cases of *The Republic*, 61 Fed. Rep. 109, in the Second Circuit; *The Annie Faxon*, 75 Fed. Rep. 312, in the Ninth Circuit, and in *Towing Company* v. *Transportation Company*, 155 Fed. Rep. 11, in the Sixth Circuit, as well as by a number of District Courts, among them being the cases of *The Amos D. Carver*, 35 Fed. Rep. 665, and *In re Meyer*, 74 Fed. Rep. 881.

Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts.

If thus the owner's liability for a tort permitted or incurred through the master or crew, although non-maritime because due to a collision between the ship and a structure upon land, be one in respect to which his liability is limited, and he applies for the benefit of such limitation to the proper District Court of the United States, "all proceedings," by the express terms of § 4285, Revised Statutes, "against the owner shall cease." The procedure in any such case is prescribed by the 54th and 55th rules in admiralty, where it is said that the court shall, "on application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims." *Providence & N. Y. Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *Butler* v. *Steamship Co.*, 130 U. S. 527, 549.

The case of *Ex parte Phenix Insurance Co.*, 118 U. S. 610, which was a petition for the benefits of the limited liability act and to stay suits at common law against the owner for liability by fire carried to buildings on land communicated from the ship, has been cited as holding that the limited liability statute did not apply to such a claim, and that a

court of admiralty could not draw to itself jurisdiction over any such claim. But that liability was incurred on September 20, 1880, a date antecedent to the act of 1884, which act expressly excluded liabilities which arose before its passage. That the decision by this court was not made until November, 1886, and that the opinion makes no reference to the act of 1884 is of no importance, since the act had no application.

The decree is reversed and the case remanded for further proceedings in accordance with this opinion.

BRYAN, COLLECTOR OF THE PORT OF CHARLESTON *v.* KER, EXECUTRIX.

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

No. 3. Argued October 25, 26, 1911.—Decided November 20, 1911.

Although a writ which the court has power to issue in a proper case may have been irregularly issued, the marshal is authorized and bound to act thereunder if it comes into his hands as an apparently valid writ.

Although the attempted delegation of authority may have been ineffectual to clothe the person signing a writ with power to do so, the marshal is protected in executing it, if it is in the usual form and bears the seal of the court; such an irregularity can be cured by amendment substituting the signature of the person properly authorized.

If process *in rem* is apparently valid and it does not appear on the face thereof that the libel on which it is issued discloses only a personal action for damages the marshal is protected in executing it.

A collector of the port cannot be held responsible for detention of a vessel because he places an inspector thereon with orders to detain her if she attempts to sail, if at the time the vessel is validly in cus-

tody of the marshal and the inspector is withdrawn before the possession of the marshal terminates.
163 Fed. Rep. 233, reversed.

THE facts, which involve the validity of process of the District Court and the power and duty of the marshal thereunder, are stated in the opinion.

Mr. Assistant Attorney General Denison, with whom *Mr. Loring C. Christie* was on the brief, for petitioner.

Mr. J. P. Kennedy Bryan for respondent:

The *Laurada* was illegally detained by the collector. Section 5290, Rev. Stat., did not justify the detention. The policy of the Government is not to make the private citizen bear the damage caused by an unlawful act of this nature; even if there was probable cause, or a direction of the Secretary of the Treasury, or officer of the Government, which did not constitute due process of law, or was not a legal justification, the Government would pay out of its own Treasury the damage to the private citizen. *Hendricks* v. *Gonzales*, 67 Fed. Rep. 351; *The Conqueror*, 166 U. S. 123, 124, 125. See, also, *Cruickshank* v. *Bidwell*, 176 U. S. 81, 82, and *DeLima* v. *Bidwell*, 182 U. S. 179; *United States* v. *Sherman*, 98 U. S. 566, 567.

The *Laurada* was not in the custody of the law, as the marshal was acting under a void warrant issued in the cause, and the court had no jurisdiction, and was himself without any authority of law, and a trespasser equally with the defendant, the collector of the port.

Where there is no jurisdiction or power to issue the warrant in the person issuing it, as in this case, the writ is not voidable but void, affording no protection to the person executing it. *Boyd* v. *United States*, 116 U. S. 627; as to who can issue writs see §§ 555, 558, 991, Rev. Stat.; Benedict's Admiralty, p. 231; Hawkins' Pl. C., Bk. 2, c. 13, § 21; 1 Hale Pl. C. 577, 1st ed., 1680, 287, and see

also *Starr* v. *United States*, 153 U. S. 617; *State* v. *Vaughan*, Harper (So. Car.), 313; *Davis* v. *Sanders*, 40 So. Car. 507; *Confiscation Cases*, 20 Wall. 93, 111; *Leas* v. *McVitty*, 132 Fed. Rep. 511; *Paper Co.* v. *Rock River Co.*, 19 Fed. Rep. 252; *Gardner* v. *Lane*, 14 No. Car. 53; *Covell* v. *Heyman*, 111 U. S. 176; *The Resolute*, 168 U. S. 437; *Bank* v. *Mixter*, 124 U. S. 721; *The Berkeley*, 58 Fed. Rep. 920, 923; *Erskine* v. *Hohnbach*, 11 Wall. 616; *Stutsman Co.* v. *Wallace*, 142 U. S. 309; *Railroad Co.* v. *Kenney*, 19 Fed. Cas. 484; *Jacob* v. *Measines*, 79 Massachusetts, 74; *Dynes* v. *Hoover*, 20 How. 80. The warrant must be from the proper officer, Troup, §§ 756–762; Meechun, §§ 6090 *et seq.;* Cooley on Torts, 2d ed., §§ 538, 546. For other cases which held that a warrant such as the one involved in this case is void and affords no protection, see *Wimbish* v. *Wofford*, 33 Texas, 109. And see 81 Illinois, 34, 39; *Greenleaf* v. *Munford*, 19 Abb. Pr. 469, 476; *Anderson* v. *Jouett*, 14 La. Ann. 614; *Hickman* v. *Larkey*, 6 Gratt. 210. And as to cases where the warrant was lawful on its face, see 79 Massachusetts, 75, and 67 Massachusetts, 45. In fact the warrant was a mere nullity. See 2 N. Y. 473.

The writ could not have been amended under § 954, Rev. Stat., and see *Brown* v. *Pond*, 5 Fed. Rep. 31; *United States* v. *Rose*, 14 Fed. Rep. 681; *United States* v. *Riley*, 88 Fed. Rep. 480; *Semmes* v. *United States*, 91 U. S. 25.

Even if the process was amendable as to signature it was void *in rem* as the court had no jurisdiction and that appears independently of the decree in the suit in which the writ was issued. *The J. R. Rumbell*, 148 U. S. 11; *The Corsair*, 145 U. S. 335, 348; *Cutler* v. *Rae*, 7 How. 729; *Vandewater* v. *Mills*, 19 How. 82; *The Schooner Freeman*, 18 How. 188; *The Lady Franklin*, 8 Wall. 325, 329; *The Keokuk*, 9 Wall. 517; *The William Fletcher*, 8 Benedict, 537; *In re Cooper*, 143 U. S. 473; *The Moses Taylor*, 4 Wall. 427.

The action is maintainable against the collector as a

joint trespasser and because the owner was entitled to possession as against the marshal. *Wilson* v. *Haley Co.*, 153 U. S. 39; *Van Brunt* v. *Schenck*, 11 Johns. 377; *Woodruff* v. *Halsey*, 8 Pick. 335; *Martindale* v. *Booth*, 3 B. & A. 498; *Barrett* v. *Warren*, 3 Hill, 348.

The collector is liable if only participating in the detention. *Gonsonland* v. *Rosomano*, 176 Fed. Rep. 486; Pomeroy's Remedies, § 281, 307–10.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action at law in the Circuit Court for the District of South Carolina, by a citizen of Pennsylvania against a citizen of South Carolina, as collector of the port of Charleston, to recover damages for the alleged unlawful detention, from November 16 to December 5, 1895, of the American steamship *Laurada*, of which the plaintiff was the owner.

The answer admitted that the defendant, as such collector, acting under instructions from the Secretary of the Treasury, caused the vessel "to be formally detained by placing an inspector on board;" but alleged that the marshal for the District of South Carolina had seized the vessel on November 15, 1895, under a monition and warrant of arrest issued out of the District Court for that district upon a libel filed in that court against the vessel, her engines, etc.; that the marshal retained the custody of the vessel, under that process, from November 15 until December 18, 1895, and that, if any damage was sustained by the plaintiff by reason of the detention of the vessel, it did not result from any act of the defendant.

Upon the trial of the issue so presented the evidence, without any conflict, established these facts:

On November 15, 1895, the marshal, acting upon the monition and warrant of arrest soon to be mentioned,

seized the vessel at Charleston and detained her in his custody until December 18, following, when she was surrendered to her master upon the execution of an agreement, with sureties, conformably to Rev. Stat., § 941, and the 11th admiralty rule. On November 16, while the vessel was so in the custody of the marshal, the defendant, as collector of the port, acting under directions from the Secretary of the Treasury, placed an inspector on board the vessel and thereby assumed a qualified control over her; but the custody of the marshal was not disturbed or questioned, or intended to be, the defendant's purpose being only to make sure that the vessel would be detained, according to the directions of the Secretary of the Treasury, in the event that the custody of the marshal should be terminated. On December 6, the Secretary of the Treasury abandoned the purpose to detain the vessel, and the defendant thereupon withdrew the inspector, the marshal still retaining his custody.

The monition and warrant of arrest under which the marshal acted was issued out of the District Court upon the libel presently to be described, and what was done by him was in strict conformity to the command of the writ. When the writ was issued the clerk of the District Court was fatally ill and absent from his office, and the deputy, his son, was attending him. A second son, who was not a deputy, was temporarily in charge of the clerk's office, with instructions, given by the deputy, to receive and file papers, and, if it became necessary, to sign and issue process. Acting upon these instructions, the brother signed and issued the writ in question, doing so in such manner that it purported to have been signed and issued by the deputy on behalf of the clerk. The libel upon which the writ issued purported in some respects to be one *in rem*, but it plainly disclosed that the libellants were not possessed of a maritime lien upon the vessel, her engines, etc., but only of a right to damages. (See *Vandewater* v. *Mills*, 19 How.

82, 90.) There was, however, no suggestion of this on the face of the writ, which was in the usual form of a monition and warrant of arrest in a suit *in rem*. It ran in the name of the President, was addressed to the marshal, commanded him to seize the vessel and to detain it until the further order of the court, bore *teste* of the judge of the District Court, was sealed with the seal of the court, purported to be signed by the deputy on behalf of the clerk, and was transmitted from the clerk's office to the marshal's office in the usual way.

At the conclusion of the evidence showing these facts, the court, at the request of the defendant, directed a verdict in his favor, and entered judgment accordingly. The judgment was subsequently reversed by the Circuit Court of Appeals, 163 Fed. Rep. 233, and the case is now here on certiorari. 212 U. S. 575.

As it is obvious that the verdict for the defendant was rightly directed, if the seizure and detention of the vessel by the marshal were justified by the writ under which he acted, we come at once to the reasons advanced for saying that his acts were not so justified. They are, (1) that the writ was not signed or issued by the clerk or his deputy, but by one who was without lawful authority, and (2) that the case stated in the libel, upon which the writ issued, was not cognizable as a suit *in rem* in admiralty, but only as a personal action for damages.

Neither reason is sufficient. Both overlook considerations which operated with impelling force to justify the acts of the marshal.

True, the purported signature of the deputy was not his own, but was affixed by his brother under an attempted but ineffectual delegation of authority, and yet the writ, in the usual form, was issued from the office of the clerk, bearing the seal as evidence of its authenticity. In short, although thus irregularly issued, it came into the hands of the marshal as an apparently valid writ. Besides, this ir-

regularity did not render the writ void, but voidable merely, for it could have been amended by substituting the true for the purported signature of the deputy. Rev. Stat., § 948; *Texas & Pacific Railway Co.* v. *Kirk*, 111 U. S. 486; *Miller* v. *Texas*, 153 U. S. 535; *Semmes* v. *United States*, 91 U. S. 21; *Cotter* v. *Alabama G. S. Railroad Co.*, 61 Fed. Rep. 747; *Long* v. *Farmers' State Bank*, 147 Fed. Rep. 360; *Ambler* v. *Leach*, 15 W. Va. 677.

True, also, the case stated in the libel was not cognizable as a suit *in rem* in admiralty, and therefore afforded no basis for the issuance of the warrant of arrest. But as this did not appear on the face of the writ, and as the court was empowered to issue such process in a proper case, it still must be said that the writ, as it was received by the marshal, was apparently a valid one.

In this situation the case falls clearly within the rule, often applied in this and other courts, which is well stated in Cooley on Torts, 3d ed., Vol. 2, p. 883, as follows:

"The process that shall protect an officer must, to use the customary legal expression, be *fair on its face*. By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."

See *Conner* v. *Long*, 104 U. S. 228, 237; *Matthews* v. *Densmore*, 109 U. S. 216; *Harding* v. *Woodcock*, 137 U. S. 43; *Stutsman County* v. *Wallace*, 142 U. S. 293, 309; *Marks*

v. *Shoup*, 181 U. S. 562; *Erskine* v. *Hohnbach*, 14 Wall. 613; *Haffin* v. *Mason*, 15 Wall. 671; *Bragg* v. *Thomson*, 19 So. Car. 572; *Goodgion* v. *Gilreath*, 32 So. Car. 388; *Clarke* v. *May*, 2 Gray (Mass.), 410; *People* v. *Rix*, 6 Michigan, 144; *Henline* v. *Reese*, 54 Oh. St. 599; *Savacool* v. *Boughton*, 5 Wend. (N. Y.) 170.

The judgment of the Circuit Court of Appeals is accordingly reversed and that of the Circuit Court is affirmed.

Reversed.

TEFFT, WELLER & CO. *v.* MUNSURI.

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

No. 22. Argued October 30, 31, 1911.—Decided December 4, 1911.

There is no appeal to this court from an order disallowing a claim made by the District Court of the United States for Porto Rico sitting as the bankruptcy court.

The express provisions in § 25 of the Bankruptcy Act for the exercise of appellate jurisdiction by implication exclude the right to exercise jurisdiction over a subject not delegated by that or some other statute.

An order of the bankruptcy court disallowing a claim is a step in the proceeding, and not a controversy arising in the proceeding within the meaning of § 24*a*. *Coder* v. *Arts*, 213 U. S. 234; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296.

The fact that no method of review is prescribed by the statute in certain cases does not justify this court in disregarding the statute and assuming jurisdiction where none exists.

That this court has assumed jurisdiction in a case in which its jurisdiction passed unchallenged is not controlling in a subsequent case when the jurisdiction is challenged. *Armstrong* v. *Fernandez*, 208 U. S. 324, qualified and limited.

The provisions for review of judgment of the District Court of the United States for Porto Rico in § 35 of the Act of April 12, 1900, 31 Stat. 85, c. 191, do not affect the exclusive modes of review specifically provided for in the Bankruptcy Act.

THE facts, which involve the jurisdiction of this court of appeals under the Bankruptcy Act, are stated in the opinion.

Mr. William G. Johnson, with whom *Mr. Wm. H. Hawkins* was on the brief, for appellants.

Mr. George H. Lamar, with whom *Mr. Willis Sweet* was on the brief, for appellees.

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

We are of opinion that a motion made to dismiss this case must prevail, and we therefore state only the facts which are essential to the consideration of that subject.

In 1907, the commercial firm of "Successores de José Hernaiz" was adjudicated an involuntary bankrupt. Tefft, Weller & Co. and those who are here conjointly appellants with that firm presented their claims against the firm, and they were allowed by the referee. In October, 1907, as the result of proceedings, whose initiation it is unnecessary to consider, the court held that one Julian Munsuri was not a limited but a general partner of the bankrupt firm and hence was generally liable for its debts. Munsuri subsequently moved the referee to vacate the allowance previously made of the claims which had been presented by the appellees and to disallow said claims. This motion was based on alleged settlements of the claims which it was asserted had been made with Munsuri in 1903. The referee denied the motion because he concluded that the asserted settlements, although they had been in form made, had been procured by the fraud of Munsuri and therefore were not binding. Munsuri, by petition for review, sought to reverse the action of the referee. The court, on February 9, 1909, passing on the

petition for review, reversed the action of the referee. It was held that the settlements relied upon by Munsuri were binding. An order was made directing that the previous allowance of the claims be vacated, and that the claims be disallowed. Thereupon the court filed its "findings of fact and conclusions of law," which were recited to have been made "in pursuance of general order in bankruptcy No. 36, p. 3." The attorney for the creditors then petitioned for the allowance of an appeal to this court from the judgment and order "whereby the referee's report denying the motion to disallow the claims of said creditors is reversed and set aside and the said claims are disallowed."

At the time the appeal was allowed (the one which is now under consideration) assignments of error were filed assailing the action of the court in disallowing the claims, and the merit of these assignments has been elaborately insisted on in the argument at bar. As appellate jurisdiction over courts of bankruptcy is expressly provided for in the bankrupt law, including the cases or classes of cases in which this court has authority to review the action of courts of bankruptcy, we must turn, at least primarily, to that act in order to test the correctness of the motion to dismiss for want of jurisdiction which has been made. Now the subject of the power to review the orders of bankruptcy courts disallowing claims in bankruptcy proceedings is in express terms provided for by the bankrupt act in § 25*a* as follows:

"APPEALS AND WRITS OF ERROR.

"*a*. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit . . . (3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

This express provision for the exercise of appellate jurisdiction by the courts therein named over the case here presented by necessary implication must be held to exclude the right of this court to exercise appellate jurisdiction over a subject not delegated unless some other provision of the statute compels to a contrary view. But instead of tending to so do, the context of the statute adds cogency to and makes irresistible the implication arising from the provision of § 25 (*a*) above quoted. This result flows from the careful provision otherwise made by the statute for the exercise of appellate jurisdiction by this court over proceedings in courts of bankruptcy or the orders, judgment and decrees rendered by such courts, none of which embrace the character of case here presented. Indeed, when the context of the statute is considered and the distribution of appellate jurisdiction for which it provides is taken into view, it becomes certain that to extend by remote implication, based upon conceptions of inconvenience, the reviewing power of this court to a subject like the one now in question would destroy the symmetry of the law and would render necessary limitations on the power of this court to review as to important subjects concerning which the power would otherwise obtain.

See § 25 (*b*), paragraphs 1 and 2, defining the appellate power of this court in certain cases and see also the right to certify questions to this court and the authority conferred on this court to allow writs of certiorari conferred in § 25 (*d*), as well as authority conferred by § 24 (*a*), to which we shall hereafter advert. We might well leave the sufficiency of the motion to dismiss to rest upon these conclusive considerations, but we nevertheless briefly refer to the contentions pressed in argument to the contrary.

1. The main reliance is upon § 24 (*a*) which, it is virtually insisted, controls the other provisions of the statute, and therefore confers jurisdiction in this case. The text of § 24 (*a*) is this:

"*Jurisdiction of Appellate Courts.*—(*a*). The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia."

But the entire argument rests upon a misconception of the words "controversies in bankruptcy proceedings," as used in the section, since it disregards the authoritative construction affixed to those words. *Coder* v. *Arts*, 213 U. S. 223, 234; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300. Those cases expressly decide that controversies in bankruptcy proceedings as used in the section do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even although they may arise in the course of proceedings in bankruptcy. The cases referred to moreover, by necessary implication, determine that the mere allowing or disallowing a claim in bankruptcy is a proceeding in bankruptcy and not a controversy arising in bankruptcy within the intendment of the section. Nor is there force in the contention that because the District Court of Porto Rico is a court of bankruptcy "not within any organized circuit of the United States," therefore authority to review its action in a case like this is conferred on this court by the concluding sentence of § 24 (*a*). This is true, because

the proposition really rests upon the misconstruction of the section already pointed out. That is to say, as the sentence relied upon only confers upon this court "a like jurisdiction" to review the acts of the particular courts of bankruptcy which the sentence designates to that conferred by the immediately preceding provisions of § 24 (*a*), that is, to review controversies in bankruptcy, it follows that the sentence confers no power to review a mere step in bankruptcy taken by a bankrupt court, even although such court be one of those referred to in the last sentence relied upon.

The fact that the result of the previous settled construction of the statute causes it to come to pass that orders in mere proceedings in bankruptcy rendered by the court below when acting as a court in bankruptcy may not be susceptible of being reviewed in any court unless in some case where such review is specially provided for in the bankrupt act, affords no ground for disregarding the plain text of the statute by assuming jurisdiction where none exists.

It is true, as suggested in argument, that in *Armstrong* v. *Fernandez*, 208 U. S. 324, jurisdiction was exerted to review the action of the court below in a case which was not susceptible of being reviewed under the construction of the statute which we have here applied. But in that case there was no appearance of counsel for the appellee, and while a general suggestion was made in the argument of appellant as to the duty of the court not to exceed its jurisdiction, no argument concerning the want of jurisdiction was made. The case therefore in substance proceeded upon a tacit assumption of the existence of jurisdiction, an assumption which would not be now possible in consequence of the authoritative construction given to § 24 (*a*) in *Coder* v. *Arts*, *supra*. Under these circumstances, the mere implication as to the meaning of the statute resulting from the jurisdiction which was in that case merely assumed to exist, is not controlling and the *Armstrong Case*,

therefore, in so far as it conflicts with the construction which we here give the statute, must be deemed to be qualified and limited.

But it is urged that as the proceeding below was a controversy between the creditors and Munsuri as to whether he was liable as a general partner, the matter before us is susceptible of being treated as a controversy arising in bankruptcy and as distinct from a step in bankruptcy proceedings. But under the circumstances here disclosed, the contention is wanting in candor. We say this because the appeal was specifically taken from the order as one disallowing the claim of the appellants of an alleged indebtedness to them from the bankrupt firm, and such was the character necessarily attributed to the order by the judge when he entered it and which was affixed to it by the assignments of error filed at the time the appeal was taken. Moreover, we think the contention is necessarily negatived, as we have said, by the ruling in *Coder* v. *Arts*. Finally, it is contended that the right to review, wholly irrespective of the provisions of the bankrupt act, the order here in question arises under § 35 of the Foraker Act, 31 Stat., p. 85, enacted nearly two years after the passage of the bankrupt law, viz.:

"Writs of error and appeals from the final decisions of the supreme court of Porto Rico and district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied."

Waiving consideration of the question as to whether the present appeal was allowed "in the same manner and under the same regulations and in the same cases as from the

supreme courts of the Territories of the United States," we think it evidence that as to questions of the character of those presented by this appeal arising in steps in bankruptcy proceedings proper, the modes of review specifically provided for in the bankruptcy act are exclusive.

Dismissed for want of jurisdiction.

MUNSURI *v.* FRICKER.

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

No. 21. Argued October 27, 30, 1911.—Decided December 4, 1911.

Tefft, Weller & Co. v. *Munsuri*, *ante*, p. 114, followed to effect that the express provisions for review contained in the Bankruptcy Act are controlling, and that review by this court under § 24*b* of an order disallowing claims is not authorized by the act.

THE facts, which involve the jurisdiction of this court of appeals under the Bankruptcy Act, are stated in the opinion.

Mr. George H. Lamar, with whom *Mr. Willis Sweet* was on the brief, for plaintiff in error.

Mr. William G. Johnson, with whom *Mr. Wm. H. Hawkins* was on the brief, for defendant in error.

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

This case relates to the same bankruptcy proceeding, steps in which formed the basis of the appeal in case No. 22, which has just been dismissed, *ante*, p. 114.

In the petition for voluntary adjudication of the alleged bankrupt firm, Julian Munsuri was averred to be a limited or special partner. Following certain proceedings before the referee and a motion by general creditors, the court below, on October 25, 1907, entered an order declaring Munsuri to be a general partner of the firm and his personal estate liable for the firm debts. It was not, however, until February 19, 1909—nearly sixteen months after the entry of the order and following the disallowance by the court of the claims of certain creditors which had been allowed by the referee—that this proceeding was commenced to obtain a review of the order and judgment of October 25, 1907. The proceeding for review was begun by the filing in the court below of a document styled "Petition for a Writ of Review to the United States District Court for Porto Rico," verified and certified as such by the attorney for Munsuri, which document, however, although couched in part in the phraseology of a petition, is also in form a writ of error directed to the judge of the court below. In the bond and citation reference is made to the proceeding as the prosecution of a Writ of Review for the correction of the judgment or order in the petition mentioned.

Objection is made by the counsel for the trustee to the exercise of jurisdiction by this court on the ground that the supposed writ and citation thereon and the docketing of the transcript are insufficient in law under any statute, or rule, or practice of the court, to bring within the appellate jurisdiction of this court, for its consideration or correction, any of the matters and things charged in the transcript. On the other hand the contention is that the proceeding may be sustained as an appeal solely upon the question of jurisdiction under § 5 of the Judiciary Act of 1891, or as a petition to superintend and revise in matter of law, under section 24*b* of the Bankruptcy Act. Aside from any question as to the lapse of time between the en-

try of the assailed order and the commencement of this proceeding for review, the decision in *Tefft, Weller & Co.* v. *Munsuri*, *ante*, p. 114, of this term, just decided, is controlling, because it was there expressly held that the express provisions for review contained in the Bankruptcy Act were controlling and that review under § 24*b* by this court is not authorized by the act.

Dismissed.

ENRIQUEZ *v.* ENRIQUEZ.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 24. Argued October 31, 1911.—Decided December 4, 1911.

Under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 695, this court can only review judgments of the Supreme Court of the Philippine Islands where the value in controversy exceeds $25,000; and where only a half interest of property is affected, jurisdiction does not exist unless the value of such half interest exceeds that amount.

An affidavit that the value of the real property involved in the action exceeds $25,000 is not sufficient to confer jurisdiction where only a one-half interest is affected and the context of the affidavit gives rise to the inference that the statements as to value relate to the entire property and not to a half interest therein.

In this case resort to the record shows that the value of the interest in the property affected is less than the jurisdictional amount.

THE facts, which involve the jurisdiction of this court of appeals from the Supreme Court of the Philippine Islands, are stated in the opinion.

Mr. Jackson H. Ralston, with whom *Mr. Frederick L. Siddons* and *Mr. Wm. E. Richardson* were on the brief, for appellants.

Mr. Allison D. Gibbs, for appellees, submitted.

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

Rafael Enriquez, as administrator of the estate of his father, Antonio Enriquez, and as his heir, joined by other children and a grandchild of the deceased also suing as heirs, who were plaintiffs below and are appellants here, sued to set aside a purported conveyance of a piece of real estate in the city of Manila made by the deceased to his daughter-in-law, Carmen, the wife of a son Francisco, who were defendants below and are appellees here. The case as ultimately presented to the court of first instance involved two questions: First, whether the assailed conveyance was forged, and if real, whether Antonio had mental capacity to execute it; and, second, if the sale was real and the mental capacity obtained, was one-half the property embraced by the deed beyond the dispositive power of Antonio because such half belonged to the estate of his deceased wife, as an acquet of the community which had existed between husband and wife. The court of first instance held that the sale was real and that there was mental capacity. It, however, decided that one undivided half of the property belonged, not to Antonio, but to his wife in virtue of her community interest, and vested on her death in her heirs. To that extent the sale was set aside and judgment was directed for 13,250 pesos as the gross value of the use of the one undivided half of the property during the time it was unlawfully retained. This sum, however, was held to be reducible by the amount of one-half of the expenditures made for the whole property, including repairs, improvements, etc., and the defendant Carmen Enriquez was ordered to forthwith make a statement of such expenditures for the purpose of an appropriate reduction in the allowance made for rents and profits. The defendants alone appealed.

In disposing of the appeal the Supreme Court said:

"The plaintiffs in this Court have neither assigned as errors the rulings made against them by the lower court nor have they discussed any such rulings in their brief. So much of the decision, therefore, as is adverse to the plaintiffs we cannot consider, and the questions to be resolved are those presented by the appeal of the defendants."

Confining itself, therefore, to the question of the existence of the community the court decided that the court below had erred on that subject, and its judgment was accordingly reversed. The court concluded its opinion as follows:

"The judgment of the court below, which rests solely upon the proposition that at the time of the death of Dona Ciriaca Villanueva one-half of this property passed to her heirs, cannot, therefore, be sustained. That judgment is reversed, without costs to either party in this court, and judgment is entered acquitting the defendants of the complaint, with the costs of the first instance against the plaintiffs."

This appeal was prosecuted. The assignments of error are solely directed to the conclusion of the court below concerning the non-existence of the community interest, and the grounds of complaint on this subject have been elaborately pressed at bar, both orally and in printed argument. We are of opinion, however, that we may not consider the subject, as we conclude that a motion made to dismiss the appeal on the ground of the absence of the requisite jurisdictional amount must prevail.

The act of July 1, 1902, c. 1369, § 10, 32 Stat. 695, authorizes us to review judgments or decrees of the Supreme Court of the Philippine Islands "in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other

competent witnesses, is involved or brought in question; . . ."

Evidently, in consequence of these requirements of the statute, there was filed with the assignments of error in the court below an affidavit of Rafael Enriquez, stating in general terms "that the real property, the title to and possession of which is involved therein (in the action), exceeds in value the sum of twenty-five thousand dollars gold coin of the United States." But even if the sum thus stated were to be accepted for the purpose of testing the existence of the requisite jurisdictional amount, the affidavit would be inadequate, since its context clearly gives rise to the inference that the sum stated is not the value of the undivided one-half of the property in controversy, but the value of the entire property. But even if it be conceded that the deficiency of the affidavit may be supplied by a resort to the record, we are of opinion that the record establishes that the essential jurisdictional amount does not exist. True, the complaint and amended complaint state amounts from which, if considered alone, it might be possible to conjecture that the jurisdictional amount existed. These pleadings seem, however, not to have been verified, and if they had been their effect would be neutralized by other parts of the record. In the first place, the consideration expressed for the sale made by Antonio Enriquez of the entire property was only eight thousand pesos, and while the amended complaint, in assailing the conveyance, alleged the actual value of the property to have been twenty thousand pesos, the trial court, from the evidence, found that the real value of the property at the time of the sale was fourteen thousand pesos; that is, seven thousand dollars currency of the United States. In the second place, that the rents and profits were greatly exaggerated in the complaint and amended complaint is shown by the fact that only 13,250 pesos was allowed by the court as the value of the use of

one-half of the property while wrongfully withheld, and this amount was subject to be reduced by charging against it the one-half cost of administering the property, including disbursements for repairs, improvements, etc., during such period. In other words, whether we look at the affidavit alone or whether we consider the record as a whole, we think it is demonstrated not only that there is a failure to establish that the requisite jurisdictional amount exists, but moreover it affirmatively appears that such amount is not involved.

Dismissed for want of jurisdiction.

ENRIQUEZ *v.* ENRIQUEZ. (NO. 2.)

APPEAL FROM THE SUPREME COURT OF PHILIPPINE ISLANDS.

No. 25. Argued October 31, 1911.—Decided December 4, 1911.

Where the record shows that the jurisdictional value is not made out by a preponderance of evidence, the appeal will be dismissed. *Red River Cattle Co.* v. *Needham*, 137 U. S. 632.

Under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 695, this court can only review judgments of the Supreme Court of the Philippine Islands where the value in controversy exceeds $25,000; and in this case it does not appear that the value of real property affected equals that amount.

Appeal from 8 Phil. Rep. 607, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from the Supreme Court of the Philippine Islands, are stated in the opinion.

Mr. Jackson H. Ralston, with whom *Mr. Frederick L. Siddons* and *Mr. Wm. E. Richardson* were on the brief, for appellants.

Mr. Allison D. Gibbs, for appellees, submitted.

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

This controversy is substantially between those who were parties of record in Cause No. 24, just decided, *ante*, p. 123. In this action the administrator and the majority of the heirs of Antonio Enriquez assailed a deed of certain property in Manilla executed by Francisco Enriquez as attorney in fact of his father, Antonio, and also a sale of the same property subsequently made to the wife of Francisco Enriquez by the person to whom he had previously conveyed it, both the deeds being assailed on the ground that they were fraudulent simulations. The prayer was that the deeds be held to be void and for a judgment for rents and profits. The court of first instance having decreed in favor of the administrator, the defendants appealed to the Supreme Court of the Philippine Islands, which court reversed the judgment and remanded the cause for further proceedings.

Following a second judgment in favor of the administrator the cause was again taken to the Supreme Court and that tribunal not only again reversed the judgment below but entered one "acquitting the defendants of the complaint." This appeal was then taken, and a motion to dismiss has been made upon the ground that the requisite jurisdictional value is not involved. Contemporaneous with the allowance of the appeal there was filed in the court below an affidavit of Rafael Enriquez, in which he averred "that the real property the title to and possession of which is involved therein exceeds in value the sum of Twenty-five thousand dollars, gold coin of the United States." Thereafter the appellees filed the affidavit of A. B. Powell, chief of the real estate division of the Bureau of Internal Revenue in the city of Manilla, whose duty it is to fix the valuation of real property in the city of Manilla to the effect that he was familiar with the value of

such real property. That the assessed value in Philippine currency of the property in question (land and improvements) was as follows:

For the years 1901 and 1902, 12,236.96 pesos.

For the years 1903 to 1907, 12,582.90 pesos.

For the year 1908, 12,192.60 pesos.

He also swore "that such assessed value was and is the true value of the property during the time mentioned." If both the affidavits be accepted, it plainly results that, considering the value of the property alone, the requisite jurisdictional amount has not been established by the preponderance of evidence. But if the conflict between the two statements be resolved by resort to the record, then we think it affirmatively appears that the requisite value does not exist. At the trial the defendants introduced proof tending to show that the value of the property when originally bought by Antonio Enriquez, as well as at the time when it was conveyed to the wife of Francisco Enriquez, was materially less than the assessed value. Indeed, this proof tended to show that the building on the property was in ruins at the time of the purchase by the wife of Francisco and was therefore practically worthless for rental purposes. This was sustained by proof that the very small sum of $750 was attributed to the building or improvements on the lot in the assessment of 1901. Despite this evidence, no proof then was offered on behalf of the plaintiffs as to the value of the property except that of one witness who expressed the opinion that the property, at the time he testified, was worth about 16,000 pesos, or $8,000 currency of the United States. The demonstration as to the absence of the jurisdictional amount which results from these considerations is not changed by taking into view the question of rents and profits. This conclusion is inevitable, since even if the amount of rents and revenues, that is, the value of the use of the property allowed by the court of first instance, be taken into account

and allowance be made at the same ratio to the date of the judgment appealed from, such sum, when added either to the assessed value or to the value fixed by the plaintiff's own witness at the trial, would be much below $25,000. On this record "we are clear," as was found to be the case in *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, "that the jurisdictional value is not made out by a preponderance of evidence;" and the appeal is therefore

Dismissed.

UNITED STATES *v.* ECKSTEIN.

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

No. 52. Argued November 10, 1911.—Decided December 4, 1911.

Section 7 of the Dingley Tariff Act of June 24, 1897, c. 11, 30 Stat. 159, known as the similitude clause, does not require that there shall be similarity of material, quality, texture and use in all four particulars, but a substantial similarity in one particular may be adequate to classify an article thereunder.

Imitation horsehair was properly classified under the similitude clause with cotton yarn enumerated in paragraph 302 of the Tariff Act instead of with silk yarn under paragraph 385, there being a substantial similitude with the former both as to material and use, even if not as to quality or texture.

167 Fed. Rep. 802, affirmed.

THE facts, which involve the correct classification, under the tariff act of 1897 of artificial horsehair, are stated in the opinion.

Mr. Assistant Attorney General Wemple, with whom *Mr. Martin T. Baldwin, Special Attorney*, was on the brief, for the United States:

The Government insists that no statutory similitude is

established, and that the merchandise is therefore dutiable under § 6 of the tariff act of 1897 as an unenumerated manufactured article.

The requirements of the similitude clause of § 7 are satisfied if there be shown a proper similarity in any one of the four particulars, "material, quality, texture, or use," named in that clause.

Artificial horsehair is made out of cellulose, which, when prepared for manufacture, is wholly wanting in all the quality and texture of the waste cotton which was chemically reduced to obtain it. This cotton waste probably never existed as cotton yarn at any time. By not even the most distant analogy can similitude to cotton yarn in either quality or texture be asserted, and the importers have not heretofore made any claim of similitude in either quality or texture. The court below based its decision entirely upon an assumed similitude of artificial horsehair to cotton yarn in the other two statutory particulars, material and use. The only question before this court is the correctness of the decision of the court in defining a legally recognizable similitude in material and in use, and in applying its definition to the facts in the case.

Statutory similitude has been held to be a *substantial* similitude in one or more of the particulars mentioned in § 7 of the tariff act of 1897. *Arthur* v. *Fox*, 108 U. S. 125, 128; *Stuart* v. *Maxwell*,16 How. 150, 162; *Murphy* v. *Arnson*, 96 U. S. 131, 133; *Pickardt* v. *Merritt*, 132 U. S. 252, 259.

Substantial similitude in material with cotton yarn is not established. If the particular importation had happened to consist of imitation horsehair whose source was wood pulp instead of cotton waste, the difference would have been in fact no greater than it is now.

The resulting product no longer consists of cotton, and is not entitled to be considered in any legislative sense a "manufacture" of cotton. *Meyer* v. *Arthur*, 91 U. S.

570, 576; *United States* v. *Proctor*, 145 Fed. Rep. 126; *Hardt von Bernuth* v. *United States*, 146 Fed. Rep. 61.

Substantial similitude in use is not established. Similitude to cotton yarn in general must be established; that is, it must be shown that the ordinary use of both artificial horsehair and cotton yarn is to effect in a particular manner or process the same concrete result. This is a proposition which argues itself; the statement of it satisfies at once the reasoning faculty. That thing has not been done in the case at bar. *Patterson* v. *United States*, 166 Fed. Rep. 733; *United States* v. *Rheims*, 175 Fed. Rep. 778.

In order to invoke similitude, it must be substantial, and it must be a lawfully recognizable similitude, a similitude to the very merchandise directly enumerated in the act, not a mere subdivision or a casual, special, or, as here, advanced form thereof.

Mr. Wade H. Ellis, with whom *Mr. John A. Kratz, Jr.*, was on the brief, for respondent:

The question of the similitude is one of fact. *Erhardt* v. *Steinhardt*, 153 U. S. 177; *Herman* v. *Arthur's Executors*, 127 U. S. 363, 370; *Wills* v. *Russell*, 100 U. S. 621.

The Government is asking this court to reverse the action of a court below based upon a question of fact; judgment based upon such finding will not be reversed unless there is no evidence to sustain it.

Similitude does not mean identity. If it did, then it would never be effective. *United States* v. *Roessler*, 137 Fed. Rep. 770. See also on this point and that of substantial similitude: *Greenleaf* v. *Goodrich*, 101 U. S. 278, 283; *Fisk* v. *Arthur*, 103 U. S. 431; *Arthur* v. *Fox*, 108 U. S. 125; *Pickhardt* v. *Merritt*, 132 U. S. 252; *Stuart* v. *Maxwell*, 16 How. 150; *Mandell et al.* v. *Seeberger*, 39 Fed. Rep. 760; *In re Herter Brothers*, 53 Fed. Rep. 913; *United States* v. *Dana*, 99 Fed. Rep. 433; *Hahn* v. *United States*, 100 Fed. Rep. 635; *Tiffany* v. *United States*, 112 Fed. Rep. 672; *In*

re Guggenheim Smelting Co., 112 Fed. Rep. 517; *Waddell & Co.* v. *United States*, 124 Fed. Rep. 301; *Rich* v. *United States*, 176 Fed. Rep. 732.

The evidence establishes that substantial similitude exists as to use to cotton yarn. *Downing* v. *United States*, 109 Fed. Rep. 885; T. D. 20556; G. A. 4334, Jan. 16, 1899.

The evidence establishes that substantial similitude exists as to material to cotton yarn.

The *Proctor*, *Patterson* and *Rheims Cases* cited by the Government do not apply.

The merchandise is a yarn commercially.

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

This suit concerns the correct classification, under the tariff act of July 24, 1897, c. 11, 30 Stat. 151, of artificial or imitation horsehair, imported by the respondent into the port of New York on October 5, 1904.

Artificial or imitation horsehair is made from cotton waste by two processes, the Fremery and the Chardonnet. By the first process, referred to in the opinion of the Circuit Court of Appeals for the Second Circuit in *Hardt von Bernuth* v. *United States*, 146 Fed. Rep. 61, the cotton waste is dissolved in a solution of cup-ammonium, a salt of copper and ammonia, and this solution is forced through fine openings, discharging into a bath of acetic acid, forming threads of cellulose. By the second process the cotton waste, or raw cotton, is at first turned into gun cotton. This gun cotton is then mixed with alcohol and ether, and dissolved into a liquid, and this liquid is forced by pressure through pipes, at the end of which there are a number of small openings. The material is subsequently subjected to a process which it is not necessary to describe.

In the manufacture under both processes the single filaments are not allowed to solidify, although they are made

to stick together, whereas in the manufacture by the like process of artificial silk the fine filaments are grouped and twisted together and solidified. The imitation horsehair is usually dyed black, imported in skeins and sometimes on spools.

Imitation horsehair is not expressly mentioned in the Tariff Act of 1897, probably because it was not commercially known when the act was passed.

The provisions of the act of 1897 which are required to be considered in the determination of the question to be decided, briefly, are these, viz: § 6, providing for duty on non-enumerated articles; § 7, the "similitude clause;" paragraph 302, the cotton yarn clause, and paragraph 385, the silk yarn clause.

The goods were classified by the collector at the port of New York as "similar" to silk yarn, and reference was made to prior decisions, viz: G. A. 4939, 5081 and 5257. Duty was collected at the rate of "30 per centum ad valorem, under paragraph 385, the silk yarn provision, as a result of applying section 7 of the 'similitude clause.' The importer protested, claiming the merchandise to be dutiable at the rate provided by paragraph 302, by similitude to cotton yarn, or at the rate of 20 per cent. under section 6, as a non-enumerated manufactured article."

Before the Board of General Appraisers testimony was seemingly directed on the part of the importers to establishing that the material was, and on the part of the Government that it was not, a yarn. On June 22, 1906, the board reversed the action of the collector and sustained the alternative claim of the importers that the merchandise was dutiable as a non-enumerated manufactured article under § 6. G. A. 6387, T. D. 27442. It is worthy of remark, however, that pending the hearing before the board the Secretary of the Treasury, in Treasury Decisions 27350, May 15, 1906, directed collectors of customs that duty should be assessed on imitation horsehair as a non-

enumerated manufactured article at the rate of 20 per centum ad valorem under § 6.

By appropriate proceedings Eckstein, the respondent here, invoked the exercise of jurisdiction by the Circuit Court for the Southern District of New York for the review of questions of law and fact involved in the decision of the Board of General Appraisers, and in that court contended that the merchandise was a yarn and was by similitude dutiable under paragraph 302 as a cotton yarn. The court, after hearing additional testimony, decided that the merchandise was not yarn, *could not* by similitude be assessed as cotton yarn or yarn of any other kind, and that the board properly assessed it under § 6 as a manufactured article not otherwise provided for. 160 Fed. Rep. 287.

The Circuit Court of Appeals (167 Fed. Rep. 802) reversed the judgment, and held that the merchandise should be classified under § 7 of the act as a non-enumerated article similar to cotton yarn, and the duty should be assessed under the paragraph (302) relating to cotton yarn. Referring to its previous opinion in the *Bernuth Case,* already referred to, wherein it was held that artificial silk, which, as we have already said, is made by similar processes, should be so classified, the court said (p. 803):

"The judge of the Circuit Court affirmed the government's classification, distinguishing that case on the ground that artificial silk was found to be a yarn, whereas artificial horsehair, being solid, and not composed of twisted or spun filaments, is not a yarn. Admitting that this is so, still artificial horsehair is like cotton yarn in material, each being composed almost entirely of cellulose, and like it in use, being largely used as glazed cotton is in making hat braids, shoe laces, binding braids, tapes, and imitation horsehair. We think these resemblances establish its similitude to cotton yarn, even if the texture of the two articles is different."

This writ of certiorari was thereupon allowed.

The question is simply this: Did the Circuit Court of Appeals properly classify the merchandise?

The portion of § 7, the similitude clause of the act of 1897, with which we are concerned, is as follows:

"Section 7. That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this Act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; . . ."

In the brief for the Government it is said: "It is well established that the requirements of the similitude clause of section 7 are satisfied if there be shown a proper similarity in any one of the four particulars, material, quality, texture or use," enumerated in the section. *Arthur* v. *Fox*, 108 U. S. 125.

As said by the Circuit Court of Appeals for the Second Circuit, in *United States* v. *Roesseler*, 137 Fed. Rep. 770, 773, "It must be borne in mind that the statute does not require identity; if that were necessary the statute would have no raison d'être."

The decision of the Board of General Appraisers and of the Circuit Court were placed upon the ground that the merchandise produced by a chemical process was not structurally a yarn, such as is produced by the mechanical process of spinning. It was not, by either the board or the court, found that there was no substantial similarity to cotton yarn in material or use. We think the evidence justifies the contention of counsel for the importer that commercially the merchandise is a yarn. As we have before said, the Government originally contended that it was a yarn, and it is reflex significance that in the Tariff Act of 1909 (August 5, 1909, 36 Stat. 11, 60, c. 6) special provision is made for these things in paragraph 405, as for "yarns, threads, filaments of artificial or imitation silk, or

of artificial or imitation horsehair, by whatever name known, and by whatever process made." But assuming, for argument sake, as did the Circuit Court of Appeals, that the merchandise is not a yarn, let us consider, even if the texture of the articles be different, whether it was correctly held that the similitude to cotton yarn was established because "artificial horsehair is like cotton yarn in material, each being composed almost entirely of cellulose, and like it in use, being largely used as glazed cotton is in making hat braids, shoe laces, binding braids, tapes, and imitation horsehair."

As to material: Respondent does not claim similarity between the merchandise in question and cotton because cellulose is found in each; the contention is that there is similarity in material because the proportion of the ingredients—cellulose, water, etc.—is the same in the merchandise in question as the proportion of the same ingredients in cotton. Counsel say, and the contention is, we think, supported by the evidence:

"The goods are made of cotton fibres. Cotton consists of pure cellulose with a small percentage of hydroscopic water. The merchandise in suit is pure cellulose with a small percentage of hydroscopic water. It differs only from the cotton fibre in that the cell structure has been broken down. Other than this, cotton and the merchandise in suit are identical in material. No element is found in cotton which is not present in this merchandise; no element is in this merchandise which is not found in cotton, and the proportion of elements in both is approximately the same."

As to use: Paragraph 302 of the act covers cotton yarns regardless of their use. Thus, yarns have four broad, general uses, viz: knitting, weaving, sewing and braiding, and manifestly a given cotton yarn could not be used for all the purposes of all cotton yarns. In the group of hard twisted yarns is found cotton yarn, used in the production

of hat braids, and in the same commercial group appears the merchandise in suit. One of the many varieties of cotton yarn used in making hat braids is what is known as glazed or polished cotton yarn. It is asserted and not denied that such merchandise has been uniformly classified for customs purposes as a cotton yarn, and so far from being a highly specialized and unusual commodity, it has been an important article of commerce for at least thirty years. However, while imitation horsehair is generally used in the production of hat braids and is used interchangeably with glazed cotton yarn for such purpose, it has, in common with cotton yarns, other uses, which are referred to in the opinion of the Circuit Court of Appeals.

Upon the whole, we are of opinion that both as to material and use there is a substantial statutory similitude between cotton yarns enumerated in paragraph 302 and the merchandise in question, both as to material and use. As the requirement of the statute is not that there shall be similarity in all of the four particulars enumerated in § 7, but a substantial similarity in one of those particulars may be adequate, the classification adopted by the Circuit Court of Appeals was proper, and its judgment is therefore

Affirmed.

GLICKSTEIN *v.* UNITED STATES.

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

No. 486. Submitted October 19, 1911.—Decided December 4, 1911.

Subdivision 9 of § 7 of the Bankruptcy Act of 1898 and the immunity afforded by it are not applicable to a prosecution for perjury committed by the bankrupt when examined under it.

The constitutional guarantee of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony, even though the testimony when given may serve to incriminate the witness, provided complete immunity be accorded.

The sanction of an oath and imposition of punishment for false swearing are inherent parts of the power to compel giving testimony and are not prohibited by immunity as to self-incrimination.

The immunity afforded by the Fifth Amendment relates to the past; it is not a license to the person testifying to commit perjury either under the provisions as to the giving of testimony in § 860, Rev. Stat., or of the Bankruptcy Act of 1898.

The provisions in the Bankruptcy Act compelling testimony do not confer an immunity wider than that conferred by the Constitution itself.

A statute in regard to giving testimony, which does not provide for prosecution for perjury, will not be construed as permitting perjury because in other statutes in that regard Congress has, from abundant caution, inserted provisions as to prosecution for perjury.

Edelstein v. *United States*, 149 Fed. Rep. 636; *Wechler* v. *United States*, 158 Fed. Rep. 579, approved. *In re Marx*, 102 Fed. Rep. 679; *In re Logan*, 102 Fed. Rep. 876, disapproved.

THE facts, which involve the construction of subdivision 9, § 7 of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. John E. Hartridge and *Mr. N. P. Bryan* for Glickstein.

The Solicitor General for the United States.

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

Glickstein, an adjudicated bankrupt, was indicted for perjury in having falsely sworn in the bankruptcy proceeding, while under examination before a referee, as required by the seventh section, subdivision 9, of the Bankruptcy Act of 1898. The indictment was demurred to on the following grounds: "*a.* A prosecution for perjury against a bankrupt at a meeting of his creditors will not lie; *b.* The indictment was based upon testimony given by the bankrupt affecting the administration and settlement of his estate; *c.* A person cannot be compelled in any criminal case to be a witness against himself." At the trial which followed the overruling of the demurrer the testimony of Glickstein, which was the subject of the indictment, was offered and objected to on the same grounds upon which the demurrer was based, and exceptions were taken to the admission of the testimony in evidence.

When the legality of a conviction and sentence of Glickstein was before the court below, as the result of error prosecuted by him, the court, stating the facts which we have recited, certified the following question: "Is subsection 9 and the immunity afforded by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?"

Section 7, subdivision 9, which we are required to consider in order to solve the question, is as follows:

"The bankrupt shall . . . (9) When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given

by him shall be offered in evidence against him in any criminal proceeding."

It is difficult to determine from the contentions urged in favor of an affirmative answer, whether it is deemed the solution of the problem requires us to decide a question of constitutional right or simply calls for an interpretation of the provision of the Bankruptcy Act to which the question relates. To exclude irrelevant matter and to confine our attention to the precise subject to be passed upon, we state certain propositions which are not open to controversy because foreclosed by decisions of this court, or which if not expressly foreclosed are so indubitably the result of settled principles as to cause them also to be not subject to reasonable dispute.

1st. It is undoubted that the constitutional guarantee of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony even although the testimony when given might serve to incriminate the one testifying, provided immunity be accorded, the immunity, of course, being required to be complete; that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation. The authorities which establish this elementary proposition are too numerous to be cited, and we therefore simply refer to a few of the leading cases on the subject. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591; *Burrell* v. *Montana*, 194 U. S. 572, 578; *Jack* v. *Kansas*, 199 U. S. 372; *Ballmann* v. *Fagin*, 200 U. S. 186, 195; *Hale* v. *Henkel*, 201 U. S. 43, 66, and *Heike* v. *United States*, 217 U. S. 423.

2nd. As the authority, which the proposition just stated embraces exists, and as the sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony, they are included in that grant of authority and are not prohibited by the immunity as to self-incrimination. Of

course this proposition is essentially the resultant of the first, since unless it be well founded the first also must be wanting in foundation. This must be the result, as it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury. That this is not disputable is shown by the fact that it has been accepted as self-evident in providing for immunity for one compelled to testify, as shown by the reservation in Rev. Stat., § 860, declaring that the immunity shall not extend to "exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid," and by a like provision, contained in the act of February 11, 1893, 27 Stat. 443, c. 83. The first of these provisions was considered in *Counselman* v. *Hitchcock*, *supra*, and the second in *Brown* v. *Walker*, *supra*, where it was expressly decided that the statute containing it complied with the constitutional guarantee.

With these propositions in hand it follows that the precise question for decision is, Did the guarantee of immunity contained in the ninth subdivision of § 7 of the Bankruptcy Act bar a prosecution for perjury for false swearing in giving testimony under the command of the section? In other words, the sole question is, Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution? The argument to maintain that it does is, that as the statute provides for immunity and does not contain the

reservation found in either § 860, Rev. Stat., or that embodied in the act of 1893, therefore, under the rule that the inclusion of one is the exclusion of the other, such reservation cannot be implied. Or, to state the proposition in another form, it is that as the statute in the immunity clause says, "But no testimony given by him (the witness who is compelled to be examined) shall be offered in evidence against him in any criminal proceeding," and as these words are unambiguous, there is no room for limiting the language so as to cause the immunity provision not to prohibit the offer of the testimony in a criminal prosecution for perjury. But the contention assumes the question for decision, since it excludes the possibility of construction when on the face of the statute the meaning attributed to the immunity clause cannot be given to it without destroying the words of the statute and frustrating its obvious object and intent. This may not be denied, since the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.

The argument that because the section does not contain an expression of the reservation of a right to prosecute for perjury in harmony with the reservations in Rev. Stat., § 860, and the act of 1893, therefore it is to be presumed that it was intended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect.

Bearing in mind the subject dealt with we think the reservation of the right to prosecute for perjury made in the

statutes to which we have referred was but the manifestation of abundant caution, and hence the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure.

Some of the considerations which we have pointed out were accurately expounded in *Edelstein* v. *United States*, 149 Fed. Rep. 636, by the Circuit Court of Appeals for the Eighth Circuit, and in *Wechsler* v. *United States*, 158 Fed. Rep. 579, by the Circuit Court of Appeals for the Second Circuit. And this leads us to observe that the necessary result of the conclusion now reached is to disapprove the opinions in *In re Marx et al.*, 102 Fed. Rep. 676, and *In re Logan*, 102 Fed. Rep. 876.

It follows that the question propounded must receive a negative answer, and our order will be,

Question certified answered No.

RIPLEY *v.* UNITED STATES.

UNITED STATES *v.* RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

ON RETURN TO MANDATE DIRECTING ADDITIONAL FINDINGS.

Nos. 498, 499. Submitted May 29, 1911.—Decided December 4, 1911.

Where the right of one claiming under a contract with the United States depends on whether the government inspector acted in good or in bad faith in refusing to allow the work to proceed, the findings of the Court of Claims should be specific in this respect; and if not, the case will be remanded with directions to make specific findings.

Findings, which simply state that the inspector in immediate charge of the work acted with knowledge, other inspectors being also referred to in the findings, and which do not make a direct and unequivocal finding as to the good or bad faith of the inspector in giv-

ing the orders, do not conform to the order of this court heretofore made in this case, 220 U. S. 491, and the case is remanded for further compliance therewith.

THE facts, which involve the sufficiency of findings of the Court of Claims, are stated in the opinion.

Mr. Wm. H. Robeson, with whom *Mr. Benj. Carter* and *Mr. F. Carter Pope* were on the brief, for appellant in No. 498, and appellee in No. 499.

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

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

Ripley recovered the sum of alleged losses occasioned by the delay consequent on the refusal of the inspector in charge of certain jetty work, being performed under contract with the United States in Aransas Pass, Texas, to permit the placing of certain crest blocks on the foundation intended to receive them. Both the United States and Ripley appealed. At the last term, when the case was before us, it became necessary to ascertain how far the findings of fact established the good or bad faith of the inspector in refusing to permit the crest blocks to be placed in position, and even upon the hypothesis of bad faith, to determine whether Ripley had been so negligent in notifying the engineer officer who was in charge of the work of the refusal of the inspector as to bar a right to recover for loss occasioned by such refusal. Concluding that the findings of fact on these subjects were so inadequate and possibly so misleading as to render it impossible for us to decide the cause on the merits, our action was stayed and the court below was directed to make and transmit as

speedily as possible additional findings on the subjects referred to, as follows:

"First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March and April, 1904, as recited in Finding VII, the inspector in charge knew 'that large parts of the work done by the claimant had fully settled and consolidated.'

"Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

"Third. Whether at any time the claimant notified the engineer officer in charge or the chief of engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer."

[See 220 U. S. 491.]

The case is now before us upon additional findings made by the court below in assumed compliance with our previous order. These findings are as follows:

"(1) When denying permission to the claimant to lay crest blocks, as stated in Finding VII, the inspector in charge knew from the time which had elapsed that large parts of the core theretofore completed by the claimant had fully settled and consolidated and were ready for the crest blocks to be laid thereon.

" (2) The refusal of said inspector to allow crest blocks to be laid at the time requested in said Finding VII thereby unreasonably delayed the work and was, on his part, a gross mistake. There is no other evidence of bad faith on the part of the assistant engineer in immediate charge.

" (3) There is no evidence to show that any protest or notice was ever made to the engineer in charge (whose of-

fice was in Galveston) or to the Chief of Engineers (whose office was in Washington) or to any officer other than the assistant engineer in immediate charge of the work of inspection."

But when we again approach the duty of deciding the case on its merits in the light afforded by these additional findings, we are constrained to the conclusion that they fail to comply with our previous order, directing a finding as to knowledge on the part of the inspector and an unequivocal finding as to his good or his bad faith.

A few words will suffice to indicate the reasons which compel us to this conclusion. Thus, in the first place, while paragraph 1 finds that the inspector knew, at the time he made the refusal to permit the placing of the crest blocks upon the foundations, that they had sufficiently consolidated to be able to receive the blocks, this is qualified by the statement that such knowledge on the part of the inspector was but derived from the period which had elapsed between the building of the foundations and the time when the refusal to permit the laying of the crest blocks was made. But this qualification causes the paragraph to be ambiguous as to the existence or non-existence of good faith on the part of the inspector, since there is nothing in the paragraph which directly or indirectly establishes that the mere lapse of time, in view of the nature and character of the work, the materials which had entered into it and the situation in which it was placed, which caused it to be impossible for the inspector to have been in good faith when he refused to permit the crest blocks to be laid.

And the same result arises from an accurate consideration of the second paragraph. This is true because, although that paragraph states that the refusal to permit the laying of crest blocks unreasonably delayed the work and was a gross mistake on the part of the inspector, these statements are qualified by the finding that there is no other evidence of bad faith "on the part of the assistant

engineer in immediate charge," a qualification which necessarily co-relates the two paragraphs and again causes the inference of gross mistake to depend upon the lapse of time referred to in the first paragraph, without any finding whatever justifying the deduction that the lapse of time, in view of the other proof in the case, excluded the possibility of the exercise of an honest judgment on the part of the inspector.

Again, while the third paragraph is clear when considered in and of itself, it nevertheless, when read in connection with the two other paragraphs, exhibits such an inaccuracy of statement as may tend to mislead, and therefore requires to be corrected. The refusal to permit the laying of the crest blocks, as shown by the original findings, was made by the inspector in immediate charge of the work, and it was as to the good or bad faith of that person to which our previous order was directed. Evidently, recognizing that fact, the first paragraph of the additional finding speaks solely with reference to the assumed knowledge of the inspector in charge, and yet the second and third paragraph, by referring the one to "the assistant engineer in immediate charge," and the other to "the assistant engineer in immediate charge of the work of inspection," may give rise to confusion by suggesting that these two findings, by their change of language, refer to a different person than the mere inspector in charge.

Concluding, for the reasons stated, that the additional findings do not conform to our previous order, since they do not make a direct and unequivocal finding as to the good or bad faith of the inspector, it becomes necessary that such findings be returned to the court below, to the end that our previous direction may be complied with, and an order to that effect will be therefore entered.

The case will therefore be remanded for compliance with our previous order.

GRIGSBY *v.* RUSSELL.

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

No. 53. Argued November 10, 13, 1911.—Decided December 4, 1911.

A condition in an insurance policy that it shall be void for non-payment of premiums means only that it shall be voidable at option of the company.

The rule of public policy that forbids the taking out of insurance by one on the life of another in which he has no insurable interest does not apply to the assignment by the insured of a perfectly valid policy to one not having an insurable interest.

In this case, *held*, that the assignment by the insured of a perfectly valid policy to one not having any insurable interest but who paid a consideration therefor and afterwards paid the premiums thereon was valid and the assignee was entitled to the proceeds from the insurance company as against the heirs of the deceased.

A valid policy of insurance is not avoided by a cessation of insurable interest even as against the insurer unless so provided by the policy itself. *Conn. Mut. Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Warnock* v. *Davis*, 104 U. S. 775, distinguished.

Where there is no rule of law against paying to an assignee who has no insurable interest in the life of the insured, and the company waives a clause in the policy requiring proof of interest, the rights of the assignee are not diminished by such clause as against the insured's administrator.

Even though a court below might hesitate to decide against language of this court referring to a debated point, if there has been no direct decision this court is not precluded by such references when the point is actually before it.

168 Fed. Rep. 577, reversed.

THE facts are stated in the opinion.

Mr. Montague S. Ross and *Mr. Jno. A. Pitts*, with whom *Mr. K. T. McConnico* was on the brief, for petitioner.

A life insurance policy, taken out in good faith by the

insured, with no idea of assigning it, payable to his "executor, administrator or *assigns*," can *afterwards*, in good faith, and for a valuable consideration, with the knowledge and assent of the insurer, be sold and assigned to one who has no insurable interest in the life of the insured; and such assignee, after he had bought a policy, taking an absolute assignment thereof, and in good faith, with the knowledge and consent of the company, pays the subsequent premiums, acquires the right to collect the proceeds of the policy at maturity.

The conflicting decisions upon this question have given rise to two general rules, termed respectively by judges and text-writers: (a) The "prevailing" or "majority" rule, holding such assignments valid, and (b) the "minority" rule holding them void.

This court has not as yet directly decided this question, but its decisions on similar questions have been differently construed in the various circuits. The Eighth Circuit has endorsed the majority, and the Fifth and Sixth Circuits, the minority rule. *Gordon* v. *Ware National Bank*, 132 Fed. Rep. 444, 450; *Alexander* v. *Lane*, 157 Fed. Rep. 1002; *Clark* v. *Equitable Life Ass. Soc.*, 143 Fed. Rep. 176.

There are also conflicting views of other courts and of text-writers with respect to the trend of the decisions of this court: see in *Clark* v. *Allen*, 11 R. I. 439, action was for money had and received by the widow of an insured against an assignee of the policy, the assignee having collected the money from the insurance company under the assignment; *Chamberlain* v. *Butler*, 54 L. R. A. 338; *Bursinger* v. *Bank of Watertown*, 67 Wisconsin, 76; *Fitzpatrick* v. *Insurance Co.*, 56 Connecticut, 116; *Amick* v. *Butler*, 111 Indiana, 578; *Insurance Co.* v. *Hazard*, 41 Indiana, 116; *Insurance Co.* v. *Brown*, 159 Indiana, 644; *Hardy* v. *Insurance Co.*, 152 No. Car. 286.

The following text-writers and annotators treat or cite the decisions of this court as favoring the "majority"

rule: Bacon on Benefit Societies and Life Insurance, 2d ed., § 302; 2 Joyce on Insurance, §§ 914–919; Am. & Eng. Encyc. of Law, 2d ed., 1025; May on Insurance (ed. 1891), § 398*a;* 25 Cyc. Law & Procedure, 709; *Crosswell* v. *Insurance Co.*, 51 So. Car. 103; *Merchants' Nat. Bank* v. *Comins* (N. H.), 101 Am. St. Reps. 657; *Steinback* v. *Diepenbrock*, 44 L. R. A. 417. See also note to 87 Am. St. Reps. 507.

The cases in this court that have been heretofore invoked by either side are, in chronological order, as follows: *Cammack* v. *Lewis*, 15 Wall. 643; *Conn. Mut. Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Ætna Life Ins. Co.* v. *France*, 94 U. S. 561; *Warnock* v. *Davis*, 104 U. S. 775; *New York Mutual Life Ins. Co.* v. *Armstrong*, 117 U. S. 597; *Crotty* v. *Insurance Co.*, 144 U. S. 621.

This court is either already committed to the "majority" rule or else has never taken any definite position upon the single sharp question presented in the case at bar. The general weight of authority is that a decided majority of the state courts uphold such assignments.

Only the States of Kansas, Alabama, Texas and Kentucky now stand clearly and unequivocally on the side of the "minority" rule. The State of Missouri is doubtful, the decisions seeming to point both ways, with possibly the stronger tendency to the "minority" rule.

On the other hand, England, Canada, Nova Scotia, New Brunswick, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin are unquestionably arrayed on the side of the "majority" rule. And if we correctly construe the decisions and expressions of this great court, the United States Supreme Court is also committed to that rule.

Four, and possibly five, States sustain the "minority" rule, and the United States Supreme Court, twenty-nine States, England, Canada, Nova Scotia, and New Brunswick support the "majority" rule. The following cases will amply bear out the statement. *New York Mutual Life Ins. Co.* v. *Armstrong*, 117 U. S. 591; *Ætna Life Ins. Co.* v. *Grant*, 94 U. S. 561; *Ætna Life Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Murphy* v. *Red*, 64 Mississippi, 614; *Steinback* v. *Diepenbrock*, 158 N. Y. 24; *Olmstead* v. *Keyes*, 85 N. Y. 593; *Valton* v. *Nat. L. Fund Assn.*, 40 N. Y. 21; *St. John* v. *Am. Mut. Life Ins. Co.*, 13 N. Y. 31; *Chamberlain* v. *Butler*, 61 Nebraska, 730; *Fitzpatrick* v. *Hartford &c. Ins. Co.*, 56 Connecticut, 116; *Bursinger* v. *Bank of Watertown*, 67 Wisconsin, 76; *Clark* v. *Allen*, 11 R. I. 439; *Crosswell* v. *Conn. Indemnity Assn.*, 51 So. Car. 103; *Rylander* v. *Allen*, 125 Georgia, 206; *A. O. U. W.* v. *Brown*, 112 Georgia, 545; *Matlock* v. *Bledsoe*, 90 S. W. Rep. 849; *Mechanics' Nat. Bank* v. *Comins*, 77 N. H. 12; *Mut. L. Ins. Co.* v. *Allen*, 138 Massachusetts, 564; *King* v. *Crane*, 185 Massachusetts, 103; *Brown* v. *Greenfield Life Assn.*, 172 Massachusetts, 498; *Dixon* v. *Nat. Life Ins. Co.*, 168 Massachusetts, 48; *Tateum* v. *Ross*, 150 Massachusetts, 440; *Hurst* v. *Robinson*, 78 Maryland, 67; *Rittler* v. *Smith*, 70 Maryland, 261; *Souder* v. *Home Friendly Soc.*, 72 Maryland, 511; *Hardy* v. *Insurance Co.*, 152 No. Car. 286; *Eckel* v. *Renner*, 41 Oh. St. 232; *Vivar* v. *Knights Pythias*, 52 N. J. L. 455, 469; *Trenton Mut. L. Ins. Co.* v. *Johnson*, 24 N. J. L. 576, 585; *Brown* v. *Equitable Life*, 75 Minnesota, 412; *Hogue* v. *Minn. Packing Co.*, 59 Minnesota, 39; *Martin* v. *Stubbins*, 126 Illinois, 387; *Bloomington M. B. Assn.* v. *Blue*, 120 Illinois, 121; *Moore* v. *Chicago Guar. Fund Life*, 178 Illinois, 202, 52 N. E. Rep. 882; *Givens* v. *Veeder*, 9 N. Mex. 256; *Harrison's Admr.* v. *Ins. Co.*, 78 Vermont, 473; *Lewis' Admr.* v. *Edwards* (Tenn.), Mss., Nashville, Dec. Term, 1903; *Davis* v. *Brown*, 159 Indiana, 644; *Millner* v. *Bowman*, 119 Indiana, 440; *Amick* v.

Butler, 111 Indiana, 578; *Hutson* v. *Merrifield*, 51 Indiana, 24; *Wheeland* v. *Atwood*, 192 Pa. St. 237; *Ulreich* v. *Reinahl*, 143 Pa. St. 238; *Grant* v. *Kline*, 115 Pa. St. 618; *Fairchild* v. *N. E. M. L. Ins. Co.*, 51 Vermont, 613; *Hearings' Suc.*, 26 La. Ann. 326; *Suc. of Miller* v. *Manhattan Ins. Co.*, 110 La. Ann. 654; *Stewart* v. *Sutcliffe*, 46 La. Ann. 240; *Prud. Ins. Co.* v. *Liersch*, 122 Michigan, 436; *Sheets* v. *Sheets*, Colo. App. 450; 36 Pac. Rep. 310; *Lemon* v. *Phœnix Mut. L. Ins. Co.*, 38 Connecticut, 294; *Farmers & Traders' Bank* v. *Johnson*, 118 Iowa, 282; *Curtis* v. *Ætna L. Ins. Co.*, 90 California, 255; *McFarland, Adm'r*, v. *Creath*, 35 Mo. App. 112, 121; *Ins. Co.* v. *Hamilton*, 5 Sneed (Tenn.), 269; *Ashley* v. *Ashley*, 3 Sim. 149; 6 Eng. Chy. Rep. 149; *Dalby* v. *India & London Policy Co.*, 15 C. B. 365, and note; *Law* v. *London Policy Co.*, 1 Kay & J. 223; *Vazina* v. *N. Y. L. Ins. Co.*, 6 Can. S. C. 278; *N. Am. L. Assur. Co.* v. *Craigen*, 13 Can. S. C. 278; 18 Novia Scotia, 440; *Mut. L. Assur. Co.* v. *Anderson*, 1 N. Bruns. Eq. Rep. 466; *Brett* v. *Warnick*, 44 Oregon, 511; *Cunningham* v. *Smith*, 70 Pa. St. 450.

In Virginia the question has been regulated by ch. 180, approved April 27, 1903.

Mr. George T. Hughes for respondents:

The rule contended for by the plaintiff allows the contract to be set afloat on the sea of commerce; the one contended for by respondent keeps it under the control of the assured and allows it to be used only as a security for sums advanced, thus taking away the temptation to evil, and holding out to the assured the possibility and hope of redeeming his contract.

For cases holding that a policy cannot be assigned to one having no insurable interest, see *Chamberlain* v. *Butler*, 87 Am. St. Rep. 508, and note in 3 L. R. A. (N. S.) 953; and see also: *Ala. Gold Ins. Co.* v. *Mobile Ins. Co.*, 81 Alabama, 321; *Helmetag* v. *Miller*, 76 Alabama, 183; *Missouri Valley Ins. Co.* v. *Sturges*, 18 Kansas, 93; *Mo. Val-*

ley Ins. Co. v. *McCuen*, 36 Kansas, 146; *Basye* v. *Adams*, 81 Kentucky, 308; *Beard* v. *Sharp*, 100 Kentucky, 606; *Brumly* v. *Ins. Co.*, 92 S. W. Rep. 17; *Huesner* v. *Ins. Co.*, 47 Mo. App. 336; *Ins. Co.* v. *Richards*, 99 Mo. App. 88; *Downey* v. *Hoffer*, 110 Pa. St. 109; *Ins. Co.* v. *Norris*, 115 Pa. St. 446; *Gilbert* v. *Moose*, 104 Pa. St. 74; *Hoffman* v. *Hoke*, 122 Pa. St. 377; *Price* v. *Knights of Honor*, 68 Texas, 361; *Insurance Co.* v. *Hazlewood*, 75 Texas, 338; *Wilton* v. *Ins. Co.*, 34 Tex. Civ. App. 156; *Tate* v. *Ins. Co.*, 97 Virginia, 74; *Roller* v. *Moore*, 86 Virginia, 512.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy and sold it to him in consideration of one hundred dollars and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The Circuit Court of Appeals in deference to some intimations of this court held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. 168 Fed. Rep. 577, 94 C. C. A. 61.

Of course the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And

although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (Janus Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue and so one that is opposed to crime. And, what perhaps is more important, the existence of such an interest makes a roughly selected class of persons who by their general relations with the person whose life is insured are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. There was a faint suggestion in argument that it had become void by the failure of Burchard to pay the third premium *ad diem*, and that when Grigsby paid he was making a new contract. But a condition in a policy that it shall be void if premiums are not paid when due, means only that it shall be voidable at the option of the company. *Knickerbocker Life Insurance Company* v. *Norton*, 96 U. S. 234; *Oakes* v. *Manufacturers' Fire & Marine Ins. Co.*, 135 Massachusetts, 248. The company waived the breach, if there was one, and the original contract with Burchard remained on foot. No question as to the character of that contract is before us. It has been performed and the money is in court. But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to, at least in its most convincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no

universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in *Shelley's Case*. Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder but the fact that such wagers came to be regarded as a mischievous kind of gaming. St. 14 George III, c. 48.

On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the Bankruptcy Law, § 70, which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only, *Godsall* v. *Boldero*, 9 East, 72, long has disappeared. *Phœnix Mutual Life Ins. Co.* v. *Bailey*, 13 Wall. 616. And cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager have no similarity to those where an honest contract is sold in good faith.

Coming to the authorities in this court, it is true that there are intimations in favor of the result come to by the Circuit Court of Appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. *Warnock* v. *Davis*, 104 U. S. 775.

On the other hand it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself. *Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U. S. 457. And expressions more or less in favor of the doctrine that we adopt are to be found also in *Ætna Life Ins. Co.* v. *France*, 94 U. S. 561. *Mutual Life Ins. Co.* v. *Armstrong*, 117 U. S. 591. It is enough to say that while the court below might hesitate to decide against the language of *Warnock* v. *Davis*, there has been no decision that precludes us from exercising our own judgment upon this much debated point. It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the Supreme Court of that State came to the conclusion that we adopt, in an unreported case, *Lewis* v. *Edwards*, December 14, 1903. The law in England and the preponderance of decisions in our state courts are on the same side.

Some reference was made to a clause in the policy that "any claim against the company arising under any assignment of the policy shall be subject to proof of interest." But it rightly was assumed below that if there was no rule of law to that effect and the company saw fit to pay, the clause did not diminish the rights of Grigsby as against the administrators of Burchard's estate.

Decree reversed.

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

UNITED STATES *v.* FIDELITY TRUST COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 280. Argued November 15, 1911.—Decided December 4, 1911.

A legacy to pay over net income to the legatee in periodical payments during the legatee's life on which the legatee has received several payments of income is not a contingent beneficial interest, but a vested life estate; and taxes paid on the value of such a legacy under the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 464, cannot be recovered under § 3 of the act of June 27, 1902, c. 1160, 32 Stat. 406. *Vanderbilt* v. *Eidman*, 196 U. S. 480, distinguished.

Congress will be presumed to use familiar legal expressions in their familiar legal sense.

45 Ct. Cls. 362, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Harr, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Paul Fuller, with whom *Mr. Barry Mohun* was on the brief, for appellees.

Mr. A. R. Serven, *Mr. H. T. Newcomb*, *Mr. Morris F. Frey* and *Mr. R. W. Joyce* also filed a brief for appellees.

Mr. George P. Montague, by leave of court, filed a brief as *amicus curiæ*.

The Attorney General, with whom *Mr. Barton Corneau* was on the brief, in opposition to motion to dismiss or affirm.

Mr. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover a portion of a succession tax paid under the act of June 13, 1898, c. 448, 30 Stat. 448,

464; the action being based on the act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, which provides for refunding "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two." The petitioner, appellee, was residuary legatee under a will, in trust to hold the fund 'either as at present invested or in such securities as to my said trustee may be deemed safe,' and to pay over the net income to the testator's niece 'in quarterly payments during all the period of her natural life.' On June 8, 1900, the appellee made a return to the collector of internal revenue, stating that the value of the residuary estate was $120,303.94, and that of a specific legacy of silverware &c. to the niece, $500. With the aid of mortuary tables, the rate of interest being assumed to be four per cent, the clear value of the legacies to the niece was fixed at $74678.68, and an inheritance tax of $5600.90 was assessed upon it, which was paid on August 16, 1900. Up to July 1, 1902, the date fixed by the statute, the petitioner had paid to the niece $17027.59 income from the residue, and had delivered to her the specific legacy valued at $500. The tax on these sums at the rate of taxation was $1314.59, which, deducted from the whole tax paid, leaves $4286.31, to recover which this suit is brought. The appellees had judgment in the Court of Claims. 45 C. Cls. 362.

The words 'which shall not have become vested,' quoted above, mean the same as 'absolutely vested in possession or enjoyment' in a later clause ending the tax on contingent interests unless so vested before July 1, 1902. *Vanderbilt* v. *Eidman*, 196 U. S. 480, 500. On this ground it is argued at great length that only so much of the life interest of the niece as she had received before the date mentioned had vested in the sense of the clause. We are of opinion that this argument cannot be maintained. The interest of the niece was not a contingent right to income as

it should accrue in her lifetime, it was a vested life estate in a fund, changing in investment at the discretion of the trustee, but retaining its equitable identity. Objections like those that are made to treating a life estate as a present unity in the enjoyment of the life tenant might be made to the similar treatment of absolute ownership in fee. In actual life a fee can be enjoyed only minute by minute, but, although eternal in theory of law, by the same theory at every moment it is all and wholly in the owner's hands. The statute does not invite speculation in a new nomenclature, or attempt to reach profounder conceptions than those familiar to the law. When it speaks of interests absolutely vested in possession we presume that it uses familiar legal expressions in their familiar legal sense. It deals in terms with the interest, that is, the legal unit of right, not with the money received before a given moment. No better example of such an interest could be given than a life estate in a fund, the enjoyment of which actually has begun; none that more clearly and absolutely excludes the qualification 'contingent' in the sense of the law. *Vanderbilt* v. *Eidman,* 196 U. S. 480, concerned a life estate in remainder, which, whether the remainder was technically vested or contingent, *Ibid.* 501, 502, was not vested in possession or enjoyment. It was assumed that the tax was payable in a case like this. *Ibid.* 488, 495.

Decree reversed.

SANDOVAL *v.* RANDOLPH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 4. Submitted October 26, 1911.—Decided December 4, 1911.

A principal betrayed by his agent into paying for property an excess over the price for which the agent obtains it may declare in assumpsit without relying upon fraud and deceit in an action for damages.

An agent who makes a secret profit in the execution of his agency may be compelled to disgorge in an action upon implied promise.

Where one agrees to act as agent to purchase property at not exceeding a specified price, he cannot avail of an unexpired option antedating the employment to purchase the property at a less price himself and make the difference.

An agreement to sell at a price paid with right of redemption within a specified period with further agreement not to redeem if an additional sum be paid within that period simply amounts to an option.

11 Arizona, 371, affirmed.

THE facts are stated in the opinion.

Mr. Henry S. Van Dyke and *Mr. Frank P. Flint*, with whom *Mr. G. Bullard* was on the brief, for appellants.

Mr. Eugene S. Ives for appellee.

Memorandum opinion by direction of the court. By MR. JUSTICE LURTON.

Action for money had and received for the use of the plaintiff. A jury was waived and there was judgment for plaintiff upon a special finding of fact. This judgment was affirmed by the court below, the court holding that there was evidence supporting the findings of fact, and that when

that was the case the court could not go behind the facts so found.

The facts so found were in every essential respect the facts stated in the complaint. They were, in substance:

1. That the plaintiff procured the defendants to negotiate with the supposed owner of a silver mine in Mexico, and buy it from the owner for the lowest possible price for the plaintiff and another, who had since assigned his interest to the plaintiff.

2. That the defendants did thereafter bargain for the property and did buy the same at the price of twenty thousand dollars, Mexican silver, taking the title to one of them.

3. That the defendants represented that they had agreed to pay twenty thousand dollars in American money for the mine, and that the plaintiff, believing this to be true, paid over to the defendants the full sum of twenty thousand dollars in American currency, which was the equivalent of twice the sum which the defendants had actually agreed to pay and did later pay for the said property.

The action was in debt to recover this excess over the cost of the property, as money had and received for the use of the plaintiff.

It would be a great scandal if a principal thus betrayed by his agent might not declare in assumpsit without relying upon fraud and deceit in an action for damages. And so the court below held was the law, and that such was the action, notwithstanding the conduct of the Sandovals was characterized as deceitful and fraudulent.

Neither is it now contended that an agent who makes a secret profit in the execution of his agency may not be compelled to disgorge and required to do so in an action upon an implied promise.

Neither do the appellants now deny that there was abundant evidence to support the finding that they did

agree to act as the plaintiff's agents and to buy for him from the supposed owner the mine they did buy; nor do they now deny that they represented to the plaintiff that they had bought the property for him at the price averred, when in fact they had paid for same only one-half that price.

What they do say is, that as a matter of law there was no relation of principal and agent, since there was conclusive evidence that they were themselves the owners of the property at the time they agreed to act for the plaintiff in buying it. Upon this hypothesis it is said that there is no evidence to support a judgment grounded upon their liability for a breach of duty as agents, since one may not act as agent for the buyer in the sale of property of which he is himself the sole owner.

But the finding of fact was that the defendants, after agreeing to purchase in behalf of the plaintiff, "*and in pursuance of that agreement*, purchased the said mining property," etc. This finding is a flat contradiction of the claim that they were the owners when they agreed to represent the plaintiff in buying the property. We lay out of consideration, in the present situation of this case, all conflicting oral evidence relating to the agreement. There is left only what is said to be conclusive documentary evidence to support the claim. But that does not do so. It consists in a contract antedating the agency agreement, by which the real owners, Ortiz and two others, agreed to sell the mine in question to one of the Sandovals, in consideration, with right of redemption within six months, of one thousand and sixty pesos, Mexican, with the further agreement that they would not exercise the right of redemption if Sandoval should pay to them "the further consideration of the sum of twenty thousand Mexican pesos." This was nothing more than an option, of which Sandoval availed himself in time, and while executing his agreement of agency.

Every other suggestion of error hinges upon this alleged inability to act as agent, or upon points of procedure clearly foreclosed by the rulings of the Arizona courts.

Judgment affirmed.

ANDERSON *v.* UNITED REALTY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 27. Argued November 1, 1911.—Decided December 4, 1911.

Where there is a separable controversy and requisite diversity of citizenship it is the duty of the state court to accept the petition and bond and proceed no further in the case; trial and judgment thereafter by the state court would be *coram non judice* unless its jurisdiction over the cause be restored.

The state court may recover jurisdiction over a cause which has been removed by defendants having separable controversy, and where plaintiff has an order entered dismissing it against the removing defendants and other defendants having like ground of removal reciting that in consideration of such dismissal the petition for removal is withdrawn, the state court has jurisdiction to proceed against the remaining defendants. *National Steamship Co.* v. *Tugman*, 106 U. S. 118, distinguished.

79 Oh. St. 23, affirmed.

THE facts are stated in the opinion.

Mr. Rhea P. Cary for plaintiff in error:

There was in this case a separable controversy between the Hammond Company and the original plaintiff, who is the plaintiff in error herein. *Barney* v. *Latham*, 103 U. S. 205; *Bacon* v. *Felt*, 36 Fed. Rep. 871; *Stanbrough* v. *Cook*, 38 Fed. Rep. 369; *Pacific Railroad Removal Cases*, 115 U. S. 2; *Bates* v. *Carpenter*, 98 Fed. Rep. 452.

The fact that neither the plaintiff or defendant was an inhabitant of the Northern District of Ohio, did not preclude the Circuit Court of the United States from acquiring jurisdiction upon the filing of the petition and bond for removal in the common pleas court of Lucas county, Ohio. *McCormick Machine Co.* v. *Walthers*, 134 U. S. 41; *St. L. & S. F. Ry. Co.* v. *McBride*, 141 U. S. 127; *Ex parte Wisner*, 203 U. S. 449; *In re Moore*, 209 U. S. 490.

Upon the filing of the petition and bond for removal, the state court was divested of jurisdiction of the suit, and its subsequent orders were *coram non judice* and void. *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Steamship Company* v. *Tugman*, 106 U. S. 108; *Traction Co.* v. *Mining Co.*, 196 U. S. 239.

Mr. Harry E. King, *Mr. Clayton W. Everett* and *Mr. Oliver B. Snider*, with whom *Mr. Edward H. Rhoades*, *Mr. Edward H. Rhoades, Jr.*, *Mr. Elmer E. Davis*, *Mr. George A. Bassett* and *Mr. Rathbun Fuller* were on the brief, for defendants in error.

Memorandum opinion by direction of the court. By MR. JUSTICE LURTON.

The single question for our consideration upon this writ of error concerns the jurisdiction of the state court to proceed with the action after one of the original defendants had filed its petition and bond for removal to the Circuit Court of the United States.

If, as we shall assume, there was a separable controversy and the requisite diversity of citizenship, it was the duty of the state court to accept the petition and bond and proceed no further in the case. A trial and judgment thereafter would be *coram non judice*, unless its jurisdiction over the cause and the parties was in some way restored. *National Steamship Co.* v. *Tugman*, 106 U. S. 118; *Trac-*

tion Company v. *Mining Company*, 196 U. S. 239, 253. But we are of opinion that the plaintiff in error is not in a position to now assert that the state court's subsequent exercise of jurisdiction was without authority. When the removal petition and bond were filed, the plaintiff, before any order was made in the state court or the record filed in the United States court, had an order entered in the state court dismissing his action against the removing defendant and certain others having like ground of removal, the order reciting that in consideration of such dismissal the petition for removal was withdrawn. Thereafter the cause was proceeded with against the remaining defendants without the hint of any objection by either the plaintiff or the remaining defendants. Upon the contrary, many steps were taken and a long jury trial had, resulting in a verdict and judgment for the defendants. Not until the cause was carried to the Ohio Circuit Court by appeal of the plaintiff was there any objection made to the jurisdiction of the trial court.

The state court had jurisdiction over the subject-matter. It recovered jurisdiction over the remaining parties by action and conduct equivalent to a formal waiver of new process and new pleadings or any formal remander by the United States court.

The *Tugman Case*, cited above, does not help the plaintiff in error. The defendant whose right to remove had been erroneously denied was held not to have waived his right to remove by subsequently consenting to a reference of the case to a referee, or by defending the suit both before the referee and the court without protesting. This court said (p. 123):

"When the State court adjudged that it had authority to proceed, the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest at subsequent stages of the trial against its ex-

ercise of jurisdiction. Indeed, such a course would scarcely have been respectful to the State court, after its ruling upon the point of jurisdiction had been made."

If, on the other hand, he had thereafter invoked the court's jurisdiction in his own behalf, he would not have been permitted later to deny it. *Texas & Pac. Ry.* v. *Eastin*, 214 U. S. 153; *Garrozi* v. *Dastas*, 204 U. S. 64, 73; *C. & O. Ry.* v. *McDonald*, 214 U. S. 191.

Judgment affirmed.

UNITED STATES *v.* STEVER.

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

No. 448. Argued October 20, 1911.—Decided December 4, 1911.

Congress will not be supposed to make the same offense indictable and punishable under either of two distinct provisions under which the procedure and the penalties are different.

Where general words follow words descriptive of particular actions they should, unless clearly manifested to the contrary, be construed as applicable to cases or matters of like kind with those described by the particular words.

Sections 3894 and 5480, Rev. Stat., each apply to different offenses and are to be construed as legislation *in pari materia.*

Section 3894, Rev. Stat., relates particularly to lottery schemes, and the general words "concerning schemes devised for the purpose of obtaining money or property by false pretenses" are limited to schemes having a similitude to lotteries and other like schemes particularly described and do not extend to the general schemes to defraud covered by § 5480, Rev. Stat.

THE facts, which involve the construction of §§ 3894 and 5480, Rev. Stat., and what constitute offenses thereunder, are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States:

Upon this writ of error the Government seeks only to have reviewed the correctness of the court's ruling as to the scope of § 3894, and the validity of the first count. Section 3894 is not limited either in its terms or by necessary implication to lottery schemes.

The clause "or concerning schemes devised for the purpose of obtaining money or property under false pretenses" is grammatically completely separated from, and has no necessary relation to, the preceding clause, "concerning any lottery, so-called gift concert, or other similar enterprise," etc. The statute on its face indicates that Congress was prohibiting the carriage in the mail and the delivery through the post office of two distinct classes of matter.

The prohibition in § 3894 is of the carriage in the mails and the delivery through the post office of matter concerning a peculiar class of frauds, to wit, "schemes devised for the purpose of obtaining money or property under false pretenses." Section 5480 is intended primarily to reach any person who "having devised or intending to devise any scheme of artifice to defraud," etc., uses the mails in furtherance of such scheme. The prohibition in § 3894 extends to anyone, whether he had devised the scheme to defraud or not, or whether he was connected with the postal service or not. Section 5480 is confined to the punishment of devisers of a scheme or artifice to defraud.

Mr. W. M. Smith and *Mr. J. S. McKenney* for defendants in error:

Section 3894, Rev. Stat., only includes, by proper construction, lottery schemes. *United States* v. *Sauer*, 88 Fed. Rep. 249; *Horner* v. *United States*, 143 U. S. 570; *Nichols* v. *State*, 26 N. E. Rep. 839.

Where words of a particular description in a statute are

followed by general words that are not specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things, or cases of like kind as those designated by the particular words. Lewis' Sutherland Stat. Const., § 443; *Alexander* v. *Alexander*, 5 Cranch, 1, 7; *United States* v. *Freeman*, 3 How. 556–564; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272, 301; *Cope* v. *Cope*, 137 U. S. 682–688; *Stockdale* v. *Insurance Co.*, 20 Wall. 323; *United States* v. *Garrettson*, 42 Fed. Rep. 22; Bishop on Statutory Crimes, § 246 *et seq.*; *Chapman* v. *Forsythe*, 2 How. 202; *Woolsey* v. *Cade*, 54 Alabama, 385; *Amos* v. *The State*, 73 Alabama, 501; Bishop on Statutory Crimes (2d ed.), §§ 119, 193, 194, 218, 220, 227.

Sections 3894 and 5480 were enacted at the same time and must be read together, and it must be presumed that they will be harmonious; they cannot be so blended as to constitute an offense not contained in either, considered separately. *United States* v. *Sauer*, 88 Fed. Rep. 240; *McDaniel* v. *United States*, 87 Fed. Rep. 324.

The count is bad, in charging "Money" instead of "Property." This count is also bad for duplicity, as it charges both causing to be deposited for mailing, and causing to be delivered, etc. *Bates* v. *State*, 124 Wisconsin, 612; *United States* v. *Conrad*, 59 Fed. Rep. 458; *Horner* v. *United States*, 44 Fed. Rep. 677; *S. C.*, 143 U. S. 207.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error to review a judgment quashing an indictment as not stating an offense triable in the Western District of Kentucky. The indictment contained two counts. The first is drawn to bring the offense within § 3894, Revised Statutes, as amended, and the second is based upon § 5480, Revised Statutes, and is for a conspir-

acy to commit the offense charged in the first count. The Government now concedes that the latter count states no offense within the Western District of Kentucky and withdraws the assignments of error relating to the judgment quashing it.

The count to be considered charges, in substance, that the defendants, on April 20, 1908, in the State of Iowa, devised a certain scheme for the purpose of obtaining money, etc., "by and under false pretenses," from various persons, among others, certain persons named, residing at Colesburg, within the jurisdiction of the court, to be effected by means of the United States mail through correspondence with them. The scheme, summarily stated, was to be effected by inducing persons, who should read their advertisements offering high grade cattle for sale, to open correspondence with them. That then the defendants were, through the mail, to make false and fraudulent representations as to the character of the cattle they offered for sale, and thereby induce such correspondents to come and inspect the cattle at Fairfield, Iowa, and that after a sale of cattle so inspected, were to substitute inferior cattle in the place of those inspected and sold. It is then averred that the defendants succeeded in opening up correspondence with certain persons at Colesburg, Kentucky, and that in furtherance of said scheme and for the purpose of obtaining money under false pretenses they, the defendants, on April 20, 1908, "unlawfully did knowingly and fraudulently deposit and cause to be deposited in the mail . . . at Fairfield, Iowa, and did then and there knowingly cause to be sent by said mail of the United States a certain letter to be conveyed and delivered by said mail of the United States at Colesburg, in the State of Kentucky, and in the western district thereof," to be delivered to persons there addressed and residing, which letter was calculated to accomplish the scheme intended, and which said letter the defendants are charged

as "having caused to be delivered by mail to the person addressed."

For convenience we set out in the margin §§ 3894 and 5480, Revised Statutes, as amended.[1]

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[1] SEC. 3894. No letter, postal-card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money-order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter carrier, nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through cor-

The last clause of § 3894 provides that an offense against any of the provisions of the section "may be proceeded against . . . either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, *or at which it is caused to be delivered by mail to the person to whom it is addressed.*"

The claim is that an indictment lies in the Western District of Kentucky, because that is the district in which the defendants caused the letter mentioned "to be delivered by mail" to the person addressed.

The Government has suggested that there is a distinction at common law between a false pretense and an in-

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respondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names on terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside of the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

dictable cheat or fraud. It may be conceded that at the common law a false pretense is not a promise, but a fraudulent and false representation of an existing or past fact, designed to induce one to part with money or goods. Bishop on Criminal Law, 6th ed., §§ 415, 419, and cases, English and American, there cited.

Whether the facts averred in this count constitute a scheme to obtain goods or money by a common-law false pretense may admit of grave doubt. But whether that be so or not, it would require very subtle distinction to conceive of a use of the mail to promote a scheme to obtain property or money by means of false pretenses which would not also be a "scheme or artifice to defraud" within the plain meaning of § 5480. For the purpose of the present discussion it is not important whether the pleader has characterized the scheme described as a false pretense or as "a scheme or artifice to defraud," since in either case a use of the mail prohibited by § 5480 is shown. That section was construed by this court, in *Durland* v. *United States*, 161 U. S. 306, 313, as "including everything designed to defraud by representations as to the past or present or suggestions and promises as to the future."

If, then, this indictment is also maintainable under § 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a scheme to defraud indictable and punishable under either of two distinct provisions, and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments. Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of pun-

ishment under one not possible under the other. Thus, under § 3894 an indictment will lie in the district in which the defendant caused the letter to be delivered by the mail to the person addressed. That is not the case under § 5480. Under section 3894, one may be imprisoned not longer than one year, while under the other he may be imprisoned for eighteen months. Under § 3894, he is subject to indictment for any number of violations. Under the other the indictment may only charge offenses to the number of three committed within the same six calendar months.

No such purpose can be fairly said to have actuated Congress. The two sections are intended to prevent the use of the mail for certain purposes. The one applies to the use of the mail for the purpose of promoting lotteries or other like schemes of chance. The other is intended to prohibit the use of the mail to carry on schemes of general fraud, the language being "any scheme or artifice to defraud." A scheme to defraud by means of false pretenses is, as we have seen, "a scheme or artifice to defraud," within the plain meaning and purpose of this section. The general words, "or concerning schemes devised for the purpose of obtaining money or property under false pretenses," found in § 3894, do not harmonize with the general purpose of that section, if construed as urged by the learned Attorney General. So construed, they would trench upon the ground covered by § 5480. The words referred to follow particular words descriptive of schemes of gain dependent upon chance, and are followed by further particular words relating to the same kind of lottery schemes.

In such circumstances, unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words.

Construing the two sections together as legislation in

pari materia, we find no manifest legislative intent forbidding the application of the rule of construction referred to. We therefore conclude that the words "or concerning schemes devised for the purpose of obtaining money or property by false pretenses," are to be limited to schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section. This view finds strong support in the case of *United States* v. *Sauer*, 88 Fed. Rep. 249, where the opinion was by Judge Severens, then District Judge.

The judgment of the court below is accordingly

Affirmed.

UNITED STATES *v.* MUNDAY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 593. Argued October 25, 1911.—Decided December 4, 1911.

Section 2350, Rev. Stat., is, by §§ 1 and 4 of the act of April 28, 1904, 33 Stat. 552, c. 1772, continued in force in the District of Alaska, and prohibits more than one entry of coal land by or for the same person or association of persons.

The policy adopted by Congress of restricting one coal land entry to each qualified entryman was to prevent monopolization of coal lands by securing to every citizen the right to obtain for himself one tract of not exceeding one hundred and sixty acres.

The rule of construction that an intention to depart from a long enforced uniform policy will not be imputed to Congress, applied in construing the act of April 28, 1904, 33 Stat. 552, c. 1772, relative to coal lands in Alaska.

A policy to confine the entryman to one entry is not affected by the fact that Congress leaves him free to assign a location made in good faith. *United States* v. *Keitel*, 211 U. S. 370.

All the statutes affecting coal land entries—act of March 3, 1873,

17 Stat. 607, c. 279, now §§ 2347–2349, Rev. Stat.; act of June 6, 1900, 31 Stat. 658, c. 996, and act of April 28, 1904, 33 Stat. 525, c. 1772—are in *pari materia* and must be read together, and no part of the earlier acts is to be regarded as inoperative unless no other construction of the later legislation is reasonable.

The single object of the act of 1904 in regard to coal lands in Alaska was to provide for the sale of unsurveyed coal lands, and it becomes inoperative as soon as the lands are surveyed.

THE facts, which involve the construction of statutes relating to location of coal lands in Alaska, are stated in the opinion.

The Solicitor General for the United States.

Mr. E. C. Hughes, with whom *Mr. Wilmon Tucker* was on the brief, for defendant in error, Munday.

Mr. Charles W. Dorr and *Mr. E. C. Hughes*, with whom *Mr. Hiram E. Hadley* was on the brief, for defendant in error, Shiels.

MR. JUSTICE LURTON delivered the opinion of the court.

This writ of error is prosecuted by the United States from a judgment sustaining a motion to quash an indictment.

The indictment is founded upon § 5440, Revised Statutes, and charges a conspiracy to defraud the United States by illegally obtaining title to forty contiguous tracts of coal lands in the District of Alaska, aggregating six thousand and eighty-seven acres, collectively known as the Stracey group, and averred to be of the value of ten million dollars.

The indictment is too long to be set out, even in an abbreviated form. The gravamen of the conspiracy charged is that the defendants induced or procured divers qualified persons to take the several steps required by law

to make locations of Alaska coal lands, not for themselves, but as the mere agents or representatives of the defendants for the purpose of securing to two named corporations a larger area of coal land than such corporations could lawfully locate for themselves.

For the defendants in error it has been very ably urged that since the concededly applicable coal land law gives to every individual, who is of age and a citizen of the United States, the right to make a coal land location for himself, and to assign his location when made, that there can be no fraud if he makes such location in the first instance for the benefit of another competent to buy the location when made. But if the provisions of the general coal land entry law found in § 2350, Revised Statutes, apply to the entry of coal lands in Alaska, the contention is now no longer an open one under the repeated interpretations of that section found in the cases of *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *United States* v. *Keitel*, 211 U. S. 370, and *United States* v. *Forrester*, 211 U. S. 399.

The corporations by whose procurement the forty locations by forty different persons were made, under the express terms of the statute referred to, were disqualified from making more than one location each, and being thus disqualified could not make a second location through an agent acting for their use and benefit. Any construction which would permit one prohibited by express command of the law from making more than one entry or location to make other entries or locations through the agency of a third person, qualified to make an entry for himself, would be to sanction a device which would nullify the purpose of the restriction.

The result must turn upon whether the restrictive features of § 2350, Revised Statutes, are applicable to the sale of coal lands in Alaska. The ruling of the court below and the contention made by the defendants in error is that the act of April 28, 1904, 33 Stat., p. 525, c. 1772, is the

only act applicable to the *unsurveyed* coal lands of Alaska. That act will be found set out in the margin.[1]

It purports to be an amendment of the act of June 6,

[1] That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

1900, 31 Statutes at Large, p. 658, c. 796, which extended to Alaska "so much of the public land laws of the United States . . . as relate to coal lands, namely, §§ 2347 to 2352, inclusive, of the Revised Statutes." The sections of the general law thus extended to Alaska are set out in the margin.[1]

These sections came from the act of March 3, 1873, 17

SEC. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

SEC. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska.

[1] SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved; *Provided*, That when any association of not less than four

Statutes at Large, p. 607, c. 279. The only change made is in the substitution in § 2350 of the words, "The three preceding sections shall be held to authorize," etc., for the words of the fourth section of the original act, reading, "That this act shall be held to authorize,"—a change made necessary because the provisions of the original act are made a part of a chapter of the general land law embracing the sale of other public lands. The act of 1873, as thus carried into the Revised Statutes, did not permit an entry of coal lands which had not been surveyed. The

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persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

entry permitted was only "by legal subdivisions." The coal lands in Alaska were unsurveyed. Thus it happened that although the act of June 6, 1900, extended the provisions of the general law to Alaska, that law was for a time inoperative because the coal lands could not be entered "by legal subdivisions," when no such legal subdivisions existed. So obviously was this the case that a circular from the Department of the Interior was issued, instructing the registers and receivers in the district of Alaska that no coal filing nor entry could be filed in their offices until there should be filed with them "the official plat of survey of the township" in which entries were sought to be made. This was the situation which brought about the act of April 28, 1904, set out in the margin.

The contention is that although this act of 1904 expressly provides "that all of the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska," that the restrictions in the general coal land law authorizing "only one entry by the same person or association of persons," etc., is in conflict and therefore not operative to locations authorized by the later legislation.

Prior to the act of 1873, the disposition of coal lands was included in the general provisions regulating the sale of public lands, and under which there were no limitations upon the number of entries one person might make. But in 1873, when Congress sought to deal with the specific subject of the sale of coal lands, the rule was adopted of confining every qualified entryman to one entry, and every association of persons, not less than four in number and under certain conditions, to the entry of not exceeding six hundred and forty acres. A corporation has been held to be an association of persons within the meaning of this section. *United States* v. *Trinidad Coal Company*, 137 U. S. 160, 169. The policy of this restriction was to pre-

vent a monopolization of such coal lands by securing to every citizen the right to obtain for himself one tract, not exceeding one hundred and sixty acres, of such coal land. *United States* v. *Trinidad Coal Company*, cited above; *United States* v. *Keitel*, 211 U. S. 370.

That continued to be the uniform policy of Congress, and so continues, unless a departure has been made by the act of 1904. But, if so, it is only as to the unsurveyed coal lands of Alaska, for undoubtedly when such lands shall be surveyed, they will come at once under the restrictions of the general law as found in §§ 2347 to 2350, inclusive, of the Revised Statutes, since the act of 1904 applies only to the unsurveyed public lands of Alaska.

There occurs to us no reason for assuming that Congress intended to abandon the policy of keeping open the right of every citizen to enter one tract and no more of the unsurveyed coal lands of Alaska that would not lead also to the abandonment of the policy as respects coal lands which had been surveyed.

An intention to depart from a uniform policy, so long enforced in regard to coal lands, should not be imputed to Congress unless the act of 1904 admits of no other construction. *Morton* v. *Nebraska*, 21 Wallace, 660, 669.

But it is said that the purpose to depart from the policy which imposed a restriction upon the number of locations which had before been authorized is manifest in the provision of § 2 of the act in question, which requires that the locator or locators, "*or their assigns*" who are citizens of the United States, shall receive a patent to the lands so located, etc. The fact that one who has made a lawful location is permitted to make an assignment, as is the plain implication from the requirement that a patent "shall" issue to "the locator or his assigns," is not indicative of a purpose to abandon the prohibition upon more than one location. By going upon coal land, opening up a mine, permanently marking the boundaries, and filing

and making the notices required under the law one, otherwise qualified, initiates a claim to the land and may, by further compliance with the law, earn the right to a patent. That the policy of the law stops at this point and leaves him free to assign his location, does not impeach the intent of Congress to confine a locator to a single location. The prohibition is against more than one entry, not against alienation after a good-faith location.

Of the restrictions concerning the entry of land under the Timber and Stone Act, it was said: "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase." *United States* v. *Budd*, 144 U. S. 154, 163.

The same argument was addressed to this court in *United States* v. *Keitel*, 211 U. S. 370, 389, as a reason for confining the prohibition to one entry made by a qualified person for the use and benefit of another who was disqualified from making a second entry. But this court said: "True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States to sell the same after he has become the owner of the land. The absence, however, of a limitation on the power to sell after acquisition affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. This clearly follows, since the right to sell that which one has lawfully acquired neither directly nor indirectly implies the authority to unlawfully acquire in violation of an express prohibition." *United States* v. *Keitel*, 211 U. S. 370, 389.

Upon the same line of reasoning we find no reason for supposing that Congress intended by the act of 1904 to remove the restriction upon more than one entry by the

same person, because it imposed none upon alienation after the right to a patent had accrued by a good-faith location.

But it is said that the restriction upon the right to make more than one entry by the same person applied only to entries made under *the three preceding sections*, i. e., §§ 2347, 2348 and 2349. That this peculiar limitation has no material significance, we have already pointed out, its presence in the section being due to the fact that § 2350 and the preceding three sections, constituting the original act of 1873, were placed in the midst of a chapter embracing many other provisions in no wise related to the entry of coal lands.. It is, however, to be borne in mind that this act of 1904 is but an amendment to the act of 1900, which extended these sections of the general coal entry law to the district of Alaska. The three acts are in *pari materia* and must be read together, and no part of the previously existing law upon the same subject is to be regarded as inoperative unless no other construction of the later legislation is reasonable.

The single object of Congress in the act of 1904 was to provide for the sale of coal lands which had not been surveyed. The provisions for the sale of such coal lands, in or out of Alaska, which had been surveyed, so that entries could be made "by legal subdivision," had already been covered by the general law which had been extended to Alaska. The conditions in Alaska were but temporary. When the coal land there should be brought under the system of surveys which prevailed in the better settled parts of the country, the act of 1904 would cease to be operative, having nothing to which it could apply. The legislation, read in the light of the situation and of the uniform policy which had so long prevailed of prohibiting more than one entry to one person, makes it plain that Congress did not intend to except the unsurveyed coal lands of Alaska from the operation of the restrictions which attached to

the sale of the surveyed coal lands in Alaska and elsewhere.

The judgment must be reversed and the case remanded for further proceedings, not inconsistent with this opinion.

Reversed.

MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY *v.* CITY OF OLATHE, KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 726. Motion to dismiss. Submitted November 13, 1911.—Decided December 4, 1911.

Unless it appears from the record that the judgment sought to be reviewed finally determines the cause this court is without jurisdiction.

Where the judgment sought to be reviewed affirms the judgment below but merely sustains the demurrer without dismissing the suit, so that the cause is left standing in the lower court for further proceedings, it is not a final judgment reviewable by this court.

THE facts are stated in the opinion.

Mr. Frank Doster, Mr. A. F. Hunt, Jr., Mr. A. M. Harvey and *Mr. J. E. Addington*, for plaintiffs in error.

Mr. Stephen H. Allen for defendant in error.

Memorandum opinion by direction of the court. By MR. JUSTICE HUGHES.

Motion to dismiss. This suit was brought by the Railway Company, plaintiff in error, against the City of Olathe, Kansas, in the district court of Johnson County,

in that State, to recover damages caused by the repeal of an ordinance authorizing the use of certain streets of the city for an interurban railway and by the consequent prevention, until the passage of a new ordinance, of its construction and operation. The defendant demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action. The District Court sustained the demurrer, and its decision was affirmed by the Supreme Court of the State. And this writ of error is brought.

The record fails to disclose a final judgment. The Supreme Court affirmed the judgment of the lower court, but this merely sustained the demurrer without dismissing the suit. The Supreme Court did not direct its dismissal, but the cause was left standing in the court below for such proceedings as might be had according to law after the decision on the demurrer, either by amendment of the petition or entry of final judgment.

As it does not appear from the record that the judgment sought to be reviewed was one which finally determined the cause, this court is without jurisdiction. *Miners' Bank of Dubuque* v. *United States*, 5 How. 213; *McComb, Executor*, v. *Commissioners of Knox County*, 91 U. S. 1; *Great Western Telegraph Company* v. *Burnham*, 162 U. S. 339; *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130.

Dismissed.

MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY *v.* CITY OF OLATHE, KANSAS. (No. 2.)

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 727. Motion to dismiss. Submitted November 13, 1911.—Decided December 4, 1911.

When the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract claimed to have been impaired, the case stands as though the subsequent law had not been passed and this court has no jurisdiction. *New Orleans Water Works* v. *Louisiana Sugar Refining Co.*, 125 U. S. 38.

Where a franchisee refuses to pay the agreed compensation on the ground that a subsequent ordinance deprived it of a part of the franchise granted, but the state court decides that it has had substantially everything and that compensation is due without regard to the part affected, no effect is given to the subsequent ordinance, no question of impairing the obligation of the contract is involved, and there being no Federal question this court has no jurisdiction under §§ 709, Rev. Stat.

THE facts are stated in the opinion.

Mr. Frank Doster, Mr. A. F. Hunt, Jr., Mr. A. M. Harvey and *Mr. J. E. Addington*, for plaintiffs in error.

Mr. Stephen H. Allen for defendant in error.

Memorandum opinion by direction of the court. By MR. JUSTICE HUGHES.

Motion to dismiss. The city of Olathe, Kansas, granted to the Railway Company, plaintiff in error, the privilege

of using certain streets for its railway, and the Railway Company agreed to pay therefor the sum of $9,000 when the road was completed. This suit was brought in October, 1908, to recover this amount and the Railway Company defended upon the ground that the road had not been completed and hence that the money was not due. It appeared that the company had built and was operating its railway over the entire route save only a certain "turn out," the construction of which the city prevented. On the trial, evidence was received, over objection, of a resolution adopted by the Mayor and Common Council on March 21, 1910, pending the suit, which purported to set aside their approval of the plans and specification so far as the "turn out" was concerned. But the decision of the court, which went for the city, was not in any sense based on that. The trial court found the facts to be as follows:

"The map or ground plan of the said proposed railway contained a red line indicating the main line of the said railway, over the streets of said city, and in addition to said main railway the Y on Santa Fe Street was indicated on said map. The said map also contained a red line, which indicated a contemplated turn out on East Park Street near the State Institution. The specifications filed with the City Clerk by the defendant company specifies in detail the work therein named, but does not mention the 'turn out' above mentioned. The Mayor and members of the City Council at the time did not know that the red line above mentioned indicated the turn out claimed by the defendant.

"On August 28th, 1907, the city brought an injunction suit restraining the defendant company from laying the said switch or turn out above mentioned, which suit is still pending.

"The said Railway Company laid its main tracks, together with the Y on Santa Fe Street, and commenced operating cars over the entire distance from some time in the

month of August, 1907, and has continued to use said track down to the present time, excepting the period of a few months when the operation of said railway was interrupted by changing from a motor car service to an electric service.

"The turn out above mentioned is not a necessary part of the construction of said road in order to reasonably operate the same throughout said city, and to the terminus, as provided in said ordinance.

"The road as contemplated by said franchise was substantially completed within the meaning of said franchise in the month of August, 1907."

Judgment, entered accordingly, was affirmed by the Supreme Court of the State, and the grounds of its decision are thus stated in its opinion:

"In brief, the question involved is whether the work to be done by the company under the franchise can be regarded as having been completed, in such sense as to make the payment of the $9,000 due, in view of the fact that the city has prevented the construction of the turn out. The company maintains that upon the acceptance of its specifications it acquired a contract right to build the turn out, which cannot be affected by any subsequent action of the city. The city contends that it cannot by contract divest itself of the power to control the use of the streets for the benefit of the public, and that the turn out, if constructed at the point designated, would unreasonably interfere with the use of the street as a highway. These matters need not be determined in this case. They are proper subjects for consideration in the injunction suit. In whatever way they may be determined we think the judgment here appealed from must be affirmed upon the ground that the work of the company authorized by the franchise has long since been substantially completed. The location of the turn out is a mere detail. The right of the company to construct it at the place selected can be determined in the

injunction action. A final judgment for the city in that proceeding will demonstrate that the stopping of work on the turn out was rightful and therefore could not be a just ground for the company's refusing to make the promised payment. If, on the other hand, it develops that the injunction was wrongfully issued the company's remedy for any consequent injury lies in seeking damages therefor, not in delaying payment of the amount agreed upon as the consideration for the granting of the franchise."

It thus plainly appears that the decision did not give effect to the subsequent resolution, which it is asserted impaired the obligation of the contract, but was placed distinctly upon the ground that without regard to that resolution, or to the question of the right of the company to construct the turn out, the money was payable, as the road had been substantially completed. The judgment would have been the same had the resolution not been adopted at all. No effect whatever has been given to it by the state court and this court is without jurisdiction to review its judgment. *Klinger* v. *Missouri*, 13 Wall. 257; *Kennebec Railroad* v. *Portland Railroad*, 14 Wall. 23; *New Orleans Water Works* v. *Louisiana Sugar Refining Company*, 125 U. S. 18; *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S. 371, 392; *Eustis* v. *Bolles*, 150 U. S. 361; *Bacon* v. *Texas*, 163 U. S. 207; *New Orleans Water Works Company* v. *Louisiana*, 185 U. S. 336, 350. As was said by Mr. Justice Gray in *New Orleans Water Works* v. *Louisiana Sugar Refining Company* (125 U. S. pp. 38, 39): "But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

Dismissed.

MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY *v.* CITY OF OLATHE. (No. 3.)

ERROR TO SUPREME COURT OF THE STATE OF KANSAS.

No. 728. Motion to dismiss. Submitted November 13, 1911.—Decided December 4, 1911.

Decided on authority of preceding case.

Same counsel as in preceding case.

Per Curiam by MR. JUSTICE HUGHES.

In case No. 728 between the same parties the same judgment will be entered as in the preceding case No. 727.

MARTIN *v.* WEST.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 33. Argued November 2, 1911.—Decided December 4, 1911.

Whether a state statute providing remedies for damages to property within the State includes those to specified classes of property is for the state court to determine, and this court accepts the construction so given. *The Winnebago*, 205 U. S. 354.

Whether a tort be maritime or non-maritime must be determined by the character and locality of the injured thing at the time the tort was committed, and subsequent facts as to location furnish no criterion. *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388.

Where a vessel by its own fault collides with and injures a bridge which is essentially a land structure and which is maintained and used as an aid to commerce on land, the tort is non-maritime.

The remedy for a non-maritime tort provided by the state statute

can be pursued in the state court against the vessel committing it, even though the statute gives a lien on the vessel.

When the interruption of interstate commerce by reason of the enforcement of a state statute otherwise constitutional is incidental only, it will not render the statute unconstitutional under the commerce clause of the Constitution.

A state statute which gives a lien upon all vessels, whether domestic or foreign and whether engaged in interstate or intrastate commerce, for injuries committed to persons and property within the State and providing that the lien for non-maritime torts be enforced in the state courts and which is not in conflict with any act of Congress, does not offend the commerce clause of the Constitution because it incidentally affects the use of a vessel engaged in interstate commerce; and so held as to §§ 5953 and 5954 of the Code of the State of Washington.

51 Washington, 85, affirmed.

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

Mr. John Trumbull, with whom *Mr. Aldis B. Browne, Mr. Alex. Britton* and *Mr. Evans Browne* were on the brief, for plaintiffs in error:

The tort was maritime. Locality fixes the jurisdiction. *The Plymouth,* 3 Wall. 20.

The substance and consummation of the injury complained of must have taken place on the high seas, or navigable waters, in order that the admiralty should have jurisdiction. *The Plymouth,* 3 Wall. 20; *In re Phenix Ins. Co.,* 118 U. S. 610; *Johnson* v. *Chicago Elevator Co.,* 119 U. S. 388; *Cleveland &c. R. R. Co.* v. *Cleveland Steamship Co.,* 208 U. S. 316; *Duluth Superior Bridge Co.* v. *Steamer Troy,* 208 U. S. 321.

In all these cases the wrong or negligence occurred on navigable waters, but the injury and damage was consummated on the land. If, therefore, the wrong or negligence originates on the land, but the substance and consummation of the injury and damage—in other words,

the cause of action—takes place upon the high seas or navigable waters, the admiralty must have exclusive jurisdiction. *Hermann* v. *Port Blakeley Mill Co.*, 69 Fed. Rep. 646.

The wrong complained of is the negligence in navigating the vessel, so that she ran against the supporting piers of one of the spans of the bridge. The substantial damage consisted in (some hours thereafter) the span falling into the river and being broken up and almost wholly destroyed. See *The City of Lincoln*, 25 Fed. Rep. 835, and *Riley* v. *Phila. & R. Ry. Co.*, 173 Fed. Rep. 839.

A State cannot by a lien law interrupt interstate and foreign commerce where no express statutory authority for such result can be found in the Federal enactments. *The Roanoke*, 189 U. S. 185; *Hall* v. *De Cuir*, 95 U. S. 485, 498.

Even if the Supreme Court of Washington has held the statute of that State applicable to sustain the attachment of the vessel thereunder for the tort alleged, such construction by that court cannot be accepted as binding in this court. *The Chusan*, 2 Story, 455; *Guffey* v. *Alaska & P. S. S. Co.*, 130 Fed. Rep. 271, 278.

A statute is to be so construed, if possible, as to leave it a valid enactment.

The state law either does not include the case of injury to a bridge by a foreign vessel engaged in interstate commerce or, if it does, it is clearly unconstitutional and void.

Where it is necessary to determine whether or not the rights secured by the Constitution or some law of the United States have been violated by a state statute or a municipal ordinance, this court will place its own independent construction upon such state law. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Proprietors of Bridges* v. *Hoboken Land & Improvement Co.*, 1 Wall. 116; *Delmas* v. *Merchants' Mutual Ins. Co.*, 14 Wall. 661; *Butz* v. *Muscatine*, 8 Wall. 575; *Northwestern University* v. *Illinois*,

99 U. S. 309; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Huntington* v. *Attrill*, 146 U. S. 657; *Mobile & Ohio Ry. Co.* v. *Tennessee*, 153 U. S. 486; *Scott* v. *McNeal*, 154 U. S. 34; *Easton* v. *Iowa*, 188 U. S. 220.

The Washington statute (§§ 5953 and 5954) was not intended to include, and does not include in its terms, injuries to a fixed structure like a bridge; nor does it give a lien on a foreign vessel engaged in interstate commerce for such injuries.

Mr. W. C. Keegin for defendant in error submitted:

The case is one that was within the jurisdiction of the state court, and the admiralty court has no jurisdiction thereover. *The Savannah*, 21 Fed. Cases, No. 12,384; *City of Milwaukee* v. *Curtis*, 37 Fed. Rep. 705; *The John C. Sweeney*, 55 Fed. Rep. 540; *The Poughkeepsie*, 162 Fed. Rep. 494, aff'd *per curiam*, 212 U. S. 557; *The Plymouth*, 3 Wall. 20; *In re Phenix Ins. Co.*, 118 U. S. 610; *Johnson* v. *Chicago &c. Co.*, 119 U. S. 388; *Cleveland & R. Ry. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316; *Duluth Bridge Co.* v. *Steamer Troy*, 208 U. S. 322.

The statute sufficiently embraces this case. Its plain and simple language renders all steamers and vessels liable for injuries committed by them to persons or property within the State, or while transporting such persons or property to or from the State.

Provisions of state statutes like those here in question are valid and effective when they do not intrench upon the domain of the admiralty. *Johnson* v. *Chicago &c. Co.*, 119 U. S. 388; *Knapp* v. *McCaffrey*, 177 U. S. 638; *Iroquois Trans. Co.* v. *De Laney Co.*, 205 U. S. 355; *Davis* v. *Cleveland &c. Ry. Co.*, 217 U. S. 157; *Berwind-White* v. *Metropolitan S. S. Co.*, 166 Fed. Rep. 782, aff'd 173 Fed. Rep. 471. See also *Olsen* v. *Birch & Co.*, 133 California, 479; *The Victorian*, 24 Oregon, 121; *Scatcherd Lumber Co.* v. *Rike*, 113 Alabama, 559; *Globe Iron Works* v. *Steamer*,

100 Michigan, 583; *Reynolds* v. *Nelson*, 116 Wisconsin, 483.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This case arose out of the collision, on May 7, 1906, of the steamer *Norwood*, owned and enrolled at San Francisco, with a supporting pier of a toll drawbridge between Aberdeen and South Aberdeen, in Chehalis County, Washington, over the Chehalis river, a navigable stream flowing into an arm of the Pacific Ocean. The pier stood upon the bed of the river, in navigable water, and the bridge was maintained and used as a connection between highways on either side of the stream, and not as an aid to navigation. The vessel was engaged in interstate commerce, was proceeding under her own motive power, and so struck the pier as to do serious injury to it and to cause one span of the bridge to collapse and fall into the river within a few hours thereafter. The cause of the collision was the negligent management of the vessel by her master and owners.

In a suit brought in the Superior Court of Chehalis County, by the owner of the bridge against the master and owners of the vessel, the former asserted and sought to enforce, under a statute of the State (Bal. Code, §§ 5953, 5954), a lien against the vessel for his damages so sustained; caused the vessel to be seized and detained by a temporary receiver, until released by the substitution of a bond by the master and owners in place of the vessel; and recovered a judgment, assessing his damages at $13,751.89 and establishing the lien so asserted. The judgment was affirmed by the Supreme Court of the State, 51 Washington, 85, and its decision is now called in question upon various grounds, which, in view of our prior decisions, require but brief notice.

The pertinent portions of the state statute are as follows:

"SEC. 5953. All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable,—

* * * * * * * *

"6. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state.

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued.

"SEC. 5954. Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, in rem, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court of this territory."

1. It is objected that the statute does not include injuries to a fixed structure like a bridge, but only to persons or property while being transported, or, at most, to movable property susceptible of being transported; and does not include a foreign vessel, such as the *Norwood*, but only domestic vessels. But of this it is enough to say, the Supreme Court of the State has construed the statute otherwise, and the case is one in which we accept that construction. *The Winnebago*, 205 U. S. 354; *Smiley* v. *Kansas*, 196 U. S. 447; *Gatewood* v. *North Carolina*, 203 U. S. 531.

2. It next is insisted that the injury, on account of which the lien was asserted, was a maritime tort, and therefore the cause of action was within the exclusive admiralty jurisdiction of the courts of the United States; the argument being that, as the collapsing span of the bridge fell into the river, it was there that the substance and consummation of the wrong took place.

It may be that the damage ensuing from the collision was aggravated by the fact that the span fell into the stream and was subjected to the force of the current and submerged in the water, but, if that be so, it furnishes no criterion for determining whether the tort was maritime or non-maritime, because that question must be resolved according to the locality and character of the injured thing—the bridge with its spans and supporting piers—at the time of the collision. It was then that the causal influence of the negligent management of the vessel took effect injuriously and gave rise to a cause of action, and what followed is important only as bearing upon the extent of the injury and resulting liability. This is well illustrated in *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388. There, the jib boom of a schooner, in the Chicago River, was negligently driven through the wall of a warehouse on adjacent land, whereby a large quantity of shelled corn, stored in the warehouse, ran out into the river and was lost. It was held that the substance and consummation of the wrong took place on land and that the tort was non-maritime, although the damage inflicted consisted chiefly of the loss of the corn. Other applications of the same principle are shown in *The Strabo*, 90 Fed. Rep. 110, and *The Haxby*, 95 Fed. Rep. 170.

As the bridge was essentially a land structure, maintained and used as an aid to commerce on land, its locality and character were such that the tort was non-maritime, *The Plymouth*, 3 Wall. 20; *The Blackheath*, 195 U S.. 361; *Cleveland Terminal and Valley Railroad Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316; *The Troy*, 208 U. S. 321; and, consequently, it was admissible to pursue in the state court the remedy provided by the state statute, even though that law gave a lien on the vessel. *Johnson* v. *Chicago & Pacific Elevator Co., supra; Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638; *The Winnebago, supra.*

3. Lastly, it is contended that the statute, as inter-

preted by the Supreme Court of the State, offends against the commerce clause of the Constitution of the United States, in that the creation and enforcement of such a lien against a foreign vessel engaged in interstate commerce is an unwarranted interference with such commerce.

We do not perceive in the statute, as interpreted and applied in the present case, any basis for this contention. As interpreted, the statute embraces all vessels, whether domestic or foreign and whether engaged in intrastate or interstate commerce, and therefore it cannot be said that its purpose is to regulate the latter. Its enforcement may occasionally and temporarily interrupt or prevent the use of a vessel in such commerce, as in this instance, but such an interference is incidental only, is almost inseparable from the compulsory enforcement of liabilities of the class in question, is not in conflict with any regulation of Congress, and does not in itself offend against the commerce clause of the Constitution. *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388, 400; *The Winnebago*, 205 U. S. 354, 362; *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway Co.*, 217 U. S. 157, 179.

We think the questions presented were rightly decided by the Supreme Court of the State, and its judgment is affirmed.

Affirmed.

UNITED STATES *v.* CONGRESS CONSTRUCTION CO.

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

No. 63. Argued November 14, 15, 1911.—Decided December 4, 1911.

Jurisdiction of the Circuit Court is in issue under § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, whenever the power of the court to hear and determine the cause as defined or limited by the Constitution or statutes of the United States is in controversy; and that covers a case where the jurisdiction of the particular Circuit Court is questioned under the statute prescribing the form and place of the action.

Under the Materialmen Act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, an action for performance of a bond given under such act can only be instituted in the district in which the contract was to be performed.

A provision in a statute prescribing that an action shall only be brought in a particular district operates *pro tanto* to displace the provisions upon that subject in the General Jurisdiction Act of 1884, 25 Stat. 433, c. 866.

THE facts, which involve the jurisdiction of this court under § 5 of the Judiciary Act of 1891 and of the Circuit Court of actions on materialmen bonds, are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States.

Mr. Jesse R. Long, with whom *Mr. Hobart P. Young* was on the brief, for Pan-American Bridge Co., plaintiffs in error.

Mr. Allen G. Mills for defendant in error Crowen.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action by the United States against the principal and sureties on a bond, given conformably to the act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, for the performance of a contract for the construction of a public building, and containing the required additional condition relating to the payment of claims for labor and materials. As stated in the declaration, the right of action arose out of the fact that, although the building had been satisfactorily completed and full payment therefor had been made to the contractor, the latter had failed to make payment to designated subcontractors who had furnished labor and materials used in the construction of the building. The action was brought in the Circuit Court of the district whereof the defendants were inhabitants, which, as appeared on the face of the declaration, was not the district in which the contract was to be performed. The subcontractors intervened and asked to have their claims adjudicated and judgment rendered thereon. The principal in the bond did not appear, but the sureties appeared specially and interposed pleas to the jurisdiction upon the ground that under the statute, conformably to which the bond was given, power to entertain the action was vested exclusively in the Circuit Court of the district wherein the contract was to be performed. The pleas were sustained and the action dismissed for want of jurisdiction, whereupon this direct writ of error was sued out and the jurisdictional question duly certified.

Before coming to that question it is necessary to consider a motion to dismiss, wherein the position is taken that the jurisdiction of the Circuit Court was not in issue in the sense of the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826. The position evidently rests upon a mis-

conception of the true import of the clause, "In any case in which the jurisdiction of the court is in issue," in that section, as interpreted by repeated decisions of this court, which, with one accord, hold that the jurisdiction of a Circuit or District Court is in issue in the sense intended whenever the power of the court to hear and determine the cause, as defined or limited by the Constitution or statutes of the United States, is in controversy. The cases of *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *United States* v. *Larkin*, 208 U. S. 333, and *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175, cited in support of the motion, do not conflict, but fully accord, with this holding. In the first case, as this court was careful to state, the power of the Circuit Court under the Federal law was not in controversy, but only its authority, in the exercise of that power, to proceed in harmony with recognized rules of law applicable alike to all courts, whether Federal or state, possessing concurrent jurisdiction. In the second case, neither the interpretation nor the operation of any statute defining or limiting the power of the District Court was in issue, but only the place of seizure of jewels sought to be forfeited as fraudulently imported, which was a subsidiary matter not amounting to a jurisdictional question in the sense of the statute. In the third case, the issue related, as was expressly said, to the applicability of a rule of law which was general in its nature and quite as controlling in other courts as in those of Federal creation. And so it was that in those cases the jurisdiction of the courts below was held not to have been in issue in the sense intended. On the other hand, in *Davidson Bros. Marble Co.* v. *United States ex rel. Gibson*, 213 U. S. 10, a case closely in point here, the application of the same guiding principle operated to sustain our jurisdiction. There, as here, the objection to the jurisdiction of the Circuit Court was that the action was brought in one district, when, under the Federal statutes, rightly interpreted, it should have been brought

in another. The objection was overruled, the case came here upon a direct writ of error, and the ruling was reviewed and reversed; it being said in the opinion (p. 18): "A party who is sued in the wrong district, and does not waive the objection, may of right appear specially and object to the jurisdiction of the court, and, the decision being against his objection, may of right bring the question directly to this court."

Here the jurisdiction of the Circuit Court, in the sense of its power to entertain the action, in view of the statutory provisions bearing upon the place for bringing such an action, was directly in issue, and so the case is rightly here upon a direct writ of error. The motion to dismiss is accordingly denied.

Whether or not, under the act of 1894 as amended in 1905, power to entertain the action was vested exclusively in the Circuit Court of the district wherein the contract was to be performed, is the question which was presented to the court below and answered in the affirmative; and the correctness of that answer turns upon the nature of the action and the provisions of the statute.

According to the declaration, the contract for the construction of the building had been satisfactorily performed, full payment therefor had been made to the contractor, the conditions of the bond had been breached only by his failure to pay designated subcontractors for labor and materials used in the construction of the building, and the object sought to be attained was the adjudication and enforcement of those demands, unaccompanied by any pecuniary demand of the United States. Manifestly, therefore, the action, although brought by the United States, was essentially one in behalf of the subcontractors, and the respective interests of the United States and the subcontractors therein were in no wise different from what they would have been had the action been brought in the

name of the United States by the subcontractors for the use and benefit of the latter.

The statute, whilst authorizing persons holding unpaid demands for labor or materials to bring such an action in the name of the United States, expressly requires that it be brought "in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy, *and not elsewhere*," and also provides that only one such action shall be brought and that it shall be so instituted and conducted, in point of notice and otherwise, that all demands of that class may be adjudicated therein and included in a single recovery.

Considering the purpose of the statute, as manifested in these provisions, we think the restriction respecting the place of suit was intended to apply, and does apply, to all actions brought in the name of the United States for the purpose only of securing an adjudication and enforcement of demands for labor or materials, whether instituted by the United States or by the creditors themselves. The reasons for the restriction are as applicable in the one instance as in the other, and it is difficult to believe that it was intended that it should be less potent when the United States acts for the creditors than when they act for themselves. The contention to the contrary is rested largely upon the supposition that, in instances like the present, where the defendants, or some of them, are inhabitants of another district, there is an insuperable barrier to the maintenance of the action in the district wherein the contract was to be performed. But this supposition is a mistaken one, for the provision restricting the place of suit operates *pro tanto* to displace the provision upon that subject in the General Jurisdictional Act, 25 Stat. 433, c. 866, § 1, and amply authorizes the Circuit Court in the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants through

the service upon them of its process in whatever district they may be found.

We conclude that the question of jurisdiction was rightly resolved by the Circuit Court, and its judgment is affirmed.

Affirmed.

UNITED STATES OF AMERICA, EX REL. TURNER *v.* FISHER, SECRETARY OF THE INTERIOR.

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

No. 60. Argued November 14, 1911.—Decided December 4, 1911.

Where, under the provisions of acts of Congress, and after a hearing, the names of relators were duly entered as Creek Freedmen by blood on the rolls made and approved by the Secretary of the Interior, rights were acquired of which the freedmen could not be deprived without that character of notice and opportunity to be heard essential to due process of law. *Garfield* v. *Goldsby*, 211 U. S. 249.

Notice to the attorney of such freedmen, given a few hours before the hearing of a motion to strike their names, on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process. *Roller* v. *Holly*, 176 U. S. 399, 409; *Hagar* v. *Reclamation Dist.*, 111 U. S. 708; *Iowa Central* v. *Iowa*, 160 U. S. 393; *Hovey* v. *Elliott*, 167 U. S. 414.

In the absence of other controlling facts, the Secretary of the Interior could have been required by mandamus to restore the names of those thus arbitrarily stricken off without notice. *Garfield* v. *Goldbsy*, 211 U. S. 249.

But mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.

Although the petition for the writ alleged that relators were freedmen duly enrolled and denied the truth of the testimony on which their names were stricken off, yet where the answer of the Secretary referred to that testimony and alleged, "on information and belief, that the relators were not freedmen members or members by blood

or marriage of the Creek Nation, and that their enrollment had been procured by fraud," a defense was stated, proof of which would have defeated the right to a restoration of relators' names, even though they had been improperly stricken from the rolls without due process. *Redfield* v. *Windom*, 137 U. S. 636, 646; *In re Sanford Co.*, 160 U. S. 257.

Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused. *In re Sanford Co.*, 160 U. S. 257.

To have issued the writ would have involved the useless thing of requiring relators' names to be reëntered, and in other proceedings having their names stricken because the original enrollment had been procured by fraud, thus admitted by the demurrer.

31 App. D. C. 332; 33 App. D. C. 195, affirmed.

In error from a judgment of the Court of Appeals of the District of Columbia affirming an order of the lower court refusing to issue a writ of mandamus requiring the Secretary of the Interior to restore the names of relators to the Freedmen Rolls of the Creek Nation, from which they had been stricken. 31 App. D. C. 332, 33 Id. 195.

Mr. Chas. H. Merillat, with whom *Mr. Chas. J. Kappler*, *Mr. James K. Jones* and *Mr. W. D. Halfhill* were on the brief, for plaintiffs in error:

The case is controlled by *Garfield* v. *Goldsby*, 211 U. S. 255.

By approval of the rolls containing their names plaintiffs in error under the statute became entitled immediately to select one hundred and sixty acres of land and to share in the tribal funds. The lands selected, plaintiffs in error being unrestricted citizens, became immediately transferable, divisible and descendible; a vested property interest. The statute makes the rolls when approved by the Secretary final rolls. It confers nowhere powers of cancellation, statutory executive discretion having been exhausted with enrollment. All subsequent executive acts looking to cancellation were unlawful. *Atlantic Del. Co.* v.

James, 94 U. S. 207; *Connor* v. *Groh*, 90 Maryland, 686; *McWilliams Inv. Co.* v. *Livingston*, 98 Pac. Rep. 914; *Cornelius* v. *Kessel*, 128 U. S. 456; Creek Agreement, § 28.

The statute declared the rolls approved to be final rolls. See *Johnson* v. *Towsley*, 13 Wall. 83.

It is *stare decisis* in this court that enrollment confers a right—a property right or privilege: also that property cannot be destroyed without notice and a hearing.

The notice given and proceedings taken by the Secretary in this case do not constitute due process of law and do not constitute notice and hearing. Due process of law in addition to notice and hearing also means a hearing before a tribunal authorized by law to conduct the proceedings it undertakes; arbitrary assumption of a power by a tribunal and proceedings by it without jurisdiction are not due process of law, and where the tribunal has jurisdiction its action is not due process of law if it refuses the accused a right to put in his defense. *Hovey* v. *Elliott*, 167 U. S. 414; *McVeigh* v. *United States*, 11 Wall. 259; *Windsor* v. *McVeigh*, 93 U. S. 277; *Dent* v. *West Virginia*, 129 U. S. 124.

By their demurrer plaintiffs in error did not admit fraud. They admitted merely illegal and unconstitutional *ex parte* proceedings by Federal officials acting outside their authority. They had sworn positively there was no fraud. Their case differs from those mandamus authorities where the plaintiff's own petition and statement admitted fraud or the equivalent showed there was no legal right, and hence, a discretion in the trial court.

Plaintiffs in error having been given vested rights by regular proceedings, must be made defendants before those rights can be forfeited. *Lalone* v. *United States*, 164 U. S. 255.

By their demurrer they admitted that Secretary Garfield believed they were fraudulently enrolled. They admit he was informed that they were fraudulently enrolled.

They did not admit that his belief was correct nor that his information was accurate. They, in their petition, specifically denied the same. Secretary Garfield averred no personal information on the subject. All that he stated was but hearsay or opinion. And it was hearsay or opinion after the fact, the event, as he admits by not denying the averments of the petition, and as the court knows judicially, he was not Secretary of the Interior or connected with that department of the Government when the names of plaintiffs were stricken from the rolls. 13 Ency. Pl. & Prac., p. 723; *Harwood* v. *Marshall*, 10 Maryland, 464; Moses on Mandamus, p. 210.

Argumentative inferences in a return, or sworn allegations which are merely constructive deductions, cannot be treated as presenting distinct issues of fact. *People* v. *Kilduff*, 15 Illinois, 502.

The authorities cited by the court below and relied upon by defendant in error are all cases where fraud was admitted or made out by petitioners' own pleadings or the admitted facts, or where parties were standing on a small legal technicality opposed to manifest intent or justice and, as a rule, where mandamus was granted, a public wrong would have been occasioned without possibility or practicability of redress. They therefore are not applicable.

Mr. Assistant Attorney General Harr for defendant in error:

Relators are not entitled to the aid of the extraordinary writ of mandamus because their enrollment was procured by fraud. This element of fraud distinguishes this case from *Garfield* v. *Goldsby*, 211 U. S. 249–264.

By their demurrer, upon which they have elected finally to stand, relators admit the allegation of fraud, as well as that they are not members of the Cherokee Nation. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257.

A court of law, following the rule in equity, will not lend its aid by the extraordinary writ of mandamus to enforce rights fraudulently acquired. High's Ex. Remedies, § 26; Merrill on Mandamus, §§ 68–72; 2 Spelling on Injunction, §§ 1371, 1380; *People* v. *Assessors*, 137 N. Y. 201; *People* v. *Jeroloman*, 139 N. Y. 14. See also to the same effect: *Commonwealth* v. *Henry*, 49 Pa. St. 530, 538; *State* v. *Commissioners of Phillips Co.*, 26 Kansas, 419; *State* v. *Graves*, 19 Maryland, 351; *Macoupin County* v. *The People*, 58 Illinois, 191; *People* v. *Ketcham*, 72 Illinois, 212; *Borough of Ansonia* v. *Studley*, 67 Connecticut, 170; *People* v. *Judge of Superior Court*, 41 Michigan, 31; *State* v. *Jersey City*, 42 N. J. Law, 94; *State* v. *Home Street Ry. Co.*, 43 Nebraska, 830.

It is unnecessary to consider whether relators had sufficient opportunity to be heard in the cancellation proceedings. Having, by their demurrer, admitted that their enrollment was procured by fraud, and having elected to stand thereon, they are not entitled to the extraordinary writ of mandamus in enforcing any rights so secured, to the injury of the Cherokee Nation.

Memorandum opinion by direction of the court. By Mr. Justice Lamar.

1. Where, under the provisions of acts of Congress, and after a hearing, the names of relators were duly entered as Creek Freedmen by blood on the rolls made and approved by the Secretary of the Interior, rights were acquired of which the freedmen could not be deprived without that character of notice and opportunity to be heard essential to due process of law. *Garfield* v. *Goldsby*, 211 U. S. 249.

2. Notice to the attorney of such freedmen, given a few hours before the hearing of a motion to strike their names, on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process.

Roller v. *Holly*, 176 U. S. 399, 409; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701, 708; *Iowa Central Railway Co.* v. *Iowa*, 160 U. S. 389, 393; *Hovey* v. *Elliott*, 167 U. S. 409, 414.

3. In the absence of other controlling facts, the Secretary of the Interior could have been required by mandamus to restore the names of those thus arbitrarily stricken off without notice. *Garfield* v. *Goldsby*, 211 U. S. 249.

4. But mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.

5. Although the petition for the writ alleged that relators were freedmen duly enrolled and denied the truth of the testimony on which their names were stricken off, yet where the answer of the Secretary referred to that testimony and alleged, "on information and belief, that the relators were not freedmen members or members by blood or marriage of the Creek Nation, and that their enrollment had been procured by fraud," a defense was stated, proof of which would have defeated the right to a restoration of relators' names, even though they had been improperly stricken from the rolls without due process. *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636, 646; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257.

6. Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257.

7. To have issued the writ would have involved the useless thing of requiring relators' names to be reëntered, and in other proceedings having their names stricken because the original enrollment had been procured by fraud, thus admitted by the demurrer.

Affirmed.

BANKER BROTHERS COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 72. Argued November 17, 1911.—Decided December 4, 1911.

The relation of vendor and vendee, and not that of principal and agent, exists where the manufacturer sells goods to another under exclusive contract and delivers goods only on payment of draft attached to bill of lading.

In this case *held*, that goods manufactured in another State and delivered only, in pursuance of contract, after payment of draft attached to bill of lading, are at rest and subject to the laws of the State while in the hands of the consignee before delivery by him to a purchaser from him, notwithstanding the consignee only ordered them after a contract with the purchaser had been made.

Where the relation of principal and agent exists between one selling goods in one State which are manufactured in another State and the manufacturer, sales made by the former within his own State are not interstate commerce transactions but are subject to the taxing power of the State.

Where the transaction of sale of an article manufactured in another State is wholly intrastate, as between vendor and vendee, it does not become interstate and immune from state taxation because the purchaser pays freight from the place of manufacture or because the purchaser obtains a warranty direct from the manufacturer.

THE facts, which involve the constitutionality of a statute of Pennsylvania taxing sales of automobiles, as enforced in this case, are stated in the opinion.

Mr. Edward J. Kent and *Mr. Harvey A. Miller* for plaintiff in error:

The plaintiff in error is engaged in interstate commerce, and, therefore, not liable to taxation by the State. *Dozier* v. *Alabama*, 218 U. S. 124; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Colwell* v. *North Carolina*, 187 U. S. 622;

Robbins v. *Shelby County*, 120 U. S. 489; *Wilton* v. *Missouri*, 91 U. S. 275; *Brennan* v. *Titusville*, 153 U. S. 289; *Lyng* v. *Michigan*, 135 U. S. 166.

The automobile sold is always actually ordered and the order signed by the purchaser submitted to the factory at Buffalo, New York, where it must first be accepted, after which the automobile is shipped to fill the order to the particular individual named therein.

Mr. George H. Calvert, with whom *Mr. John C. Bell*, Attorney General of the State of Pennsylvania, *Mr. James M. Magee*, *Mr. Donald Thompson* and *Mr. Murdoch Kendrick*, were on the brief, for defendant in error:

Merchandise, even though an article of interstate commerce, is subject to state taxation, provided the act imposing such tax does not attempt to regulate interstate commerce or discriminate against it. *Brown* v. *Maryland*, 12 Wheat. 436; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 520; *Emert* v. *Missouri*, 156 U. S. 320; *American Express Co.* v. *Iowa*, 196 U. S. 146; *Darnell* v. *Memphis*, 208 U. S. 119; *Phillips* v. *Mobile*, 208 U. S. 479.

Upon receipt of the automobile by Banker Brothers Company, it had reached its destination and was at rest in the State within the meaning of that rule. *General Oil Co.* v. *Crain*, 209 U. S. 228; *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 578; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 96.

The act levying the tax does not attempt to regulate interstate commerce and does not discriminate against it. *Robbins* v. *Shelby Co.*, 120 U. S. 501.

The right of the State to tax trades, professions, and occupations, cannot be questioned by the Federal Government. *Knisely* v. *Cotterel*, 196 Pa. St. 628; *Ficklen* v. *Shelby County*, 145 U. S. 1.

Admitting that the majority of defendant's sales are of foreign cars, yet this fact is not material in determining

their liability under the act of 1899 because they are engaged in the general business of automobile dealers. *Brennan* v. *Titusville*, 153 U. S. 289; *Hopkins* v. *United States*, 171 U. S. 592; *Stockard* v. *Morgan*, 185 U. S. 35.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Banker Brothers Company, a corporation doing business in Pittsburg, was charged, as retail venders, with a tax of 1 per cent on $351,000 on sales of automobiles to persons in Pennsylvania under a statute of that State. It denied liability on the ground that the sales were interstate transactions. A decision of that point involves the question as to whether Banker Brothers Company acted as principal or as agent of a New York manufacturer.

It appears that the George N. Pierce Company was engaged in the business of manufacturing automobiles in Buffalo, and in 1905 made a contract by which it agreed "to build for and sell automobiles to Banker Brothers Company at twenty per cent less than list price. Deliveries to be f. o. b. Buffalo as soon as practicable after order for deliveries are received. Payments to be made in cash."

The Banker Brothers Company kept no machines in stock except those used for demonstration, and were allowed to sell only within a restricted territory on terms stipulated by the manufacturer. The purchaser of the machine was to pay at least ten per cent when he signed a printed form addressed to Banker Brothers Company requesting it "to enter my order for ——— motor car, for which I agree to pay the list price f. o. b. factory, as follows: $——— upon signing this order, and the balance upon delivery of the car to me."

The name of the Pierce Company did not appear anywhere on this printed form furnished by it, but when the Banker Brothers Company accepted the order it remitted the cash to the Pierce Company. If the latter accepted

the order, it agreed thereupon to make the automobile and ship it, drawing on Banker Brothers Company for the balance of the list price, less twenty per cent, with bill of lading attached. The Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which though shipped in interstate commerce had become at rest in the State of Pennsylvania. Banker Brothers Company had the title and delivered it to the buyer on his paying the balance of the purchase money. Compare *Dozier* v. *Alabama*, 218 U. S. 124. The written contract was silent on the subject, but it was stipulated that the Pierce Company warranted the machine direct to the purchaser.

It is contended that Banker Brothers Company were agents and the Pierce Company an undisclosed principal. It is urged that the sale was an interstate transaction between the manufacturer and the purchaser, with Banker Brothers Company merely acting as an agent which looked after the delivery of the machine and collected the purchase price.

This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But as between Banker Brothers Company and the Pittsburg purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him and under the duty of paying to the State a tax on the sale.

The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase the Pierce Company would have no right to sue him on the

contract. The fact that he was liable for the freight by virtue of the agreement to "pay the list price f. o. b. factory" did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the manufacturer direct.

These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *American Express* v. *Iowa*, 196 U. S. 133, 146. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania.

Affirmed.

UNION PACIFIC RAILROAD COMPANY *v.* UPDIKE GRAIN COMPANY AND CROWELL LUMBER AND GRAIN COMPANY.

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

Nos. 353, 354, 355, 356. Argued October 18, 1911.—Decided December 4, 1911.

Interstate Commerce Commission v. *Diffenbaugh*, *ante*, p. 42, followed to effect that under the Interstate Commerce Law, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, 590, elevation of grain is included in transportation, and, subject to the power of the Commission to determine the reasonableness of the payments, carriers can compensate owners of grain in transit for elevation services rendered in connection therewith.

Although a carrier may have had an ulterior motive in establishing a general rate of compensation for services rendered to it in connection with goods in transit, the real consideration is the service rendered; and even if the carrier does not realize the desired benefit it cannot deprive one actually rendering the service of the compensation on the ground of non-compliance with regulations of an association of which the carrier is a member and over which the party rendering the service has no control.

A carrier must treat all alike. It cannot pay one shipper for services rendered to his goods in transit, and, by enforcing an arbitrary rule, deprive another shipper rendering similar services of compensation therefor.

A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail.

In this case *held*, that the Union Pacific Railroad Company could not refuse to pay the owner of an elevator located on other railroads compensation for elevating grain similar to that paid to owners of elevators located on its own railroad on account of failure to return cars within an arbitrary and unreasonable time fixed by the Union Pacific; but also *held* that such cars should be returned within a reasonable time in order to entitle the parties rendering service to compensation therefor.

178 Fed. Rep. 223, affirmed.

THE facts are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* and *Mr. Henry W. Clark* were on the brief, for plaintiff in error.

Mr. Edward P. Smith, with whom *Mr. Constantine J. Smyth* was on the brief, for defendants in error.

Mr. Constantine J. Smyth and *Mr. Edward P. Smith*, with whom were *Mr. Nelson H. Loomis*, *Edson Rich*, *F. C. Dillard*, *R. W. Blair* and *E. H. Crocker*, filed a brief for plaintiff in error on motion to dismiss.

MR. JUSTICE LAMAR delivered the opinion of the court.

In 1899, the Union Pacific found it desirable to have grain unloaded at its terminals in Council Bluffs in order that cars might be promptly returned for use on its line. In consideration that Peavey would there erect and maintain an elevator, it agreed to pay him 1½ cents per hundred for elevating grain. It subsequently made similar contracts with what are called "Peavey Companies" which had elevators along its tracks in the cities of Omaha, South Omaha and Kansas City, terminal points of the Union Pacific. Thereafter it agreed, on certain conditions, to pay for similar service by elevator companies in the same cities, even though the elevators were not located immediately on the railroad tracks. It thereupon filed a Tariff Circular with the Commission, in which the Union Pacific recited that "to expedite the movement, and to secure the prompt release and return of equipment, an allowance . . . will be made" to elevators performing the service on through grain in carloads, transferred by the elevators at the points named:

"No allowance will be made when more than forty-eight hours elapse between time of delivery . . . to the elevator, or connecting lines and the release and return of the empty cars to the Union Pacific."

That company was and is a member of a railway association, which regulated the switching, loading and unloading of cars. One of its rules provided that:

"Cars received loaded in switching service must be confined to switching territory and when made empty must be returned to the owner if a direct connection within that territory or otherwise to the road from which received or may be loaded in accordance with Rule 2 a, b or c.

Rule 2 (a). "Loaded via any route so that the home road will participate in the freight rate; (b) loaded to the road from which originally received, if such loading is in the direction of the home road, but not otherwise; (c) loaded to an intermediate road in the direction of the home road."

As the Peavey elevators were located alongside the tracks of the Union Pacific, these rules did not affect their right to recover for elevation service. But, as the elevators of the defendants in error were located on the lines of other railroads in Omaha and South Omaha, it frequently happened that cars, after being unloaded at their elevators, were not returned to the Union Pacific, and that others were not returned within 48 hours. In those cases the Union Pacific refused to make payment for unloading these cars. The defendants in error filed a complaint with the Commission, asking for reparation. An order to that effect having been granted, they brought a joint suit for reparation.

Most of the allegations in the complaint were denied by the Union Pacific in its answer, which claimed that nothing was due, because the plaintiffs had not returned the cars within 48 hours stipulated in the tariff on file. It also alleged that the grain had been unloaded through plaintiffs' private elevators, which were not operated in the exercise of any public duty, but for the purpose of private gain; that the handling of the grain was for the

purpose of having it weighed, stored, inspected, cleaned, mixed or otherwise treated in the elevator, and that the tariff allowing for elevator charges in their elevator was unlawful.

After hearing evidence showing the amount of grain elevated for which payment had not been made, and considering the tariff and rules of the switching company, the court directed a verdict in favor of each of the plaintiffs for the amount shown to be due them. The judgment as modified was affirmed by the Circuit Court of Appeals, 178 Fed. Rep. 223, and the railroad brought the case here. There are forty assignments of error, but they need not be separately considered, as the case must be determined by a few controlling principles:

1. The Union Pacific's contention that payment for reparation cannot be made to the owner who stores and mixes the grain must first be considered.

The long mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the Interstate Commerce Commission was answered by the act of June 29, 1906, 34 Stat. L. 584, 590, c. 3591, in which Congress declared that "the term 'transportation' shall include . . . all . . . facilities of shipment, . . . irrespective of ownership, . . . and all services in connection with the . . . elevation, and transfer in transit . . . and handling of property transported." Carriers were required "to provide and furnish such transportation upon reasonable request therefor."

The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation. For § 4 (34 Stat. 590) provides that "if the owner . . . renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable,"

the Commission being authorized to determine what was reasonable.

This act was passed after the decision by the Commission in 1904 (10 I. C. C. 309), that the Peavey contract was valid, and after the recommendation in its report for 1905 (p. 11), that it should be given authority to determine whether the allowance paid to the owner was just. The statute must be taken as a legislative recognition of the long-continued practice and a declaration that the incidental advantage derived by the owner was not undue.

In pursuance of the authority thus expressly conferred the Interstate Commerce Commission, in April, 1907 (12 I. C. C. 86), fixed the allowance for elevating grain at ¾ of a cent per hundred pounds, being actual cost, with no allowance whatever for profit. Its final order (14 I. C. C. 315), prohibiting any payment to the owner who performed this transportation service was reversed, as being beyond the jurisdiction of the Commission, because Congress had expressly permitted such payment to be made (*Interstate Commerce Commission* v. *Diffenbaugh*, *Same* v. *Peavey*, *ante*, p. 42). The language of the statute and this decision answer the Union Pacific's contention that it was unlawful to pay these companies for transportation services.

2. The Union Pacific's desire to have cars promptly unloaded so that they might be returned to its own line may have been the principal motive which induced it to agree to pay elevator charges. But the consideration, moving between the carrier and the elevator, was the service performed by the latter in unloading grain at terminal points. This relieved the carrier of the expense of building similar structures and avoided the delay of having the grain transferred from one car to another by the slow process of shovelling. When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or

some other person hired for the same purpose. Having earned the compensation, the elevator company could not be deprived of its right because foreign cars were not returned to the Union Pacific under the rules of the railway association, of which the Union Pacific was a member and over which the elevator companies had no control.

3. For elevating grain from like foreign cars the Peavey Companies were paid because their elevators happened to be located on the Union Pacific tracks. But if the rule is valid against the plaintiffs, it would put it in the power of the carrier to say which elevator should be paid, and which not paid, for performing the same transportation service. It could load grain belonging to the plaintiffs into foreign cars, and in spite of the service rendered by them to the carrier in unloading, no payment would be made, because these foreign cars, under the rule, were not returned to the Union Pacific. It is not necessary that any such improper purpose should be shown to exist. It might have existed, and if so, could not be proved by the injured party. The power to make such a discrimination would prevent the enforcement of any regulation frequently having such operation.

The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's tracks. This cannot be directly done, nor indirectly by means of regulation. A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail himself.

4. The trial court was right in holding that the railroad company must make reparation by paying for the elevation of grain in those cars not returned in forty-eight hours, because they belonged to the switching company, or to a road which had a direct connection in the switching territory (2 a), and in those which when emptied were routed so that the home road participated in the freight rate (2 b).

But while elevators off the tracks of the Union Pacific cannot be affected by unreasonable rules tending to deprive them of just compensation, neither can they disregard the obligation promptly to unload, so that the cars might be put in service as soon as practicable. This was conceded by the defendants in error, and they accepted the ruling that they were not entitled to recover for elevating grain out of some 200 cars, which could have been unloaded and returned in a much shorter time, but which they detained beyond the forty-eight hours.

Judgments affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE HUGHES concur in the result in view of the decision in *Interstate Commerce Commission* v. *Diffenbaugh, Same* v. *Peavey, ante*, p. 42.

CHICAGO JUNCTION RAILWAY COMPANY *v.* KING.

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

No. 34. Argued November 2, 3, 1911.—Decided December 11, 1911.

The repugnancy of the Safety Appliance Law to the Constitution is not now open to controversy; it has been held constitutional. *Southern Railway Co.* v. *United States*, *ante*, p. 20.

Where the constitutional question is not advanced by the defendant until the trial it does not give jurisdiction of an appeal to this court from the Circuit Court of Appeals. *Macfadden* v. *United States*, 213 U. S. 288.

Where the cause of action is based on a statute of the United States there is an appeal to this court from the judgment of the Circuit Court of Appeals.

Although there may be jurisdiction because the cause of action rests on a statute of the United States, where none of the contentions directly invoke the interpretation of the statute, but merely the question whether, on the evidence, there was a right of recovery, the case is of the character of cases in which it was the purpose of the Judiciary Act of 1891 to make the judgment of the Circuit Court of Appeals final, and this court will only examine the record to see if plain error has been committed; and if that is not apparent, it will, as in this case, affirm the judgment.

169 Fed. Rep. 372, affirmed.

THE facts are stated in the opinion.

Mr. John D. Black, with whom *Mr. John Barton Payne* was on the brief, for plaintiff in error.

Mr. James C. McShane, for defendant in error, submitted.

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

This action to recover for personal injuries begun in a

state court, was removed to a Circuit Court and there decided for the plaintiff. To obtain a reversal of a judgment affirming, the case is here upon an assumption that a constitutional question is involved which gives jurisdiction. It is admitted that such question, that is, the repugnancy of the Safety Appliance Law to the Constitution, is now not open to controversy because of a recent decision. *Southern Railway Co.* v. *United States*, *ante*, p. 20. Yet, as the case is here, other errors relied upon, it is urged, must be decided. But even conceding that the constitutional question was not wholly frivolous when first advanced, as it arose only at the trial, it does not give jurisdiction. *Macfadden* v. *United States*, 213 U. S. 288. But this is negligible, since by the pleadings the cause of action was based on a statute of the United States—the Safety Appliance Law—which gives jurisdiction. *Macfadden* v. *United States*, *supra*. The damage thus arose: After cutting out some cars from an interstate freight train at the Union Stock Yards in Chicago, the train could not be re-coupled because of a broken knuckle on the coupler of one of the cars. The plaintiff, a switchman, secured a new knuckle and going between the cars to put it in place of the broken one, was crushed by a backward movement of the train, which brought the uncoupled cars together. The movement was ordered by the train conductor with the purpose of shoving the train back several city blocks to where it was proposed to repair the coupler.

Coming to consider the contentions, although they seemingly involve many propositions, they all are reducible to the assertion that the plaintiff was so clearly guilty of contributory negligence, in one aspect or the other, that it was the duty of the court to instruct a verdict for the defendant. Indeed, this is expressly stated in the argument to be the result of all the propositions except two relating to an instruction given and to one refused. But these

two instructions when rightly considered are of the same character, as they also rest ultimately upon the contention that the proof on particular subjects was such as to necessitate a binding instruction for the railway company.

The following, therefore, as to all the contentions, is clearly apparent: First. That while they may in a general sense involve the Safety Appliance Law, none of them directly invoked the interpretation of that law. Second. That while the contentions, from an ultimate point of view, present a question of law—that is, was there any substantial evidence to go to the jury?—in their primary aspect they call for an examination of the entire evidence to determine whether it had any substantial tendency to establish the right of the plaintiff to recover. Third. That although we have jurisdiction to review because the cause of action as stated in the pleadings rested upon the Safety Appliance Law, the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the Judiciary Act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals.

Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof. We are of this opinion because, in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the court below in any of the particulars complained of. In the discharge of such duty in this case, in view of the full opinion of the Circuit Court of Appeals, and in the light of the adequate examination which we have made of the

record, as we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the courts below, it follows that the judgment of the Circuit Court of Appeals must be and it is affirmed.

Affirmed.

MUTUAL LOAN COMPANY *v.* MARTELL.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 29. Submitted October 27, 1911.—Decided December 11, 1911.

The validity of police regulations depends upon the circumstances of each case, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 591.

The power of the State extends to so dealing with conditions existing in the State as to bring out of them the greatest welfare of its people. *Bacon* v. *Walker*, 204 U. S. 311.

Police power is but another name for the power of government; it is subject only to constitutional limitations which allow a comprehensive range of judgment, and it is the province of the State to adopt by its legislature such policy as it deems best.

Legislation cannot be judged by theoretical standards but must be tested by the concrete conditions inducing it.

A State may, as a police regulation, make assignments of future wages invalid except under conditions that will properly restrict extravagance and improvidence of wage-earners.

A State may, under conditions justifying it, prescribe that an assignment by a married man of wages to be earned by him in future shall be invalid unless consented to by his wife.

This court recognizes the propriety of deferring to tribunals on the spot and will not oppose its notions of necessity to legislation adopted to accomplish a legitimate public purpose. *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358.

A State has power to prescribe the form and manner of execution and

authentication of legal instruments in regard to property, its devolution and transfer. *Arnett* v. *Reade*, 220 U. S. 311.

There are many legal restrictions that may be placed by a State on the liberty of contract, and this court will not interfere except in a clear case of abuse of power. *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549.

The legislature of a State has a wide range of discretion in classifying objects of legislation; and even if the classification be not scientifically nor logically appropriate, if it is not palpably arbitrary and is uniform within the class, it does not deny equal protection.

Legislation may recognize degrees of evil without denying equal protection of the laws.

The statute of Massachusetts making invalid assignments for security for debts of less than $200 of wages to be earned unless accepted in writing by the employer, consented to by the wife of the assignor, and filed in a public office, is not unconstitutional as depriving the borrower or the lender of his property without due process of law, nor is it unconstitutional, as denying equal protection of the law, because certain classes of financial institutions are exempted from its provisions. It is a legitimate exercise of the police power and there is a basis for the classification.

200 Massachusetts, 482, affirmed.

THE facts, which involve the validity under the Fourteenth Amendment of a statute of Massachusetts in regard to assignments of wages as security for loans, are stated in the opinion.

Mr. Lee M. Friedman for plaintiff in error:

Plaintiff does not deny the right in the legislature to pass a law fixing the rate of interest that may be taken on a loan of a sum of money of less than two hundred dollars; nor the right to reasonably regulate such business, so long as the statutes for that purpose do not violate constitutional privileges and guaranties; but does contend that Ch. 605 of the acts of 1908, Massachusetts, is in violation of such privileges and guaranties.

In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense

or manifest evil, or the preservation of the public health, safety, morals, or general welfare, and that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend towards the accomplishment of the object for which the power is exercised. 22 Am. & Eng. Ency., 2d ed., 938; *Austin* v. *Murray*, 16 Pick. (Mass.) 126; *Greensboro* v. *Ehrenreich*, 80 Alabama, 579; *Noel* v. *People*, 187 Illinois, 587; *Chaddock* v. *Day*, 75 Michigan, 527; *State* v. *Ashbrook*, 154 Missouri, 375; *Smiley* v. *McDonald*, 42 Nebraska, 5; *People* v. *Gilson*, 109 N. Y. 389; *Mugler* v. *Kansas*, 123 U. S. 661; *In re Willshire*, 103 Fed. Rep. 620; *Lawton* v. *Steele*, 152 U. S. 133; *In re Marshall*, 102 Fed. Rep. 323.

The police power cannot be used as a cloak for the invasion of personal rights or private property; neither can it be exercised for private purposes or for the exclusive benefit of particular individuals or classes. *Ritchie* v. *People*, 155 Illinois, 98; *State* v. *Schlenker*, 112 Iowa, 642; *Matter of Jacobs*, 98 N. Y. 98; *Lien* v. *Norman County Com'rs*, 80 Minnesota, 58; *Deems* v. *Baltimore*, 80 Maryland, 164; *State* v. *Chicago &c. R. Co.*, 68 Minnesota, 381.

Occupations may be classified for license, provided always the classification is reasonable; but unreasonable classification which is not based on any real distinction between the different classes will render a statute void. 21 Ency. of Law, 2d ed., 804; *State* v. *Garbroski*, 111 Iowa, 496; *State* v. *Ashbrook*, 154 Missouri, 375; *Yick Wo* v. *Hopkins*, 118 U. S. 369; *Templar* v. *State Board of Examiners*, 131 Michigan, 256; *State* v. *Dering*, 84 Wisconsin, 585.

The State may not single out a class of citizens and subject it to oppressive discrimination. *Nashville &c. R. Co.* v. *Taylor*, 86 Fed. Rep., 185; *Tinsley* v. *Anderson*, 171 U. S. 106; *Minneapolis Ry. Co.* v. *Beckwith*, 129

U. S. 29; *Watson* v. *Nevin*, 128 U. S. 582; *Ohio* v. *Dollison*, 194 U. S. 447.

Even if this law were fair on its face and impartial in appearance (which it clearly is not), yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259; *Chy Sung* v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; *Soon Hing* v. *Crowley*, 113 U. S. 703.

By "equal protection of the laws" is meant "equal security under them to every one under similar terms, in his life, his liberty, his property and in the pursuit of happiness." It not only implies the right of each to resort on the same terms with others to the courts for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances. *Clark* v. *Kansas City*, 176 U. S. 114; *Lowe* v. *Kansas*, 163 U. S. 81; *State* v. *Ashbrook*, 154 Missouri, 375.

Equality of rights, privileges, and capacities should and must unquestionably be the aim of the law. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Magoun* v. *Illinois Trust & S. B. Co.*, 170 U. S. 283.

The classification is an improper one of the persons legislated against; making the rate of interest that may be charged on a loan of money of less than two hundred dollars depend upon the kind and nature of the security taken is an unconstitutional enactment. *Nichols* v. *Walter*, 37 Minnesota, 262; *Johnson* v. *Ry. Co.*, 43 Minnesota, 222; *Ex parte Sohncke*, 148 California, 262.

An assignment of future earnings which may accrue under an existing employment is a valid contract and creates rights which may be enforced both at law and in equity, and to limit them deprives the owner of his property without due process of law. *Tripp* v. *Brownwell*, 12 Cush. (Mass.) 376; *Citizens' Loan Association* v. *B. & M. R. R.*, 196 Massachusetts, 528. And see as to the extent of the liberty guaranteed: *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Commonwealth* v. *Perry*, 155 Massachusetts, 117; *Barbier* v. *Connolly*, 113 U. S. 27.

Section 7 of Ch. 605 is an unlawful interference with the liberty of both employé and the person loaning him money. *Lochner* v. *New York*, 198 U. S. 53; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684.

If their rights can be limited by the legislature, it must be by virtue of the police power reserved to it. As to definition of the term "police power" and the limitations to which it is subject, see *Commonwealth* v. *Alger*, 7 Cush. 53, 84; *State* v. *Ashbrook*, 154 Missouri, 375; *In re Sohncke*, 148 California, 262; *Commonwealth* v. *Perry*, 155 Massachusetts, 117; *Lochner* v. *New York*, 198 U. S. 53; *Kuhn* v. *Detroit*, 70 Michigan, 534; *State* v. *Redmon*, 114 N. W. Rep. 137; *People* v. *Steele*, 231 Illinois, 341; *People* v. *Marcus*, 185 N. Y. 257; *Bessette* v. *People*, 193 Illinois, 334; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Godcharles* v. *Wigeman*, 113 Pennsylvania, 131; *State* v. *Goodwill*, 33 W. Va. 179.

The right to contract a debt or other obligation is included in the right to liberty and is also a right of property. *Kuhn* v. *Common Council of Detroit*, 96 Michigan, 534; *Lochner* v. *New York*, *supra*; *Ritchie* v. *People*, 115 Illinois, 98.

In *People* v. *Steele*, 231 Illinois, 340, an act to prevent speculating in theater tickets commonly called "scalping"

was declared to have no relation to the public health, safety, morals, or welfare, and was held unconstitutional, in that it arbitrarily deprived persons in the theater business, and brokers engaged in selling theater tickets, of liberty and property without due process of law.

Section 7 considered simply from the standpoint of an unlawful interference with liberty of contract and the taking of property without due process of law is unconstitutional, as it is not clear that in some way the public generally is affected either in health, morals or its general welfare. *Ritchie* v. *People*, 155 Illinois, 98; *Toney* v. *Steel*, 141 Alabama, 120; *State* v. *Krentzberg*, 114 Wisconsin, 530; *Coffeyville Vitrified Brick & T. Co.*, 69 Kansas, 297; *State* v. *Julow*, 129 Missouri, 163; *Gillespie* v. *People*, 188 Illinois, 176; *Liep* v. *St. Louis, I. M. & S. R. Co.*, 58 Arkansas, 407; *Harding* v. *People*, 160 Illinois, 459; *State* v. *Missouri Tie & Timber Co.*, 181 Missouri, 536; *State* v. *Loomis*, 115 Missouri, 307; *Braunsville Coal Co.* v. *People*, 147 Illinois, 66; *Republic Iron & S. Co.* v. *State*, 160 Indiana, 379; *Commonwealth* v. *Perry*, 155 Massachusetts, 117.

A law to be constitutional and valid must be so formed as to extend to and embrace equally all persons who are or may be in the like situation or circumstances; and the classification also must be natural and reasonable, and not arbitrary or capricious. *Sutton* v. *State*, 96 Tennessee, 696; *State* v. *Loomis*, 115 Missouri, 307; *State* v. *Hann*, 61 Kansas, 146; *Magoun* v. *Bank*, 170 U. S. 283; *Eden* v. *People*, 161 Illinois, 296.

Section 8 is unconstitutional, as an unlawful interference with the liberty of contract, as it arbitrarily requires the consent of a party to the making of the assignment, who has no property interest in the subject-matter of the same.

A wife has no property interests in her husband's earnings as such. In Massachusetts in no statute is there

any provision giving her any such interest in said earning.

This is clearly an unlawful interference with the liberty to contract. *Fladney* v. *Sydnor*, 172 Missouri, 318.

The exemptions in § 6 render the act unconstitutional.

Statutes exempting building and loan associations stand on a different footing and can be distinguished; see *Bailey* v. *People*, 190 Illinois, 28; *Re Home Discount Co.*, 147 Fed. Rep. 538; *Vanzant* v. *Waddell*, 2 Yerger, 260, 270; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 156; *State* v. *Loomis*, 115 Missouri, 307; *Santa Clara* v. *Southern Pacific R. R. Co.*, 18 Fed. Rep. 385.

There was no appearance or brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

The question in the case is the validity, under the Fourteenth Amendment of the Constitution of the United States, of a statute of the State of Massachusetts (Stat. 1908, c. 605) which (§ 7) makes invalid against the employer of a person any assignment of or order for wages to be earned in the future to secure a loan of less than $200 until the assignment or order be accepted in writing by the employer and the assignment or order and acceptance be filed and recorded with the clerk of the city or town in the place of residence or employment, according as the person making the assignment be or be not a resident of the Commonwealth. If such person be married, the written consent of his wife must be attached to the assignment or order. (Section 8.) National banks and banks which are under the supervision of the bank commissioner, and certain loan companies, are exempt from the provisions of the act. (Section 6.)

The action is in contract on two promissory notes given by two different persons with an assignment by each of wages to be earned in the future in the defendant's service (defendant in error here, and we will so designate him, and the plaintiff in error as plaintiff). The assignments were duly recorded, but were not accepted in writing by defendant. The assignor in the second assignment was a married man whose wife did not consent to the assignment.

Judgment was entered in the Superior Court for the defendant, which was affirmed by the Supreme Judicial Court of Massachusetts. 200 Massachusetts, 482.

The contention of plaintiff is (1) that the provisions of §§ 7 and 8 deprive it of due process of law, and (2) that § 6 deprives it of the equal protection of the laws.

(1) To sustain this contention it is urged that the statute being an exercise of the police power of the State, its purpose must have "some clear, real and substantial connection" with the preservation of the public health, safety, morals or general welfare, and it is insisted that the statute of Massachusetts has not such connection and is therefore invalid.

This court has had many occasions to define, in general terms, the police power and to give particularity to the definitions by special applications. In *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592, it was said that "the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety," and that the validity of a police regulation "must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."

In *Bacon* v. *Walker*, 204 U. S. 311, 318, it was decided that the police power is not confined "to the suppression

of what is offensive, disorderly or unsanitary," but "extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people."

In a sense, the police power is but another name for the power of government, and a contention that a particular exercise of it offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the province of the State, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And within that range the Massachusetts statute can be justified. Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it, and this test was applied by the Supreme Judicial Court of Massachusetts in passing on the validity of the statute under review.

The court hesitated to say, as at least, one court has said, that a total prohibition of the assignment of wages would be valid, but justified the partial restriction of the statute on the ground that the extravagance or improvidence of the wage-earner might tempt to the disposition of wages to be earned, and he and his family, deprived of the means of support, might become a public charge. It was pointed out besides that his needs might be taken advantage of by the unscrupulous. The purposes of the statute are certainly assisted by the formalities which it prescribes as requisite to the validity of an assignment. The requirement that it (the assignment) be accepted in writing by the employer, it was pointed out, protects him and secures the assignment from dispute; and the requirement that the acceptance and the assignment be recorded checks an attempt of the wage-earner to procure a dishonest credit.

The court found more difficulty with the provision which requires the consent of the wage-earner's wife to the assignment, but justified it on the general considerations we have mentioned, and on the ground of her interest in the right use of his wages, though she have no legal title in them.

We cannot say, therefore, that the statute as a police regulation is arbitrary and unreasonable and not designed to accomplish a legitimate public purpose. We certainly cannot oppose to the legislation our notions of its necessity, and we have expressed "the propriety of deferring to the tribunals on the spot." *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365.

There are other grounds upon which the statute may be sustained than those expressed by the Supreme Judicial Court of the State. As we have seen, it does not prohibit assignments of wages to be earned. It prescribes conditions to the validity of such assignments, and in this it has many examples in legislation. It has the same general foundation that laws have which prescribe the evidence of transactions and the manner of the execution and authentication of legal instruments. The laws of the States exhibit in their diversities the power of the legislature over property, its devolution and transfer. It is rather late in the day to question that power. See *Arnett* v. *Reade*, 220 U. S. 311.

But if we consider the Massachusetts statute strictly as a limitation upon the power of contract it still must be held valid. A statute not unlike it came before this court in *Knoxsville Iron Co.* v. *Harbison*, 183 U. S. 13. It was a statute of the State of Tennessee and required the redemption in cash of any store orders or other evidence of indebtedness issued by employers in payment of wages due to employés. It was assailed as an arbitrary interference with the right of contract. It was sustained as a proper exercise of the power of the State.

There must, indeed, be a certain freedom of contract, and, as there cannot be a precise, verbal expression of the limitations of it, arguments against any particular limitation may have plausible strength, and yet many legal restrictions have been and must be put upon such freedom in adapting human laws to human conduct and necessities. A too precise reasoning should not be exercised, and before this court may interfere there must be a clear case of abuse of power. See *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, where the right of contract and its limitation by the legislature are fully discussed.

(2) This contention attacks § 6 of the statute which exempts from its provisions certain banks, banking institutions and loan companies. It is urged that the provision is discriminatory and therefore denies to plaintiff the equal protection of the laws.

We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. This was the view that the Supreme Judicial Court took, and, we think, rightly took. The court said that the legislature might have decided that the dangers which the statute was intended to prevent would not exist in any considerable degree in loans made by institutions which were under the supervision of bank commissioners, and "believed rightly that the business done by them would not need regulation in the inter-

est of employés or employers," citing *State* v. *Wickenhoefer,* 64 Atl. Rep. 273, a decision by the Supreme Court of Delaware. See *Engel* v. *O'Malley,* 219 U. S. 128.

But even if some degree of evil which the statute was intended to prevent could be ascribed to loans made by the exempted institutions, their exception would not make the law unconstitutional. Legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection provision of the Fourteenth Amendment to the Constitution of the United States. *Ozan Lumber Co.* v. *Union Bank,* 207 U. S. 251; *Heath & Milligan Co.* v. *Worst,* Id. 338.

This court sustained a classification like that of the Massachusetts statute in *Griffith* v. *Connecticut,* 218 U. S. 563, where a statute of Connecticut, which fixed maximum rates of interest upon money loaned within the State to persons subject to its jurisdiction was upheld as a valid exercise of the police power of the State; and a provision of the statute which exempted from its operation "any national bank or trust company duly incorporated under the laws of the State, and pawnbrokers," was decided to be a legal classification.

Judgment affirmed.

UNION PACIFIC RAILROAD COMPANY *v.* MASON CITY AND FORT DODGE RAILROAD COMPANY.

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

No. 31. Argued November 2, 1911.—Decided December 11, 1911.

The object of the provisions in acts of July 25, 1866, 14 Stat. 244, c. 246, and of February 24, 1871, 16 Stat. 430, c. 67, for the construction of railway bridges across the Mississippi and Missouri rivers was that the trains of all railroads terminating at the rivers should be allowed to cross on reasonable terms, and for the more perfect connection of railroads running to the bridges on either side of the river; and, the statutes being construed in that light, the approaches on both sides of the river must be regarded as parts of the structures.

A railroad bridge can be of no use to the public unless united with the necessary appurtenances for public accommodation.

A distance of four miles in the scheme of the Union Pacific Railroad may be reasonably within the expression "at or near."

The decree of the Circuit Court affirmed by this court in 199 U. S. 160, gave to the Mason City and Fort Dodge R. R. Company the right to cross the Union Pacific bridge over the Missouri river and this included the use of main and passing tracks over and approaching the bridge to the extent necessary to constitute a continuous line from the terminus at Council Bluffs to the point at Omaha mentioned therein, but the decree did not give the Mason City Road any rights to use other tracks and terminal facilities of the Union Pacific Railroad.

165 Fed. Rep. 844, reversed.

THE facts, which involve the construction of a decree of the Circuit Court in regard to the joint use of railroad tracks between Omaha and Council Bluffs, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. N. H. Loomis* was on the brief, for appellants.

Mr. John Barton Payne for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is whether the decree of the United States Circuit Court for the District of Nebraska, rendered in a suit brought by appellee against the Union Pacific Railroad Company in 1903, which adjudged to appellee and to its lessee, the Chicago Great Western Railway Company, the equal and joint use of the main and passing tracks of the Union Pacific, means the use of such tracks in connection with the bridge of that company over the Missouri river between Omaha and Council Bluffs, or the tracks independently of such use, or, in other words, a general use of the tracks for business having no connection with the bridge or use of it, or, to be more specific and to bring forward the particular use claimed, whether, as facilities for elevators established by appellee in Omaha "and generally for a grain terminal," or as shall be necessary or convenient in its business as a common carrier, it may operate its own motive power and use the tracks of the Union Pacific to deliver cars to the Chicago, Rock Island & Pacific Railroad, which has connection with the tracks of the Union Pacific. The appellee contends that such right is given by the decree. The appellants assert that the Union Pacific alone has the right to deliver cars to appellee's property or take them from it to connecting carriers, as it does, it is contended, for all other railroads, according to contracts which have obtained for many years.

The Circuit Court decided that the decree gave the use, contended for by the appellee, and adjudged appellants guilty of contempt for obstructing such use. The decision was affirmed by the Circuit Court of Appeals. 165 Fed. Rep. 844.

The decree adjudged that appellee and its lessee, the Chicago Great Western Railway Company, were "admitted into the full, equal and joint use of the main and passing tracks of the Union Pacific Railroad Company, now located and established, or which may hereafter be located and established, from the eastern terminus of said tracks in Council Bluffs, in the State of Iowa, to a connection with the Union Stock Yards Railroad and the other railroads connecting with the Union Pacific Railroad at South Omaha, in the State of Nebraska, including the bridge over which said tracks extend across the Missouri River between the cities of Council Bluffs, Iowa, and Omaha, Nebraska; also the connection with, and the tracks pertaining thereto, of the general passenger station of the said Union Pacific Railroad in Omaha, and said passenger station and all tracks and facilities connected therewith; also a connection with the side or spur tracks leading from the main line to the lower grade of the sidings and spur tracks in Omaha, and such extensions as may be hereafter made; also a connection with the side tracks in Omaha on which to receive from and deliver to said Union Pacific Railroad Company freight which may be handled through the warehouses, or may be switched by the said Union Pacific Railroad Company; also the connections with the Union Stock Yards tracks in South Omaha, and with the tracks of all other railway companies which now or may hereafter connect at or near South Omaha, with the tracks of the Union Pacific Railroad Company hereinbefore described, each and all, to the same extent and upon the same terms and conditions stated in the contracts between the Union Pacific Railroad Company and the Chicago & Northwestern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago, Rock Island & Pacific Railway Company, as appears by the contracts in evidence in this case, and the depot contract, and the supplemental con-

tract between the same parties, being Exhibits 6 and 7, attached to the bill of complaint herein, without preference or discrimination."

It is manifest that the rights of appellee and its lessee company which were adjudged by the decree are measured by the rights of the other railroads mentioned in the decree, and what they were are defined in certain cases in which they came up for consideration.

The first of the cases was *Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564. It was brought by the Chicago, Rock Island & Pacific Railway Company against the Union Pacific Railroad Company to compel specific performance of a contract in regard to the use of the tracks of the latter. The following is a summary of the facts: The Union Pacific Company controlled and operated more than five thousand miles of railroad, and, among others, a main line extending from Council Bluffs, Iowa, by way of Omaha and Valley Station, Nebraska, to Ogden, Utah, a distance of about eleven hundred miles, and other roads not necessary to mention.

The Rock Island Company owned and operated a line of railway extending from Chicago, by way of Davenport, Iowa, to St. Joseph, Missouri, and thence, through certain points, to Colorado Springs and Denver. It also operated other lines, amounting in the aggregate to more than three thousand miles. The St. Paul Company was operating more than six thousand miles of railroad, and one of its lines extended from Chicago to Council Bluffs.

The Rock Island Company determined to connect its lines from Chicago to Council Bluffs with its southerly line to Colorado Springs by constructing a bridge across the Missouri river at Council Bluffs and a railroad from that terminus, by way of Omaha and South Omaha and other points, thereby shortening its line from Chicago to Denver. The St. Paul Company joined in the under-

taking in order to extend its line from Council Bluffs on to Omaha and South Omaha. The two companies, to execute their purpose, caused a corporation to be created under the laws of Iowa, with power to build a bridge across the river at Omaha, Congress granting to the corporation the necessary franchise. Act of June 12, 1884, 23 Stat. 43, c. 82. Pending the making of the surveys and other preparations, the Union Pacific Company proposed to the companies to make with them a trackage arrangement by which they could use the bridge and tracks of the Union Pacific Company between Council Bluffs and South Omaha for their terminal facilities in Omaha and South Omaha, and the continuous line desired by the Rock Island Company could be completed. The proposal was accepted and the contracts subsequently drawn. The preamble to the Rock Island Company contract recited that that company had become a domestic corporation of Nebraska, and proposed to extend its railway from its terminus at Council Bluffs to a connection with its leased line, the Chicago, Kansas & Nebraska Railway, at the city of Beatrice; that the parties to the contract believed that the interests of all would be promoted by using for a part of said extension the main tracks of the Union Pacific Railway Company in the cities of Council Bluffs and Omaha, the bridge over the Missouri river and portions of certain other roads not necessary to mention.

The specific and material provision was as follows, the italics being ours: "The Pacific Company hereby lets the Rock Island Company into the full, equal and joint possession and use of its *main and passing tracks*, now located and established, or which may be hereafter located and established, between the terminus of such tracks in the city of Council Bluffs, in the State of Iowa, and a line drawn at a right angle across said tracks within one and one half (1½) miles southerly from the present passenger station of South Omaha, in the State of Nebraska, includ-

ing the *bridge* on which said tracks extend across the Missouri River, between said cities of Council Bluffs and Omaha; *connections* with Union Depot tracks in Omaha, the side or spur track leading from its main tracks to the lower grade of the Pacific Company's sidings and spur tracks in Omaha, and such extensions thereof as may be hereafter made; side tracks in Omaha on which to receive from and deliver to the Rock Island Company freight that may be handled through the warehouses, or switched by the Pacific Company; *the connections* with the Union Stock Yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the Rock Island Company may construct, maintain and exclusively use a track or tracks, aggregating three thousand (3,000) feet in length, for the storage of cars and other purposes, for the term of nine hundred and ninety-nine (999) years." The consideration is expressed, and it is provided "that the Pacific Company lets the Rock Island Company into the full, joint and equal possession and use of its tracks, stations and appurtenances along the line of the railway of the Republican Valley Company," the Pacific Company reserving the right to admit any other company to the joint use and possession of the same tracks and property upon substantially the same terms.

Performance of the contract was entered into. Subsequently a change of management of the Pacific Company took place, and that company forcibly prevented the Rock Island Company and the St. Paul Company from using the tracks at Omaha, which they were entitled to use under the contracts, and absolutely refused to perform the contracts.

Suit was then brought by those companies to compel specific performance of the contracts, and the Pacific Company set up as a defense that the contracts were *ultra vires*, and that the use of its road, as claimed, would deprive it of the means granted to it by the act of Congress,

of earning money with which to maintain its corporate existence, perform the duties of a common carrier and meet the demands of the Government. The defenses were not sustained, and it was decreed that the contract was "the valid obligation of the parties thereto, and should be performed in good faith by each of them;" that it secured the several rights embraced therein, all of which were specifically set forth, subject to certain limitations which need not be given. 47 Fed. Rep. 15. The decree was affirmed by the Circuit Court of Appeals. 51 Fed. Rep. 309.

The case in this court was considered on the appeal of the Rock Island Company, the court saying that if the decree in favor of that company be affirmed a like result must follow in the case of the St. Paul Company, and stated the questions to be (p. 580) "whether these contracts are within the corporate powers of the parties; were duly authorized as respects the Union Pacific Railway Company; were such contracts as a court of equity can specifically enforce; and were properly enforced on the merits." More specifically, it was said (p. 581) that it could be remarked "in the outset that the main contention of the Pacific Company concerns the tracks between Council Bluffs and South Omaha, including the bridge." This, then, we must accept as the subject of the controversy to which the court addressed itself and by which the decision must be explained.

It was decided that the contracts were not *ultra vires*, the court basing its decision upon the general powers of the Pacific Company in relation to the subject-matter and its duties as a common carrier, and decided that there was no reasonable ground upon which it could "be held invalid as an unlawful assumption of power." But the court, going beyond such general operation and relation, said: (p. 585) "But the determination of the existence of the power to grant running rights in this instance does not rest on these considerations," and based its decision

as well upon the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river and its construction and operation, holding that those acts "imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and tracks between Council Bluffs and Omaha." And the court said (p. 586) "that South Omaha was included."

These propositions were announced: The original charter of 1862 required the construction of the Pacific road from the east bank of the river, and so impliedly authorized the company to bridge it. The implication was made express by the amendatory act of 1864, and the company given authority "to construct a bridge over said Missouri river." The bridge was for the company's road, and no provision was made for other roads, nor were special means provided for the construction of the bridge. By 1871, several roads had been built from the East to Council Bluffs, and others were in process of construction in Nebraska, with Omaha as their terminus. On February 24 of that year the Omaha Bridge Act was passed (February 24, 1871, 16 Stat. 430, c. 67), in which it was provided that "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska," the company was authorized to issue bonds not exceeding two and one-half million dollars and to "secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress."

The act further provided that for the use and protection of the bridge and property the company should be governed and limited by the act of Congress of July 25, 1866, 14 Stat. 244, c. 246, in regard to the construction of cer-

tain bridges and to establish them as post roads. Nine bridges were authorized by that act to be constructed, eight over the Mississippi river and one over the Missouri river, and it was provided in § 1 of the act which authorized the construction of the bridge across the Mississippi at Quincy, Illinois, that when constructed the trains of all railroads terminating at the river should be allowed to cross, for reasonable compensation to be made to the owners of the bridge. This provision was made applicable to the other bridges.

The court said (p. 587): "The common object of both these acts plainly was the more perfect connection of roads running to the bridges on either side of the river;" and this, it was further said, was in harmony with the numerous acts of Congress referred to in the opinion of the Circuit Court of Appeals.

Answering the objection that if these acts justified the granting of the use of the bridge it did not justify the granting of the use of the tracks, the court remarked that the authority was given to place a mortgage "on the bridge and approaches and appurtenances," and that it would seem clear that the approaches on both sides of the river must be regarded as a part of the structure. And it was further said (p. 588): "Moreover, the act refers to 'the tracks and depots required to perfect the same.' A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots and other facilities for the public accommodation. And we consider Council Bluffs, Omaha and South Omaha, under the facts, as necessarily embraced in the intention of Congress. It is true that it appears that from the depot to the point in South Omaha where the tracks of the companies connected, is about four miles; but the scheme of Congress was to accomplish the more perfect connection 'at or near Council Bluffs, Iowa, and Omaha, Nebraska,' and we think this distance reasonably within the terms

of the act of 1871, liberally construed, as the act should be."

The next case which came to this court was *Union Pacific Company* v. *Mason City Company*, 199 U. S. 160. The Mason City Company was complainant in the suit in the Circuit Court, and operated a railroad having its western terminus at Council Bluffs, and sought in that suit to connect with and use the bridge, approaches and tracks of the Union Pacific Company upon the same terms and conditions as the roads which were parties to the suit in 163 U. S., *supra*. It based its claim upon the acts therein set out and considered, it having no contract with the Union Pacific as the other railroads had. The Circuit Court and the Circuit Court of Appeals sustained its claim. 124 Fed. Rep. 409; 128 Fed. Rep. 230.

In this court, the Mason City Company contended that its right to the use of the bridge and approaches was determined by the decision in 163 U. S., and, further, that if mistaken in that, it had such right under the statutes of the United States and by the terms of the contract between the city of Omaha and county of Douglas, with which contract we are not concerned. To the contention the Union Pacific replied that so much of the opinion as dealt with the statutory obligation was *obiter dictum*. It also urged that the statutes were misconstrued, and that the status of the present Union Pacific Company differed so much from that of the then defendant as to make them inapplicable.

Disposing of the contention that the reference to the statutory obligation of the Union Pacific was *obiter*, the court said (p. 165):

"While the claim of the plaintiffs in that case was founded directly upon contracts, yet if there were a statutory duty to let them into the joint use of the bridge and its approaches that was enough to sustain a decree in their favor, and the contracts might be regarded as

simply relieving the court of the work of settling minor matters, such as method of use, compensation therefor, and matter of control. Indeed, the alleged invalidity of the contracts was rested largely on the scope of the statutes, and the duties to the Government and the public imposed thereby on the railroad company."

To the contention that the statutes had been misconstrued, the court replied (p. 166) that, "We see no reason to question the conclusion announced in the former opinion." The other contentions were also held untenable. The decree against the Union Pacific was affirmed, with some minor reservations which it is unnecessary to notice.

It was this decree that the Union Pacific Company was, in the present case, adjudged guilty of contempt for violating. The decree we have already set out.

The parties are in sharp controversy as to its meaning, but, necessarily, whatever ambiguity arises from some of its parts, its extent must be determined by what preceded it and what it was intended to execute—in other words, that the bridge act of 1871 is the measure of the rights given by decree in connection with the act of 1866 providing for a bridge across the Mississippi River at Quincy, Illinois, and other bridges. 14 Stat. 244. The latter act, as we have seen, provided that "all trains of all roads terminating at said river at or opposite said point shall be allowed to cross said bridge for reasonable compensation." And, as we have also seen, the act of 1871 was passed "for the more perfect connection of any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska." And the powers conferred and the use and protection of the bridge that should be erected were "governed and limited" by the provisions of the act of 1866. The two acts, therefore, express the powers conferred and the obligations imposed on the Union Pacific Company. And this court so construed them, saying, as we have seen, that

"the common object of both these acts was the more perfect connection of roads running to the bridges on either side of the river." A right to the "approaches and appurtenances" was given as necessary to the connection and to make it effective. It did not otherwise subject the property of the Union Pacific Company to the use of other companies. It bridged the river—"the transportation gap"—between Council Bluffs and Omaha, the country east of the river and the country west of it. It did no more. It did not intend to give to other roads a right in the terminal of the Union Pacific Company beyond what was necessary for a right of passage over the "gap," giving the same continuity to other roads which the Union Pacific Company had. That the act of Congress had this object the Circuit Court of Appeals did not deny. The court said (165 Fed. Rep. 850):

"It is true that the object of the requirement of the acts of congress was to bridge the transportation gap and to facilitate the transfer of cars passing between railroads east and railroads west of the Missouri river, but this fact did not deprive the court which was called upon to enforce this legislation of its jurisdiction to prescribe the limits and the terms of the use which the Pacific Company should allow, nor of its power and duty to exercise a wide and wise judicial discretion in fixing those limits and terms."

Of course the court had power to pass on the issues presented to it, and we might have to yield to its decision as *res judicata* if its decree was as broad as asserted, but we do not so understand its decree. It gave only what the Chief Justice, in 163 U. S., called "running rights." As we have already pointed out, the original charter of the Pacific road only impliedly authorized the building of a bridge across the river. The act of 1864 expressly authorized it, but the bridge contemplated was for the use of the Pacific Company only. No provision was made for other roads. The act of 1871 enlarged the powers of the

company, giving it means to construct the bridge, but at the same time put the obligation on the company of permitting its use by other roads, as we have seen, "indicating [we quote from 163 U. S. 587] a settled policy that all structures of this character should allow connecting roads to cross them with their cars, trains and engines." And this was the right which was given over the tracks, such right over the tracks being necessary to the right over the bridge. *Id.* 587, 588. The right to cross them, bridge and tracks, it will be observed, and thereby provide "for the more perfect connection of the roads east of the river with those west of it." That this was the purpose is expressed in many places in the opinion. The bridge was decided to be the principal and dominating thing, to which the rights in the tracks were accessory and only given as appurtenant and necessary as a means to avail of its use.

The Mason City Company would upset this order and make paramount the use of the tracks; indeed, make the use of the tracks independent of any use of the bridge, though the only rights it possesses are given by the act authorizing the construction of the bridge. It was because its railroad connected with the Union Pacific at Council Bluffs that it was enabled to invoke the provisions of that act. It now claims a right on the west side of the river to the use of tracks in connection with what it terms "a grain terminal" in Omaha, for which purpose it has purchased certain real estate. And it represents "that, in order to provide the necessary elevators and other special facilities, it has purchased other real estate, the title to which it has caused to be conveyed to the Omaha Grain Terminals, a corporation of the State of Nebraska, every share of the capital stock of said corporation being owned by" it. It sets forth, in detail, length of tracks and their connection with those of the Union Pacific, and the number and capacity of the elevators which are necessary to accommodate "the grain business naturally tributary

to the city of Omaha." It also sets forth that, as a carrier of live stock and live stock products, it must have facilities "in close proximity to the South Omaha stock yards." We quote these averments to illustrate the extent of the rights claimed. It is to accommodate the business thus described and its business as a common carrier that the Mason City Company asserts the right to use the tracks of the Union Pacific Company which connect with the tracks of other companies—specifically, in this case, with the Chicago, Rock Island & Pacific Railway Company. It was a prevention of the use of the latter tracks in order to deliver a car of stucco hauled by an engine of the Mason City Company to the Rock Island Company that was held to contemn the decree. If the Mason City Company had the right to deliver that car it had the right to deliver all cars, and the court so decreed, finding that there was a physical connection between the tracks of the Rock Island and the main tracks of the Union Pacific at South Omaha, and that by the terms of the decree the Mason City Company had "the right to run its engines, cars or trains" over such tracks, and from them "over and through the said connection on to the tracks of the Union Pacific Company at South Omaha."

The court, therefore, decided that the decree authorized the use of the Union Pacific track for local switching purposes and enjoined the prevention of such use. As we have pointed out, we do not think the decree justified the conclusion of the court. The rights asserted transcend anything given by the bridge act. The tracks of the Union Pacific Company, as urged by its counsel, are its property, and the supervision and control thereof cannot be taken from it and given to its connections except to the extent expressed in the bridge act, which gave, as we have seen, the use of the bridge and of the main and passing tracks as necessary approaches to the bridge. And it is of special significance that none of the "tenant companies" (parties

in 163 U. S.) ever claimed such right except in one attempt by the Rock Island, after these proceedings to punish the Union Pacific officers for contempt.

We are, therefore, of opinion that the decree admitted appellee to the use of the "main and passing tracks" of the Union Pacific Company from their eastern terminus at Council Bluffs, only to a physical connection with the roads and at the places mentioned therein, including the bridge over which the tracks extend across the Missouri river between Council Bluffs and Omaha. And that such use was all that was necessary to constitute the road's continuous lines from east to west or from west to east.

The decree of the Circuit Court of Appeals affirming the order of the Circuit Court adjudging the appellants guilty of contempt of the decree entered August 12, 1903, is reversed, and the cause remanded to the Circuit Court for further proceedings in accordance with this opinion.

ALUMINUM COMPANY OF AMERICA *v.* RAMSEY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 56. Submitted November 8, 1911.—Decided December 11, 1911.

Although a statute increasing the liability of corporations may, as to corporations of the State, be an exercise of the reserved power to alter, amend and repeal, the application of that principle as to foreign corporations depends on many considerations and involves Federal questions.

Whether or not a classification merely between all corporations and partnerships and individuals offends the equal protection clause, a classification of corporations operating railroads and individuals does not offend that provision of the Constitution.

One within a distinct class which is properly subject to classification cannot question the constitutionality of the classification on the

ground that it is too broad and includes others outside of that class.

Although the state court may have applied the statute to plaintiff in error merely as a corporation, if the record shows that it is a corporation of a kind properly classified by the statute and there is equality within that class, the statute will not be held invalid as repugnant to the equal protection clause of the Constitution.

89 Arkansas, 522, affirmed.

THE facts, which involve the constitutionality, under the Fourteenth Amendment, of the Arkansas Fellow Servant Law, are stated in the opinion.

Mr. U. M. Rose, Mr. G. B. Rose, Mr. W. E. Hemingway and *Mr. J. F. Loughborough* for plaintiff in error:

The act of 1907 is unconstitutional because it denies to plaintiff in error the equal protection of the law and deprives it of its property without due process of law.

It imposes obligations upon corporations without regard to the class of business in which they are engaged and in a matter where the classification of corporations is not authorized because of the nature of their entity.

Corporations are persons within the Fourteenth Amendment and are entitled to all of its protections. *Gulf, Colorado & Sante Fe Ry.* v. *Ellis*, 165 U. S. 154; *Santa Clara County* v. *Southern Pacific Ry.*, 118 U. S. 394; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 29; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Missouri* v. *Lewis*, 101 U. S. 30; *Hays* v. *Missouri*, 120 U. S. 68; *Duncan* v. *Missouri*, 152 U. S. 377; *Lowe* v. *Kansas*, 163 U. S. 88.

See also the following: *N. Y. &c. Ry.* v. *New York*, 165 U. S. 633; *Cargill Co.* v. *Minnesota*, 180 U. S. 469; *Chicago &c. R. R. Co.* v. *Pontius*, 157 U. S. 211; *Atchison, T. & S. F. Ry.* v. *Matthews*, 174 U. S. 96; *St. L. & S. F. Ry. Co.* v. *Matthews*, 165 U. S. 1; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Southern Ry. Co.* v. *Green*, 216 U. S. 400,

412; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 112; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Mr. Henry M. Armistead and *Mr. T. M. Mehaffy*, with whom *Mr. J. E. Williams* was on the brief, for defendant in error:

The act of the legislature of Arkansas, adopted in 1907, is constitutional under the power reserved in the Arkansas constitution of 1874, to alter or amend corporate charters. *Greenwood* v. *Union Freight R. Co.*, 105 U. S. 13; *St. L., I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 404; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Northern Cent. R. Co.* v. *Maryland*, 187 U. S. 258; *N. Y. & N. S. R. Co.* v. *Bristol*, 151 U. S. 567; *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205, approved in *Orient Ins. Co.* v. *Daggs*, 172 U. S. 45; *Berea College* v. *Kentucky*, 211 U. S. 45; *Holyoke Water Power Co.* v. *Lyman*, 15 Wall. 500; *Close* v. *Glenwood Cemetery*, 107 U. S. 466; *Sperry & Hutchinson Co.* v. *Rhoades*, 220 U. S. 502; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 17; *C., B. & Q. R. Co.* v. *McQuire*, 219 U. S. 565; *Shields* v. *Ohio*, 95 U. S. 324; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258.

The adoption of the act is a legitimate exercise of the right of classification of corporations as artificial persons, subject to special rules, independently of the reserved power to amend charters. *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis Railway* v. *Herrick*, 127 U. S. 211; *Chicago &c. Ry. Co.* v. *Pontius*, 157 U. S. 210; *Tulis* v. *Lake Erie &c. Ry. Co.*, 175 U. S. 351; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60; *El Paso &c. Ry. Co.* v. *Guiterrez*, 215 U. S. 87; *L. & N. Ry. Co.* v. *Melton*, 218 U. S. 36; *Railway* v. *Turnipseed*, 219 U. S. 35; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *C., B. & Q. Ry. Co.* v. *McGuire*, 219 U. S. 555; *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413; *Lindsey* v. *Carbonic Gas Co.*, 220 U. S. 61; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *A., T. & S. F. R. Co.* v. *Matthews*,

174 U. S. 104; *M., K. & T. Ry. Co.* v. *May*, 194 U. S. 267.

The hazard incurred by the defendant in error was a risk of railroading as to which the legislature might make a special rule. *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The defendant in error brought this action against the plaintiff in error in the Saline Circuit Court of the State of Arkansas to recover for personal injuries alleged to have been received by him while in the employment of the company, which maintained a railroad to its mines, on account of the negligence of a fellow servant.

The action was based upon a statute of the State called by the parties "The Fellow Servant Law." (Acts 1907, Act 69, p. 162.) The statute makes railroad corporations operating within the State and every company, whether incorporated or not, engaged in the mining of coal, "liable to respond in damages for injuries or death sustained" by agents, employés or servants, "resulting from the careless omission of duty or negligence of such employer," or "any other agent, servant or employé of the said employer," in the same manner as though the carelessness, omission of duty or negligence was that of the employer.

The company assailed the constitutionality of the statute by the request for the following instruction, which was refused by the trial court: "You are instructed that the act of the legislature, approved March 8th, 1907, known as 'The Fellow Servant Law,' in providing it shall apply to all corporations but shall not apply to individuals, persons or partnerships, except those engaged in the operation of a railroad or coal mine, denies to this defendant the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States."

There was a verdict for the plaintiff, defendant in error here, upon which judgment was duly entered. It was sustained by the Supreme Court of Arkansas. 89 Arkansas, 522.

The Supreme Court sustained the action of the trial court in refusing the instruction on the authority of *Ozan Lumber Co.* v. *Biddie*, which had been previously decided, and which is reported in 87 Arkansas, 587. This action of the court is assigned as error, and is the Federal question relied on.

A motion is made to dismiss, and, alternately, to affirm, respectively, on the ground that there is no Federal question in the state court's construction of the statute, and that if there be such a question it is foreclosed by repeated decisions of this court. In support of the motion to dismiss it is contended that the state court decided that the act assailed is an amendment to the charter of the corporation under the reserved right to amend, alter or repeal the charter, and of this the corporation cannot complain, the exertion of such right being a condition of its existence.

In *Ozan Lumber Co.* v. *Biddie*, *supra*, the court decided that "The Fellow Servant Law" was an amendment to the charters of corporations, made under the right reserved in the constitution of the State to repeal, alter or amend such charters. The Ozan Lumber Company, however, was a domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local; so we pass to the consideration of the merits.

On the merits the case is in a very narrow compass and does not demand much discussion, though plaintiff in error earnestly presses the contention that the statute is discriminatory in that it applies to all corporations, but does not apply to individuals or partnerships. Whether

that exact distinction, that is, the distinction merely between corporations and partnerships and individuals, is competent for a legislature to make, under its power of classifying objects, we are not called upon to decide. The distinction made by the statute is broader. The distinction (among others) it makes is between railroads operating in the State and individuals, and such distinction has been maintained by this court as not offending the Constitution of the United States. *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593. See also *Employers' Liability Cases*, 207 U. S. 463, 504, and *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

What grievance plaintiff in error might have if it were not operating a railroad we are not called upon to consider, because it is limited in its complaint to the effect of the statute on it and cannot appropriate the grievance that corporations engaged in mining, but not operating railroads, may have on account of the distinction made between them and individuals.

It is true that the Supreme Court of the State, following *Ozan Lumber Co.* v. *Biddie, supra*, decided the law was a regulation of corporations, and applied it to the plaintiff in error because it was a corporation, not distinguishing it as one operating a railroad. It, however, may be so distinguished under the statute. That is, the statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class. In other words, not only the plaintiff in error, but all other corporations operating railroads are covered by the statute.

We think, therefore, that the statute of Arkansas is not repugnant to the Fourteenth Amendment, and the judgment is

Affirmed.

UNITED STATES *v.* GARBISH.

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

No. 362. Argued November 7, 1911.—Decided December 11, 1911.

Under the act of August 1, 1892, 27 Stat. 340, c. 352, restricting service of laborers employed on public works of the United States to eight hours a day except in cases of extraordinary emergency, the exception does not relate to contemplated emergencies necessarily inhering in the work, or to mere requirements of business convenience or pecuniary advantage, but only those exceeding the common degree.

This court assumes that Congress uses a phrase in a statute with a consciousness of its meaning and with the intention of conveying such meaning.

A contractor for public works has the statute before him and can govern himself accordingly. There is no hardship in holding him to its terms.

An intention of Congress to exempt from provisions of a general statute declaring a public policy a conspicuous public work, such as repairing levees of the Mississippi river, would undoubtedly have been expressed; and *held*, that the continuing necessity of prompt completion of the work on such levees cannot be classed as an extraordinary emergency within the meaning of the Eight Hour Law of 1892.

Quære, to what extent the court can take judicial knowledge of necessity for and conditions of a public improvement such as Mississippi river levees.

180 Fed. Rep. 502, reversed.

THE facts, which involve the construction of the Federal Eight Hour Labor Law, are stated in the opinion.

The Solicitor General for the United States.

Mr. E. D. Saunders for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Defendant in error was indicted for violation of the act

of Congress of August 1, 1892, c. 352, 27 Stat. 340, which restricts the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government or by any contractor or subcontractor, upon any of the public works of the United States, to eight hours in any one calendar day, and makes it unlawful for any officer of the Government or any such contractor to require or permit any such laborer to work a longer time "except in cases of extraordinary emergency."

The indictment set out in proper form that defendant in error had violated the law by permitting and requiring his employés engaged in building a public levee on the Mississippi River, which was part of the public works of the United States, to work more than eight hours "on the 17th day of August, 1908, at a time and under circumstances when there was no extraordinary emergency, for the reason that at that season of the year, to-wit, during the months of August, September, October, and November and December, the waters of the Mississippi River annually fall below the level of the surrounding land and are retained within the banks of said river without the necessity of any artificial levees, as was true on August 17, 1908." It is further charged that the levees were being constructed in the usual and ordinary course of levee building done annually for the increase in size and strength of such levees, in preparation for the high waters that come down the river, the levees being of standard size and sufficient to resist usual high water, but not unusual high waters, that occasionally, although not every year, come down the river, it being the policy, rule and custom of the Government to increase the standard of levees by destroying inferior levees and replacing them with stronger and higher ones year by year until the levees shall all be brought to a standard able to withstand any unusual floods. And it is further charged that the particular

work which the defendant in error was constructing was nothing unusual or out of the ordinary, but was being done in pursuance of the policy indicated and at the usual time, so as to allow the levee time to settle and pack and become ready and able to serve the purposes for which it was constructed; that is, to withstand and retain the high waters of the Mississippi river before their usual annual rise, and the time of construction being the usual and customary time to so complete and perfect the levee, before the annual rise of the waters, as would exist in the construction of any levee on the river "any year and at any place and by any contractor, all of whom know, as did the said Garbish, that the waters of the Mississippi river annually fall and are retained within the natural banks thereof during the period or season aforesaid, and begin to rise above the natural banks thereof, and therefore to need artificial levees to retain them, in the month of January each year."

Defendant demurred to the indictment, on the ground that it did not set forth any offense against the laws of the United States or any violation of the laws of the United States. The demurrer was sustained.

In passing upon the demurrer the court said that the defendant rested his case upon the proposition "that the building of levees on the Mississippi River, in the Eastern District of Louisiana, at all times presents an extraordinary emergency," and hence that the work on the river is exempt from the operation of the law. The court took judicial notice of the fact asserted and sustained the conclusion from it. The court said that certain facts were within the common knowledge of the people of the district, which, taken in connection with the specific allegations of the indictment, overcame the mere conclusion of the pleader that no extraordinary emergency existed, and instanced the following: The work on the levees was absolutely necessary for the preservation of property

and the cultivation of the land; therefore it has always been usual for levee work to proceed with the utmost dispatch, and the labor of the day has never been restricted to eight hours. It is necessary, the court said, that the levees be built in as short a time as possible, that they may settle and that the grass may become well rooted on them before they are called upon to bear the strain of the high river.

From these facts the court assumed the existence of others, as follows (180 Fed. Rep. 502, 503):

"It is true that the months of August, September, October, November and December are the most favorable for levee building, but there is no certainty that during any part of these months the river will maintain a low stage. When the river is bank full, necessarily no levees can be built. Statistics of the river's height, at New Orleans, show that during the past 25 years the river has been bank full on nearly every day of the year, and these statistics may well apply to the locality where the defendant was working. An unprecedented rain, or an early freeze followed by a thaw, anywhere in the valley of the Mississippi River or its tributaries, might unexpectedly cause the river to rise at New Orleans. No one can foresee or anticipate the acts of nature, and who can say that a few days' more time, in which it might have become solidified, would not have so materially added to the levee's strength as to enable it to withstand the pressure, and without which it might signally fail."

The Government insists that the court assumed too extensive a judicial knowledge, and urges that the most important of the assumed facts, that the river has been bank full almost every day in the year, and the extension of the fact to the locality where defendant was working, is contradicted by the official hydrographs, 1871 to 1907 and 1907 to 1911, attached to the Government's brief, from which it appears that at Carrollton, which is a

few miles above New Orleans and a few miles below St. James Parish, the river, from 1872 to 1910, had never been above the stage at which it begins to interfere with the construction of levees, in August, September, October and November, and only a few days in August, 1875, touched that stage; and the Government further contends that it was not a matter to be judicially taken notice of that the work could not be properly expedited unless the laborers be employed more than eight hours a day. But aside from these considerations, it has been decided that no mere requirement of business convenience or pecuniary advantage is an extraordinary emergency within the meaning of the act. *Ellis* v. *United States*, 206 U. S. 246, 256, 257. And, besides, the extraordinary emergency which relieves from the act is not one that is contemplated and inheres necessarily in the work. *United States* v. *Sheridan-Kirk Contract Co.*, 149 Fed. Rep. 809. It is a special occurrence, and the phrase used emphasizes this. It is not an emergency simply which is expressed by it, something merely sudden and unexpected, but an extraordinary one, one exceeding the common degree. We must assume that the phrase was used with a consciousness of its meaning and with the intention of conveying such meaning. As said by the Solicitor General, "the phrase 'continuing extraordinary emergency' is self-contradictory."

The building and repair of levees on the Mississippi River is one of the most important and conspicuous of the public works of the United States, and if it had been intended to exempt it from the provisions of the act of August 1, 1892, which declared a public policy in regard to labor, it would have been expressed. There is no hardship in this to a contractor. He has before him the law and the conditions affecting the work which he may undertake and can govern himself accordingly.

Judgment reversed and cause remanded with directions to overrule the demurrer.

CONSAUL ET AL, ADMINISTRATORS OF MOYERS, *v.* CUMMINGS, ADMINISTRATOR OF EDMONDS.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 38. Argued November 6, 1911.—Decided December 11, 1911.

The law implies equality between partners and does not favor claims of the survivor for services rendered after dissolution of the firm and which lead to efforts to prove disparity.

Each partner is bound to devote himself to the firm's business and there is no implied obligation on the part of the other partners to pay him more than his proportion for performing his duty; and this rule applies to a surviving partner completing the business of the firm.

While equity at times makes exceptions to the general rule that a surviving partner is not allowed compensation for winding up the affairs of the copartnership, this case does not fall within such exceptions.

A limited partnership formed by two lawyers to prosecute claims against the Government, one of whom had already secured the claims and the other of whom was to attend to the prosecution, *held* not to be one in which either the lunacy or death of the former would amount to a dissolution or entitle the survivor to extra compensation for prosecuting the claims after such events to a successful conclusion, the partnership gains being payable *in solido* and dependent upon success, and the record showing that the deceased partner did not at any time aid materially in the prosecution of the claims and was not expected to.

A surviving partner of a law firm prosecuting claims under powers of attorney from the claimants to the deceased partner cannot retain the business individually and claim that the powers to the deceased partner were revoked by his death; he must account to the representatives of the deceased partner for his share of the fees.

If the defendant should have previously accounted, but wantonly refused or neglected so to do, interest is properly chargeable from the filing of the bill.

If a defendant did not except to a ruling fixing a date for calculating interest on an account, and asked to be allowed interest on advances from the same date, he is deemed to have acquiesced in the ruling, and cannot complain of it in this court.

A curator and administrator of a deceased member of a partnership, who has no power of sale, is not chargeable with laches because he waits until the surviving partner has realized the assets of the copartnership before demanding an account. The interests of his ward and intestate are founded in contract and cannot be destroyed by mere non-action.

33 App. D. C. 132, affirmed.

THE facts in these cases are fully set out in the decisions on the various appeals reported in 17 App. D. C. 269; 24 Id. 36; 30 Id. 540; 33 Id. 132. Only what is material to an understanding of the assignments of error need be now stated.

George B. Edmonds was an attorney in Washington, practicing in the Court of Claims. Under agreements to pay contingent fees, and giving him power of substitution, he represented a large number of clients, who had claims pending in that court and before Congress. A schedule was attached to a contract made in 1888 by Edmonds with Gilbert Moyers, also an attorney, in which they agreed "as special partners to prosecute these claims in Congress and before the court." The fees and expenses were to be equally divided. Edmonds also stipulated therein that said "Moyers shall represent and be associated with me in the prosecution of the said claims as joint attorney of record."

Edmonds was adjudged a lunatic in 1891, and Cummings was appointed his committee. There had only been a few collections, and most of the claims were still pending at the time of Edmonds' death in 1896. By virtue of appropriations made in March, 1899, Moyers collected a large amount in May, 1899. Cummings made a demand on him for a settlement, and Moyers several times promised to make a statement, explaining that the delay

was caused by bad health. Nothing having been done, Cummings was appointed administrator of Edmonds on August 22, 1899, and on September 16, 1899, filed a bill for an accounting. Among other things Moyers, in his answer, claimed that Edmonds, in consideration of money advanced by him in ignorance of the lunacy proceedings, had conveyed to Moyers all his interest in the fees that might be collected. This transfer he claimed operated as a dissolution of the firm. The court ordered an accounting; Moyers appealed. That decree having been affirmed, the case was referred to a master. He found that Edmonds had not sold his interest in the fees and that the partnership had not been dissolved, but allowed Moyers credit for the amount advanced in 1892. He found that the fees earned aggregated about $26,000, and after deducting the expenses and allowing Moyers credit for the advances, found balance in favor of complainant, with interest thereon, from September 16, 1899, the date Moyers should have accounted. Moyers on the appeal offered no objection to this award of interest, but claimed that under the same rule interest should have been allowed him on the advances made in 1892. The Court of Appeals sustained this view, and directed that in restating the account interest should be allowed Moyers on these advances from, say, January, 1893, to September 16, 1899. On a subsequent hearing the account was thus restated. On a later appeal the court held that, as Moyers had taken no exception, this ruling was conclusive. The court also held that Moyers was entitled to credit for expenses advanced in claims which were finally disallowed by the court.

During the litigation other claims were pending in the Court of Claims. But in view of the controversy over the fees Moyers abandoned some of them, and on his advice a few of the claims were put in the hands of attorneys associated with Moyers in business. They made collection, but the master charged Moyers with the proportion of the

fees thereon due Edmonds under the original contract. Other claims were withdrawn by clients and placed with attorneys not connected with Moyers in business. Congress passed additional acts of appropriation, by virtue of which some of the other claims in the schedule were collected. These items were included in the master's final statement of account. This was approved by the chancellor and affirmed on appeal. The case is here on numerous assignments of error, all of which have been abandoned except those in which Moyers' administrators claim that (1) he should have been allowed compensation for services after the dissolution of the firm; (2) that he should not have been charged with interest from September 16, 1899, but only from the final decree of November, 1908, when for the first time the amount due was made certain, and (3) the refusal to dismiss the bill on the ground of complainant's laches.

Mr. A. S. Worthington and *Mr. Charles F. Consaul*, with whom *Miss Ida N. Moyers* was on the brief, for appellants:

The special partnership agreement between Moyers and Edmonds was dissolved either by the adjudicated insanity of Edmonds, in 1891, or by his death, in 1896, and the utmost measure of recovery by the estate of Edmonds would be one-half the reasonable value of services rendered by the special partnership prior to such dissolution of the special partnership, less one-half partnership expenses incurred and less advances made by Moyers to Edmonds.

The death of a partner dissolves a partnership. *Scholefield* v. *Eichelberger*, 7 Pet. 586; *Burwell* v. *Cawood*, 2 How. 560, 576. See also to same effect *Davies* v. *Christian*, 15 Gratt. (Va.) 11; *Gratz* v. *Bayard*, 11 S. & R. (Pa.) 41; *Knapp* v. *McBride*, 7 Alabama, 19; *Goodburn* v. *Stevens*, 5 Gill (Md.), 1; *Williamson* v. *Wilson*, 1 Bland (Md.), 418; *Griswold* v. *Waddington*, 15 Johns. (N. Y.) 82; *White*

v. *Union Ins. Co.*, 1 N. & McC. (S. C.) 559; Story on Partnership, 7th ed., § 317; Parsons on Partnership, 4th ed., § 342; *Ames* v. *Downing*, 1 Bradf. (N. Y.) 321.

The surviving partner is entitled to compensation for special services rendered in realizing the assets of the partnership after dissolution. *Babbitt* v. *Riddell*, 1 Grant's Cases (Pa.), 161; *Justice* v. *Lairy*, 19 Ind. App. 272, 277; *Denver* v. *Roane*, 99 U. S. 355; *Starr* v. *Case*, 59 Iowa, 491; *Rowell* v. *Rowell*, 122 Wisconsin, 1, 24; *Lamb* v. *Wilson*, 3 Nebraska (Unoff.), 496, 505; 98 N. W. Rep. 37; *Vanduzer* v. *McMillan*, 37 Georgia, 299. See also *Newell* v. *Humphrey*, 37 Vermont, 265, 270; *Royster* v. *Johnson*, 73 N. Car. 474; *Zell's Appeal*, 126 Pa. St. 329, 333; *Maynard* v. *Richards*, 166 Illinois, 466; Bates on Partnership, § 773; *Schenkl* v. *Dana*, 118 Massachusetts, 236, citing *Willett* v. *Blanford*, 1 Hare, 253; Lindley on Part., 3d ed., 1034 *et seq.;* Story on Part., 6th ed., §§ 322, 343, 350; *Cameron* v. *Francisco*, 26 Oh. St. 190; *Thayer* v. *Badger*, 171 Massachusetts, 279, citing *Turnball* v. *Pomeroy*, 140 Massachusetts, 117; *Robinson* v. *Simmons*, 146 Massachusetts, 167, 176.

When Edmonds died he had no capital invested in the partnership business. His powers of attorney and fee contracts were revoked and nullified by his death. The capital could not consist of his services because he was dead and could render no services. His estate never rendered any services, after his death, so his estate had nothing in the partnership or its earnings after his death. *Condon* v. *Callahan*, 115 Tennessee, 285, 291, citing *Brown* v. *Tastet*, 1 Jacob, 284; *Cameron* v. *Francisco*, 26 Oh. St. 190; *Newell* v. *Humphrey*, 37 Vermont, 265.

If the surviving partner in a commercial partnership happened to be a lawyer, and if, in order to realize on firm assets, he had to bring suits and conduct them as an attorney at law, he would be entitled to charge the same commission as any other lawyer would have charged.

And see where this court intimates that in winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor, the surviving partner may be entitled to compensation. *Denver* v. *Roane*, 99 U. S. 355; *Sterne* v. *Goep*, 20 Hun, 397; *Osment* v. *McElrath*, 68 California, 466.

As Edmonds' authority, conferred by powers of attorney, died when Edmonds died, there remained no authority vested either in Edmonds or his employé, Moyers, to further proceed with his claims. Therefore Moyers after the death of Edmonds acted under direct employment by the claimants.

Any relation of employer and employé existing between Edmonds and Moyers terminated at the death of Edmonds; Mecham on Agency, § 249; and see *Gage* v. *Allison*, 2 Am. Dec. 682; *Merrick's Est.*, 8 Watts & Serg. (Pa.) 402; *Adriance* v. *Rutherford*, 57 Michigan, 170.

It was error to allow any interest to the Edmonds' estate on any sum found to be due as the result of the proceedings had, from a date prior to the entering of the final decree pursuant to the mandate of this court.

Interest is not properly allowable on running or open account or on accounts which are unliquidated, or concerning which there is an honest dispute between the parties, and is not usually allowable on partnership accountings until a balance has been struck. *Gyger's Appeal*, 62 Pa. St. 73; *Clark* v. *Clark*, 46 Connecticut, 586; *Imperial Hotel Co.* v. *Claflin Co.*, 175 Illinois, 119, 124; *Pieser* v. *Minkota Milling Co.*, 94 Ill. App. 595; *Henderson Cotton Mfg Co.* v. *Lowell Machine Shop*, 86 Kentucky, 668; *Sweeney* v. *Neely*, 53 Michigan, 421; *Houston* v. *Crutcher*, 31 Mississippi, 51; *Holden* v. *Peace*, 39 N. Car. 223; *Dexter* v. *Arnold*, 3 Massachusetts, 284; *Pengra* v. *Wheeler*, 24 Oregon, 532; *Grubb's Appeal*, 66 Pa. St. 117; *Stearns* v. *Mason*, 24 Gratt. 484; *South Carolina* v. *Port Royal R. R.*

Co., 89 Fed. Rep. 565, 574; *Haskell* v. *Vaughan*, 5 Sneed (Tenn.), 618.

A partner cannot be heard to allege that the other partner owed him anything, after dissolution, until there has been a "general settlement," which means the striking of a balance. *Rogers* v. *Yarnell*, 51 Arkansas, 198; *Heald* v. *Handy*, 89 California, 632; *Raymond Bros.* v. *Williams & Chapman*, 40 Iowa, 117; *Williams* v. *Hersey*, 17 Kansas, 18; *Ory* v. *Winter*, 6 Mart. N. S. (La.) 606; *Flannery* v. *Anderson*, 4 Nevada, 437; *Edwards* v. *Dargan*, 30 S. Car. 177; *Stamps* v. *Tenn. Co.*, 59 S. W. Rep. (Tenn.) 769; and in *Ryan Drug Co.* v. *Hvambsahl*, 92 Wisconsin, 62; interest was allowed, but on the theory that the accounts should be deemed "accounts stated," concerning which there was no dispute between the parties.

The bill should have been dismissed for lack of equity in view of the obvious laches of the complainant. *Baker* v. *Cummings*, 169 U. S. 189.

The silence of Edmonds' representative which extended over the period beginning with January 31, 1891, and ending in the spring of 1899—over eight years—operated to the great prejudice of Moyers; operated in its real effect, according to the courts below, to cause Moyers to carry with him as a partner, the lunatic up to 1896, and the decedent after that date. This is surely unconscionable, and should not be permitted by a court of equity. *Abraham* v. *Ordway*, 158 U. S. 416, 421; *McKnight* v. *Taylor*, 1 How. 161. See also *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 1; *Kane* v. *Bloodgood*, 7 Johns. Ch. Rep. 93; *Decouche* v. *Saratiere*, 3 Johns. Ch. Rep. 190; *Prevost* v. *Gratz*, 6 Wheat. 481; *Hughes* v. *Edwards*, 9 Wheat. 489; *Willison* v. *Matthews*, 3 Pet. 44; *Miller* v. *McIntire*, 6 Pet. 61, 66; *Bowman* v. *Wathen*, 1 How. 189.

Moyers, as surviving partner, after such a lapse of time cannot even be charged as trustee if he were one. *Badger* v. *Badger*, 2 Wall. 87, 96; *Norris* v. *Haggin*, 136 U. S. 386.

When a party relies on ignorance of facts material to his rights as an excuse for laches or delay in asserting them, he must show *why* he was so long ignorant, and acquit himself of all knowledge of facts which would even put him on inquiry. *Badger* v. *Badger*, 2 Wall. 87; *Stearns* v. *Page*, 7 How. 819; *Ware* v. *Galveston City Co.*, 146 U. S. 102; *Moore* v. *Greene*, 19 How. 69; *Beaubien* v. *Beaubien*, 23 How. 190; *New Albany* v. *Burke*, 11 Wall. 107; *Foster* v. *Mansfield &c. R. Co.*, 146 U. S. 88; *Godden* v. *Kimmell*, 99 U. S. 201; *Wood* v. *Carpenter*, 101 U. S. 135; *Hardt* v. *Heidweyer*, 152 U. S. 547; *Hammond* v. *Hopkins*, 143 U. S. 224.

Mr. Charles Cowles Tucker, with whom *Mr. J. Miller Kenyon* was on the brief, for appellee.

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

In this accounting of the affairs of a special partnership between attorneys at law, the survivor claims compensation for services rendered after dissolution of the firm.

Claims of this sort are not favored. They lead to efforts to prove a disparity between the partners, when the law implies equality. They necessitate a balancing of the value of the work of each in securing the business and earning the profits, as well as a comparison of the time they may spend on the matters under consideration. Each partner is bound to devote himself to the firm's business, and there is no implied obligation that for performing this duty he should be paid more than his proportionate share of the gains. Neglect by one to do his part may be of such character as to justify a dissolution. But as long as the firm continues there is usually no deduction because one partner has not been as active as the other. The same is true where death prevents either of the part-

ners from performing his contract. The law did not permit him to appoint a substitute, nor can his personal representative, no matter how well qualified, assist in winding up the affairs of the firm. Whether that be considered a right or duty, it is in either event cast on the survivor. In performing it he only carries out an obligation implied in the partnership relation, and is therefore entitled to no compensation for thus doing what he was bound to do and what would have been imposed on the other had the order of their death been different. To allow the survivor compensation wherever he continues the business would be to offer an inducement to delay the settlement which ought to be made as soon as possible.

To this general rule there are exceptions, where, under peculiar circumstances, the principles of equity entitle the survivor to compensation. *Thayer* v. *Badger, Admr.*, 171 Massachusetts, 279. Thus, where by authority of law, or under a power in the will, the personal representative consents that the business may be continued by the survivor, the estate must pay for such additional services. Or, where without such consent, and at his own risk, the survivor continues the business and makes a profit, the estate is bound to allow reasonable compensation if it elects to share in the gains thus made.

So where a member of a firm, by his voluntary act, dissolved the partnership the partner who continued the business was allowed compensation for performing services in which he had the right to have expected the continued assistance of the other. Extra compensation has also been allowed in a few cases where, in order to realize on the assets, it was absolutely necessary for the survivor to continue the business beyond the reasonable time allowed for winding up its affairs. See *Justice* v. *Lairy*, 19 Ind. App. 272; *Zell's Appeal*, 126 Pa. St. 329; *Schenkl* v. *Dana*, 118 Massachusetts, 236; *Gray* v. *Hamil*, 82 Georgia, 375; *Beatty* v. *Wray*, 19 Pa. St. 516; *Cameron* v. *Francisco*,

26 Oh. St. 190; *Robinson* v. *Simmons*, 146 Massachusetts, 167; *Holmes* v. *Higgins*, 1 Barn. & C. 74. Then, too, there is a suggestion in *Denver* v. *Roane*, 99 U. S. 355, 359, that there may be "a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor."

This point is not involved and on it no ruling is made, because we are not dealing with questions between the administrator of the deceased and the surviving member of an ordinary law partnership, where the latter conducts to a conclusion the business of the firm, under circumstance, where there may be a right from time to time to call on the client for compensation for the value of services rendered and even though the case is finally lost. Here the agreement related solely to litigation in which compensation was for success and not for the value of services rendered. Such payment was to be *in solido*, and the partners agreed that the fees should be divided *in solido*.

Moyers insists, however, that the peculiar facts of this case bring him within the other exceptions pointed out above; that when Edmonds was adjudged a lunatic, in 1891, the firm was dissolved; that with the knowledge of Cummings, who was acting as Edmonds' committee, Moyers continued to prosecute the claims, paid out large sums for necessary expenses, and, in spite of probable failure, rendered valuable services, which finally earned the fees now to be divided. He claims that in equity and good conscience he should be paid reasonable compensation for this work, in which Edmonds rendered no assistance.

Moyers put in his services against the claims turned over to the firm by Edmonds, who stipulated that Moyers should *represent* him, and to that end "be associated in the prosecution of the claims as joint attorney of record." Edmonds rendered little or no assistance and apparently was not expected to do so, for Moyers himself testified that

the contract was "an employment of me to attend to certain business for him in the Court of Claims in regard to certain cases. It might be styled a limited partnership. It was not a general partnership." In prosecuting the claims and collecting the money Moyers therefore only did what he contracted to do, and is not entitled to compensation beyond that set out in the agreement. That these services extended over a long period does not increase his share nor lessen Edmonds' interest in the profits. Under the contract, Moyers agreed to prosecute the claims and could neither abandon them without just cause nor advise clients to put them in the hands of others. If he did so, he is chargeable with the fees which should have been earned by him under the articles of partnership. Neither can Edmonds' interest be diminished on the ground that the contract of employment by the client was revoked by his insanity or death. They made no such objection and apparently acquiesced in Edmonds' arrangement by which they were put in the hands of Moyers. The survivor cannot retain the business thus coming to him by virtue of a contract with Edmonds without accounting for his share of the fees.

Moyers was charged with interest on the balance due from September 16, 1899, when the suit was filed, being the date on which the master found he should have accounted with the complainant. Moyers contends that what, if anything, was due was uncertain; that it required numerous references in order to properly state the account; that it was not liquidated until the final decree in November, 1908, when, for the first time, the true balance was ascertained, and hence that interest should only run from that date. Interest is allowed by way of damages for failure to pay money when it is due and frequently is not allowed except from the time the amount to be paid has been definitely ascertained. But there are many cases in which interest is charged from a prior date. Here the de-

fendant at first promised to make a statement, then contended, without substantial support, that the partnership was dissolved because Edmonds had transferred his interest in the fees. He resisted the accounting, failed to produce books, vouchers and statements proper to be kept by a surviving partner. As the Court of Appeals said, the delay and difficulty in reaching a conclusion was largely due to his failure to keep proper books. Under the circumstances the master properly allowed interest from the date the bill was filed. *Spalding* v. *Moser*, 161 U. S. 375; *Nashua & Lowell R. Corp.* v. *Boston &c. R. R.*, 61 Fed. Rep. 237, 247. Moyers did not except to this method of calculating interest; on the contrary, he obtained a ruling that on the same basis he should be allowed interest from 1892 on advances then made by him to Edmonds. He cannot now complain that the account was stated in accordance with a rule in which he acquiesced, and the benefit of which he invoked.

In the last assignment, it is alleged that the court erred in not dismissing the bill because of complainant's laches in filing it. It is contended that after Cummings was appointed committee of Edmonds in 1891, he knew of the contract of special partnership and that Moyers was prosecuting these claims, and not only made no demand for a settlement, but permitted Moyers to do all the work, incur all of the expense, and run all of the risks, without notifying him that Edmonds' representative would claim one-half of the profits. It is urged that such conduct was inequitable and that to wait until eight years before filing proceedings constituted laches which requires a dismissal of the bill. We find nothing in the facts or in the relation of the parties that made it incumbent on Cummings to warn Moyers of Edmonds' claim, even if Cummings had the full knowledge of all the facts which is necessary to raise any such obligation. Edmonds' right was rooted in the contract, and has only been enforced in pursuance

of its terms. Cummings had no title to Edmonds' property, but was a mere curator, with limited powers. He could not have sold Edmonds' interest in these claims to Moyers or anyone else without an order of court. For a much stronger reason he could not accomplish the same result and destroy Edmonds' right therein by a mere non-action. The fees were not collected until the spring of 1899, and within four months thereafter the bill for an accounting was filed.

The decree is

Affirmed.

UNITED STATES *v.* MORGAN.

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

No. 463. Argued October 19, 1911.—Decided December 11, 1911.

It is not a condition precedent to prosecutions for violation of the Pure Food and Drug Act that an investigation or hearing be had in the Department of Agriculture.

Where a statute provides for notice in one case and permits prosecutions without notice in another case it shows that there was no intent to make notice jurisdictional.

Repeals by implication are not favored; nor is there a presumption that a law passed in the interest of public health was intended to hamper prosecutions of offenses against the statute itself.

A statute will not be construed as grafting exceptions on the criminal law in favor of offenders against that particular statute in the absence of clear and unambiguous expressions.

Citizens are furnished the surest safeguards against malicious prosecutions by the Fourth Amendment.

Section 4 of the Pure Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 678, does not repeal Rev. Stat., §§ 771 or 1022, making it the duty of the district attorney to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, nor does it limit him to prosecute only those offenders who have had a hearing before the Department of Agriculture.

THE defendants maintained an establishment in New York where, after filtering Croton water drawn from the city pipes, adding mineral salts and charging it with carbonic acid, the water was bottled and sold as "Imperial Spring Water." In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910, when they were found guilty of shipping misbranded goods in interstate commerce. They moved in arrest of judgment on the ground that it was not alleged that they had been given notice and a preliminary hearing by the Department of Agriculture, contending this was a condition precedent to the return of a valid indictment. The judge held that such hearing must be granted in all cases where the prosecution was instituted by the Department of Agriculture or its agent (181 Fed. Rep. 587), and from a later order sustaining the motion in arrest the Government brought the case here under the Criminal Appeals Act.

The Solicitor General, with whom *Mr. Jesse C. Adkins* and *Mr. Loring C. Christie* were on the brief, for the United States:

In no case is it a condition precedent to prosecution for a violation of the Pure Food and Drugs Act that an investigation or hearing be had in the Department of Agriculture.

The Federal grand jury possesses full inquisitorial power and may indict upon knowledge acquired either from their own observations or upon the evidence of witnesses called

of their own motion before them, and even though no preliminary hearing be had before a committing magistrate. *Hale* v. *Henkel*, 201 U. S. 43.

The departmental investigation and hearing do not constitute a means of defining any element of the crimes. They are defined by §§ 1 and 2 of the act. The offense was putting a misbranded article of food into interstate commerce, and the crime was committed when the shipment was made. The manner of acquiring the evidence can make no change in the crime.

Uniformity of procedure does not require the construction contended for. Such preliminary hearing is not intended as an aid to the court.

The lawfulness of the manufacturer's label depends only on its truth, not on any action of the Secretary of Agriculture. The latter cannot make pure what is adulterated, nor make true what is false. Nor does the Secretary's finding *prima facie* establish the defendant's guilt. Such construction would be prejudicial to the accused and an invasion of his rights.

If the departmental findings are not received in evidence they should not be averred in the indictment.

The provisions for investigation by the Department are not inconsistent with prosecutions through the ordinary channels or criminal procedure. The object of the statute is accomplished by prosecutions in either way.

In construing statutes imposing upon certain public officers the duty of their enforcement, such duty is not exclusive, but proceedings for violations of the statute may be begun in the usual way. *Commonwealth* v. *Carroll*, 145 Massachusetts, 403; *Commonwealth* v. *Murphy*, 147 Massachusetts, 577; *Commonwealth* v. *Mullen*, 176 Massachusetts, 132; *Isenhour* v. *State*, 157 Indiana, 517; *Commonwealth* v. *Spencer*, 28 Pa. St. 301; *Commonwealth* v. *Arrow*, 32 *Ib.* 1; *People* v. *Beaman*, 102 N. Y. App.

Div. 155; *Attorney General* v. *Great Northern Railway Co.*, 1 Dewry and Smale, 154.

The departmental hearing is not necessary to the rights of the accused. The object of the hearing is to protect the innocent dealer who furnishes evidence to fasten the crime upon the guilty person. This right is not lost by the retailer even though he may have no hearing. The production of the guaranty at the trial will insure his acquittal.

In the present case the sample was not obtained from the defendants; hence they were not entitled to notice or hearing. *Inter. Com. Com.* v. *Chicago, Rock I. & Pac. Ry. Co.*, 218 U. S. 109.

The construction contended for if applied to libels under § 10 of the act would practically destroy the value of the act.

The remedy under that section is the destruction of the offending article itself. This remedy is independent of the criminal prosecutions prescribed in §§ 1 and 2. *Hipolite Egg Co.* v. *United States*, 220 U. S. 55.

That such inquiry is not necessary in civil proceedings has been held by the courts in the following cases: *United States* v. *Fifty Barrels of Whiskey*, 165 Fed. Rep. 966; *United States* v. *Sixty-five Casks of Liquid Extracts*, 170 Fed. Rep. 449; *United States* v. *Nine Barrels of Olives*, 179 Fed. Rep. 983; *United States* v. *One Hundred Barrels of Vinegar*, 188 Fed. Rep. 471. *United States* v. *Twenty Cases of Grape Juice*, decided May 8, 1911, 189 Fed. Rep. 331, can be distinguished from this case.

Mr. Alexander Thain for defendants in error:

This court has no jurisdiction to review the decision of the court below.

The construction given to the statute by the court below is in accordance with well-established legal principles.

The obvious purpose in providing a hearing was to prevent injustice and abuse of the statute by business rivals of the manufacturer, who might otherwise, by laying complaint with the attendant publicity, ruin that competitor's business before he ever had his day in court and an opportunity to disprove the charge. The act can be and should be so construed as to prevent such results.

The statute in providing for a preliminary hearing intended that both the dealer and the manufacturer should have an opportunity to be heard on these and similar questions and to show their good faith before the drastic measures are resorted to. See debate in the Senate February 2, 1906 (Congressional Record, Vol. 40, Part 2, p. 1923), from which it is clear that Congress contemplated that the manufacturer and dealer should have an opportunity to be heard before criminal proceedings were commenced against them.

The courts have already had occasion to comment upon the fact that the usefulness of this act is threatened by the unreasoning zeal sometimes shown in its enforcement. *In re Wilson*, 168 Fed. Rep. 566 at 568; *French Silver Dragee Co.* v. *United States*, 179 Fed. Rep. 824.

When an act, not before subject to punishment, is declared penal, and a mode is pointed out in which it is to be prosecuted, that mode must be strictly pursued. Wharton's Crim. Pleading & Practice, 9th ed., § 230; 1 Wharton's Precedents, p. 23, and cases; *Commonwealth* v. *Chase*, 125 Massachusetts, 202.

Special matter of the whole offense should be set forth in the indictment with such certainty that the offense may judicially appear to the court. 1 Wharton's Precedents &c., Ch. II, notes, p. 22. *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Simmons*, 96 U. S. 360; *People* v. *Taylor*, 3 Denio, 91.

Where a statute attaches to a named offense certain technical predicates, these predicates must be used in the

indictment. Beal, Cardinal Rules of Legal Interpretation, 2d ed., 443, and cases.

The American rules and cases on the subject are not different. *Shaw* v. *Railroad Company*, 101 U. S. 557, 565; *Todd* v. *United States*, 158 U. S. 278, 288; *Harrison* v. *Vose*, 9 How. 373, 378; 1 Wharton's Precedents, p. 28; Wharton's Crim. Plead. &c., 9th ed., § 166.

Other fatal defects appear in the indictment.

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

The Federal courts have not agreed as to the effect of the provision for notice and hearing found in § 4 of the Pure Food and Drug Act of June 30, 1906, 34 Stat. L. 768, c. 3915. *United States* v. *Barrels Olives*, 179 Fed. Rep. 983. *United States* v. *Cases of Grape Juice*, 189 Fed. Rep. 331. Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act.

Under the Pure Food Law not only a manufacturer, but any dealer, shipping adulterated or misbranded goods in interstate commerce is guilty of a misdemeanor. In aid of enforcement of the statute it is made the duty of the Department of Agriculture to collect specimens of such articles so shipped, and the Bureau of Chemistry is required to analyze them. But, even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the "party from whom the sample was obtained" might be a dealer holding a guaranty from his vendor that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (§ 9) is made "amenable to the prosecutions, fines and other penalties."

The act, therefore, declares (§ 4) that when, on such examination by the Board of Chemistry, the article is found to be adulterated, "notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard." If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact, together with a copy of the analysis, to the proper district attorney, who (§ 5), *without delay*, must "institute appropriate proceedings," by indictment, or libel for condemnation, or both, as the facts may warrant.

But the act also contemplates (§ 5), that complaints may be made to the district attorney by state health officials. In that class of cases, no doubt because the state agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such state officers "shall present satisfactory evidence of such violation." But the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard.

In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by the fact that it contains no reference to giving notice to anyone except "to the party from whom the sample was obtained." And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act in providing for proceedings against such guarantor contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury.

In cases like the present, or where foreign goods are labelled as of domestic manufacture and vice versa, no scientific examination may be necessary. But usually a chemical analysis will be required to determine whether an article is adulterated. The Bureau of Chemistry is

equipped to do that work, so that in practice most prosecutions will be based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the sample was received; if he voluntarily attends he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the Department, or a trial in court.

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the Department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case, does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats., §§ 771, 1022. So, an improper finding by the Department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the inter-

est of the public health was to hamper district attorneys, curtail the powers of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the Department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an Information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors,—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice. There is nothing in the nature of the offense under the Pure Food Law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime. The judgment is

Reversed.

UNITED STATES AT THE RELATION OF KINNEY *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY.

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

No. 664. Motion to dismiss or affirm. Submitted December 4, 1911.—Decided December 18, 1911.

Where the effect of the denial of plaintiff's motion for judgment is simply to postpone consideration of the subject until the trial, plaintiff's interests are not prejudiced and there cannot be reversible error.

Occurrences at the trial cannot be considered if the record contains no bill of exceptions.

A paper in the record signed by the plaintiff is not a bill of exceptions although styled exceptions to charge of jury and purporting to be initialed by the trial judge. *Origet* v. *United States*, 125 U. S. 243.

Even if a part of the record were treated as a bill of exceptions if all matters therein depend for their solution upon examination of evidence not in the record, this court will affirm, not having any means for determining whether reversible error arose from the action of the court.

186 Fed. Rep. 477, affirmed.

THE facts are stated in the opinion.

Mr. Thomas Stokes and *Mr. Bayard Henry*, for defendant in error in support of the motion.

Mr. Robert D. Kinney, relator in *propria persona*, in opposition thereto.

Memorandum opinion by direction of the court. By MR. CHIEF JUSTICE WHITE.

The trial court instructed a verdict for the defendant,

and the court below affirmed its action. The suit was to recover upon the bond of a Clerk of a Circuit Court. 186 Fed. Rep. 477. We think a motion to affirm must prevail.

All the errors relied upon complain of a refusal to grant a motion of the plaintiff for judgment because of the insufficiency of "an affidavit of defense" and of various rulings made at the trial. Although the motion for judgment was denied, its merits were not passed upon, since the effect of the ruling was simply to postpone consideration of the subject until the trial, and therefore the exception which was formally allowed was simply "to the refusal by the court to decide the issue of law raised by plaintiff's motion for judgment," etc. But afterwards the defendant filed formal pleas to the statement of plaintiff's claim and joined issue thereon. As the ruling left it open to raise the question presented by the motion, it follows that the mere order of postponement did not prejudice and cannot possibly constitute reversible error. As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled "Exceptions to the charge to jury," initialed "J. B. McP., trial judge," and signed by the plaintiff, is not a bill of exceptions (*Origet* v. *United States*, 125 U. S. 240, 243), but if it were to be treated as a bill of exceptions, as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the court on any of the subjects to which the paper refers. This being the case, it becomes our duty to affirm.

Affirmed.

LEWERS AND COOKE, LIMITED, *v.* ATCHERLY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 69. Argued December 4, 1911.—Decided December 18, 1911.

Where one asks the aid of a court of chancery in executing a former decree, he takes the risk of opening such decree for reëxamination. *Lawrence Manufacturing Co.* v. *Janesville Cotton Mills*, 138 U. S. 532.

Of two former decrees adjudicating title to real estate, the Supreme Court of Hawaii having found that the earlier was right and bound all interests and that the later was wrong, this court affirms, seeing no reason for not following the local court.

Great weight should be attributed to the decision of the court on the spot, especially when ancient law is involved, such as existed in Hawaii before the annexation.

This court sustains the rule laid down by the Supreme Court of Hawaii that decisions of the Board of Land Commissioners of 1845 could not be attacked except by direct appeal to the Supreme Court of Hawaii as provided by law.

A decree establishing a will may determine who is entitled to testator's property without determining that a particular property belonged to the inheritance.

Where a case has not passed to a final decree one buying *pendente lite* from a party thereto stands no better than the vendor. *Mellen* v. *Moline Iron Works*, 131 U. S. 352.

18 Hawaii, 625; 19 Hawaii, 47, affirmed.

THE facts are stated in the opinion.

Mr. David L. Withington, with whom *Mr. William R. Castle*, *Mr. W. A. Greenwell* and *Mr. Alfred L. Castle* were on the brief, for appellant:

It was error to overrule the discretion of the Court of Land Registration in declining to reopen the decree of 1858.

The court then had jurisdiction, the case was decided on the merits, and, whether the decree was right or wrong, the decision is now *stare decisis*, and property rights have been built up on the faith of that decree. *Darling* v. *Westmoreland*, 52 N. H. 401. See also as to other matters in

discretion of the court, *Central Trust Co.* v. *Locomotive Works*, 135 U. S. 207; *Davis* v. *Braden*, 10 Pet. 286; *Early* v. *Rogers*, 16 How. 599; *Slicer* v. *Bank of Pittsburg*, 16 How. 571; *McAllister* v. *Kuhn*, 96 U. S. 87; *United States* v. *Estudillo*, 1 Wall. 710; *Rio Grande Irrigation and Colonization Co.* v. *Gildersleeve*, 174 U. S. 602.

No abuse of discretion on the part of the Land Court has been shown. Appellants have a legal title to the land, since it will be presumed that a deed has been executed, as adverse possession was found by the Land Registration Court, *Kaai* v. *Mahuka*, 5 Hawaii, 354; *Fauntleroy's Heirs* v. *Henderson*, 51 Kentucky, 447.

The equitable title is in appellant. Before the Mahele, land tenures were in one sense feudal, but by the Great Mahele the King surrendered the allodial ownership of the land, reserving certain portions to the crown, certain portions to the King personally, and certain portions for the public use. Commissioners were appointed, upon whom were conferred all private and public powers over property belonging to the King, who were only authorized to ascertain the claimant's kind and amount of title and to award for or against that title. *Thurston* v. *Bishop*, 7 Hawaii, 421; Art. IV, c. IV, Kamehameha III, 107.

At the time of making this award, April 10, 1849, the guardian had the absolute control and management of the ward's property, with the power to dispose of the same without the necessity of any order of court, and his failure to present a claim to the Commissioners was binding on the infant. *Kamehameha* v. *Kahookano*, 2 Hawaii, 118; *Laanui* v. *Puohu*, 2 Hawaii, 161.

Even had the guardian done his duty, the proceedings would have been the same, excepting that the award and the patent would have been issued to the guardian for the ward. *Kalakaua* v. *Keaweamahi*, 4 Hawaii, 577; *Lono* v. *Phillips*, 5 Hawaii, 357, 359; *Kaaihue* v. *Crabbe*, 3 Hawaii, 768; *Jones* v. *Meek*, 2 Hawaii, 9.

The Hawaiian court had jurisdiction in an action to reach property in a suit in equity. *Montgomery* v. *Coady*, 2 Hawaii, 322; *Davis* v. *Brewer*, 3 Hawaii, 270, and 3 Hawaii, 359; *Wei See* v. *Young Sheong*, 3 Hawaii, 489.

Equity will relieve against every species of fraud and so may set aside or annul decrees or judgments obtained through fraud. *Akeau* v. *Iakona*, 13 Hawaii, 216; *Norris* v. *Herblay*, 9 Hawaii, 514; *Mills* v. *Briggs*, 4 Hawaii, 506; and see *Hop* v. *Parke*, 6 Hawaii, 688; *Hackfield* v. *Bal*, 6 Hawaii, 364. See also *Perry* v. *Lucas*, 11 Hawaii, 350; *Kapea* v. *Moehonua*, 6 Hawaii, 49.

The minors having been represented at the probate of the will by their guardian *ad litem*, and having contested the probate, are bound by that judgment. *Keliipelapela* v. *Pamano*, 1 Hawaii, 503, 505.

Judge Allen was bound by the decision of Judge Robertson in probate, who held that Kalakaua was the equitable owner of the property and that Kinimaka was his guardian under the will of Kaniau.

The Hawaiian cases cited by the court are not in conflict with the holding of Chief Justice Allen and *Kukuahu* v. *Gill*, 1 Hawaii, 90.

The decisions of this court sustain Chief Justice Allen's jurisdiction.

Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. *Johnson* v. *Towsley*, 13 Wall. 85; *Stark* v. *Starr*, 6 Wall. 419; *Bagnell* v. *Broderick*, 13 Pet. 436; *Patterson* v. *Winn*, 11 Wheat. 380; so where one an agent of another procures the patent to be issued to himself; *Ringo* v. *Binns*, 10 Pet. 269; and for cases where property has been adjudged to be held by the legal owner as trustee *ex maleficio* see, *Angle* v. *Chicago R. R. Co.*, 151 U. S. 1, 26; *Moore* v. *Crawford*, 130 U. S. 122; *White* v. *Cannon*, 6 Wall. 443; *Massie* v. *Watts*, 6

Cranch, 148; *Meader* v. *Norton*, 11 Wall. 442; *Felix* v. *Patrick*, 145 U. S. 317, 328; *Bernier* v. *Bernier*, 147 U. S. 242; *Bockfinger* v. *Foster*, 190 U. S. 116; *Johnson* v. *Waters*, 111 U. S. 640; *Widdicombe* v. *Childers*, 124 U. S. 400; *Sanford* v. *Sanford*, 139 U. S. 642. See also cases in regard to Californian and Mexican titles holding that the act in regard to private land claims includes perfect as well as inchoate or equitable titles, and that the only remedy is by appeal. *Botiller* v. *Dominguez*, 130 U. S. 238; *Ainsa* v. *New Mexico & Ariz. R. Co.*, 175 U. S. 76.

The act provides for a confirmation rather than a quit-claim. *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339; *Los Angeles F. & M. Co.* v. *Los Angeles*, 217 U. S. 226.

Trust relations respecting the property between the patentee and others may be enforced equally with such relations between him and others respecting any other property. *More* v. *Steinbach*, 127 U. S. 70.

There is nothing in the Hawaiian act which would justify any distinction between the principles laid down in these decisions and the principles to be applied to the case of 1858.

As there is neither Hawaiian statute nor judicial precedent in conflict, these cases are binding on the Hawaiian court.

The decree of Judge Roberston admitting the will of Kaniu to probate is a binding adjudication that Kalakaua was, after the death of Kaniu, beneficially entitled to the premises in question. *Keliipelapela* v. *Pamano*, 1 Hawaii, 503, 505.

The decree of November 2, 1858, is a conclusive adjudication between the parties, and is complete and final. *Kuala* v. *Kuapahi*, 15 Hawaii, 300; *McChesney* v. *Kona Sugar Co.*, 15 Hawaii, 710; *United States* v. *Morse*, 218 U. S. 493, 505; *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352.

If the decree of 1858 was not adversary but by consent,

yet as it is based on a valuable consideration, namely, the release of other lands, it cannot be upset to-day.

The decision in *Kapiolani Estate, Limited,* v. *Atcherly* is a binding and conclusive adjudication on the appellee.

If the decision of 1903 is not the law of the case, then the question should be regarded as foreclosed on the ground of *stare decisis*. *Vail* v. *Arizona*, 207 U. S. 201.

The decisions of Judge Robertson and Chief Justice Allen in 1858, and the decision of the Supreme Court in 1903 having laid down a rule of property, the appellant was entitled to rely upon it in making a purchase of the property, and the Hawaiian court cannot disregard its former opinion.

These decisions had become a rule of property, and the appellee relied on them in paying only $50 for the Kinimaka title in 1897, before the decision of 1903; and the appellant relied on all the decisions, including that of 1903, as declaring a rule of property, in paying $35,000 for the Kalakaua title. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 372.

A single decision of the Hawaiian Supreme Court has been held to establish a rule of property. *Kealoha* v. *Castle*, 210 U. S. 148. It is not only a rule of property, but is a rule of this particular property, which the purchaser had a right to rely on, and which is binding on every court until reversed. *Grignon* v. *Astor*, 2 How. 343; *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 451, 458; *Henderson* v. *Griffith*, 5 Pet. 151; *Minn. Min. Co.* v. *Nat. Min. Co.*, 3 Wall. 332; *Bibb* v. *Bibb*, 79 Alabama, 437; *Hihn* v. *Curtis*, 31 California, 398; *Schori* v. *Stephens*, 62 Indiana, 441; *Frank* v. *Evansville & I. R. Co.*, 111 Indiana, 132; *Dunklin County* v. *Chouteau*, 120 Missouri, 577; *White* v. *Kyle*, 1 Serg. & R. 15; *Bright* v. *Esterly*, 199 Pa. St. 88; *Henderson* v. *Rost*, 11 La. Ann. 541; *Wilkins* v. *Chicago, St. L. & N. O. Ry. Co.*, 110 Tennessee, 442; *Union Ry. Co.*

v. *Chickasaw Cooperage Co.*, 116 Tennessee, 598; *O'Rourke* v. *Clopper*, 22 Tex. Civ. App. 377.

The decisions of 1858 and 1903 necessarily construed the statutes defining the jurisdiction of the Land Court and of the Supreme Court in 1858 and held that that court had jurisdiction. These decisions became a part of the law, and a subsequent decision could not change the rights of the parties. *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66; *State* v. *Comptoir Nat. D'Escompte De Paris*, 51 La. Ann. 1272; 1 Kent's Com. 476; Suth. Stat. Constr., § 319; *Rowan* v. *Reynolds*, 5 How. 134; *Ohio L. Ins. & T. Co.* v. *Debolt*, 16 How. 416; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558; *Muhlker* v. *N. Y. & H. R. R. Co.*, 197 U. S. 544.

The rule is the same in regard to a conveyance as to any other contract. Its validity and effect is determined by the laws then in force. *Stephenson* v. *Boody*, 139 Indiana, 66; *Haskett* v. *Maxey*, 134 Indiana, 182; *Levy* v. *Hitsche*, 40 La. Ann. 508; *Fisher* v. *Lott*, 110 S. W. Rep. 822; *Myers* v. *Boyd*, 144 Indiana, 449.

Nor is it material in this case that the change is by judicial decision and not by statute. *Loeb* v. *Trustees of Township*, 179 U. S. 472.

The rule applies where the question involved is the jurisdiction of a court with reference to land. *Herndon* v. *Moore*, 18 S. Car. 355; *Hall* v. *Wells*, 54 Mississippi, 301.

Mr. Lyle A. Dickey, with whom *Mr. E. M. Watson*, was on the brief for appellee:

No presumption arises from lapse of time and occupation that in 1858 Richard Armstrong executed a deed of this land to Lalakaua. *Ricard* v. *Williams*, 7 Wheat. 221, 227; *Fletcher* v. *Fuller*, 120 U. S. 534, 550, 592.

The Supreme Court was not bound to follow its own prior decision in *Kapiolani Estate, Limited*, v. *Atcherly*

as *stare decisis*. *Hertz* v. *Woodman*, 218 U. S. 205, 212. The rule of law of the case did not deprive the Supreme Court of Hawaii of power to decide that the decree of 1858 was erroneous. A ruling on a demurrer is not such a final adjudication that the court may not reconsider its action and enter a contrary order nor decide the same matter differently when subsequently presented again in the same case. 31 Cyc. 350; *Hamilton* v. *Marks*, 63 Missouri, 167, 172; *Jungk* v. *Reed*, 12 Utah, 292; *Reeves* v. *Petty*, 44 Texas, 249, 254; *Meyers* v. *Dittmar*, 47 Texas, 373; *Norton* v. *Knapp*, 64 Iowa, 112, 115; *Hastings* v. *Foxworthy*, 45 Nebraska, 676, 697; *Penn. Co.* v. *Platt*, 47 Oh. St. 366, 379; *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339.

The stipulation entered into between Kapiolani Estate, Limited, and appellee in the equity suit, to withdraw the original pleadings and substitute others and reciting that both parties wished to have the question of *res adjudicata* settled before proceeding farther, does not bind the parties here in any way, much less the court.

Appellant as a purchaser from Kapiolani Estate, Limited, bought *pendente lite* with notice of the pending litigation and the claims of appellee and so has no right to rely on any rule of law, there being no final decree. *Mellen v. Moline Iron Works*, 131 U. S. 352, 370; *Gay* v. *Parpart*, 106 U. S. 679, 696.

The principle of *stare decisis* does not apply to the decree of 1858 for there is no decision. The decree of 1858 lays down no rule of property.

Practice in the courts of a Territory is based upon local statutes and procedure and the Supreme Court of the United States is not disposed to review the decision of the territorial supreme court in such cases. *Sante Fe County* v. *Coler*, 215 U. S. 296, 307; *Sweeny* v. *Lomme*, 22 Wall. 208, 213; *Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *Fox* v. *Haarstick*, 156 U. S. 674, 679; *Maytin* v.

Vela, 216 U. S. 598, 602; *Armijo* v. *Armijo*, 181 U. S. 558, 561; *English* v. *Arizona*, 214 U. S. 359, 363.

The original tenure of Hawaii from the time Kamehameha first established the monarchy to 1839 was feudal and a despotism. The King and each overlord under him had absolute ownership and control of the land and people under him. Rev. Laws of Hawaii, pp. 1164–66, 1179, Laws of 1842, of Hawaii, Ch. LIV.

The awards of the Board of Commissioners to quiet land titles gave fee simple titles for the first time; did away with feudal tenure and settled forever all claims to lands arising prior to December 10, 1845. See act to organize the Executive Departments of the Hawaiian Islands. Part I, Ch. VII, Art. IV.

In the case of 1858 no fraud, actual or constructive, was pleaded or proved. General allegations of fraud are insufficient. *Greenameyer* v. *Coats*, 212 U. S. 434, 444; *United States* v. *Arredondo*, 6 Pet. 691, 716.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree refusing to the appellant the registration and confirmation of its title to a parcel of land, described as lot 1 of Land Commission Award 129, Royal Patent 1602. 18 Hawaii, 625. 19 Hawaii, 47. The appellant claims through mesne conveyances from David Kalakaua. Kalakaua was adopted by one Kaniu as her child. She had certain rights, not fully defined, in the land, and left all her property to Kalakaua by an oral will in 1844. Her husband, Kinimaka, seems to have reported this to the King, as required in those days, and there is evidence that the King disapproved it on account of Kalakaua's youth. The fact is not found or admitted, however, and the judge who established the will denied the power of the King. In 1849 the Land Commission adjudged the land to Kinimaki in fee simple. In 1856, on or

shortly before his coming of age, Kalakaua filed a bill in equity in the court of land registration of Oahu, according to the finding of the Supreme Court, to establish a trust against Kinimaka, but this suit was not carried to final decree. In 1858 he proved the will of Kaniu, 2 Hawaii, 82, and thereafter in the same year brought another bill against the widow and guardian of the minor children of Kinimaka, who had died, which ended in a decree that the guardian convey the premises to Kalakaua. This was in 1858. There was no conveyance in accordance with the decree, but Kalakaua occupied the land before and after he became King, conveyed it to his wife, Kapiolani, in 1868, and after his death she occupied it until her death in 1898.

The respondent claims by virtue of a remainder limited in the will of Kinimaka. In 1901 she brought an action of ejectment, whereupon the Kapiolani Estate, Limited, brought a suit in equity to restrain her, on the ground of the foregoing facts. There was a demurrer, which was overruled, 14 Hawaii, 651, and in that stage of the case the appellant bought from the Kapiolani Estate. The cause is still pending, the parties having agreed to try their rights in the present suit.

When the demurrer to the bill of the Kapiolani Estate was overruled the subject mainly discussed was whether the decree of 1858 against the guardian of Kinimaka's children bound the children, they not having been made parties to the bill, as it was admitted that they should have been. But the decision now appealed from, while hinting at a possible difference upon that point, in view of 'the many indications that the decree of 1858 was substantially a consent decree,' placed itself upon a different ground. It held (18 Hawaii, 632) that the appellant, "in seeking to register a title depending upon the unexecuted decree in *Kalakaua* v. *Pai and Armstrong* is, as against the holder of the outstanding legal title, in the same position as a party asking the aid of a court of chan-

cery in executing a former decree, and it is well established that he must take the risk of opening up such decree for reëxamination. *Lawrence Mf'g Co.* v. *Janesville Mills*, 138 U. S. 552." Acting on this rule, as to the application of which in practice we see no sufficient reason for not following the local court, the Supreme Court came to the conclusion that the adjudication of the Land Commission in 1849 bound all interests, and that the decree of 1858 was wrong.

On this point also there is every reason for attributing great weight to the decision of the court on the spot. It concerns the powers of another earlier local tribunal and involves obscure local history concerning a time when the forms of our law were just beginning to superimpose themselves upon the customs of the islanders. Such customs are likely to be distorted when translated into English legal speech. Thus Kaniu is spoken of as the owner of the land; yet a few years before the King would have done with it as he liked, and that the tradition and fact had not wholly disappeared after his grant of the Constitution of 1839 is indicated by his alleged conduct touching the will. The precariousness of titles is emphasized by the laws of 1842. So it is said that Kinimaka was the natural guardian of Kalakaua, we presume on the evidence that Kaniu assented to a suggestion that she had better leave her property in Kinimaka's hands till Kalakaua came of age. But it would be going rather far to apply the refined rules of the English Chancery concerning fiduciary duties to the relations between two Sandwich islanders in 1846, on the strength of such a fact. The real foundation of settled titles seems to have been the establishment of the Land Commission in 1845. *Thurston* v. *Bishop*, 7 Hawaii, 421, 428. When the Supreme Court of Hawaii repeats what it has been saying for many years that the decisions of that Board could not be attacked except by a direct appeal to the Supreme Court provided by law, no imperfect analogy

such as that of patents issued by our Land Department is sufficient to overthrow the tradition, fortified as it is by logic and good sense.

Of course, the later decree establishing the will does not affect the case. That determined only that Kaniu left all her property to Kalakaua, but not that any particular property belonged to the inheritance. The decree overruling the demurrer of the defendant to the bill of the Kapiolani Estate also is relied upon. But as that case has not passed to a final decree, and the appellant bought the land in controversy *pendente lite*, it can stand no better than its vendor the party to the suit. *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 370 If that case instead of this had been prosecuted to final decree there was nothing in its former action to hinder the Supreme Court from adopting the principle now laid down, even though it thereby should overrule an interlocutory decision previously reached. *King* v. *West Virginia*, 216 U. S. 92, 100, 101. Other details were mentioned in argument, but nothing more seems to us to need remark.

Decree affirmed.

MAYER *v.* AMERICAN SECURITY & TRUST COMPANY, EXECUTOR OF MAYER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 77. Argued December 5, 1911.—Decided December 18, 1911.

Equitable titles are subject to devise and if not specifically bequeathed, form part of the residuary estate.

One of the objects of a residuary clause is to gather up unremembered, as well as uncertain, rights; and the words "all the rest and residue of my estate, real, personal and mixed, which I now possess or which

may hereafter be acquired by me" are sufficient to carry an equitable estate.

33 App. D. C. 391, affirmed.

THE facts are stated in the opinion.

Mr. A. S. Worthington and *Mr. Edwin C. Brandenburg*, with whom *Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* were on the brief, for appellant:

A possibility of reverter is not an interest or estate in land that can be devised or assigned. *Vail* v. *Long Island R. R. Co.*, 106 N. Y. 287; *Towle* v. *Remson*, 70 N. Y. 309; *De Peyster* v. *Michael*, 6 N. Y. 506; *Nicholl* v. *N. Y. & Erie R. R. Co.*, 12 N. Y. 131; *Locke* v. *Hale*, 165 Massachusetts, 20; *Bouvier* v. *Baltimore & N. Y. R. R. Co.*, 67 N. J. Law, 281; *Helms* v. *Helms*, 137 N. Car. 206. See also *Ohio Iron Co.* v. *Auburn Iron Co.*, 64 Minnesota, 407; *Warner* v. *Bennett*, 31 Connecticut, 469; *Highbee* v. *Rodeman*, 129 Indiana, 247; *Berenbroick* v. *St. Luke's Hospital*, 23 App. Div. (N. Y.) 339; Tiedeman on Real Property, § 277; *Sexton* v. *Chicago Storage Co.*, 129 Illinois, 331; *Denver & S. F. Ry. Co.* v. *School District No. 22*, 14 Colorado, 327; and see note 60 L. R. A. 762; *Church* v. *Elliott*, 65 S. Car. 251.

An equitable interest as defined in 15 Cyc. 1087, is "such an interest as a court of equity can pursue and appropriate to the discharge of debts." Certainly this interest does not fall within this definition. As to the law of Maryland where the property is located, see *Iglehart* v. *Armiger*, 1 Bland's Chancery, 519, 524.

The estate could not pass under will. *Upington* v. *Corrigan*, 151 N. Y. 143; *Church* v. *Young*, 130 N. Car. 8; *Goodright* v. *Forrester*, 8 East, 552, 566; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Ruch* v. *Rock Island*, 97 U. S. 693.

The cases cited in opposition are based on statute and do not apply to this property.

Under Maryland statutory provision the property was

not such as could pass under the will, under the law as in force at the time of Mr. Mayer's death.

There is no presumption in favor of an intention on the part of the testator to deprive his heir at law of his real estate. Such an intent must be clear and free from doubt. *Rizer* v. *Perry*, 58 Maryland, 121, 137; *Bourke* v. *Boone*, 94 Maryland, 477; *Hambleton* v. *Darrington*, 36 Maryland, 446; *Doe* v. *Underdown*, Willes, 293.

The words used in the agreement regarding a reconveyance are practically a direction to reconvey to the heir, inasmuch as the interest of the testator, before breach, was not assignable. *Locke* v. *Hale*, 165 Massachusetts, 20.

To tie up the property here involved until appellant reaches forty-eight years of age does violence to the rule of law favoring the early vesting of estates. *Mercer* v. *Safe Deposit Company*, 91 Maryland, 114.

Apt words were not used, and the words used did not include this possibility for the reason that "estate" does not include such a possibility. *Cole* v. *Ensor*, 3 Maryland, 452.

Mr. Wm. F. Mattingly for appellee:

The cases where the donor conveys directly to the donee upon condition and cases of mere possibility of reverter have no application to the case at bar, yet if the testator's estate in this property was a contingency coupled with an interest or a possibility coupled with an interest, and it was all that and more, then it was devisable and formed part of the residuary estate. 4 Kent's Comm. 261; *Jones* v. *Roe*, 3 Term Rep. 88. See also 2 Williams' Saunders, 338*k*; *Doe* v. *Weatherby*, 11 East, 322; *Williams* v. *Thomas*, 12 East, 141; *Hayden* v. *Stoughton*, 5 Pick. 528; *Clapp* v. *Stoughton*, 10 Pick. 463; *Austin* v. *Cambridgeport Parish*, 21 Pick. 215.

Suppose the testator had lived until after October 15, 1908, the trust company would have reconveyed the prop-

erty to him, or, whether it did or not, the entire title would have been in him, and would undoubtedly have passed under the residuary clause of the will. See Maryland Code of 1904, § 314.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill for a conveyance to the plaintiff of a parcel of land to which he claims a right under a trust deed of his father, Theodore J. Mayer. The case was heard on bill and answer, the Supreme Court dismissed the bill, and its decree was affirmed by the Court of Appeals. 33 App. D. C. 391. The facts are these: On February 5, 1907, Mayer conveyed the premises to the Washington Loan and Trust Company and the latter executed a declaration of trust by which it was to convey them to the George Washington University "when and at such times as" the University should comply with certain conditions, by the purchase of certain other specified land, &c. "In the event of the failure of the said University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the Trustee, when said property, so as aforesaid conveyed to the Trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs and assigns." The word 'when' in the sentence is superfluous, but the meaning is plain. The reasonable time was determined and has elapsed, as is agreed by the University as well as by the Trustee, and the conditions have not been performed, but in March, 1907, before the breach of condition, Mayer died.

Mayer made his will on February 15, 1907, a few days after the trust deed and a month before his death. After pecuniary legacies and a specific devise to the plaintiff of his residence, its contents, etc., he gave the residue of his estate to the American Security and Trust Company

in trust to make various payments to the plaintiff at different stated times, and upon his attaining the age of forty-eight years to convey all of the trust fund remaining in its hands to the plaintiff in fee. Then followed gifts to the plaintiff's children in the event of his dying before the testator or before reaching the age of forty-eight, and alternative legacies if he left no children surviving him. The question is whether the property covered by the trust deed should be conveyed to the plaintiff now or falls into the residue to be held upon the trusts created by the will.

The argument for the appellant is that the grantor, Mayer, retained a mere possibility of reverter, which was not devisable, and that if he had more than that still he did not devise it by his will. But the answer is plain. Of course the grantee, the Washington Loan and Trust Company, got the legal title in fee, but by its declaration of trust and its answer it disavowed any beneficial interest, and if the equitable title was in Mayer it was subject to devise by him. But it necessarily was either in Mayer or in the George Washington University, and the courts below were quite right in holding that all rights of the University were subject to a condition precedent that never was fulfilled. The beginning of its rights was to be by conveyance 'when and at such time as' the University should have made the required purchase. Or, as stated in another clause not yet quoted, "This declaration of trust is intended to set forth the terms and conditions under which the said Chevy Chase property, or the proceeds thereof, is to be conveyed or given to the said George Washington University." That it was not given until those terms and conditions were complied with could not be said more plainly. We should add that the University by its answer makes no claim either to the land or to the profits between the date of the deed and the loss of its rights.

Mayer then at his death had a present equitable right to

the land subject only to be defeated by an event that has not happened, and we see as little ground for doubting that he disposed of it as there is for denying that he had it. The residuary clause is in the usual form, "All the rest and residue of my estate, real, personal and mixed, which I now possess or which may hereafter be acquired by me"; amply sufficient to carry the equitable estate. No doubt Mayer thought that the Chevy Chase property would go another way, but it manifestly was not certain, and moreover one of the objects of a residuary clause is to gather up unremembered as well as uncertain rights.

Decree affirmed.

ACME HARVESTER COMPANY *v.* BEEKMAN LUMBER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 9. Argued April 25, 1911.—Decided December 18, 1911.

The denial of a right claimed under the judgment of a Federal court lays the foundation for a review in this court, and where the state court proceeds to judgment on the ground that bankruptcy proceedings against the defendant had been concluded by denial of adjudication and the injunction against suits in the state court thereby dissolved this court has jurisdiction.

A finding by the state court that bankruptcy proceedings had been concluded by denial of adjudication does not conclude this court on writ of error to review the judgment of the state court.

Where the state court bases its jurisdiction entirely on the construction given a Federal statute by it adversely to contention of plaintiff in error, this court has jurisdiction to review the judgment. *Rector* v. *Bank*, 200 U. S. 405.

The filing of a petition in bankruptcy is a *caveat* to all the world, and, in effect, an attachment and injunction. *Mueller* v. *Nugent*, 184 U. S. 1, 14.

It is the duty of the bankruptcy court to promptly determine the ques-

tion of adjudication and to proceed with the selection of a trustee and administration of the estate; and it cannot, even if for the benefit of creditors, deny an adjudication and hold jurisdiction over the estate for the purpose of allowing some of the creditors to effect a reorganization and distribution of the property.

With the denial of adjudication the jurisdiction of the bankruptcy court ends and the property becomes subject to ordinary methods and jurisdiction of courts of competent jurisdiction.

There is no power in the District Court to issue an *ex parte* injunction, without notice or service of process, attempting to restrain a creditor suing in a State outside the jurisdiction of the District Court. Ancillary jurisdiction in aid of the jurisdiction of the District Court exists under the act of June 25, 1910, c. 412, 36 Stat. 838. *Re Wood & Henderson*, 210 U. S. 246, distinguished.

215 Missouri, 221, affirmed.

THE facts, which involve the jurisdiction of the bankruptcy court, are stated in the opinion.

Mr. Alexander New and *Mr. Edwin A. Krauthoff*, with whom *Mr. Arthur Miller* was on the brief, for plaintiff in error, submitted.

Mr. Hannis Taylor for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.[1]

This case is here upon writ of error to the Supreme Court of the State of Missouri. The facts stated in the record disclose that on October 19, 1903, an agreement was formulated, having for its purpose the placing of the affairs of the Acme Harvester Company, plaintiff in error, in the hands of a committee of creditors. With this purpose in view an agreement for the signature of the creditors was circulated, naming a committee of five and calling upon the stockholders of the Acme Harvester Company to deposit their shares with the committee, the directors and officers of the company to resign their respective

[1] Announced by Mr. Chief Justice White in the absence of Mr. Justice Day.

offices, and the committee to have power to elect a board of directors, who should act until the debts of the company were paid in full, and, when so paid, the shares of stock to be redelivered to the owners. In the circular accompanying the agreement for the signature of the creditors it was set forth that the affairs of the company were in such shape that, if kept a going concern, the debts could be paid, and deprecating a resort to legal proceedings in court.

On October 22, 1903, certain creditors filed a petition in involuntary bankruptcy against the Acme Harvester Company in the District Court of the United States for the Northern District of Illinois, seeking to have the company adjudicated a bankrupt, charging that it was insolvent and had made certain preferential transfers of property. On October 24, 1903, the creditors' committee issued a circular in which they recited that one-half the creditors in number and two-thirds in amount had already signed the creditors' agreement; that a petition in bankruptcy had been filed by a law firm claiming to represent three claims, for the purpose of throwing the company into bankruptcy; that one of the creditors had already withdrawn from the proceedings, and setting forth that the success of such proceedings would wreck the company, destroy its business, and sacrifice the value of its assets. The committee added an expression of its confidence that the court would deny an application for a receiver, and leave the business in the hands of the creditors. On October 26, 1903, the creditors' committee issued another circular, in which it was said that the United States District Court in Chicago had refused to appoint a receiver, and in so doing the judge had said:

"This estate is a very large one, and is in the hands of a committee of reputable creditors. It is my judgment that the creditors ought to manage and control the estate. The creditors can produce results much better than any

receiver in handling a large manufacturing concern like the Acme Harvester Company."

The circular further said that the court had referred the matter to the referee in bankruptcy to inquire into the truth of the allegations of the petition, and to ascertain whether the petitioning creditors had any standing or right to file the petition, adding that there was really only one creditor left in the bankruptcy proceeding. On November 2, 1903, a circular was issued in which it was stated that an overwhelming majority of the creditors had signified their approval of the plan, and had executed and forwarded the agreement to the creditors' committee. On December 2, 1903, the Acme Harvester Company, by its vice-president, wrote to the Beekman Lumber Company, calling attention to the fact that the Lumber Company had not yet signed the creditors' agreement, and saying:

"You may not be aware that United States Judge Kohlsaat has stopped the matter of any one bringing suit against this company or endeavoring to throw it into bankruptcy, he having decided that we are solvent and that the only reasonable and fair way to handle the business, paying its debts, etc., is through the medium of the credit committee selected by our heaviest creditors. This being the case the only basis on which your claim will receive recognition is by joining with the balance of our creditors, signing the agreement, thus putting yourself on record that you are a creditor and are entitled to such dividends as from time to time the committee might declare."

The Beekman Lumber Company, it appears, did not sign the creditors' agreement, nor, so far as the record discloses, prove its claim in bankruptcy, and on December 7, 1903, filed a petition in the Circuit Court of Jackson County, Missouri, for the purpose of recovering a judgment against the Acme Harvester Company upon an ac-

count for lumber sold and delivered prior to the institution of the proceedings in bankruptcy. No trustee having been selected in the bankruptcy proceedings, the Acme Harvester Company appeared in the state court to file a motion to stay the proceedings, setting up the pending proceedings in bankruptcy. This motion was sustained on January 11, 1904. On May 14, 1904, motion to stay was overruled, and the former order set aside. On October 3, 1904, a petition was filed in the District Court of the United States at Chicago, where the bankruptcy proceedings were pending, for an injunction against the Beekman Lumber Company to restrain it from further pursuing its action in the state court. An injunction was granted, without notice to the Beekman Lumber Company, on *ex parte* hearing the same day. From reports in the record it appears that the creditors' committee took charge of the company's property, and, as such committee, made reports to the United States District judge at Chicago of the doings of the committee in the management of the property, purchases, sales, etc. The creditors' committee also issued a statement to the creditors, showing the results of the business, enclosing copies of the reports made to the Federal District Court, and recommending a reorganization of the company on the basis of stock issued to creditors, at par, for their claims, and fifty cents on the dollar to creditors who did not go into the reorganization. A circular letter, issued by the committee on April 1, 1905, states that two-thirds of the creditors had already been heard from, about eighty per cent (80%) of them desired stock, and the rest preferred fifty per cent (50%) in cash.

On October 12, 1904, the Acme Harvester Company answered in the state court, setting up the pendency of the bankruptcy proceeding and the issuing of the injunction in the District Court of Chicago. Replication was filed by the plaintiff, and, upon trial, a judgment on the

account was directed and rendered on June 20, 1905, in favor of the plaintiff for the amount of its account. Thereafter proceedings in review were prosecuted to the Supreme Court of Missouri, and that court held that the District Court of the United States had no authority to issue the injunction against proceedings in the state court, and held further that the facts disclosed that the District Court of the United States had declined to adjudicate the Acme Harvester Company a bankrupt, and left the property to be administered outside of the Bankruptcy Law, and that the prosecution in bankruptcy had been abandoned. 215 Missouri, 221.

A motion to dismiss the proceedings for want of jurisdiction was made in this court and passed for consideration to the merits. The contention is that inasmuch as the Supreme Court of the State found, as a matter of fact, that the bankruptcy proceedings had been concluded, by denial of the adjudication and an abandonment of the proceedings, that this finding of fact is binding upon this court upon writ of error to the state court, and therefore there is no substantial basis for the writ of error. We are of the opinion that the contention in this respect is not well founded. The defendant below set up a proceeding in a Federal court as a protection against further prosecution in the state court. It further set up the issuing of an injunction in the Federal court, undertaking to stay proceedings in the state court. Thereby the defendant claimed the benefit of a Federal right, which brought the case within § 709 of the Revised Statutes of the United States. The denial of a right claimed under the judgment of a court of the United States lays the foundation for a review in this court. *Pittsburgh &c. Railway Co.* v. *Loan & Trust Co.*, 172 U. S. 493; *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The alleged finding of fact that the jurisdiction of the Federal court had ended cannot conclude this court in

reviewing a question of this character. The defendant asserted the power and jurisdiction of the Federal court invoked before the beginning of the state proceedings, and alleged its sufficiency to protect it against further proceedings in the state court. The right of ultimate determination of a contention of that character in this court cannot be defeated by the finding of the state court that the Federal court had exceeded or ended its jurisdiction. The determination of a question of that kind is not a finding upon a disputed question of fact, nor within that class of cases in which this court has repeatedly held that the facts as found in the state court would be regarded as conclusive here. Moreover, the case involved a construction of the Bankruptcy Act. As the plaintiff in error contended that the proper construction of the act would defeat the jurisdiction of the state court, the adverse ruling gave this court jurisdiction. *Rector* v. *Bank*, 200 U. S. 405.

Proceeding, then, to the determination of the case upon its merits, the first question is, Should the state court have declined to exercise its jurisdiction when the pending proceeding in bankruptcy was set up in denial of the right to entertain further proceedings in the state tribunal? It appears from the facts already stated that the petition in bankruptcy had been filed some time before the attempt to attach the property of the bankrupt in the hands of the garnishee in the state court. There is no dispute upon this record that the money attached was owing to the bankrupt and was unquestionably its property.

Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in *Mueller* v. *Nugent*, 184 U. S. 1, 14, where it is said: "It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction, *Bank* v. *Sherman*, 101 U. S. 403; and on adjudication, title to the bankrupt's property became vested in the trustee,

§§ 70, 21*e*, with actual or constructive possession, and placed in the custody of the bankruptcy court," it is none the less certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. It is true that under § 70*a* of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. Paragraph 5, § 70*a*, in reciting the property which vests in the trustee, says there shall vest "property which, prior to the filing of the petition, he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him" [the bankrupt]. Under § 67*c* attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if its enforcement would work a preference. Provision is made

for the prompt taking possession of the bankrupt's property, before adjudication if necessary (§ 69*a*). Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the act. These provisions, and others might be recited, show the policy and purpose of the Bankruptcy Act to hold the estate in the custody of the court for the benefit of creditors after the filing of the petition and until the question of adjudication is determined. To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal distribution of the estate among all creditors of the same class which is the policy of the law. The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits which would virtually amount to preferences in favor of such creditors. See in this connection the well-considered cases of *State Bank* v. *Cox*, 143 Fed. Rep. 91, C. C. App. of the Seventh Circuit; *Board of County Commissioners* v. *Hurley*, C. C. of Appeals of Eighth Circuit, 169 Fed. Rep. 92, 94.

It follows that, if the bankruptcy proceedings were pending, so that the bankruptcy court acquired jurisdiction over the estate, it was error for the state court to proceed to a judgment and appropriation of the property on the attachment suit of a single creditor. It therefore becomes necessary to inquire whether the state court was right in determining that the bankruptcy court had

lost its jurisdiction because of the proceedings had therein. In addition to the facts stated, the Supreme Court of Missouri, in its opinion, said that at the time of the hearing in that court, five years after the institution of bankruptcy proceedings, counsel admitted that no adjudication in bankruptcy had as yet taken place. The case presented therefore shows that the bankruptcy court, upon the filing of the petition in bankruptcy, found an outstanding creditors' agreement under which it was proposed to administer and distribute the estate. It declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts outside of the court and not contemplated in the Bankruptcy Act. The creditors in large numbers signified a purpose to take stock in a reorganization, and for more than five years after the time of the filing of the petition, it was found by the Supreme Court of Missouri, had made no attempt to adjudicate the corporation a bankrupt, or proceed to the settlement of the estate under the requirements of the act.

It was the duty of the bankruptcy court, if it intended to administer the property under the Bankruptcy Law, to promptly determine the question of adjudication, to proceed with the selection of a trustee and the administration and distribution of the estate, as required by the act. This it evidently declined to do, and permitted the creditors' committee, which had been organized for the avowed purpose of defeating court proceedings, to administer the estate, to buy and sell property, and mature a plan for the reorganization of the concern. This may have been for the benefit of the creditors, but it was not the administration of the law as laid down in the Bankruptcy Law. It is not within the province of the bankruptcy court to deny an adjudication in bankruptcy, and then hold jurisdiction

over the property for the purpose of allowing some of the creditors to effect a reorganization and distribution of the property.

We cannot say that the Supreme Court of Missouri was wrong; indeed, we think it was right in reaching the conclusion that the District Court had declined to adjudicate the corporation a bankrupt and vest its property in a trustee, and deeming it best for the creditors to follow out their plans, had found that the case was not one calling for the intervention of the bankruptcy court. Indeed, there is nothing in the record to contradict the statement of the circular in evidence in the court below that the court had found the corporation solvent. With the question of adjudication determined against the right to proceed in bankruptcy, the jurisdiction of the District Court ended, and the property became subject to the ordinary methods of procedure in courts of competent jurisdiction.

It is suggested that even now the bankruptcy court may proceed to an adjudication, but this suggestion is at war with all that has been done with the knowledge and sanction of the District Court. As we have seen, the property to be administered in the bankruptcy court is that which belonged to the bankrupt at the filing of the petition, and then subject to his debts. This property can never be recovered. With the sanction of the District Court much of it has been sold, its character has been changed, and it has been dealt with by the creditors' committee regardless of the provisions of the Bankruptcy Law. Many of the creditors have signified their purpose to adjust their claims by taking stock in a reorganization, or fifty cents on the dollar, of the amount of their claims. The whole proceeding makes it clear that the District Court denied the adjudication and declined to exercise its jurisdiction as a bankruptcy court.

As to the injunction, we are of the opinion that there was no power in the District Court to issue an *ex parte* injunc-

tion, without notice or service of process, attempting to restrain the Beekman Lumber Company from suing in a State outside the jurisdiction of the District Court. Such proceeding could only have binding force upon the Lumber Company if jurisdiction were obtained over it by proceedings in a court having jurisdiction, and upon service of process upon such creditor.

Whether ancillary proceedings could be had in a District Court in aid of the jurisdiction of an original court of bankruptcy was a subject of much discussion and divers decisions in the Federal courts. In *Babbitt, Trustee,* v. *Dutcher,* 216 U. S. 102, and on the petition of Elkus in the matter of the Madison Steel Company, a bankrupt, *Elkus, Petitioner,* 216 U. S. 115, the matter came before this court, and it was there determined that there was ancillary jurisdiction in the courts of bankruptcy, in aid of the original jurisdiction in the bankruptcy court, to make orders and issue processes summarily in aid of the original jurisdiction. In the opinion in *Babbitt* v. *Dutcher* it was pointed out by Mr. Chief Justice Fuller, speaking for the court, that the jurisdiction of the bankruptcy courts under the act of 1898 was limited to their respective territorial limits, and was in substance the same as that provided by the act of 1867, giving such courts jurisdiction in their respective districts in matters of proceedings in bankruptcy. The necessary deduction from these cases is to deny to the District Courts jurisdiction such as was sought to be asserted in this case by the issuing of an injunction against one not a party to the proceeding, and which undertook to have effect in the distant jurisdiction outside the territorial jurisdiction of the District Court. Under the act of 1898, as expounded in the two cases in 216 U. S., *supra,* the injunction might have been sought in the District Court of the United States in the District in Missouri where personal service could have been made upon the Beekman Lumber Company. Since the decision

in the cases just referred to, Congress has passed the act of June 25, 1910, 36 Stat. 838, c. 412, amending the Bankruptcy Law, specifically giving ancillary jurisdiction over persons and property within their respective territorial limits to the District Courts of the United States in aid of the receiver or trustee appointed in a bankruptcy proceeding pending in another court of bankruptcy. Statutes of the U. S. of 1909–1911, part 1, page 838.

Nor is there anything in the decision in *In re Wood and Henderson*, 210 U. S. 246, running counter to the conclusion herein announced. In that case it was held that under § 64*d*, giving the bankruptcy court having jurisdiction of the estate the right to determine the amount of an attorney's fee paid out of the estate in anticipation of bankruptcy proceedings, that notice might be served outside the district with a view to a hearing to determine the amount of such compensation. In that case it was expressly held that § 64*d* was *sui generis*, and the right to send notice to the attorneys outside of the district was based upon the theory of that section that the property was within the jurisdiction of the bankruptcy court, which could alone determine the amount to be deducted for the attorney's fee in anticipation of the proceeding; that the proceeding was administrative in character, and that for its purpose a hearing might be had upon form of notice sufficient to advise the attorneys that the court was proceeding to act under the authority conferred by the law.

Finding no error in the judgment of the Supreme Court of Missouri, it is affirmed.

CITY OF CHICAGO *v.* STURGES.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 39. Argued November 6, 1911.—Decided December 18, 1911.

The question of validity of a state statute under the state constitution is foreclosed in this court by the decision of the highest court of the State.

The general principles of law that there is no individual liability for an act which ordinary human care and foresight could not guard against and that loss for causes purely accidental must rest where it falls, are subject to the legislative power which, in the absence of organic restraint, may, for the general welfare, impose obligations and responsibilities otherwise non-existent.

Primarily government exists for the maintenance of social order and is under the obligation to protect life, liberty and property against the careless and evil-minded.

Legislation reasonably adapted to the maintenance of social order, affording hearing before judgment, and not affirmatively forbidden by any constitutional provision, does not deny due process of law.

It is a familiar rule of the common law that the state which creates subordinate municipal governments and vests in them police powers essential to preservation of law and order may impose upon them the duty of protecting property from mob violence and hold them liable for loss caused by such violence.

Liability of the municipality for property destroyed by mob violence rests upon reasonable grounds of public policy and operates to deter the lawless destruction of property.

It is not unreasonable for a State to make a county liable for damages sustained by sufferers whose property is not within any incorporated city.

Equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be merely an arbitrary mandate. A classification between cities and unincorporated subdivisions of a county is a reasonable one within the equal protection clause of the Fourteenth Amendment.

The act of Illinois of 1887 indemnifying owners of property for damages by mobs and riots is not unconstitutional as depriving cities of

their property without due process of law because liability is imposed irrespective of the power of the city to have prevented the violence; nor is it unconstitutional as denying equal protection of the law because it discriminates between cities and unincorporated subdivisions of a county.

237 Illinois, 46, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the mob and riot indemnity law of Illinois, are stated in the opinion.

Mr. John W. Beckwith and *Mr. Joseph F. Grossman*, with whom *Mr. William H. Sexton*, *Mr. Edward J. Brundage* and *Mr. Robert N. Holt* were on the brief, for plaintiff in error:

The statute denies equal protection of the laws.

An arbitrary classification of persons or corporations to be affected does not render a law applying to one such class general in character. *Braceville Coal Co.* v. *People*, 147 Illinois, 66; *Eden* v. *People &c.*, 161 Illinois, 296; *Gulf, Colorado &c. Ry.* v. *Ellis*, 165 U. S. 150; *Frorer* v. *People*, 141 Illinois, 171; *Millett* v. *People*, 117 Illinois, 294; *Harding* v. *People*, 160 Illinois, 459; *People* v. *Martin*, 178 Illinois, 611; *People* v. *Knopf*, 183 Illinois, 410; *Matthews* v. *People*, 202 Illinois, 389.

Where a general law can be made applicable, a special law is unconstitutional. *Gulf, Colorado &c. Ry.* v. *Ellis*, 165 U. S. 150; *Badenoch* v. *City of Chicago*, 222 Illinois, 72; *Bailey* v. *People*, 190 Illinois, 28, 34; *Hibbard & Co.* v. *City of Chicago*, 173 Illinois, 91; *People* v. *Cooper*, 83 Illinois, 585; *People* v. *Knopf*, 183 Illinois, 410; *People ex rel.* v. *Meech*, 101 Illinois, 200.

Municipal corporations proper, and *quasi* municipal corporations can be distinguished. See Dillon on Mun. Corp., 4th ed., 42.

Due process of law requires that a party be given an opportunity to be heard on every question of fact or

liability. *Ohio-Miss. Ry. Co.* v. *Lackey*, 78 Illinois, 55; *Zeigler* v. *S. & N. A. R. R. Co.*, 58 Alabama, 594; *Hager* v. *Reclamation Dist.*, 111 U. S. 701; *Jensen* v. *Ry. Co.*, 6 Utah, 253; *D. & R. G. Co.* v. *Outcalt*, 2 Colo. App. 395; *Wadsworth* v. *U. P. Ry. Co.*, 18 Colorado, 600; *Cateril* v. *U. P. Ry. Co.*, 2 Idaho, 540; *Bielenberg* v. *Montana U. Ry. Co.*, 8 Montana, 271; *Thompson* v. *M. P. Ry. Co.*, 8 Montana, 279; *Schenck* v. *U. P. Ry. Co.*, 5 Wyoming, 430; *East Kingston* v. *Tolle*, 48 N. H. 57; *Stoudenmire* v. *Brown*. 48 Alabama, 699; *Street* v. *City of New Orleans*, 32 La. Ann. 577.

Due process of law requires only what is demanded by the usual general law, according to the nature of the particular matter in hand. It will not tolerate unusual or arbitrary actions. *Holden* v. *Hardy*, 169 U. S. 366; *Davidson* v. *New Orleans*, 96 U. S. 97.

Where the void provisions in a statute cannot be eliminated without affecting the remaining portions the whole statute becomes void. Cooley, Const. Lim. 178.

Equal protection means subjection to equal laws applying alike to all in the same situation. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

The act deprives plaintiff in error of its right to a judicial inquiry upon the question of fact as to whether or not it was derelict in the duties which it owes to the public—to preserve the peace and protect private property.

English authority for legislation under the police power of the state is inapplicable to our jurisprudence. In England there are no vested rights. Its police power is absolute and without limitation. Coke, 4 Inst. 36.

To justify legislation in this country under the police power of the state it must appear that the act is reasonably necessary for the accomplishment of the purpose for which it is passed, and not unduly oppressive. *Lawton* v. *Steele*, 152 U. S. 133.

The act cannot be justified upon the theory that there

is an implied contract between the State and the city that the latter shall preserve the peace and maintain good order within its borders. These duties are not contractual obligations, but are imposed upon municipalities *in invitum*. But even if they are contractual the act is unconstitutional because it conclusively presumes a breach of the contract.

The proceedings in the state courts in which judgment was rendered against plaintiff in error herein were not due process of law. If any question of fact or liability be conclusively presumed against it, this is not due process of law. *Zeigler* v. *Ala. R. R. Co.*, 58 Alabama, 594; *Chicago &c. R. R. Co.* v. *Minnesota*, 134 U. S. 418.

The State has no greater control over the property rights of municipal corporations than of other corporations or individuals. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 694; *New Orleans* v. *Water Works Co.*, 142 U. S. 79; *Williams* v. *Eggleston*, 170 U. S. 304; *Louisville* v. *Commonwealth*, 1 Duvall (Ky.), 295; *New Orleans R. R. Co.* v. *New Orleans*, 26 La. Ann. 478; *Touchard* v. *Touchard*, 5 California, 306.

The funds of plaintiff in error are its private property and they cannot be taken without due process of law. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 694; *City* v. *C. & N. W. Ry. Co.* (Ill. Appellate Court, not yet reported); *People* v. *Fields*, 58 N. Y. 491.

The statute contravenes the Fourteenth Amendment, in that it denies to cities and its inhabitants the equal protection of the law.

The guarantee of the equal protection of the law means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances. *Missouri* v. *Lewis*, 101 U. S. 22; *Barbier* v. *Connolly*, 113 U. S. 27; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The act arbitrarily discriminates between cities and villages or incorporated towns. To justify legislation affecting a class of persons the classification must bear a reasonable relation to the purposes for which the legislation is aimed. Cases *supra* and *People* v. *Knopf*, 183 Illinois, 410; *Bessette* v. *People*, 193 Illinois, 334; *Richards* v. *Hammer*, 42 N. J. L. 435; *Hightstown* v. *Glenn*, 47 N. J. L. 105; *People* v. *Fox*, 247 Illinois, 402.

Each city, village or town incorporated prior to the adoption of the Illinois constitution of 1870 is as similar or dissimilar as their special charters and hence the fact that a municipality was organized under the name of "city" prior to the constitution of 1870, bears no reasonable relation to the purposes of the act, which is to suppress mob violence and to indemnify the owners of property for damages occasioned by mobs and riots throughout the State. Art. X, § 1, Illinois Constitution, 1848; *People* v. *Board of Trustees*, 170 Illinois, 468.

Cities and villages or incorporated towns organized since the adoption of the Illinois constitution of 1870 differ only in the manner of organization. Their rights and powers are identical and their duties and obligations should and must be correspondingly the same. Starr & Curtiss' Annotated Illinois Statutes, 1896, Ch. 24.

The judgment of the state Supreme Court that there is such a difference between cities, villages and towns as to form a rational basis for classification in the act under consideration is not conclusive upon the Supreme Court of the United States. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Balt. & Pot. Railroad* v. *Hopkins*, 130 U. S. 210; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131; *A., T. & S. F. R.* v. *Matthews*, 174 U. S. 96; *Houston & Texas Central Rd. Co.* v. *Texas*, 177 U. S. 77; *Enfield* v. *Jordan*, 119 U. S. 680.

The terms "city," "village" or "incorporated town" are not synonymous, nor is the term "city" generic, so

as to include "village" or "incorporated town." *Enfield* v. *Jordan*, 119 U. S. 680; *Pitzman* v. *Freeburg*, 92 Illinois, 111; *People* v. *Fox*, 247 Illinois, 402.

The act is penal as well as remedial and should be strictly construed. *Allegheny* v. *Gibson*, 90 Pa. St. 397; *Underhill* v. *Manchester*, 45 N. H. 214, 221.

The statute is in derogation of the common law and nothing can be read into it by implication. *Shaw* v. *R. R. Co.*, 101 U. S. 557; *Porter* v. *Dement*, 35 Illinois, 478; *Thompson* v. *Weller*, 85 Illinois, 197; *Hamilton* v. *Jones*, 125 Indiana, 176; *Thornburg* v. *Am. Strawboard Co.*, 141 Indiana, 443; *Sarazin* v. *Union R. R. Co.*, 153 Missouri, 479.

The act arbitrarily discriminates between the inhabitants of the same county and is therefore unconstitutional.

The statute gives to owners of property in the county outside the limits of any city a right of action against said county, but does not give such right to owners of property within the same county if within the limits of any city. *Barbier* v. *Connolly*, 113 U. S. 27.

Mr. Almon W. Bulkley, *Mr. Frank J. Loesch*, *Mr. James Stillman* and *Mr. Timothy J. Scofield* submitted, the court having declined to hear counsel for defendant in error:

It is a rule of construction that a penal statute is to be strictly construed, but courts do not construe such statutes so strictly as to defeat the apparent purpose of the legislature in the enactment of the law. *United States* v. *Wiltberger*, 5 Wheat. 76, 95; Black on Interpretation of Law, Hornbook Series, 288; *United States* v. *Winn*, Fed. Cas. No. 16,740; *Hines* v. *Wilmington & W. R. Co.*, 95 N. Car. 434; *People* v. *Goodhart*, 248 Illinois, 373.

A penal statute is one which imposes punishment for a violation of statutes and which the governor of a State, or the President of the United States, is vested with power

to pardon. *P., Ft. W. & C. Ry. Co.* v. *Methven*, 21 Oh. St. 586; *Huntington* v. *Attrill*, 146 U. S. 657; Sutherland on Stat. Const., § 358.

The indemnifying statute here involved as construed by the Supreme Court of Illinois is not an act for the punishment of a city or county for a failure or an inability to control the actions of mobs and riotous assemblages. *Sturgis* v. *City of Chicago*, 237 Illinois, 46.

When an act of the legislature can be construed and applied so as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts. *Colwell* v. *Water Power Co.*, 19 N. J. Eq. 249; *People* v. *Supervisors*, 17 N. Y. 241; *Newland* v. *March et al.*, 19 Illinois, 384; Cooley's Const. Law, 184; *Grenada County* v. *Brown*, 112 U. S. 261.

The indemnifying act here involved is remedial and should be liberally construed. *Sturgis* v. *Chicago*, 237 Illinois, 46; *Schiellien* v. *Kings County*, 43 Barb. 490; *Sarles* v. *New York*, 47 Barb. 447; *Underhill* v. *Manchester*, 45 N. Y. 214; *Hermits of St. Augustine* v. *Philadelphia County*, Bright, 116.

There is a difference between cities and villages which forms a rational basis for a valid classification for purposes of legislation. *Dawson Soap Co.* v. *Chicago*, 234 Illinois, 314; *People* v. *Nellis*, 249 Illinois, 12.

A legislature may classify cities and enact laws applicable to such cities according to their classification but the classification must not be arbitrary. *Anderson* v. *Trenton*, 42 N. J. L. 486; *City of Danville* v. *Fox*, 247 Illinois, 402.

This court is not authorized to inquire into the grounds or reasons upon which a state supreme court proceeds in its construction of a state statute. *Marchant* v. *Penn. R. R. Co.*, 153 U. S. 380.

A village is a small assemblage of houses for dwellings, or business, or both, in the country, whether situated

upon regularly laid out streets and alleys or not. *Ill. Cent. R. R. Co.* v. *Williams*, 27 Illinois, 48; *T. W. & W. R. R. Co.* v. *Spangler*, 71 Illinois, 568.

The Supreme Court of Illinois construes the word village as used in the act for the incorporation of cities and villages to be a village or small collection of residences which has become incorporated for the better regulation of its internal police. *Phillips* v. *Town of Scales Mound*, 195 Illinois, 353, 358.

The act does not violate the due process provisions of the Fourteenth Amendment. *Williams* v. *Eggleston*, 170 U. S. 304; *Williams* v. *Parker*, 188 U. S. 491; *Keys* v. *Lowry*, 199 U. S. 233; *Delaware Railroad Tax*, 18 Wall. 206; *City R. R. Co.* v. *New Orleans*, 143 U. S. 192; *Marchant* v. *Penn. R. R. Co.*, 153 U. S. 380; *Postal Tel. Cable Co.* v. *Charleston*, 153 U. S. 692; *Michigan Cent. R. Co.* v. *Powers*, 201 U. S. 245.

Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits. Their functions are for the public good. They are created, among other purposes, to manage the concerns, police and public interest of the people living within their territory, and they are subject to legal obligations and duties, and derive all their powers from the legislature, except where the constitution of the State otherwise provides. They have only such powers as the legislature confers upon them. All the rights, duties and obligations of such a corporation must be ascertained and defined by the laws of the State which created it. *Louisiana* v. *New Orleans*, 109 U. S. 285; *Board of Commissioners* v. *Lucas*, 93 U. S. 108; *Citizens' Street Ry. Co.* v. *Detroit Railroad*, 171 U. S. 48.

The terms of the act do not violate the equal protection provisions of the Fourteenth Amendment. *Mobile* v. *Kimball*, 102 U. S. 691; *Marchant* v. *Penn. R. R. Co.*, 153 U. S. 380; *Minneapolis Railroad Co.* v. *Beckwith*, 129 U. S.

26; *Missouri Pacific R. R. Co.* v. *Humes*, 150 U. S. 512; *Missouri Pacific R. R. Co.* v. *Mackey*, 127 U. S. 205.

MR. JUSTICE LURTON delivered the opinion of the court.

The only question under this writ of error is as to the validity of a statute of the State of Illinois entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots." Laws of 1887, p. 237.

The defendant in error recovered a judgment against the city under that statute, which was affirmed in the Supreme Court of the State. 237 Illinois, 46. The validity of the law under the Illinois constitution was thus affirmed, and that question is thereby foreclosed. But it was urged in the Illinois courts that the act violated the guarantee of due process of law and the equal protection of the law as provided by the Fourteenth Amendment of the Constitution of the United States.

By the provisions of the statute referred to, a city is made liable for three-fourths of the damage resulting to property situated therein, caused by the violence of any mob or riotous assemblage of more than twelve persons, not abetted or permitted by the negligent or wrongful act of the owner, etc. If the damage be to property not within the city, then the county in which it is located is in like manner made responsible. The act saves to the owner his action against the rioters and gives the city or county, as the case may be, a lien upon any judgment against such participants for reimbursement, or a remedy to the city or county directly against the individuals causing the damage, to the amount of any judgment it may have paid the sufferer.

It is said that the act denies to the city due process of law, since it imposes liability irrespective of any question of the power of the city to have prevented the violence, or of negligence in the use of its power. This was the in-

terpretation placed upon the act by the Supreme Court of Illinois. Does the law as thus interpreted deny due process of law? That the law provides for a judicial hearing and a remedy over against those primarily liable narrows the objection to the single question of legislative power to impose liability regardless of fault.

It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent.

Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law, it is not to be regarded as denying due process of law under the provisions of the Fourteenth Amendment.

The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the State to preserve social order and the property of the citizen against the violence of a riot or a mob.

The State is the creator of subordinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. This duty and obligation thus entrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults.

The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus, "The Hundred," a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Winchester, 13 Edw. I, c. 1, coming on down to the 27th Elizabeth, c. 13, the Riot Act of George I (1 Geo. I, St. 2) and Act of 8 George II, c. 16, we may find a continuous recognition of the principle that a civil subdivision entrusted with the duty of protecting property in its midst and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar character have been enacted by several of the States and held valid exertions of the police power. *Darlington* v. *Mayor &c. of New York*, 31 N. Y. 164; *Fauvia* v. *New Orleans*, 20 La. Ann. 410; *County of Allegheny* v. *Gibson &c.*, 90 Pa. St. 397. The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the

lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law.

There remains the contention that the act discriminates between cities and villages or other incorporated towns.

The liability is imposed upon the city if the property be within the limits of a city; if not, then upon the county. The classification is not an unreasonable one. A city is presumptively the more populous and better organized community. As such it may well be singled out and made exclusively responsible for the consequence of riots and mobs to property therein.

The county, which includes the city and other incorporated subdivisions, is, not unreasonably, made liable to all sufferers whose property is not within the limits of a city.

The power of the State to impose liability for damage and injury to property from riots and mobs includes the power to make a classification of the subordinate municipalities upon which the responsibility may be imposed. It is a matter for the exercise of legislative discretion, and the equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be a mere arbitrary mandate.

The cases upon this subject are so numerous as to need no further elucidation.

Among the later cases are *Williams* v. *Arkansas*, 217 U. S. 79; *Watson* v. *Maryland*, 218 U. S. 173; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549; *House* v. *Mayes*, 219 U. S. 270.

Judgment affirmed.

BROWN *v.* ALTON WATER COMPANY.

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

No. 75. Argued December 4, 5, 1911.—Decided January 9, 1912.

This court may not by indirection do that which it cannot do directly; and cannot, therefore, review on direct appeal a judgment of the Circuit Court on the question of jurisdiction based on a decision of the Circuit Court of Appeals which it was the imperative duty of the Circuit Court to follow, and which is not, and cannot be, before this court for review by appeal.

Where the Circuit Court dismisses for want of jurisdiction, and the Circuit Court of Appeals does not deem the question of jurisdiction should be certified to this court but reverses and remands with directions to take jurisdiction, and this court refuses certiorari, a direct appeal will not lie to this court from the judgment of the Circuit Court based on the decision of the Circuit Court of Appeals which it was the imperative duty of the Circuit Court to follow.

The Judiciary Act of 1891 affords by one method or the other an opportunity for review by this court of every judgment or decree of a lower court which the Judiciary Act contemplated should be reviewed by this court.

THE facts, which involve the jurisdiction of this court over direct appeals from the Circuit Court, are stated in the opinion.

Mr. Elijah N. Zoline and *Mr. James Hamilton Lewis* for appellants.

Mr. William Burry, with whom *Mr. Levi Davis* and *Mr. F. B. Johnstone* were on the brief, for appellee.

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

In view of the fact that our interposition was vainly sought at one or the other stage of this protracted litiga-

tion, we shall state the history of the controversy more fully than perhaps we would otherwise do.

In 1901 the New England Water Company owned and operated a water plant at Alton, Illinois. This plant was acquired from the Alton Water Works Company. In October, 1901, the United Water Works Company filed in a court of the State of Illinois a creditor's bill against the New England Water Company and the Farmers' Loan & Trust Company, trustee under a mortgage covering the plant of the Water Works Company. Other parties and corporations, because of their asserted claims in or to the property, were joined as defendants.

The Farmers' Loan & Trust Company not only appeared in the cause, but in the same court filed a bill to foreclose its mortgage. Among those made defendants to this bill were a corporation known as the Boston Water & Light Company and the International Trust Company. The Boston Company was made a defendant on the ground that it asserted some claim to a portion of the property which the complainant insisted was covered by the mortgage sought to be foreclosed as a result of an after-acquired property clause contained in that mortgage. The International Trust Company was made a defendant as trustee of a mortgage executed in favor of that company by the Boston Company, embracing the property which the bill averred was covered by the prior mortgage in favor of the Farmers' Loan & Trust Company.

The causes were consolidated and a receiver was appointed. The Boston Water & Light Company, asserting a separable controversy, removed the consolidated cause to the Circuit Court of the United States for the Southern District of Illinois, and that court overruled a motion to remand. The International Trust Company answered and contested the claim made in the bill that the property mortgaged to it was covered by the mortgage of the Farmers' Loan & Trust Company.

The Circuit Court entered a final decree on December 23, 1903. By that decree the operation of the mortgage in favor of the Farmers' Loan & Trust Company as charged in the bill was recognized and the priorities of the respective liens upon the property were fixed. While the lien of the mortgage in favor of the International Trust Company, as trustee, was recognized, it was decreed to be subordinate to the prior mortgage to the Farmers' Loan & Trust Company. The decree contained the usual provisions fixing the amount due, directing payment, ordering a sale upon default in payment, and barring all parties and their privies.

The Circuit Court of Appeals, on an appeal taken by the International Trust Company and others, finally disposed of the case. The removal was sustained, and it was held that by the after-acquired property clause in the mortgage of the Farmers' Loan & Trust Company, that mortgage embraced the property covered by the mortgage in favor of the International Trust Company as trustee. 136 Fed. Rep. 521. A writ of certiorari was refused by this court on April 3, 1905. *Boston Water & Light Co.* v. *Farmers' Loan & Trust Co., Trustee, et al.*, and *New England Water Works Co. et al.* v. *Farmers' Loan & Trust Co., Trustee, et al.*, 197 U. S. 622.

A sale under the decree of foreclosure took place, the property bringing about enough to satisfy the mortgage in favor of the Farmers' Loan & Trust Company. Pending a motion to confirm this sale, certain parties, the same who are now appellants, alleging themselves to be holders of bonds secured by the mortgage of the International Trust Company, objected to the confirmation of the sale, on the ground that the property embraced in the mortgage to the International Trust Company was not covered by the mortgage of the Farmers' Loan & Trust Company. It was alleged that the persons appearing were not privies to the foreclosure proceedings and the decree en-

tered therein, because they had not been made parties *eo nomine*, and were not represented by the International Trust Company, as the powers conferred upon that corporation by the deed of trust did not give authority to represent the bondholders. The objections were stricken from the files, and the sale was confirmed. Among other things, the order of confirmation enjoined all parties to the suit and all persons claiming through or under them, their attorneys, solicitors, etc., "from setting up any pretended or alleged title against the title of the purchasers." A question as to the distribution of the proceeds among coupon holders was subsequently reviewed in the Circuit Court of Appeals. 137 Fed. Rep. 729.

The present appellee, the Alton Water Company, became the owner of the property sold under the decree in foreclosure. Subsequently the present appellants, as holders of bonds secured by the mortgage to the International Trust Company, and the same persons who had objected to the confirmation of the sale, treating the prior foreclosure proceedings as to them as non-existing, commenced in a state court a suit to foreclose the mortgage in favor of the International Trust Company. The International Trust Company, the Boston Water & Light Company, the Alton Water Works Company, the Alton Water Company, as one in possession of the property, as well as other bondholders, various alleged lien holders and adverse claimants, were made parties. As stated by both parties in argument, persons who were interested in maintaining the decree in the prior foreclosure proceedings, asked a commitment for contempt against the attorney who appeared for the complainants in the suit in the state court, and under the stress of a commitment for contempt the proceedings in the state court were discontinued. The commitment was, however, set aside by the Circuit Court of Appeals, 154 Fed. Rep. 273, and a petition for a writ of certiorari to review the order of

reversal was denied by this court. *Peck* v. *Lewis*, 207 U. S. 593.

Following the decision last referred to, appellants refiled their foreclosure bill in the state court. The Alton Water Company thereupon filed in the court below the bill which is now before us as ancillary to the bill filed in the original foreclosure suit, invoking the authority of the court in virtue of the jurisdiction acquired in the foreclosure proceedings, to protect as between the parties to such suit the rights acquired under the foreclosure sale. The bill only prayed that the further prosecution in the state court be enjoined. The defendants were those who were asserting the right as bondholders under the International Trust Company mortgage to foreclose in the state court and their attorneys. Each of such defendants separately filed a general demurrer, and each also specially demurred on the ground that the court was "without jurisdiction, both over the subject-matter and parties to the suit," and that the bill was not an ancillary bill, as it appeared on its face that the defendant was not a party to the prior foreclosure proceedings. The demurrers were sustained and the bill was dismissed "for want of jurisdiction."

The Circuit Court of Appeals reversed this decree, and held that the persons who, as alleged bondholders, were complainants in the foreclosure suit in the state court, had been fully represented in the prior foreclosure by the International Trust Company, and therefore that such persons were parties and privies to the prior decree, and their rights were concluded thereby. Upon this basis it was expressly decided that the bill did not invoke the power of the court as a matter of original jurisdiction, but was, in its essence, purely ancillary, since it only sought the aid of the court to uphold a jurisdiction previously acquired, and to enforce and protect an authority previously exerted. In thus enforcing its prior decree it was pointed

out there was no room for saying that the original jurisdiction and power of the court as a Federal court was involved, upon the theory that the defendants had not been brought in by proper process, since there was no controversy on that subject. It was moreover held that upon the premises stated none of the grounds of demurrer raised any controversy as to the general power of the court under the laws of the United States to administer the relief prayed, but simply called in question the right of the court as a matter of chancery practice, to afford relief in the mode and manner asked. The court decided that the case was one properly within its appellate cognizance, and was not within the category of cases susceptible of being brought directly to this court from a circuit court as involving the jurisdiction and authority of the circuit court as a Federal court. 166 Fed. Rep. 840. A petition for certiorari to review this action of the court was denied on January 11, 1909. *Lewis* v. *Alton Water Co.*, 212 U. S. 581.

Several months after the filing of the mandate of the Circuit Court of Appeals reversing the decree of dismissal, the cause was heard upon bill and answer and upon the default of certain defendants. A decree was entered perpetually enjoining the prosecution of the cause in the state court and prohibiting any attempt in the future to foreclose the mortgage to the International Trust Company. Thereupon the court allowed the direct appeal which is now before us. At the time of granting the appeal there was filed among the papers in the cause a certificate signed by the presiding judge in which in substance it was recited that when the case came on for hearing the answering defendants challenged the jurisdiction of the court as a Federal court to hear and determine the cause, and that the objection was overruled and exception taken. It was further recited that at the close of the hearing the defendants excepted to the ruling "that the facts

stated in the answers do not constitute a sufficient defense in law to the cause of action of the complainants, and that no constitutional guarantees or privileges of the defendants as set forth in their answers were violated by the entering of the decree set forth in the bill and answer, and that the defendants were not deprived of their property without due process of law in violation of the Federal Constitution."

It is plain that our right to review depends on the existence of a question of jurisdiction subject, under the Judiciary Act of 1891, to be brought here directly from a circuit court. The case reduces itself to this, since the matters of constitutional right to which the court refers in its certificate are not independent, but are involved in and subordinate to the question of jurisdiction, and hence will be disposed of by deciding that issue.

It is not disputable that the action of the court below on the question of jurisdiction was the necessary result of the decision of the Circuit Court of Appeals, since it was the imperative duty of the Circuit Court to give effect to that decision. As consequently it will be impossible to reverse for error the action of the Circuit Court without reversing the foundation upon which the action of that court rested, that is, the dominant decree of the Circuit Court of Appeals, it must result that the decree can only be reversed by reviewing and reversing the decree of the Circuit Court of Appeals. That decree, however, not being before us, and moreover as the statute gives no power to this court to review a decree of a Circuit Court of Appeals merely because of the existence of a question of jurisdiction, it comes to pass that we may not by indirection do that which we cannot do directly, and hence the decree of the Circuit Court, under the conditions here existing, is not susceptible of being reviewed.

The fundamental mistake which underlies the argument by which it is sought to sustain the right to a direct

review consists in failing to distinguish between the mere methods of review provided by the act of 1891, and the distribution made by that act of original and appellate judicial power. More immediately the fault of the argument consists in disregarding the duty of the Circuit Court to apply the law of the case arising from the decision of the Circuit Court of Appeals, an error hitherto pointed out in *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31. That case involved an unsuccessful attempt to obtain a review in this court of a judgment of a circuit court entered in compliance with a mandate of the Circuit Court of Appeals to which the case had been previously taken. In denying the right to review under the circumstances the court said (p. 37):

"That court (the Circuit Court of Appeals) took jurisdiction, passed upon the case, and determined by its judgment that the appeal had been properly taken. If error was committed in so doing, it is not for the Circuit Court to pass upon that question. The Circuit Court could not do otherwise than carry out the mandate from the Court of Appeals, and could not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court."

But the proposition insisted upon virtually is that this ruling is inapplicable here, since this case involves a question of jurisdiction directly reviewable in this court under the act of 1891. The reasoning sustaining this assumption is as follows: As, it is said, the decision of the Circuit Court was in favor of the defendants, and, therefore, no occasion arose to seek a review of the question of jurisdiction until the decree of the Circuit Court of Appeals, unless it be held that the right exists to review the action of the Circuit Court, it will arise that the right of direct review of the jurisdictional questions, which it was the purpose of the act of 1891 to confer upon this court, will be lost in many cases and thus the purpose of the statute be frustrated. This, however, as already pointed out, in

a changed form of statement involves confounding the remedial processes created by the act of 1891, with the distribution of jurisdiction made by that act. True it is that the act confers authority to directly review the classes of jurisdictional questions which the act contemplates. True, also, it is that the act does not deprive judgments of the Circuit Courts of Appeals of their final character and open them to review in this court because alone of the presence of a jurisdictional question susceptible of being reviewed directly from a Circuit Court. But this affords no reason for the exertion of an appellate power not conferred by the act, nor does it justify the assumption that the power of this court to review in such a case would be wanting. On the contrary, as pointed out long ago by this court the remedial processes which the statute of 1891 creates when rightly understood are adequate, by one method or the other, to afford ample opportunity for a review by this court of every judgment or decree of a lower court which the statute contemplated should be reviewed and revised by this court. *Robinson* v. *Caldwell*, 165 U. S. 359. Thus, as the case cited points out, if a question of jurisdiction which would be directly reviewable in this court if arising in the Circuit Court, should develop or require decision for the first time in the Circuit Courts of Appeals, the power to certify to this court would afford ample means to obtain a review by this court of such question. And if that right in such a case should not be exerted by the Circuit Court of Appeals, the discretionary right to allow the writ of certiorari which the act confers would afford a complete means of securing, in the fullest degree, the results contemplated by the act. It is, of course, an obvious misconception to indulge in the assumption that it was the duty of the Circuit Court of Appeals to have certified the question of jurisdiction, since the opinion of that court shows that it deemed the case would not have justified a direct appeal to this court had

the question of jurisdiction arisen primarily in the Circuit Court. The fact that after the decision of the Circuit Court of Appeals a petition for certiorari was considered and by this court denied makes it certain that there was opportunity by this court to revise the action of the Circuit Court of Appeals.

As it follows that we have no jurisdiction to review by direct appeal the action of the Circuit Court in giving effect to the decision of the Circuit Court of Appeals, it results that the appeal must be dismissed.

Appeal dismissed.

BERRYMAN *v.* BOARD OF TRUSTEES OF WHITMAN COLLEGE.

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

No. 95. Argued December 13, 1911.—Decided January 9, 1912.

The amount in controversy where the question is whether a contract of exemption from taxation has been impaired by subsequent legislation is measured by the value of the right to be protected and not by a mere isolated element, such as the tax for a single year.

In this case the jurisdictional value of amount in controversy *held* to exceed $2,000, although the actual tax, the collection whereof was sought to be enjoined on the ground that its imposition impaired the obligation of a legislative contract, was less than $2,000.

Cases, in which the jurisdictional value of amount in controversy is limited to the single tax involved, reviewed and distinguished.

The act of March 2, 1867, 14 Stat. 426, now Rev. Stat., § 1889, prohibiting the granting by territorial legislatures of especial privileges related to conferring new privileges on existing corporations as well as to granting privileges in original charters; and the prohibition included all especial privileges such as exemption from taxation.

In construing a statute the court must be controlled by the power

manifested by the act and not by the motive which initiated it; the scope of the act may extend beyond the generating causes thereof.

The rule that exemptions from taxation must be strictly construed against the exemption is as broad as the subject to which it relates; the rule applies not only to the extent of the legislative grant itself but also to the power of the legislature to make it.

A contract for exemption from taxation is an especial privilege, and is none the less within the prohibitions of § 1889, Rev. Stat., because granted to an educational institution; it cannot be regarded as beyond the prohibition because granted as an equivalent.

The fact that Congress failed to disapprove an act of a Territorial legislature does not validate it if the act was passed in direct violation of a prohibitive provision in the organic act. *Clayton* v. *Utah*, 132 U. S. 632.

THE facts, which involve the jurisdiction of the Circuit Court of the United States on the question of the amount involved and also the validity of an act of the legislature of the Territory of Washington exempting property of an educational institution from taxation, are stated in the opinion.

Mr. Everett J. Smith, with whom *Mr. Lester S. Wilson* was on the brief, for appellants:

The amount in controversy is the tax in issue and no more, and as that is less than $2,000, the Circuit Court had no jurisdiction.

The effect on future taxation of a decision that the particular taxation is invalid, cannot be availed of to add to the sum or value of the matter in dispute. *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68; *Clay Center* v. *Farmers' L. & T. Co.*, 145 U. S. 224; *New England Mortgage Co.* v. *Gay*, 145 U. S. 123; *Citizens' Bank* v. *Cannon*, 164 U. S. 319; *Rude* v. *Westcott*, 130 U. S. 152; *Walter* v. *Northeastern Railroad*, 147 U. S. 370.

The prayer for a perpetual injunction against future taxation is superfluous, and is evidently made in aid of

the jurisdictional amount. *Brown* v. *Trousdale*, 138 U. S. 389; *Smith* v. *Adams*, 130 U. S. 167.

The allegation that the amount in controversy is more than $2,000 is a mere conclusion; and has no weight as against the specific allegations of the bill, failing to show such amount. *Fishback* v. *West. Un. Tel. Co.*, 161 U. S. 26.

The right claimed by appellee of perpetual exemption from taxation of property now owned by it, and of property which it may hereafter acquire, is purely conjectural. It may or may not own a dollar's worth of property at any given time. *Kurtz* v. *Moffitt*, 115 U. S. 487.

The sum or value of the amount in controversy may not be made up by a computation of the abstract rights of appellee to exemption from taxation upon whatever property, if any, it may at any time in the future own. *Washington & G. R. Co.* v. *Dist. of Col.*, 146 U. S. 227.

The Washington Territorial Exemption Act was not intended to bind the State thereafter to be formed.

The taxing power of the State is never presumed to be relinquished, and it exists unless the intention to relinquish it is declared in clear and unambiguous terms, admitting of no other reasonable construction. *Southwestern R. Co.* v. *Wright*, 116 U. S. 231.

Territorial governments cannot be presumed, where a State would be, to have intended to bind, by a territorial legislative act, States thereafter to be formed from them, in such sweeping and vital matters as to perpetually exempt from taxation all property which a private corporation may at any time acquire, within its borders.

Regardless of the intent of the territorial legislature, the exemption act was void, and did not constitute a contract for perpetual exemption from taxation.

The territorial legislature was directly prohibited from granting such exemption by the organic act, § 1924, Rev. Stat.

Singling out this especial college and enacting a law

that its property should be exempt from taxation, showed a partiality and discrimination violative of the rule of both equality and uniformity required by § 1924, Rev. Stat. U. S. *Edye* v. *Robertson*, 112 U. S. 580; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 593; and 158 U. S. 601; Cooley on Taxation (1903 ed.), p. 381.

The requirement of uniformity in taxation refers to property or persons of the same class. It requires the rate to be uniform on the same class everywhere, with all people and at all times. *State* v. *Whittlesey*, 17 Washington, 447; Miller, Const. of United States, 241.

The territorial grant of exemption was an "especial privilege," within the meaning of the amendment to the organic act of March 2, 1867, § 1889, Rev. Stat. *New Jersey* v. *Wright*, 117 U. S. 648; *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Chesapeake & Ohio R. Co.* v. *Miller*, 114 U. S. 176; *Memphis & Little Rock R. Co.* v. *Berry*, 112 U. S. 609. The cases of *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 174; *Pickard* v. *Tennessee & R. Co.*, 130 U. S. 642, simply decide that immunity from taxation is a personal, or an especial privilege, not extending beyond the immediate grantee, unless otherwise so declared in express terms.

A territorial law passed in violation of the positive prohibition of Congress is void. *Clayton* v. *Utah*, 132 U. S. 632; *Snow* v. *United States*, 18 Wall. 317.

While the assent of Congress may be implied, from lapse of time, and without specific sanction, to certain laws of a territory, laws enacted by the legislative assembly of Washington Territory require to be submitted to Congress, and if disapproved, they are void; § 1850, Rev. Stat.; *Clinton* v. *Englebrecht*, 12 Wall. 446; *Miners' Bank* v. *State of Iowa*, 12 How. 7; *Baca* v. *Perez*, 42 Pac. Rep. 162; this relates to matters of general territorial procedure, and not to matters contained within a private act as this one was.

The territorial legislature recognized the Congressional requirement that taxes must be uniform and equal, and that exemptions from taxation, except in cases specified, were prohibited; see § 2829, Code of Washington Territory, 1881.

The territorial act did not constitute a contract of perpetual exemption from taxation—it was a gift without consideration.

In procuring and accepting the amended charter, the Board of Trustees of Whitman College gave no additional pledge, and promised nothing which it had not already promised and was bound in honor to perform under its acceptance of the original charter. There was no consideration to support a contract for exemption from taxation. *Grand Lodge* v. *New Orleans*, 166 U. S. 143.

If appellee is entitled to relief in any event, the decree of the court is too broad.

Mr. W. T. Dovell, with whom *Mr. George Turner* and *Mr. Thomas Burke* were on the brief, for appellee:

The jurisdictional amount is involved. Although the tax for one year is less than $2,000, clearly the right to a perpetual exemption of all of appellee's property exceeds that in value. *Betterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 225; *Mississippi & Missouri R. Co.* v. *Ward*, 2 Black, 485; *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322; *Lanning* v. *Osborne*, 79 Fed. Rep. 657.

When the object or purpose of the bill is the assertion of a right which is alleged to be disputed by the respondent, and it may be fairly gathered from the bill that the asserted right is of a value in excess of two thousand dollars, jurisdiction is thereby conferred. *Brown* v. *Trousdale*, 138 U. S. 389; *Nashville, C. & St. L. Ry. Co.* v. *McConnell*, 82 Fed. Rep. 65; *Scott* v. *Donald*, 165 U. S. 107; *Texas & Pac. Ry. Co.* v. *Kuteman*, 54 Fed. Rep. 547; *Stinson* v. *Dousman*, 20 How. 461; *Evenson* v. *Spaulding*,

150 Fed. Rep. 517; *Delaware Ry. Co.* v. *Frank*, 110 Fed. Rep. 689; *Smith* v. *Adams*, 130 U. S. 167; *Albright* v. *Sandoval*, 200 U. S. 9; *American Fertilizing Co.* v. *Board of Agriculture*, 43 Fed. Rep. 609; *Simon* v. *House*, 46 Fed. Rep. 317; *Humes* v. *City of Fort Smith*, 93 Fed. Rep. 857; *Southern Express Co.* v. *Mayor &c. of Ensley*, 116 Fed. Rep. 756; *City of Hutchinson* v. *Beckhan*, 118 Fed. Rep. 399; *Pennsylvania Co.* v. *Bay*, 138 Fed. Rep. 203.

Citizens' Bank v. *Cannon*, 164 U. S. 319, was not a suit to exempt property from taxation permanently.

Assuming the jurisdictional amount to be sufficient, the Circuit Court had power to hear the cause under the authority of numerous cases: *Given* v. *Wright*, 117 U. S. 648; *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1; *City Ry. Co.* v. *Citizens' R. Co.*, 166 U. S. 557; *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65; *Wilmington & Weldon R. Co.* v. *Alsbrook*, 146 U. S. 279; *Ill. Cent. R. Co.* v. *Adams*, 180 U. S. 28; *Starin* v. *New York*, 115 U. S. 248.

The rule that an asserted exemption from taxation will not be upheld, if by any reasonable interpretation it may be avoided, has no application here. *Citizens' Bank* v. *Parker*, 192 U. S. 85; *Clinton* v. *Englebrecht*, 13 Wall. 441; *Swan* v. *Williams*, 2 Michigan, 431; *Walker* v. *S. P. Ry. Co.*, 165 U. S. 593.

The court will not strike down an act of the territorial legislature unless it be clearly repugnant to the paramount law, and if, by any reasonable interpretation of the act, it may be made to consist with the superior law, it shall stand.

Congress granted to the people of the Territory of Washington the right of self-government. In so doing it placed upon them the duty of providing for the education of their youth, and failed to make a specific charge as to how that duty should be performed. It is fair to assume

that the plan adopted will not be demolished unless it be found unquestionably to defy some provision of the paramount law.

The term "especial privileges" as used in the act of Congress does not refer to a grant of this character. *Chesapeake & Ohio Railway Co.* v. *Miller*, 114 U. S. 176; *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 174; *Plattsmouth* v. *Nebraska Telephone Co.*, 114 N. W. Rep. 588.

The right to occupy—often to monopolize—ferry sites, bridge sites or highways had been granted, and there was no uniformity in the powers, franchises and privileges thus granted to different incorporations.

It was to prevent this and to establish uniformity in the powers and privileges of corporations that the act of 1867 was passed. It was meant to deprive the legislature of the power to grant private charters and to require them to pass general laws for this purpose. *Jones* v. *Habersham*, 107 U. S. 174.

No grant made by the State for an adequate consideration may be called an "especial privilege," and an institution of the character of appellee certainly renders to the State a consideration to support its charter. *Dartmouth College* v. *Woodward*, 4 Wheat. 519; *Home of Friendless* v. *Rouse*, 8 Wall. 430, 437; *State* v. *Hamline University* (Minn.), 48 N. W. Rep. 1119; *Yale University* v. *New Haven* (Conn.) 42 Atl. Rep. 87; *Illinois* v. *Ill. Cent. R. Co.*, 33 Fed. Rep. 730, 769; *Firemen's Fund* v. *Roome*, 93 N. Y. 313.

The maintenance of institutions of learning has ever been considered a public function, and any corporation or association which helps to perform this function renders a public service.

The act of the territorial legislature granting the exemption, not having been disapproved, is valid.

There was conferred upon territorial legislatures the power to legislate upon all rightful subjects of legislation

not inconsistent with the Constitution and laws of the United States. § 1851, Rev. Stat.; 12 A. & E. Enc. of Law (2d ed.), 272; *St. Paul & Pacific R. Co.* v. *Frank M. Parcher &c.*, 14 Minnesota, 224, 250; *Clinton* v. *Englebrecht*, 13 Wall. 446; Cooley's Const. Lim. (7th ed.), p. 54, note; *Miners' Bank* v. *State of Iowa*, 12 How. 1; *Atlantic & Pac. R. Co.* v. *Lesueur* (Ariz.), 19 Pac. Rep. 157; *Sperling* v. *Calfee* (Mont.), 19 Pac. Rep. 204; *Baca* v. *Perez*, 42 Pac. Rep. 162; *Williams* v. *Bank of Mich.*, 7 Wend. 540; *Clayton* v. *Utah*, 132 U. S. 632.

Even under the failure of Congress to disapprove, the act of the legislature is the strongest possible evidence of approval by that body.

The act of the legislative assembly of 1883 was an amendment of the preëxisting charter and did not constitute a new charter. *Wallace* v. *Loomis*, 97 U. S. 146; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Attorney General* v. *Joy* (Mich.), 20 N. W. Rep. 806; *S. P. R. Co.* v. *Orton*, 6 Sawyer, 157, 185; *Wells* v. *O. R. & N. Co.*, 15 Fed. Rep. 561.

The prohibition contained in the act of Congress did not deprive the legislature of the power to alter the preexisting charter by special law. Morawetz on Priv. Corp. (2d ed.), § 12; *Attorney General* v. *Railroad Companies*, 35 Wisconsin, 425.

The grant of perpetual exemption is based upon a consideration so that it constitutes a contract. *Grand Lodge* v. *New Orleans*, 166 U. S. 143.

By the amendatory act the scope of the institution was increased from that of a seminary to a college. This enlarged scope, on account of which large contributions are alleged to have been received and the additional obligation undertaken by the amended charter, furnished the consideration for the exemption. *City Railway Co.* v. *Citizens' R. Co.*, 166 U. S. 557.

The consideration for a grant of an exemption from

taxation to an institution of this character is always to be presumed. *Illinois Central R. R.* v. *Decatur*, 147 U. S. 201.

The exemption in the charter is not in contravention of the organic act. *Columbia &c. R. R. Co.* v. *Chilberg*, 6 Washington, 612.

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

On December 20, 1859, the legislature of Washington enacted a private law creating Whitman Seminary in Walla Walla County. By the act eight persons were incorporated under the name of the "President and Trustees of Whitman Seminary." The corporation was given perpetual existence and the incorporators authority to govern its affairs and to name their successors. The right to acquire and hold real estate was conferred, with the duty of devoting all the revenue to the support of an institution of learning, for the education of both sexes, which it was the purpose of the act to have established. The capital stock of the corporation was limited by the sixth section to $150,000. The act was accepted by the incorporators and the institution for which it provided, the Whitman Seminary, was established in Walla Walla County. After a lapse of twenty-three years, the Seminary, in November, 1883, owned considerable personal and real property, devoted to the purposes of the corporation. In that year and month a special act was passed by the territorial legislature, entitled "An act to amend . . ." the act previously referred to (November 28, 1883, Laws of 1883, p. 399). By this act, in the form of an amendment the original incorporators were incorporated under the name of "The Board of Trustees of Whitman College." The act, section by section, amended the prior act. It gave the trustees power to perpetuate themselves and govern

the new corporation, which was endowed with perpetual existence. The act, in many respects, enlarged the powers of the old corporation, struck out the sixth section, which contained the limitation of $150,000 of capital stock, and substituted for it the following: "That the property of said board of trustees of Whitman College, including all income and proceeds shall be used exclusively for the purposes of education, and in consideration of said use, said property, income and proceeds shall not be subject to taxation." The organic law of the Territory, the act of Congress of March 2, 1867, § 1, 14 Stat. 426, c. 150, when this last act was passed, contained the following, now embodied in Rev. Stat., § 1889:

"That the legislative assemblies of the several Territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon-roads, irrigating-ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable or scientific association."

Whitman College took over the property and effects of the Seminary. It increased its holdings of real and personal property, the avails of which were all devoted to the purposes of the institution. It was in existence when the territorial government passed out of being and the State of Washington was incorporated into the Union, and it is conceded by both sides in argument that no question which requires to be decided on this record calls for a consideration of any of the events or legislation which were a part of the transition from the territorial form of government to statehood. Up to 1905 it is inferable that no attempt was made to tax the property of Whitman College.

In 1905, however, the assessing officers of the county of Walla Walla, who are the appellants upon this record, acting under the authority of the state taxing law, and, upon the assumption that the property of the corporation was taxable, assessed its real property in the county of Walla Walla not actually and physically used for the purposes of the institution, and taxes were levied on such assessment amounting to $946.32. The corporation thereupon filed in the Circuit Court of the United States the bill which is now before us. The bill contained no averment of diversity of citizenship, and exclusively invoked the authority of the court below upon the ground of the existence of a perpetual contract right of exemption from taxation created by the sixth section of the act of 1883, and the impairment of such contract by the assessment and levy of the taxes in question.

The bill, as amended by stipulation, averred the existence of the contract, the compliance by the corporation with all its obligations, the acquisition of large amounts of property through contributions and otherwise dedicated to the purposes of the corporation, the detriment and loss which would be occasioned as the result of levying taxes upon the property of the corporation by the county of Walla Walla or otherwise by state authority, the destruction of the right of perpetual exemption not only as to the present but as to all future acquired property of the corporation which would result, and a consequent loss or damage vastly in excess of two thousand dollars. In substance, the prayer was for a decree recognizing and enforcing the contract of perpetual exemption from taxation as to all the property of the corporation, present or prospective, and for an injunction adequate to secure these results.

The defendants by demurrers challenged the jurisdiction of the court and the equity of the bill. After hearing, the court held that it had jurisdiction, that the contract

declared on had been established and was protected from impairment by the contract clause of the Constitution and therefore the assessment and levy of the taxes complained of were void. As defendants elected not to further plead, a final decree was entered granting the relief prayed in the bill. The appeal now before us was then taken.

The taxing officers of the county of Walla Walla, the defendants below and appellants here, insist that we may not review the merits, because the court below had no jurisdiction over the cause, and therefore we must reverse and remand, with directions to dismiss the bill. This rests upon the proposition that as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the power of taxation which might be exerted in other taxing districts, or by adding taxes which, if the right to tax existed, might be assessed and levied in future years. This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.

Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation and as broad as its power to acquire and hold property.

Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue

presented is not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract, and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and the duty to protect the contract right and in the nature of things causes jurisdiction for such purpose to be measured by the value of the right to be protected, and not by the value of some mere isolated element of that right. And the doctrine just cited has been applied in two cases so obviously in principle like this as practically to foreclose the question. The first is *New Orleans* v. *Citizens' Bank*, 167 U. S. 371. In that case a corporation of the State of Louisiana filed its bill in the Circuit Court to enjoin the collection of all taxes of a particular character against it, on the ground of a contract of exemption protected from impairment by the contract clause of the Constitution. As a means of establishing the existence of the contract exemption relied upon, certain judgments recognizing the existence of the contract exemption and enjoining particular taxes were pleaded as conclusively, by the principle of the thing adjudged, establishing the existence of the alleged contract. It was contended, among other things, that as the controversies in the cases in which judgments had been rendered concerned taxes for only particular years, the thing adjudged arising from the judgments was necessarily restricted to the taxes of the years in controversy and did not extend to future taxes, as they were not and could not have been embraced in the litigation. Deciding that this contention was unsound and deducing the existence of the contract as the result of the proof arising from the thing adjudged, it was pointed out that to deny in a case of contract exempting from taxation the right to a decree co-extensive with the power to tax which the contract restrained would be in and of itself an impairment of the contract, since if judicial power was not adequate to

control by the thing adjudged the right to a contract exemption and to prevent violations of such right, the power to contract would be of no avail. The second case, *Deposit Bank* v. *Frankfort*, 191 U. S. 499, came here on error to the Court of Appeals of the State of Kentucky. In the state court a judgment of a Circuit Court of the United States, recognizing the existence of contract exemption from taxation was pleaded as a bar against the enforcement of taxes which were embraced within the contract of exemption. The state court refused to give effect to the pleaded judgment of the Circuit Court of the United States on the ground that as by the settled rule in Kentucky judgments restraining the collection of taxes were limited to the particular taxes referred to and did not extend to taxes for future years, the judgment of the Circuit Court should be so limited, and therefore that judgment was not *res judicata*. In reversing the action of the state court on this subject, this court said (p. 512):

"The vice of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court. The controversy was as to the force and effect of the Hewitt law as a contract; not for one year but for all years; not for one assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract, and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The court had jurisdiction of the parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by state legislation within the right guaranteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank."

Measuring the contention as to the absence of the jurisdictional sum by the principles thus established, it answers itself, since the argument is equivalent to saying that a subject which is necessarily included in the relief to be granted and is, in the nature of things, concluded by the decree to be rendered is yet excluded from consideration for the purpose of the issues in the cause—that is, may not be taken into account in ascertaining whether there is jurisdiction over the controversy.

We state in the margin the cases principally relied upon to support the contention as to the want of jurisdiction.[1] It would suffice to say of these cases that if they supported the proposition which they are cited to maintain, they have been qualified and restricted by the cases which we have just reviewed. But such result is uncalled for, as an analysis of the cases will show that all of them considered, in the absence of contract, where the right to levy a particular tax was assailed, whether there was authority to make up the jurisdictional amount required, by calling into the consideration the influence which the judgment might have upon different taxes or the power to take in view future illegal taxes upon the theory that they might be levied.

We come to the merits, that is, to determine whether the special act incorporating Whitman College was a private charter within the prohibition of the organic act and therefore void, and, if not, whether the exemption from taxation which it conferred was an "especial privilege" within the prohibition of the organic act and hence beyond the power of the territorial legislature to grant. We thus at once bring face to face the act of 1883 and the

[1] *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68; *Clay Center* v. *Farmers' L. & T. Co.*, 145 U. S. 224; *New England Mortgage Security Co.* v. *Gay*, 145 U. S. 123; *Citizens' Bank* v. *Cannon*, 164 U. S. 319; *Rude* v. *Westcott*, 130 U. S. 152; *Walter* v. *Northeastern Railroad Co.*, 147 U. S. 370.

prohibitions of the organic act dismissing all questions concerning the incorporation of the Territory of Washington into the Union as a State, because, as we have seen, it is conceded that nothing on that subject controls the question here to be decided.

We do not think it necessary to inquire whether the act of 1883, although it be assumed that it virtually called into being a new juridical person endowed with new powers and duties, may be treated, not as the original grant of a private charter, but as simply an amendment of the prior charter, because of the form in which the act of 1883 was couched. This is done, because as the issues for decision will be disposed of by considering the case in the light of the prohibition against "especial privileges," it will become unnecessary to consider the operation of the prohibition against the grant of private charters. We think it clear also that the disjunctive character of the prohibition found in the organic act excludes in reason the possibility of saying, as contended in argument, that the especial privileges provided against were simply intended to prohibit the conferring of such privileges as part and parcel of the granting of the prohibited private charters. To adopt such a view would cause the prohibition against especial privileges to be superfluous, and would be repugnant to the plain intent of the act, as manifested from its language. That intent, we think, was to take away the power to grant the forbidden especial privileges by any form of legislative action, leaving no room, therefore, for the implication that it was the purpose of the organic act to recognize the right to give especial privileges, provided only it was not made a part of the grant of a forbidden private charter. And this also completely serves to dispose of the contention that it was the intention of the prohibition against especial privileges to forbid merely the creation of such privileges as a legislative grant of an exclusive right to ferries, bridges, etc.,

which it is urged was a common form of territorial legislative abuse prior to the adoption, in 1867, of the organic act, and therefore was presumably the evil intended to be reached by the enactment of that act. We say this because, even if it be conceded that such alleged abuses were the generating cause of the insertion in the organic act of the prohibition against especial privileges, that concession affords no ground for the generic prohibition and for saying that it should be only applied to one class of especial privileges to the exclusion of all other such privileges. We must be controlled by the power which the act manifests, not by a consideration of the mere motive which initially energized the bringing of the power into play.

We at once moreover concede, for the sake of the argument, that the exemption from taxation which was conferred was upon a consideration, and therefore rested in contract, and if it was in the power of the territorial government to make, is protected from impairment by the contract clause of the Constitution. With this concession in mind, and before coming to determine whether the exemption was valid, that is, whether, in and by virtue of the prohibition in the organic law forbidding especial privileges, the territorial legislature was incompetent to grant a contract exemption, we briefly advert to the contention made that a broad meaning must be given to the organic act for the purpose, if it can be done, of establishing that there was no limit upon the power of the territorial legislature to exempt. It is conceded that the elementary rule is that exemptions from taxation must be strictly construed. But it is said that this applies only to the contract of alleged exemption, and has no relation to the inquiry whether the legislature had the power to exempt, because full legislative power must be presumed to exist unless there be a plain prohibition to the contrary. While we are of opinion that the contention has

no direct bearing on the more important proposition here to be decided, we cannot give it, even by silence, our assent, because we consider that it admits, on the one hand, the rule of strict construction and at once denies it upon the other, by improperly restricting the area of its operation. We say this because if, in a particular case, the duty arises of determining whether words of restriction found in the fundamental law are intended to operate a limitation on the legislative power to grant contract exemptions from taxation, the rule of strict construction is just as applicable as it would be to a case where it was applied for the purpose of determining whether the particular terms of an alleged contract did or did not embrace an exemption from taxation. We think the rule of construction is as broad as the subject to which it relates and its operation does not depend upon whether the question is one of limitation of legislative power or of the true interpretation of a contract asserted to be one of exemption.

This brings us to the text of the organic act. That a contract giving perpetual succession to a corporation and endowing it with a perpetual exemption from taxation as to all its property, real and personal, is an "especial privilege," seems to us too clear for anything but statement. We fail to see how any other conclusion can be reached, in view of the fact that the very essence of such a contract is to endow the corporation as to its property forever with the privilege of being exempt from the operation and control of the essential governmental power of taxation and thereafter to cause the corporation and all its property, so far as that subject is concerned, to live under the law of the contract and not under the law of general taxation.

But it is said that while this may be the superficial view, it is not an accurate and legal one, since the word privilege has been construed by this court not to include a

contract of exemption from taxation. The cases relied upon are, *Chesapeake & Ohio Ry.* v. *Miller*, 114 U. S. 176, and *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174. Briefly, the subject passed upon in those cases and in others of a similar character was this: Where a corporation enjoyed a right of exemption as to the whole or a part of its property, did such exemption from taxation pass under a foreclosure sale to the purchaser at such sale when by law the rights and privileges of the corporation were transferred by the sale? In other words, the question was whether the transmission of the privileges of the corporation to another embraced the privilege resulting from a contract exemption from taxation. It was held that it did not, upon the theory that a contract exemption from taxation was so exceptional in its nature, that the right to transmit it was not embraced in the general authority to transmit privileges, and therefore the power to transfer must be expressly and specially conferred. These rulings were but an illustration in another form of the duty to which we have previously referred under all circumstances to bring to the consideration of the question whether a contract exemption from taxation exists the rule of strict construction. And of course, when the principle upon which the cases were decided is rightly understood their inappositeness to the case before us is manifest. This must be, unless it can be said that rulings which held that a contract of exemption was a privilege of such character that it could not be transmitted without express authority was a ruling that a contract exemption was no privilege at all.

It is urged that as in this case there was a consideration for the especial privilege granted, the agreement of the incorporators to establish and maintain an institution of learning, therefore the exemption cannot be held to be an especial privilege within the intendment of the organic act, since the privilege so bestowed was conferred not as

an especial privilege, but as an equivalent for the contract obligations assumed. As we have seen, however, it is the contract of exemption which, in the very nature of things, characterizes the grant as an especial privilege. When this is borne in mind it appears that the proposition is that the feature which gave to the grant the essential characteristic of an especial privilege must be held to cause it not to be of that nature.

The only principal contention remaining unnoticed is the alleged acquiescence of Congress in the grant of exemption resulting from its failure to disapprove the act of 1883. Rev. Stat., § 1850. The foundation, however, upon which that contention rests has been decided to be without merit. *Clayton* v. *Utah*, 132 U. S. 632, 642.

We have not reviewed the minor considerations which, in various forms of statement, have been pressed in argument concerning the wisdom displayed by the territorial assembly in enacting the act of 1883, and the far-reaching and public benefits which have resulted from the provisions of that act and the possible injury to the public weal to arise from now holding that the contract exemption from taxation which the act granted was beyond the scope of the legislative authority. It suffices to say that whatever may be the cogency of the suggestions thus made, it is obvious that they but invite us into a field of inquiry which lies beyond the line which separates the judicial from the legislative authority, and therefore we may not give heed to them.

The decree of the Circuit Court is reversed and the cause is remanded to the District Court with directions for further proceedings in conformity to this opinion.

ROCK ISLAND PLOW COMPANY *v.* REARDON, TRUSTEE IN BANKRUPTCY OF BROWN.

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

No. 98. Submitted December 11, 1911.—Decided January 9, 1912.

A bankrupt, in Illinois, within a few days of filing a petition in voluntary bankruptcy, confessed judgments upon which executions were issued and returned unsatisfied but no actual levy was made; thereafter and before filing the petition he transferred goods in his possession to the vendor thereof, who claimed they had been delivered on conditional sales; the trustee began subrogation proceedings to preserve the liens of the judgments for the benefit of the estate, to which the judgment creditors assented, and also commenced proceedings to compel redelivery of the goods transferred on ground that lien of judgments inured to estate; the trustee had also claimed a right to recover the goods on the ground of unlawful preference; *held*, that

Under the law of Illinois, delivery to the sheriff of the executions on the judgments operated without levy to create liens upon the property of the judgment debtor within the county.

Such liens were paramount to rights in the property possessed by the vendor under contracts of conditional sale.

The effect of the subrogation order was to render inoperative as a preference in favor of the judgment creditors the liens obtained through the executions and to preserve such liens as of the date of filing the petition for the benefit of the estate. *First National Bank* v. *Staake*, 202 U. S. 141.

Liens of execution creditors, as they exist when a petition of involuntary bankruptcy is filed, cannot be subsequently destroyed by acts of the creditors to the prejudice of the estate.

As the holder of the goods had not been prejudiced by the proceedings to recover for unlawful preference, the trustee was not barred from asserting the lien of the judgments on the same goods for the benefit of the estate.

168 Fed. Rep. 654, affirmed.

WHETHER the Plow Company or Reardon, as trustee of the bankrupt estate of Frank Brown, has the better right to certain personal property delivered by Brown to the Plow Company is the question to be decided on this record.

The facts pertinent to the controversy are these: Brown was a merchant and engaged in business at Pekin, Tazewell County, Illinois. On November 13, 1907, he confessed judgment for $247.15 and $400 and costs in favor of a creditor, the Peoria Cordage Company, a corporation, and on the same day an execution was issued, which was received and endorsed by the sheriff of Tazewell County on the following day. On November 23, 1907, Brown confessed judgment in favor of another creditor, the D. M. Sechler Carriage Company, a corporation, for the sum of $282.25 and $400, with costs, and on the same day execution issued, and on the next day was received and endorsed by the sheriff of Tazewell County. While these executions were outstanding and unsatisfied, Brown, on November 25, 1907, delivered merchandise, consisting of gang plows, cultivators and other farm implements of the value of $500, to the Rock Island Company, appellant, and as the result of the transaction an indebtedness of Brown to the Plow Company of $406 was extinguished. When the goods were delivered to the Plow Company Brown was insolvent and the Plow Company had reason to believe that such was the fact. Two days after the delivery of the property to the Plow Company Brown filed a petition in voluntary bankruptcy, and Reardon was subsequently qualified as trustee of the bankrupt estate.

Seeking to avail of the provisions of § 67, paragraphs *c* and *f* of the Bankruptcy Act, the trustee, on January 21, 1908, filed with the referee a petition setting forth the obtaining of the judgments by the Sechler and Cordage companies heretofore referred to, that the executions issued on those judgments were liens from the date of receipt by the sheriff on all the real and personal prop-

erty of the bankrupt located in Tazewell County, Illinois, and continued to be liens down to the date of the filing of the petition in bankruptcy, and prayed that the liens of said executions might be declared null and void as to the Sechler and Cordage companies, but might be preserved for the benefit of the estate in bankruptcy. The creditors just named entered their appearance and consented that the prayer of the petition be granted, and an order was entered on the date when the petition was filed granting the relief sought.

Three days after the entry of the subrogation order the trustee commenced this litigation by filing a bill of complaint on the chancery side of the District Court of the United States, Southern District of Illinois, Northern Division—the same court in which the bankruptcy proceedings were pending. The petition assailed the transfer and delivery of property by Brown to the Plow Company on November 25, 1907, heretofore referred to, as an unlawful preference. The court was asked to decree a surrender of the property to the trustee or payment of its value. On March 27, 1908, the Plow Company filed its plea, and therein in substance contended that the assailed transaction was not an unlawful preference. It averred that it had previously delivered the property to Brown, under and by virtue of the terms of certain written contracts, annexed as exhibits to the plea; that the title of such property "always was and remained in" the Plow Company; and, that it "lawfully took and repossessed itself" of the property by reason of the failure of Brown to pay for the same according to the contracts. Shortly after, the trustee, by leave, filed an amendment to his bill of complaint. The amendment consisted in detailing the facts as to the obtaining of the judgments of the Sechler and Cordage companies heretofore referred to, and an issue of executions on the judgments prior to the transfer of Brown to the Plow Company, and that the executions

were outstanding at the time of the filing of the petition in bankruptcy. The proceedings before the referee culminated in the order preserving the liens of the judgments for the benefit of the bankrupt estate were next set forth, and it was claimed that the liens thereby preserved were superior to any claim which the Plow Company had to the goods in controversy. In a plea to the amended bill the Plow Company reiterated the facts upon which it based the claim that in receiving the goods from Brown it merely took possession of its own property and had not obtained an unlawful preference. It further sets forth that when it received the goods no levy had been made under either of the executions issued upon the judgments obtained by the Sechler and Cordage companies, and that in consequence it had the superior right to the goods. Want of notice of the subrogation proceedings and the consequent invalidity of the order of subrogation was also averred. It was in addition averred that the judgment in favor of the Cordage Company was not a valid lien on January 21, 1908, the date when the order of subrogation was made, because prior thereto the execution had been returned to the sheriff and filed and docketed in the court which had issued the same. Furthermore, it was averred that the execution on the Sechler judgment had been returned by the sheriff with an endorsement, "no property found," and was filed on February 22, 1908, in the court from which it had issued, and that rights based upon the issue of such execution could not be originated thereafter, viz., on April 16, 1908, when the amended bill was filed.

The cause was heard upon the sufficiency of the plea just reviewed, and the plea was held sufficient. The trustee elected not to file a reply to the plea, and a decree was thereupon entered dismissing the bill. On appeal the decree of dismissal was reversed by the Circuit Court of Appeals (168 Fed. Rep. 654), and this appeal was then taken.

Mr. W. H. Sholes, with whom *Mr. Walter H. Kirk* was on the brief, for appellant:

The contracts under which the goods were delivered to the bankrupt contain a condition that the "right to the possession of all goods shall remain and inure to the Plow Company, with the effect that it may hold or retake and subject the same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel leases of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser."

The character of the transaction is fixed at its inception and nothing short of a new agreement between the parties can alter the original nature of the contract. Where it appears from the circumstances of the case that the parties intended a sale to be conditional, although no condition has been expressed, a condition to be attached to the sale may be implied. Story on Sales, § 253; 6 Am. & Eng. Enc. Law (2d ed.), 439; *Harkness* v. *Russell*, 118 U. S. 663.

The right to possession was recognized by the parties to said contracts as equivalent to the retention of title. No fraud can be attached or urged to the making of said contracts. The right to possession by the Plow Company existed on the dates of making of said contracts but was only exercised on November 25, 1907, before the rights of third parties had intervened.

These contracts cannot be construed otherwise than as contracts of conditional sale, and the validity of such contracts is well recognized by the courts of Illinois. *Emerson Piano Co.* v. *Maund*, 85 Ill. App. 453; *Kimball Co.* v. *Cruikshank*, 123 Ill. App. 581; *O'Neil* v. *Rogers*, 110 Ill. App. 662.

The trustee in bankruptcy stands in the shoes of the bankrupt himself and takes no better title than the bankrupt had as of the date of adjudication. He does not take

the estate of the bankrupt as an innocent purchaser or a third person, but takes subject to all valid liens, claims and demands outstanding against the bankrupt. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Hardin* v. *Osborne*, 94 Illinois, 571; *Burgett* v. *Paxton*, 99 Illinois, 288; *O'Hara* v. *Jones*, 46 Illinois, 288; *Matter of Bates, Assignee*, 118 Illinois, 524; *Field* v. *Ridgely*, 116 Illinois, 424; *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146.

In other words, the trustee, to prevail in this cause, must find some creditor of the bankrupt who had a better right to the Plow Company's goods in the hands of the bankrupt on the day the Plow Company took them from the bankrupt, than the Plow Company itself had, and must, if at all, succeed in his contentions, here, by being subrogated to that creditor's rights for the benefit of the entire bankrupt estate. If there was no such creditor, or if that creditor's rights have been lost by laches or limitations, the trustee cannot now prevail. The statutory or judicially determined rules of property of Illinois control and determine the validity of such liens, if any, as the Cordage Company and the Carriage Company obtained by their judgments and executions. Collier on Bankruptcy (6th ed.), 553; *Humphrey* v. *Tatman*, 198 U. S. 91; *In re First Nat'l Bank*, 135 Fed. Rep. 62; *In re Greene*, 134 Fed. Rep. 137.

Under the laws and judicially determined rules of property in Illinois, the liens of the Cordage Company and Carriage Company executions which had not been perfected and made absolute and effective by levy, were, on November 25, 1907, defeated and lost in consequence of the repossession of its goods then in the possession of the bankrupt, by the Plow Company under the said conditional sale contracts, and thereafter neither the sheriff nor the trustee had the right to follow and take the same away from the Plow Company. *People* v. *Johnson*, 4 Brad. (Ill. App.) 346; *Peters* v. *McConnell*, 16 Ill. App. 526;

Travers v. *Cook*, 42 Ill. App. 580 (582); *Minor* v. *Herriford*, 25 Illinois, 344; *Davidson* v. *Waldron*, 31 Illinois, 120; *Chittenden* v. *Rogers*, 42 Illinois, 100; *Mulheisen* v. *Lane*, 82 Illinois, 117. See also *Davidson* v. *Waldron*, 31 Illinois, 120; *Powers* v. *Wheeler*, 63 Illinois, 29; *In re J. B. Hopkins*, 1 Am. Bk. Rep. 209.

Mr. Franklin L. Velde, with whom *Mr. Ira J. Covey* was on the brief, for appellee:

The contracts under which the appellants claim to have taken possession of the goods in question were fraudulent and void as to the appellee acting as trustee in bankruptcy.

The contracts in question were not conditional sale contracts as they did not contain any provision retaining title in the seller.

Treated as conditional sale contracts, they furnished no defense to the rights of the appellee as trustee who was vested with the rights of execution creditors under the subrogation order of the district court.

Where goods are sold to the bankrupt upon credit, and upon the understanding that the title to such of them as should not be sold by him should remain in the vendor until payment of the purchase price or that the goods or the proceeds should be held by the purchaser as security the purchaser being in actual possession, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. The title to the goods vests absolutely in the buyer and passes to his trustee in bankruptcy under § 70*a*. *In re Garcewich*, 8 Am. Bk. Rep. 149; 115 Fed. Rep. 87; *Pontiac Buggy Co.* v. *Skinner*, 158 Fed. Rep. 858; *Robinson* v. *Elliott*, 22 Wall. 513; *In re Rodgers*, 125 Fed. Rep. 169; *In re Carpenter*, 125 Fed. Rep. 831; *Security Warehouse Co.* v. *Hand*, 206 U. S. 415; *In re Antigo Screen Door Co.*, 123 Fed. Rep. 249; *In re Rasmussen*, 136 Fed. Rep. 704; *In re Gault*, 120 Fed. Rep. 443; *Skilton* v. *Codington*, 185 N. Y. 80; *In re Perkins*,

155 Fed. Rep. 237; *In re George Hassam*, 153 Fed. Rep. 932; *Union Trust Co.* v. *Trumbell*, 137 Illinois, 146; *Deering Shoe Co.* v. *Washburn*, 141 Illinois, 153; *In re Tucker*, 161 Fed. Rep. 584; *Mitchell* v. *Mitchell*, 147 Fed. Rep. 280.

The agreements in this case are peculiar. They do not contain the usual provisions of contracts of this kind that the title to the goods shall remain in the vendor until they are paid for. The most that can be said of these contracts is that they give to the vendor a sort of chattel mortgage lien.

The trustee stands in the position of an execution creditor. Section 67, pars. *c* and *f* of the Bankruptcy Act of 1898; *First National Bank* v. *Staake, Trustee*, 202 U. S. 141; *In re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514; *In re Merrow*, 131 Fed. Rep. 993.

The only controversy here possible concerning the rights arising thereunder is between the attaching creditor and the trustee. As both these parties are agreed that the latter shall be subrogated to the rights of the former, the judgment of the referee is affirmed. See *In re N. Y. Printing Co.*, 6 Am. Bk. Rep. 615; 110 Fed. Rep. 514; 49 C. C. A. 133.

Under the law of Illinois these goods which the Plow Company received from the bankrupt two days before the petition was filed and while both of these executions were in the hands of the sheriff, could have been levied upon by him. *Peoria Mfg. Co.* v. *Lyons*, 153 Illinois, 427; Chattel Mortgage Act, 2 Starr & Curtiss, 2743; *St. Louis Iron Works* v. *Kimball*, 53 Ill. App. 636.

If the goods could have been levied upon by the sheriff under these executions, then the trustee in bankruptcy representing now, as he does, these execution creditors, has the right to the goods in question. *In re Antigo Screen Door Co.*, 123 Fed. Rep. 249; Collier on Bankruptcy (6th ed.), 588; see also *Gilbert* v. *National Cash Register Co.*, 176 Illinois, 288, and cases cited.

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

The only question arising for decision is whether the facts set up in the plea of the Plow Company are sufficient to exempt that company from accountability to the trustee for receiving a preference within the terms of the Bankruptcy Act. The consideration which this question received in the opinion delivered by the Circuit Court of Appeals makes unnecessary any elaborate review of the subject.

We assume, for the sake of argument, as did the Circuit Court of Appeals, that the contracts by virtue of which the Plow Company claimed it re-took possession of the property in question were conditional sale contracts, whereby the Plow Company retained in itself the title and right of possession of its goods until paid for by Brown, and that by virtue of such contracts the taking or re-taking of the property in question was valid as between the Plow Company and the bankrupt. The inquiry then is whether the contracts and the possession taken thereunder of the property in controversy by the Plow Company are operative to bar the rights asserted by the trustee in and by force of the subrogation proceedings. The claim of the trustee was in substance, 1, that delivery to the sheriff of executions upon the Sechler and Cordage judgments operated without levy to create liens upon the real and personal property of Brown the judgment debtor within the county; 2, that such liens were paramount to rights in the property possessed by a vendor under a contract of conditional sale; and, 3, that the effect of the subrogation order was to render inoperative as a preference the liens obtained by the judgment creditors through their executions, and to preserve such liens as of the date of the filing of the proceedings in voluntary bankruptcy for the benefit of the estate in bankruptcy.

That the Circuit Court of Appeals rightly held the affirmative of these three propositions we entertain no doubt. Upon the first two propositions that court said (p. 658):

"As the law of Illinois must govern the answer to both questions, and the rule there is well settled, as we believe, for an affirmative answer to each, no difficulty appears in the solution. Paragraph 9 of chapter 77, Rev. St. Ill., 1874 (2 Starr & C. Ann. St., 1896, p. 2336) provides: 'No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed.' This is a modification of the rule at common law which created a lien from the issuance of the writ, and its effect to create a lien in favor of the execution creditor is recognized in numerous decisions noted in Starr & C. Ann. St., supra. See *Frink* v. *Pratt & Co.*, 130 Illinois, 327, 331, one of the citations in appellee's brief. The cases cited contra, declaratory of the rule that an officer receiving the execution has 'no interest in the property itself' to maintain an action therefor 'until after a levy,' do not touch the present inquiry of lien in favor of the execution creditor, and are plainly inapplicable. Upon the second question, it is stated in *Gilbert* v. *Nat. Cash Register Co.*, 176 Illinois, 288, 296, that 'whatever may be the rule in other jurisdictions,' this rule is established in Illinois: 'If a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with an apparent ownership, a *bona fide* purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor.' The authorities there cited for such rule are deemed sufficient reference; and we remark that no departure appears from the doctrine thus stated in any of the Illinois cases called to our attention."

It is significant that in the argument at bar counsel for the Plow Company make no attempt to point out wherein the authorities cited by the court are not applicable and authoritative on the propositions which they were cited as supporting, and indeed entirely omit any reference to them.

The decision in *First National Bank* v. *Staake*, 202 U. S. 141, 146, is authoritative upon the last proposition. As the executions issued upon the judgments, which executions were held by the sheriff for levy, operated to create liens upon the property in question, then in the possession of Brown although held under conditional sale contracts, and such liens were paramount to the rights of the vendor, the Plow Company, it is manifest that the right of the judgment creditors to resort to such property in satisfaction of their liens could not be destroyed by a mere transfer of possession from one party to the contract to the other party thereto. It also follows in reason, we think, that the liens of the execution creditors in the property as they existed when the petition in involuntary bankruptcy was filed could not be subsequently destroyed by the acts of the creditors, the third parties, to the prejudice of the estate, and that if the rights of the bankrupt estate could be lost by the laches of the trustee, the record presents no evidence of such laches. The circumstance that the trustee, in ignorance perhaps of the existence of the conditional sale contracts, first based the right to relief solely upon the claim that an unlawful preference was created through the payment by means of the transfer made by Brown, when insolvent, of an indebtedness to the Plow Company, did not operate to the prejudice of the Plow Company and was plainly insufficient to bar the trustee from asserting an additional right to the relief prayed, viz., the right growing out of the subrogation order made prior to the commencement of the litigation.

Decree affirmed.

GRING *v.* IVES.

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

No. 115. Submitted December 18, 1911.—Decided January 9, 1912.

The act of March 3, 1899, c. 425, § 10, 30 Stat. 1121, 1151, authorizing establishment of harbor lines was not intended, and did not operate, to paralyze all state power concerning structures of every character in navigable waters within their borders, or to automatically destroy property rights previously acquired under sanction of state authority. *Cummings* v. *Chicago*, 188 U. S. 410.

In this case the Federal question relied upon is so absolutely without merit, and the grounds are so frivolous, as not to afford a basis for exercise of jurisdiction, and the writ of error is dismissed.

Writ of error to review 150 Nor. Car. 137, dismissed.

THE facts are stated in the opinion.

Mr. James A. Toomey for plaintiff in error:

The record as a whole shows clearly that the claim of Federal rights was asserted from the beginning by the plaintiff in error in such manner as to bring it to the attention of the lower court. The paramount right of navigation in navigable waters was claimed, and it was maintained that any obstruction to navigation without authority from Congress or the legislature was unlawful, constituted a public nuisance, and was a direct violation of the provisions of §§ 9–12 of the River and Harbor Act, March 3, 1899, 30 Stat. 1151. It further appears from the record that the right, privilege and authority claimed under the aforesaid act of Congress were denied by the court below, and consequently this court has jurisdiction. *Appleby* v. *Buffalo*, 221 U. S. 524; 172 U. S. 67.

The substantial question presented is whether the lower

court erred in refusing to instruct the jury that defendants in error, upon all the evidence, could not recover, because the acts of negligence complained against were not the proximate cause of the injury, but that the efficient and proximate cause of said collision and consequent damage was the maintenance by the defendants in error of a public nuisance in a navigable river of the United States, expressly contrary to and in violation of a Federal statute.

The Pasquotank river is a navigable stream, and the defendants in error were not affirmatively authorized by Congress or by any legislative power to construct or maintain a marine railway or any other structure extending into that river one hundred feet beyond the harbor line shown to have been established by the Secretary of War pursuant to the act of Congress. The collision occurred at nighttime at point 36 feet outside the harbor line so established, where the water was 25 feet deep and navigable. The lower court held as a matter of law that whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels, and that it was not shown to be located there illegally or to be a public nuisance.

This doctrine is a denial of the validity and legal effect of the United States statute hereinbefore set forth, and is at variance with decided cases. *Hannibal Bridge Company* v. *United States*, 221 U. S. 194.

If defendants in error had complied with the statute and had not placed an obstruction in a navigable stream, the accident would not have happened. *Atlee* v. *Packet Co.*, 21 Wall. 389; *Grand Trunk Ry.* v. *Backus*, 46 Fed. Rep. 216; *Northern Pacific Ry.* v. *United States*, 44 C. C. A. 136; see also cases reported at 38 Fed. Rep. 614; 9 N. J. Eq. 526; 28 N. Y. 396; 72 Maine, 181; 18 Barb. (N. Y.) 277; 9 Can. Sup. Ct. 239; and cases cited in 90 L. R. A. 59, note 7.

Mr. E. F. Aydlett for defendants in error:

Establishment of harbor lines can only be shown by proof of the ordinance, just as any other ordinance. The ordinance not being shown there is no proof.

Any obstruction beyond an established harbor line is not necessarily unlawful. The evidence shows this railway to have been constructed "some 18 years ago"; that referring to harbor line tends to show an establishment if any in 1902, 16 or 18 years after the construction of the ways. Such an ordinance has no retroactive effect and does not affect structures previously erected. 29 Cyc. 343 and 344 (b); *Commonwealth* v. *Alger*, 7 Cush. (Mass.) 53.

Defendant would not be justified in recklessly or negligently running into even an unlawful obstruction.

In the absence of any specific legislation on the subject, riparian owners have a qualified property in the water frontage belonging by nature to their land, and a right to construct wharfs, piers, landings, etc., subject to such general rules and regulations as the legislature, in the exercise of its power, may prescribe for the protection of public rights in rivers or navigable waters. *Bond* v. *Wool*, 107 Nor. Car. 148. *Brainbridge* v. *Sherlock*, supra.

Railways of this character which are necessities of commerce and for repairing vessels, cannot be constructed without going under water and to deep-water mark. Otherwise vessels of deep draught could not be hauled out, and therefore the extension is necessary to a reasonable use of the same.

The rights of navigation while paramount are not exclusive, *Post* v. *Munn*, 7 Am. Dec. 570, and even granting that the railways were absolutely without warrant of law and therefore a nuisance and subject to abatement, parties must yet exercise care and cannot recklessly or wantonly injure them, for they are still private property and entitled to this degree of protection. 29 Cyc. 305, 311(h), 318; *The Brinton*, 66 Fed. Rep. 71.

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

Gring, upon the theory that Federal questions were wrongly decided against him, seeks the reversal of a judgment for three hundred dollars, damages occasioned by the running of a tugboat, of which he was the owner, against a marine railway, the property of the defendants in error, who were plaintiffs below. The railway was situated on the shore of the Pasquotank river in the harbor of Elizabeth City, North Carolina. The injury to the railway was committed on the night of December 24, 1905. The Supreme Court of North Carolina, in affirming the judgment of the trial court, rendered on the verdict of a jury, stated these facts (150 Nor. Car. 137, 138):

The marine railway had been in existence for eighteen years prior to the injury complained of. The railway extended to the margin of the channel and between the end of the railway and the opposite side of the channel, which was buoyed, there was a space of 540 feet, constituting the usual highway for navigation. The night upon which the tug collided with the bridge was "a bright moonlight night and there was also a bonfire on shore and a line of electric lights which lighted up the harbor." The conduct which occasioned the running of the tug against the railway was thus stated: "The evidence is that the tugboat, which was bound down the river, instead of following the usual course, ran diagonally towards the shore, and striking the marine railway of plaintiffs, damaged it. The captain of the tugboat testified that he knew the locality well, having passed it more than two hundred times. After the injury he offered to pay damages, but the parties could not agree upon the amount." Commenting upon the facts thus stated, the court observed: "Clearly the proximate cause (of the injury) was the negligence of the tugboat in not proceeding on its course in a channel 540 feet

wide, but going several hundred feet out of its way and driving in shore against the marine railway."

In disposing of a contention concerning an alleged harbor line established under the act of Congress of March 3, 1899, c. 425, § 10, 30 Stat. 1121, 1151, and the proposition that the railway, because it projected beyond said assumed line, was a public nuisance, and therefore the complainant was entitled to negligently and wantonly injure it, the court said (p. 138):

"Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there illegally, or that it was a public nuisance; and if it had been, the tugboat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show."

The only one of the assignments of error filed at the time this writ of error was sued out which in the remotest way relates to a Federal question is the third, which is concerned with the reasoning of the court just referred to and is based upon the assumption that there could be no recovery because of the asserted establishment by the Secretary of War some time between 1900 and 1902 of a harbor line under the authority of the act above mentioned. In argument the proposition to which the assignment relates is, that the court erred in not deciding that any structure projecting into the river beyond the established harbor line was illegal and a public nuisance which the plaintiff might wantonly injure or destroy. As we have seen, however, the court found as an undisputed fact that the railway in question was constructed and had been in operation many years before the establishment of the alleged harbor line. Under this condition the court was obviously right in holding that the railway had not been located in violation of the act of 1899 and was equally obviously right in deciding that the plaintiff had no right to recklessly injure it. The basis of the assumed Federal

right rests upon the plainly erroneous assumption that the act of 1899 was intended to or did operate to paralyze all state power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even although acquired prior to the act of 1899 under the sanction of state authority. *Cummings* v. *Chicago*, 188 U. S. 410. See also *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S. 365.

In view of the character of the case, the facts found by the court below and the absolute want of merit in the Federal question relied upon, we are of opinion that the grounds relied upon for review are of so frivolous a nature as not to afford the basis for the exercise of jurisdiction, and our decree therefore will be

Dismissed for want of jurisdiction.

NORTHERN PACIFIC RAILWAY CO. *v.* STATE OF WASHINGTON EX REL. ATKINSON, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 136. Submitted December 19, 1911.—Decided January 9, 1912.

A train moving and carrying freight between two points in the same State, but which is hauling freight between points one of which is within and the other without the State, or hauling it through the State between points both without the State, is engaged in interstate commerce and subject to the laws of Congress enacted in regard thereto. *Southern Railway Co.* v. *United States*, 222 U. S. 20.

The right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has

been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive power.

Congress by enacting a statute in regard to a subject within its exclusive power manifests its purpose to call that power into effect, and at once removes that subject from the sphere of state action and even if Congress provides that the statute shall not go into effect until a subsequent date the States lose control of that subject during the intermediate period from the enactment to the active operation of the statute.

The enactment by Congress of the Hours of Service Law, March 4, 1907, c. 2939, 34 Stat. 1415, was a manifestation by Congress of its intent to bring the subject of hours of labor of employés of interstate carriers under its control; and, although the act did not go into effect for a year after its passage, the various state laws on the subject became inoperative at once on the enactment.

In this case the court referred to the report of the committee of Congress having the legislation in charge as indicating the intent of Congress in enacting the statute.

53 Washington, 673, reversed.

THE facts are stated in the opinion.

Mr. Charles W. Bunn for plaintiff in error:

In the absence of legislation by Congress the state statute would have been a valid exercise of the police power of the State and free from constitutional objection, even as to railroad employés engaged in interstate commerce. But as Congress, by the act of March 4, 1907, completely regulated the hours of labor of the employés in question, the act of the legislature of Washington was void as to such employés.

After March 4, 1908, the state law clearly was inoperative, *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *State* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 136 Wisconsin, 407, and during the year intervening between March 4, 1907, and March 4, 1908, Congress, in effect, had declared that commerce should be free from regulation in this respect. Had Congress thought the time ripe to put such regulation into effect,

it would have made its act immediately operative. Congress would not without some reason it thought good deliberately enact such a law, and say it should not take effect until a year later. See report of Mr. Esch, from Committee on Interstate and Foreign Commerce, No. 7641, February 16, 1907, p. 6; also see speech of Mr. Stevens, of Minnesota, Cong. Rec., Feb. 18, 1907, pp. 3248, 3251. This report and recommendation were adopted by Congress. Senate bill, No. 5133, was to take effect immediately, but Congress agreed to the House amendments—including the one postponing the effective date of the law to one year after its passage.

The case of safety appliances is strictly analogous to this in granting delay, as it was obvious that the railway equipment of the country could not be changed in a day to meet the requirements of the law. In case of hours of labor, as in that of safety appliances, it is plain that the new requirements could not be made effective in a day. Some time at least was necessary for preparation. In either case the determination of Congress that a certain time was necessary is conclusive against state action in the meantime. It is not to be expected that Congress in any such case would insert in its act an express prohibition on the States. *Houston* v. *Moore*, 5 Wheat. 1, 21; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; *Sinnot* v. *Davenport*, 22 How. 227; *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96.

It is a well-known historical fact that the principal cause which led to the enactment of the Constitution was the intolerable interference with commerce by the different States.

Commerce is a delicate thing, easily interfered with and retarded. Whenever Congress takes cognizance of any phase of interstate commerce it must be presumed that it has regulated as far as it thinks the subject ought to be

regulated. It is just as if Congress declared in terms that no further regulation should be made.

Congress, knowing that before the sixteen-hour law could, with fairness or safety, be put into effect it would be necessary to change many division points, and train runs, to create new divisions, to increase the number of employés, to change the residence of many of them, and to make numerous other rearrangements, saw fit to say one year's time should be allowed for these purposes. But the legislature of Washington saw fit to say that, in its opinion, less time for the change was necessary. The state legislation is in conflict with and has attempted to overrule the determination of Congress.

The question involved has been decided by the supreme courts of at least three other States. Missouri and Wisconsin have decided in favor of appellants' contention, and Montana against it—see *State* v. *Missouri Pacific Ry. Co.*, 111 S. W. Rep. 500; *State* v. *Chic., Mil. & St. P. Ry. Co.*, 136 Wisconsin, 407. In *State* v. *Nor. Pac. Ry. Co.*, 93 Pac. Rep. 945, the Supreme Court upheld the state act on the authority of *Smith* v. *Alabama*, 124 U. S. 465, and *Sherlock* v. *Alling*, 93 U. S. 99, but these cases not only do not support the conclusion but are hardly in point. So also as to the case of *Larrabee* v. *Talbott*, 5 Gill, 429, on which the court below based its decision.

Mr. W. V. Tanner, Attorney General of the State of Washington, for defendant in error:

An act regulating the hours of labor of employés engaged in train service on railroads is within the police power of the State. *Cleveland &c. Railway Co.* v. *Illinois*, 177 U. S. 514, and cases there cited.

While a State may not "regulate" interstate or foreign commerce, yet state authority over the same is not wholly excluded in the absence of congressional action, for state legislation in many ways may affect such commerce and

the persons engaged therein without constituting a "regulation" of it within the meaning of the Federal Constitution.

The question of conflict is to be determined by the ordinary rules of statutory construction, and it should not be held that the state legislation has been superseded except in cases of manifest repugnancy. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Missouri &c. Railroad Co.* v. *Haber*, 169 U. S. 613, 623.

There is no repugnancy between the act of Congress effective March 4, 1908, and the act of the legislature effective July 12, 1907, during the interim preceding the taking effect of the act of Congress.

As a general rule a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. *Rice* v. *Ruddiman*, 10 Michigan, 125; *Price* v. *Hopkins*, 13 Michigan, 318; *Grant* v. *Alena*, 107 Michigan, 335; *H., H. & S. A. Railway Co.* v. *State*, 81 Texas, 572; *Jackman* v. *Garland*, 64 Maine, 133; *Evansville &c. R. R. Co.* v. *Barbee*, 59 Indiana, 592; 26 Am. & Eng. Ency. of Law, 565

The identical question before the court in the case at bar was considered by the Supreme Court of Montana in *State* v. *Northern Pacific Ry. Co.*, 36 Montana, 582, in which the court held that in the absence of some express or implied declaration of a purpose that such shall be the result, legislation is not effective for any purpose until it becomes effective. The act of Congress contains no such declaration, and the state statute, which was valid and in force at the time of its passage, remains in force until the act of Congress becomes effective.

This question has been passed upon by the supreme courts of four of the States. In Montana and Washington it has been held that the act of Congress is not repug-

nant to acts theretofore adopted by the state legislatures. In Missouri and Michigan the courts have reached the contrary conclusion. *State* v. *Chicago, M. & St. P. Ry. Co.*, 136 Wisconsin, 407; 117 N. W. Rep. 686, and *State* v. *Missouri Pacific Ry. Co.*, 212 Missouri, 658; 111 S. W. Rep. 500. The decision of the Supreme Court of Washington is supported by the better reasoning.

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

On July 3 and 4, 1907, the Northern Pacific Railway Company, in operating a train on its road in the State of Washington, permitted some of the train crew to remain on duty more than sixteen consecutive hours. This being apparently contrary to the prohibition of the act of Congress known as the "Hours of Service" law, approved March 4, 1907, c. 2939, 34 Stat. 1415, if the railroad company in the operation of the train was subject to the power of Congress and the prohibitions of the act were otherwise applicable, there was a violation of the act and a liability to its penalties.

The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling. *Southern Railway Co.* v. *United*

States, 222 U. S. 20. But while thus governed by the act of Congress the prohibitions of that act were not operative. This follows, by reason of the provisions of § 5 to the following effect: "That this Act shall take effect and be in force one year after its passage."

About a month before the occurrences heretofore referred to, that is, on June 12, 1907 (Laws 1907, p. 25, c. 20) a law of the State of Washington regulating the hours of service of railway employés became effective. Without going into detail it suffices to say that the provisions of that act greatly resembled those of the act of Congress and prohibited the consecutive hours of service which had taken place on the train of the Northern Pacific road. The Attorney General of the State commenced the proceeding now before us to recover penalties for the violation of the state law. The railroad answered, admitted the acts complained of, but denied any liability for the penalties imposed by the state law. The denial was based upon the assertion that the train was an interstate train, and was not subject to the control of the State because within the exclusive authority of Congress, manifested by the enactment of Congress on that subject. The trial court granted a motion for judgment upon the pleadings and awarded one thousand dollars penalty, and it is to a judgment of the Supreme Court of the State affirming such action that this writ of error is prosecuted.

Considering the character of the transportation, the court below held that the train was an interstate train, and within the potentiality of the exercise by Congress of its power to regulate commerce. Despite this, it was held that the penalty had been rightly imposed, because until Congress had acted upon the subject it was competent for the State to make a regulation concerning the hours of service of employés on railroad trains moving within the State, and to apply such regulation to a train engaged in interstate commerce. This, however,

was based, not upon a supposed concurrent state and Federal power, but solely on the ground that Congress had not acted on the subject, and therefore the state regulation should be applied. Indeed, the court in express terms declared that if Congress had legislated "its act supersedes any and all state legislation on that particular subject," and it was stated that the State in argument had so conceded.

The court said (53 Washington, 673, 676):

"On the other hand, it is conceded by the State that the power of the Congress to regulate interstate commerce is plenary, and that, as an incident to this power, the Congress may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employé of a carrier so engaged shall be required to remain on duty; and that when it does legislate upon the subject, its act supersedes any and all state legislation on that particular subject. In fact, these propositions can hardly be said to be debatable in the state courts, since the Federal courts, whose decisions are authoritative on questions of this character, have repeatedly announced them as governing principles in determining the validity of regulative legislation concerning carriers of interstate commerce. *Escanaba &c. Transp. Co.* v. *Chicago*, 107 U. S. 678; *Morgan &c. S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455; *Nashville &c. R. Co.* v. *Alabama*, 128 U. S. 96; *Gladson* v. *Minnesota*, 166 U. S. 427; *Lake Shore &c. R. Co.* v. *Ohio*, 173 U. S. 285; *Erb* v. *Morasch*, 177 U. S. 584."

Thus, conceding the paramount power of Congress, the operative force of the state law was solely maintained over the interstate commerce in question because of the provision of the act of Congress providing that it should not take effect until one year after its passage. As a result, the act was treated as not existing until the expiration of a year from its passage. Copiously referring

to authorities as to when a legislative act was to be treated as taking effect, the court said (p. 678):

". . . It seems clear that the Federal statute did not speak as a statute until after March 4, 1908, the date on which it went into effect; for if a law passed to take effect at a future day must be construed as if passed on that day, and if, prior to the time it goes into effect, no rights can be acquired under it and no one is bound to regulate his conduct according to its terms, it is idle to say that it has the effect of a statute between the time of its passage and the time of its taking effect. A statute cannot be both operative and inoperative at the same time. It is either a law or it is not a law, and, without special words of limitation, when it goes into effect for one purpose it goes into effect for all purposes."

But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postpon-

ing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.

We do not pause to cite authorities additional to those referred to by the court below, but we observe in passing that the aspect in which we view the question was cogently stated by the Supreme Court of the State of Missouri in *State* v. *Missouri Pacific Ry. Co.*, 212 Missouri, 658, and has also been lucidly expounded by the Supreme Court of the State of Wisconsin in *State* v. *Chicago, M. & St. P. Ry. Co.*, 136 Wisconsin, 407.

But if we pass these considerations and consider the issue before us as one requiring merely an interpretation of the statute, we are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for one year the meaning which must be affixed to it in order to hold that during the year of postponement state police laws applied. In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision if it was contemplated that the prohibitions of state laws should apply in the meantime. This is true because if it be that it was contemplated that the subject dealt with should be controlled during the year by state laws, the postponement of the prohibitions of the act could accomplish no possible purpose. This is well illustrated by this case, where, by the ruling below, a state regulation substantially similar to that contained in the act of Congress is made applicable. In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act, a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which

caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill made to the House of Representatives by the Committee on Interstate and Foreign Commerce, wherein it was said (Report No. 7641, dated February 16, 1907, p. 6):

"Owing to the probable necessity of changing in some instances division points, entailing the removal of employés, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after its approval."

For the reasons stated the judgment of the Supreme Court of the State of Washington must be and it is

Reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion.

RED "C" OIL MANUFACTURING COMPANY *v.* BOARD OF AGRICULTURE OF NORTH CAROLINA.

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

No. 141. Argued December 21, 22, 1911.—Decided January 9, 1912.

This court will not lightly attribute improper motives to the law-making power, and will not, on a mere charge, regard a statute imposing inspection fees as an act to raise revenue. *Ellis* v. *United States*, 206 U. S. 246.

Prima facie, the charge for inspection in an act otherwise constitutional is reasonable. *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 417.

The fact that oil inspection laws have been passed in a majority of the States shows that oil is a proper subject for police regulation.

In this case this court cannot conclude that the charge for inspecting oil, provided by the North Carolina oil inspection law of 1909, is

so seriously in excess of what is necessary for the object designed to be effected as to justify the imputation of bad faith and the conclusion that the law is one for revenue and not merely for inspection. *Patapsco Guano Co.* v. *South Carolina*, 171 U. S. 354.

This court cannot determine what the actual operation of a statute will be after its enactment by going outside the record and taking judicial knowledge of what has happened since the filing of the transcript here.

If the inspection fees exacted under a state statute average largely more than enough to pay expenses, the presumption is that the State will reduce them to conform to the constitutional authority to impose fees solely to reimburse for expense of inspection.

What relief shall be accorded to one who may sustain injury by the failure of a State to protect his rights under the Constitution, cannot be determined before there has been such failure.

A requirement by the legislature that illuminating oils must be safe, pure, and afford a satisfactory light, establishes a sufficient primary standard, and remitting to the proper state board the establishment of rules and regulations to determine what oils measure up to those standards does not amount to a delegation of legislative power.

Where one complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, he should seek relief by applying to that board to modify them.

A state police statute cannot be declared invalid because in the opinion of this court it does not accord with sound policy. The appeal for redress must be to the law-making power.

In the year 1909, North Carolina passed an act for the inspection, under the control of the Board of Agriculture, of all kerosene or other illuminating oils sold, or offered for sale, in the State. (March 8, 1909, Pub. Laws 1909, c. 554, p. 911.) The object of such inspection was declared to be in order to determine the safety and value of such oils for illuminating purposes. A charge of one-half cent per gallon was fixed, which the law declared should be paid to the commissioner of agriculture for the purpose of defraying expenses connected with the inspection, testing and analyzing of oils in the State. It was provided that the act should go into effect on July 1, 1909.

Two days after, viz., on July 3, 1909, this suit was commenced by the appellant, the Red "C" Oil Manufacturing Company, a corporation of the State of Maryland. The defendants named were the Board of Agriculture of North Carolina and the members of the board, and the object of the bill was to restrain the enforcement of the act referred to because it was charged to be not a proper exertion of the police power of the State, and, besides, was asserted to be repugnant to the Constitution of the United States.

The bill averred that the complainant was a large shipper of illuminating oils from the State of Maryland into the State of North Carolina, and that it did an extensive business in North Carolina in dealing in such oil. The provisions of the assailed act were set out *in extenso*, as also the terms of an act of the General Assembly approved on March 9, 1909 (Pub. Laws 1909, c. 441, p. 742), which forbade the collection of a tax upon dealers in oils, authorized by § 58 of the Revenue Act (March 8, 1909, Pub. Laws 1909, c. 438, p. 674), passed at the same session, "from any persons, dealers or corporations paying the taxes imposed under the inspection law enacted at the present session of the General Assembly, entitled 'An act to provide for the inspection of illuminating oils and fluids;' Provided, however, if the said Oil Inspection Act should be held invalid, section fifty-eight, Revenue Act, shall remain in full effect." In the preamble of this latter act it was recited that the "inspection tax" was much greater than the "tax" imposed under § 58 of the Revenue Act, and that "it is not the purpose of the General Assembly that the said taxes shall be cumulative." In addition to averring the appointment of inspectors by the Board of Agriculture, and the purpose of the board to enforce the collection of the inspection taxes, there were set forth the regulations adopted by the board under the authority of the statute.

The particulars by which it was asserted the statutory charge was shown to be unlawful may be thus summarized: The charge or "tax" was not for the purpose of defraying the cost of the inspection of oil, but was imposed for revenue upon the goods of complainant shipped into the State of North Carolina from the State of Maryland, and was hence in conflict with the commerce clause and the Fourteenth Amendment. The law, it was charged, was not a police regulation, since an inspection of oil "for value and luminosity" was not within the competency of legislative action, and the public safety was not concerned, since illuminating oils, as the result of modern methods of manufacture, were no longer explosive. The charge or tax, it was averred, was more than double the amount necessary for the inspection proposed, and would realize annually a surplus for the state treasury of more than $20,000. It was further charged that the act fixed no standard for the guidance of the Board of Agriculture, but in effect arbitrary powers were conferred upon the board, and, indeed, legislative authority had been delegated to it. The power thus conferred, it was also alleged, had been exerted in an arbitrary manner, and tests prescribed which were not necessary "in order to procure the safety of oil, to protect the people from the sale of oils which are dangerous." Certain of the regulations promulgated by the board were also assailed as being uncertain, unreasonable, illegal and oppressive.

On the filing of the bill an order was entered temporarily restraining the defendants from enforcing, as against the complainant, the statute and the rules and regulations of the board thereunder. The restraining order was subsequently amended by requiring the complainant, "pending the final determination of this cause," to "pay the one-half cent per gallon upon all illuminating oils sold by it in the State, as prescribed in said act." The defendants jointly and severally answered the bill, and took

issue upon all the matters alleged in the complaint. As regards the allegation that the inspection fee was unnecessarily high and would yield a large surplus over the expenses, the defendants said:

"Defendants say that they have made no estimate that any excess may be left after paying all the proper and necessary expenses of inspection, and these defendants say that they have no means of actually approximating the amount that the tax of one-half cent per gallon will yield, or the expenses of equipping and maintaining a competent inspection force and department. That the legislature thought that one-half cent a gallon would be necessary to pay the expenses of inspection, and these defendants are informed and believe, and therefore aver, that this is as low an inspection tax as there is to be found in any State having oil inspection laws, and lower than the taxes in a great many of the States. In some States there is a graduated scale of taxation of more than one-half cent for small quantities and less than one-half cent for large quantities. The said act expressly provides, in § 6, that the Commissioner of Agriculture shall include in his report to the General Assembly an account of the expenses under this act. The said act also provides that all money paid for inspection taxes shall be kept by the State Treasurer as a distinct fund to be styled, 'The Oil Inspection Fund.' At the end of one year, it can be seen exactly what the inspection costs and how much is paid for it by dealers in oil, and until it shall appear that said tax is excessive, a charge, to that effect, by complaint, is premature and ill-considered."

Both parties filed affidavits in support of their respective claims. The matter was heard upon a motion for an injunction upon the bill, answer and affidavits just referred to. Elaborately examining all the contentions, the court (172 Fed. Rep. 695), concluded that the complainant was not entitled to relief by injunction, and that

as respects the other relief asked the bill should be dismissed. A final decree was thereupon entered and this appeal was then taken.

Mr. Robert W. Winston, with whom *Mr. Chas. B. Aycock* was on the brief, for appellant:

This legislation violates the commerce clause.

The one great object in the adoption of the Constitution, was to keep the commercial intercourse among the States free from all invidious or partial restraint. *Gibbons* v. *Ogden*, 9 Wheat. 9.

By whatever name called, the attempt by a State to tax interstate commerce is void. *Corporation Tax Cases*, 220 U. S. 160; *Galveston Railroad* v. *Texas*, 210 U. S. 1.

The power to tax involves the power to destroy. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Wilkerson* v. *Robner*, 140 U. S. 545.

An habitual and continual levying and collecting of taxes for inspection purposes far in excess of the amount necessary, and the covering of such taxes into a state treasury, is quite conclusive that the law was passed to raise revenue, and not for inspection purposes. *Postal Telegraph Cable Co.* v. *New Hope*, 192 U. S. 55.

Under the guise of inspection laws, a system of interstate tariff taxation has arisen and States have acted under a misconception of the *Patapsco Guano Case*, 171 U. S. 345, to such an extent that state governments are largely operated upon funds derived from illegal inspection laws. *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17.

As North Carolina manufactures no oil, it is proceeding under the guise of an inspection act to tax oils from other States. That the act does not on its face discriminate against oil from sister States makes no difference. Interstate commerce cannot be taxed at all. *Robbins* v. *Taxing District*, 120 U. S. 489; and see 135 Nor. Car. 520.

All statutes which relate to the same subject-matter

must be taken to be one system and so construed. Lord Bacon, 3d Rule, Vol. 6, 382; *State* v. *Bell*, 3 Iredell, 509; *State* v. *Melton*, Busbee's Law, 49.

This legislation was really a tax and an attempt to raise larger revenue, and not for the purposes of inspection. This appears by the caption.

The preamble is the key to open the understanding of a statute. *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550; *United States* v. *Palmer*, 3 Wheat. 610.

A State cannot make a law designed to raise money to support paupers, etc., an inspection law within the constitutional meaning of that word by calling it so in the title. *Postal Tel. Appeal*, 192 U. S. 55; *New York* v. *Compagnie Gen. Trans. Co.*, 107 U. S. 759.

Grossly unreasonable inspection fees render the act void and unmask the same, disclosing the real intention to tax, to raise revenue, and not to inspect. *Passenger Cases*, 7 How. 819. See for other instances where inspection laws have been declared revenue laws: *Brimmer* v. *Redman*, 138 U. S. 79; *A. F. Co.* v. *Board of Agriculture*, 43 Fed. Rep. 610; *Hannibal R. R.* v. *Husen*, 95 U. S. 465. *Postal Tel. Co. Case*, 192 U. S. 64; *Lochner* v. *New York*, 198 U. S. 45; *Stockard* v. *Morgan*, 185 U. S. 27.

North Carolina stands alone among the States of the Union in not having a specified standard of safety for oil, but has delegated this whole question to an auxiliary board, to wit: The Board of Agriculture. A statute which delegates a discretionary power to fix the rule by which taxes shall be adopted, or rights measured, is unconstitutional. Commerce Clause, Prentice and Egen, 311.

The legislature itself ought to lay down the test, which ought to be defined by general rules. Freund, Police Power, par. 649; *Field* v. *Clark*, 143 U. S. 649; *United States* v. *Keokuk Railroad*, 45 Fed. Rep. 178.

The particular exercise of police power must tend in a degree that is perceptible to secure some object of the

proper exercise of police power and the court must be able to see that the means adopted have a reasonable relation to the ends desired. 145 N. Y. 39. See also *Gibbons* v. *Ogden*, 9 Wheat. 1. If the act is intended to raise revenue it is not valid. *Willis* v. *Standard Oil Co.*, 50 Minnesota, 280.

Where visibly poor quality affects neither health nor safety, the police power cannot interfere. Freund, Police Power, § 279; see also 171 U. S. 18 and 30; *Harmon* v. *State*, 66 Oh. St. 249; *Matthews* v. *Murphey*, 23 Kentucky, 750; *Mayor of Baltimore* v. *Radecke*, 49 Maryland, 217; *In re Kollock*, 165 U. S. 526.

In *Buttfield* v. *Stranahan*, 192 U. S. 470, a primary standard for tea had been established by Congress; in *Patterson* v. *Kentucky*, 97 U. S. 501, the standard had been fixed by the legislature at which oil should flash; in *United States* v. *Grimaud*, 220 U. S. 506, Congress could not in the nature of things designate a fixed standard as to what lands might be grazed and hence delegated this duty to the commissioner. For other cases in which delegation of general power has been held unconstitutional, see *C. W. & Z. R. Co.* v. *Clinton County*, 1 Oh. St. 88; *Adams* v. *Burgh*, 37 L. R. A. 157; *O'Neill* v. *American Fire Ins. Co.*, 26 L. R. A. 715; *Anderson* v. *Manchester Fire Ins. Co.*, 28 L. R. A. 609.

Except where authorized by the Constitution, as in respect to municipalities, the legislature cannot delegate legislative power; cannot confer on any body or person the power to determine what shall be law. The legislature only shall determine this. *State* v. *Young*, 29 Minnesota, 551; *Ex parte Cox*, 63 California, 21; *Port Eureka Harbor Comrs.* v. *Excelsior Redwood Co.*, 88 California, 491; *State, Marshall* v. *Cadwalader*, 36 N. J. L. 283; *State* v. *Armstrong*, 3 Sneed, 635; *Barto* v. *Himrod*, 8 N. Y. 483; *Kosciusko* v. *Slomberg*, 68 Mississippi, 469; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465; *Copcutt* v. *Yonkers Board of Health*,

140 N. Y. 1; *Re Smith*, 146 N. Y. 68; *State* v. *Speyer*, 67 Vermont, 502; *State* v. *Fond du Lac*, 63 Wisconsin, 234.

The act also violates the Fourteenth Amendment of Constitution.

Mr. T. W. Bickett, Attorney General of the State of North Carolina, for appellees:

The suggestion that, under the guise of doing one thing, the General Assembly is attempting to do another, will not be considered by this court. The courts are not disposed, neither are they at liberty, to impute improper motives to the lawmaking power of the Government. Black on Constitutional Law, § 41; *Atchinson &c. Ry. Co.* v. *Matthews*, 174 U. S. 96; *Florida &c. Ry. Co.* v. *Reynolds*, 183 U. S. 471; *Ellis* v. *United States*, 206 U. S. 246; *The Chinese Exclusion Case*, 130 U. S. 581.

Complainants themselves concede that if the act is intended in good faith to protect the public from danger or from being imposed upon, and is reasonably calculated to afford such protection, it is well within the police power of the State. *Plumley* v. *Massachusetts*, 155 U. S. 461; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *McLean* v. *Denver &c. Ry.*, 203 U. S. 38; *Asbell* v. *Kansas*, 209 U. S. 257; *Oil Co.* v. *Crain*, 209 U. S. 211; *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159.

Oil inspection laws have three times been before this court, and none of them has been condemned. *Patterson* v. *Kentucky*, 97 U. S. 501; *Oil Co.* v. *Crain*, 209 U. S. 211; *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159.

In view of the opinions of oil expert chemists, and in view of the legislation of thirty-five States upon the subject, we submit that the contention that the inspection of illuminating oil is not a permissible exercise of the police power of the State finds its only support in the vigor of its asseveration.

The inspection tax of one-half cent per gallon is not

so excessive upon its face as to warrant the court in declaring it unconstitutional and void. *McLean* v. *Denver & R. G. Ry.*, 203 U. S. 38.

No facts are set forth in the bill showing that the tax is excessive, and it seems that the charge is based upon the alleged fact that the defendants estimate that they will be able to turn into the State Treasury $20,000 per year. These allegations in the bill are met by a complete denial by the defendants, who say they have made no estimate at all.

The General Assembly cannot be charged with bad faith for adopting a tax as low as the lowest known to exist. *Patapsco Guano Case*, 171 U. S. 354.

The inspection act is not unconstitutional and void as an attempt to delegate legislative powers to the Board of Agriculture.

The most enlightened and efficient governments on this earth are those in which the largest amount of discretion is vested in the constitutional departments of the Government; and the highly technical plea of the complainant in this case is counter to the most advanced thought of the times. 6 Am. & Eng. Ency. of Law, 1021; *Buttfield* v. *Stranahan*, 192 U. S. 470, 532; *Locke's Appeal*, 13 Am. Rep. 720; *Wayman* v. *Southard*, 10 Wheat. 1; *Isenhour* v. *State*, 157 Indiana, 517; *St. Louis Railway Co.* v. *Taylor*, 210 U. S. 281; *Union Bridge Co.* v. *United States*, 204 U. S. 364. This question has been thoroughly considered, and the authorities exhaustively reviewed, in the recent case of *United States* v. *Grimaud*, 220 U. S. 506, and appellees' contention sustained.

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

In view of the full reference to and the review of decided cases made by the district judge in the opinion by

him delivered, we content ourselves with a comparatively brief discussion of the questions pressed at bar.

These all come to two propositions, which are thus stated by counsel:

"1. That the North Carolina Oil Inspection Act is unconstitutional and void in that, under the guise of exercising a police power, the General Assembly of North Carolina is really attempting to impose a revenue tax upon interstate commerce.

"2. That the said inspection act is unconstitutional, in that the General Assembly of North Carolina has attempted to delegate to the Board of Agriculture legislative powers."

As to the first proposition, we append in the margin a clear and adequate summary of the act made by the judge below (p. 696):[1]

[1] The act provides:

SEC. 1. "That all kerosene, or other illuminating oils, sold or offered for sale in this State, shall be subject to inspection and test to determine the safety and value for illuminating purposes." All manufacturers, wholesalers and jobbers, before selling or offering for sale, in this State, any kerosene, or other oil, for illuminating purposes, are required to file with the Commissioner of Agriculture a statement, showing that they desire to do business in the State, and to furnish the name or brand of the oil, or oils, which they desire to sell, with the names and address of the manufacturer, and that such oil will comply with the requirements of the law.

SEC. 2. Power is conferred upon the Commissioner of Agriculture to collect samples of any illuminating oil offered for sale in this State and have the same analyzed. The inspection of oil, as authorized by the act, is to be under the direction of the Board of Agriculture, which is authorized "to make all necessary rules and regulations for the inspection of such oil and to adopt standards of safety, purity or absence from objectionable substances and luminosity when not in conflict with this act, and which they may deem necessary to provide the people of the State with satisfactory illuminating oil."

The Board of Agriculture is required to appoint oil inspectors not exceeding, in number, one from each Congressional District, whose compensation shall not exceed one thousand dollars a year and ex-

The bill, as we have stated, was filed when the statute had been in force but two days and when of necessity the result of its operations was conjectural. We are asked now to hold that, although the General Assembly declared in the statute that the charge or tax authorized to be imposed was made "for the purpose of defraying the expenses connected with the inspection, testing and analyzing of oils in this State," the real purpose of the legislature was to levy a tax for revenue in violation of the commerce clause of the Constitution. Reading the statute as an entirety, or in connection with the supplemental legislation of March 9, 1909, we find no adequate reason for imputing to the General Assembly of North Carolina an attempt to do one thing under the guise or pretense of doing another. The mere designation of the exaction as a tax is not sufficient to warrant the deduction

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penses. They are given power to examine all barrels, tanks, or other vessels containing kerosene or other illuminating oils, to see that they are properly tagged, and shall, as directed, collect and test samples of oil offered for sale in different sections of the State, and, when instructed, collect and send samples to the Department of Agriculture for examination.

SEC. 3. "For the purpose of defraying the expenses connected with the inspection, testing and analyzing oils in this State there shall be paid to the Commissioner a charge of one-half cent per gallon which payment shall be made before delivery to agents, dealers or consumers in this State." Provision is made for attaching to each barrel, tank, tank car, and other containers a tag or stamp to be furnished by the Commissioner of Agriculture showing that the tax has been paid. When oil is shipped in tank cars or other large containers, the manufacturer or jobber shall give notice to the Commissioner of Agriculture of every shipment, with the name and address of the person, company or corporation to whom it is sent, and the number of gallons, on the day the shipment is made.

SEC. 4. "All moneys received under the provisions of this act shall be paid into the State Treasury and kept as a distinct fund to be styled 'The Oil Inspection Fund.' All checks or orders in payment for tags or stamps shall be made payable to the State Treasurer. The Commissioner of Agriculture is authorized to draw out of said fund,

that the charge authorized for the inspection was not one really for such purpose. We cannot lightly attribute improper motives to the law-making power. *Florida &c. Ry. Co.* v. *Reynolds*, 183 U. S. 471; *Ellis* v. *United States*, 206 U. S. 246. Putting out of view, therefore, questions of motive, two subsidiary contentions remain, viz., *a*, that oil is not a proper subject of inspection; and *b*, that the tax in question is so excessive on its face as to be unconstitutional. The conceded fact that in thirty-five States of the Union oil inspection laws are in force is sufficient to adversely dispose of the first of these contentions. As stated by the court below (p. 705):

"While there is much diversity of opinion in respect to the danger of explosion from the use of kerosene oil and of the power to ascertain its illuminating capacity, it is evident that the question has not so far passed beyond the domain of debate, that the Legislature may not subject it

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upon his warrant, such sums as may be necessary to pay all expenses incurred in connection with this act including salary to oil chemist, or chemists, cost of inspection, blanks," etc.

SEC. 5. "The State Treasurer shall, on the first day of June and December of each year turn into the general fund of the State all moneys of the oil fund in his hand in excess of the amount drawn out by the Commissioner of Agriculture for expenses."

SEC. 6. The Commissioner of Agriculture is required to include in his report to the General Assembly an account of the operations and expenses under the act.

SEC. 7. Provides: that, whenever complaint is made to the Department of Agriculture in regard to the illuminating qualities of any oil sold in this State, the Commissioner shall cause a sample of said oil or oils complained of to be procured, and have the same thoroughly analyzed and tested as to safety and illuminating qualities. If such analysis or other tests shall show that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden and report of the result or results shall be sent to the party making the complaint and to the manufacturer of such oil.

The remaining sections prescribe penalties for violation of the provisions of the law. The act went into effect July 1, 1909.

to reasonable inspection before permitting its sale in the State. The court cannot say that such a law has no reasonable relation to the public safety or welfare."

The contention that the tax is so excessive on its face as to conclusively evidence the unconstitutionality of the burden, if imposed as a mere inspection charge, is, we think, also without merit. *Prima facie* the charge must be deemed to be reasonable. *Western Union Telegraph Co.* v. *New Hope*, 187 U. S. 419. Again, as said by the court below (p. 710):

"It appears from an examination of the various oil inspection laws in force in the United States that the charges for inspection vary from one-half to one and one-half cents per gallon, and that in States wherein population and other conditions are similar to those in this State the charge is about the same as that fixed by the act."

Looking at the elements which may have possibly entered into the calculation of the General Assembly as to what would be a reasonable inspection charge, we cannot, to quote from the opinion in the Patapsco Guano Case, *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 354, "conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected, as to justify the imputation of bad faith and change the character of the act."

In disposing of the contention just stated we are not at liberty to travel outside of the record and take judicial notice of the operation of the act since the transcript of record was filed in this court. We here reiterate what was said in the case last cited (p. 354): "If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge." If the trial made of the act establishes the fact to be as asserted, that the exaction in question is excessive, the presumption is that in the

orderly conduct of the public business of the State the necessary correction will be made to cause the act to conform to the authority possessed, which is to impose a fee solely to recompense the State for the expenses properly incurred in enforcing the authorized inspection. What relief should be awarded in the event the legislature of North Carolina failed in its positive duty in this particular is not a question open for consideration upon this record, as no such failure of duty on the part of the legislature had occurred or could possibly have happened when this suit was commenced, a few days after the passage of the act.

The remaining contention is that the act is repugnant to the state constitution because it attempts to delegate to the Board of Agriculture the exercise of legislative powers. The legislative requirement was that the illuminating oils furnished in North Carolina should be safe, pure and afford a satisfactory light, and it was left to the Board of Agriculture to determine what oils would measure up to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable. *Buttfield* v. *Stranahan*, 192 U. S. 470, 492; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *St. Louis, Iron Mountain & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; *United States* v. *Grimaud*, 220 U. S. 506.

We have not attempted to enumerate the objections urged against the rules and regulations adopted by the Board of Agriculture. The court below was clearly right when it observed that if, as the complainant alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the Board of Agriculture to modify them. A law cannot be declared invalid because in the opinion

of the court it does not accord with sound policy. The appeal for redress in such case must be to the law-making power.

Decree affirmed without prejudice.

ARAN *v.* ZURRINACH.

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

No. 146. Submitted December 22, 1911.—Decided January 9, 1912.

Under the act of April 12, 1900, c. 191, 31 Stat. 85, this court cannot review a judgment of the District Court of the United States for Porto Rico where the amount in controversy is less than five thousand dollars, unless the validity or interpretation of an act of Congress is brought in question, or a right claimed thereunder is denied.

Not every mere question of irregularity in applying the law of the United States arising in the court below confers a right of review on this court which otherwise would not exist; and where, as in this case, there is generality of statement and absence of specification to sustain the objections raised, in regard to qualifications and drawing of jurors in Porto Rico and the application of the Federal statutes thereto, the questions raised will be regarded as too frivolous to sustain jurisdiction, and the writ of error will be dismissed.

THE facts are stated in the opinion.

Mr. Francis H. Dexter for plaintiffs in error:

The panel of the jury summoned to try this cause was not drawn from a box containing the names of three hundred qualified jurors.

The said panel was not drawn and the names of jurors constituting the same were not placed in the box in the manner required by the act of Congress of June 30, 1879,

21 Stat. 43, because it appeared that the court and the jury commissioner of the court did not have the qualifications provided for by the said act. *United States* v. *Chaires*, 40 Fed. Rep. 820.

The court erred in overruling the separate demurrer of defendant Dexter. § 1731, Civil Code, Porto Rico.

The conduct of the court below during the trial was arbitrary, oppressive and illegal and the judgment should be reversed.

Mr. Frederick L. Cornwell and *Mr. N. B. K. Pettingill* for defendant in error:

As the judgment was for less than $5,000, the jurisdiction of this court must depend upon the presence of a Federal question which is both material and not frivolous. *Royal Ins. Co.* v. *Martin*, 192 U. S. 149; *American R. Co.* v. *Castro*, 204 U. S. 453; *Kent* v. *Porto Rico*, 207 U. S. 113.

As the court held that under the testimony there was nothing left for the jury to decide but that it must merely register a decision made for it by the court the question whether the jury was composed of eligibles or ineligibles became immaterial and even if error were committed it could not lead to a reversal of the judgment.

Whether this action of the court, in determining that upon the evidence no other verdict than one for plaintiff was warranted, was or not erroneous involves no Federal question—and, where the actual decision of the case turns upon a non-federal ground, the judgment cannot be reviewed here because a question, Federal in its nature, may also have been decided in the course of the trial. *Commercial Bank* v. *Buckingham*, 5 How. 317; *Hale* v. *Akers*, 132 U. S. 554, 564; *Cal. Powder Wks.* v. *Davis*, 151 U. S. 389; *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Ark. S. R. Co.* v. *German Bank*, 207 U. S. 270, 275.

These consequences appear so clearly from the record and are so simply reached that, we submit, not only should

the judgment below be affirmed, or the writ of error be dismissed, but the plaintiffs in error should also be adjudged to pay the 10 per cent damages provided for by rule 23, as the contentions regarding the presence of a Federal question are so frivolous that the writ must be considered to have been taken for delay only. *Amory* v. *Amory*, 91 U. S. 356; *Wilson* v. *Everett*, 139 U. S. 616; *Gregory &c. Co.* v. *Starr*, 141 U. S. 222; *Texas & P. R. Co.* v. *Volk*, 151 U. S. 73; *Nelson* v. *Flint*, 166 U. S. 276.

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

Zurrinach sued Aran and Dexter, the one as principal and the other as surety, on a written contract and recovered judgment, the court having instructed a verdict for the amount claimed, viz., $1,565.72.

When our jurisdiction to review the court below depends upon amount, five thousand dollars is the criterion. We have hence no jurisdiction on this writ unless there be some basis for it other than the amount involved. Act of April 12, 1900, 31 Stat. 77, 85, c. 191. The basis relied upon to establish that we have jurisdiction is the action of the court upon certain motions concerning the qualifications of the jury commissioners and an alleged failure of such commissioners, in making up the panel, to comply with the law of the United States. The proceedings thus relied on are as follows: At the opening of the trial the defendants thus moved:

"Defendants move the Court to quash the panel of the Jury drawn for service at this term for the reason that the said panel was not drawn from a box containing the names of three hundred qualified jurors; and for the further reason that the present panel was not drawn and the names of the jurors constituting the same were not placed therein as required by the Act of Congress, . . .

in this, to wit; the Clerk of this Court, John L. Gay, is a member of the Democratic party of the United States, but is not a member of any political party of Porto Rico or of the District, nor is he a registered voter in Porto Rico. The Jury Commissioner of this Court, who together with the said Clerk, placed the names of jurors in the jury box, is not a member of any political party of the United States and is not an American citizen, but is a member of the so-called Republican party of Porto Rico. The principal or majority party in this district is and was at the time the names of jurors were placed in the said box and drawn therefrom by the said Clerk and Jury Commissioner the so-called Unionist party. All to the prejudice of defendants."

On making this motion, the counsel stating that he desired to offer proof, the clerk of the court was called to the stand, but the court refused to hear his testimony and overruled the motion forthwith, stating "that it had personal knowledge of the mode and manner in which the jury was drawn and the law with reference to the manner and regards the same as having been strictly in accordance with the law and does not regard the question in Porto Rico of the politics of the parties as being applicable to the same extent as it would be in the States." The motion was "also denied on the ground that it was not filed within the time required by law and no five days' notice was given to the other party."

It is settled that the provisions of the thirty-fifth section of the act of April 12, 1900, previously referred to, which gives a right to bring to this court from the District Court of Porto Rico by writs of error or appeal all final decisions of such court in all cases where "an act of Congress is brought in question and the right claimed thereunder is denied" does not contemplate that the right to review thus conferred should be confined solely to cases where the validity of an act of Congress is called in question

or its interpretation is necessarily involved, but also gives power to review where a right under an act of Congress was asserted and denied in the court below. *Crowley* v. *United States*, 194 U. S. 461, 466; *Rodriguez* v. *United States*, 198 U. S. 156. In the *Crowley case* the accused, by a plea in abatement, questioned the competency of certain grand jurors, who participated in the finding of the indictment, on the ground that the grand jury had been selected without any reference to the qualifications prescribed by the local law, when, as the result of an act of Congress, the local law should have been respected and applied. The plea was specific, and set up accurately the particular persons whose qualifications were challenged. Without going into detail in the *Rodriguez case*, it is true also to say that the legality of both the grand and petty jury was drawn in question because of a failure to apply the law of the United States governing the same.

But neither the principle which the cases referred to maintain nor the reasoning by which they were controlled support the proposition that any and every mere question of irregularity in applying the law of the United States which arises in a case in the court below confers a right to review on this court which otherwise would not exist. Moreover, neither the rule announced in the cases nor the reasoning which controlled them gives support to the further assumption that the right to a review by this court of the whole case, which otherwise would not exist, can be brought about by raising in the court below questions concerning the application or methods of enforcement of the applicable laws of the United States when, from the manner in which they are raised—that is, their generality of statement and the absence of all specification to sustain them—the conclusion is justified that they are of a frivolous character.

Putting out of view the ruling of the court based on the delay in making the motion assailing the capacity of the

jury commissioners and the qualifications of the panel which, it is urged, establish the right to review by this court, we are of opinion that the questions raised in the motion, either inherently or because of the manner in which they were raised, come within the propositions just stated and therefore are not controlled by the ruling in the *Crowley* or *Rodriguez* case. In the first place, in so far as the motion was addressed to the qualifications of the jury commissioners, it was, on its face, so wanting in merit and wholly frivolous as to afford no support whatever to the contention that the court in overruling it denied a right claimed under an act of Congress. In the second place, that is, as far as the challenge to the panel is concerned, if it be that the concluding sentence of the motion referring to the alleged political opinions of some of the jurors selected by the commissioners was an enumeration of the disqualification relied upon as the basis of the motion to quash the panel, its frivolousness was equally manifest. If, on the other hand, this view be not taken, then the mere general statement in the motion to quash, without any specification whatever of the ground relied upon, renders a like conclusion inevitable.

As the amount involved is not adequate to give jurisdiction, and the alleged claims of right under the act of Congress relied upon for that purpose are inadequate to form the basis of the exertion of jurisdiction, because of their unsubstantial and wholly frivolous character, it results that our order will be,

Writ of error dismissed for want of jurisdiction.

TITLE GUARANTY & SURETY COMPANY *v.* UNITED STATES, TO THE USE OF GENERAL ELECTRIC COMPANY.

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

No. 856. Submitted November 20, 1911.—Decided January 9, 1912.

Section 1007, Rev. Stat., makes the allowance of a writ of error, and the lodgment thereof in the office of the clerk within sixty days after date of judgment, an essential prerequisite to the granting of a supersedeas. Nothing in § 6 or § 11 of the Judiciary Act of 1891 affects the provisions of § 1007, Rev. Stat., in this respect.

An order cannot control a subject to which it cannot lawfully extend; and a stay order, granted to give the defeated party an opportunity to apply to this court for certiorari, does not operate to extend the time within which the writ of error must be lodged in order to be the basis for a supersedeas.

There is a difference between a stay order for purposes of rehearing, which prevents a judgment from becoming final, and one granted to enable an application to be made for certiorari which does not prevent the judgment from becoming final.

THE facts are stated in the opinion.

Mr. Louis Barcroft Runk and *Mr. H. B. Gill* for defendant in error in support of the motion.

Mr. Russell H. Robbins and *Mr. James F. Campbell* for plaintiff in error in opposition thereto.

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

The motion to vacate the supersedeas must prevail.

Although the writ of error was allowed and was lodged in the office of the clerk more than six months after the entry of the judgment, the bond was approved to operate as a supersedeas. Under these circumstances it is ap-

parent that the order for supersedeas was improvidently granted. No other conclusion is possible in view of § 1007, Rev. Stat., making the allowance of a writ and the lodgment of the same in the office of the clerk within sixty days after the date of a judgment an essential prerequisite to the granting of a supersedeas. *Western Construction Co.* v. *McGillis*, 127 U. S. 776; *Covington Stock Yards Co.* v. *Keith*, 121 U. S. 248; *Sage* v. *Central R. R. Co.*, 93 U. S. 412; *Kitchen* v. *Randolph*, 93 U. S. 86.

It is, nevertheless, insisted, First, that this case is not within the rule, because as the Judiciary Act of 1891 (March 3, 1891, c. 517, 26 Stat. 826) by the sixth section allows one year for the prosecution of error from this court to the judgments of the Circuit Court of Appeals and in express terms fixes no period for the allowance of a supersedeas, therefore, as the supersedeas was allowed within the year, it was in time. This, however, ignores the provision of § 11 of the act of 1891, as follows: "And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, . . ." *Hudson* v. *Parker*, 156 U. S. 277, 282. Nor would a different result arise from the concession argumentatively that from a consideration of the context of § 11 of the act of 1891 the passage which we have quoted should be restricted to writs of error from the Circuit Courts of Appeals to inferior courts and to appeals from such courts to the Circuit Courts of Appeals. Nothing is contained in the act of 1891 regulating the time when an appeal from a Circuit Court of Appeals to this court or a writ of error from this court to such courts must be taken in order to operate as a supersedeas. The general pro-

vision of Rev. Stat. § 1007 under the hypothesis stated would therefore be applicable. It thus results that the mistake in allowing the supersedeas in the case which is before us is equally demonstrated by the correct application of the act of 1891 as well as by yielding to the erroneous construction of that act which is pressed in argument. Second. After the entry of the judgment in the Circuit Court of Appeals a stay order was entered in that court to afford an opportunity of applying to this court for a writ of certiorari, and such application was made and refused. Upon this premise the argument is that as the writ of error was allowed and lodged with the clerk within sixty days after the refusal by this court of the petition for certiorari, therefore, even under the assumption that § 1007 applied, there was power to allow the supersedeas. But no power in this court to allow a certiorari under the act of 1891 exists in a case where there is authority to review the action of the lower court by error or appeal. This being true, it follows that the contention is that the granting of the stay order to enable a certiorari to be applied for operated to change the statutory time fixed for allowing a supersedeas on error or appeal, although such subject could not have been lawfully contemplated as being within the scope of the stay order. In other words, the argument comes to this, that the stay order embraced and controlled a subject to which it could not lawfully extend. And this consideration at once serves to mark the distinction between the operation of a stay order granted for the purposes of a pending application for rehearing, since the pending of a rehearing operates to prevent the judgment or decree from becoming final, for the purpose of error or appeal, until the application is disposed of.

As it results that the supersedeas was improvidently allowed, our order must be and is,

Supersedeas vacated.

VOGT *v.* GRAFF AND VOGT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 73. Argued November 17, 1911.—Decided January 9, 1912.

The rule in Shelley's case is a rule of property in the District of Columbia, and the question for this court to determine is not whether it has or has not a legal foundation, or is or is not a useful rule of property, but whether it applies to the case in controversy.

Where the testator directs that on the sale of his real estate the proceeds be divided and paid over to his heirs at once, except the share of a specified heir which shall be paid to trustees to be by them invested, the income thereon to be paid to such heir, the principal to be paid to his heirs after his death, the application of the rule in Shelley's case would destroy the radical distinctions intended by the testator, and the rule does not apply.

Notwithstanding the peremptory force of the rule in Shelley's case, where there are explanatory and qualifying expressions showing a clear intention of the testator to the contrary, the rule must yield and the intention prevail. *Daniel* v. *Whartenby*, 17 Wall. 639.

A condition of the rule in Shelley's case is that the particular estate and the estate in remainder must be of the same quality, both legal or both equitable, and where the former is equitable and the latter is legal, the rule does not apply and the two estates do not merge.

Quære: Whether in the case at bar the estate in remainder is legal or equitable.

Quære: Whether the rule in Shelley's case is applicable to personal property.

33 App. D. C. 356, affirmed.

THE facts, which involve the construction of a will made by a resident of the District of Columbia, are stated in the opinion.

Mr. John C. Gittings, with whom *Mr. Justin Morrill Chamberlin* was on the brief, for appellant:

Until the court below rendered the decision in this

case, it was conceded that the "Rule in Shelley's Case" was applicable to personal property in this jurisdiction. *Garth* v. *Baldwin*, 1755; 2 Vesey Sr., Ch. Rep. 646. *Horne* v. *Lyeth*, 4 Harris and Johnson, 435, holds this case was binding authority, and it has ever since been followed in the Maryland courts. See also *Warner* v. *Sprigg*, 62 Maryland, 14, and *Hughes* v. *Nicklas*, 70 Maryland, 482; *Engle* v. *Mades*, 25 Wash. Law Rep. 220; *Simms* v. *Georgetown College*, 1 App. D. C. 79, 80.

If the rule has any application to personal property at all, it has the same force and effect as when applied to real estate. If applied by analogy, it must be applied, of course, under the same circumstances and conditions; consequently it is a rule of law and not a rule of construction.

Being a rule of law, it is inflexible and will necessarily override any intention of a testator to the contrary in those cases where it is applicable. *Horne* v. *Lyeth*, *supra*.

There may be a class of cases involving executory trusts where courts have not applied the rule. But in the case at bar, by no possible torture of the testator's language can it be construed to read as an executory trust. *Neves* v. *Scott*, 9 How. 211; 2 Underhill on Wills.

A mere direction to convey the legal title or to pay over a fund where the limitations of the trust are complete, does not alone make a trust executory. *Rowan* v. *Chase*, 94 U. S. 818; *Cushing* v. *Blake*, 30 N. J. Eq. 689, 670; *Edgerton* v. *Lord Brownlaw*, 4 H. L. C. 1210. The "Rule in Shelley's Case" must be applied in a court of equity to the same extent as in courts of law, when the trust estate is executed. Preston on Estates, 362; Ferne on Remainders, 157; *Bale* v. *Coleman*, 1 P. Williams, 142; *Simms* v. *Georgetown College*, *supra*.

The very moment we attempt to treat the "Rule in Shelley's Case" as subservient to a testator's intention, we absolutely efface and obliterate it as a rule of law, and turn it into a mere rule of construction. If this can be

done when the subject-matter is personalty, what analogy is there in its application to real estate? None.

For authority for its decision the court below cites a case long since overruled on every point upon which it was decided, viz.: *Bacon's Appeal*, 57 Pa. St. 504, 514. See *Grimes* v. *Shirk*, 169 Pa. St. 174, 181; *McCann* v. *Berkley*, 204 Pa. St. 214; *Shopley* v. *Diehl*, 203 Pa. St. 566, 569.

The rule of construction is that if technical words are used they must be given their primary legal meaning, unless there is something on the face of the will that shows not only that they were not so used by the testator, but will clearly show in what sense they were used. *Daniel* v. *Whartenby*, 17 Wall. 643; *Van Grutten* v. *Foxwell*, reported in Appeal Cases, L. Rept. (1897), 658, 684.

Although the Chief Justice of the court below quotes the rule of construction laid down by this court in *Daniel* v. *Whartenby*, *supra*, he immediately thereafter ignores it.

There are no inconsistent words in that paragraph of the devise in question, and there is a total absence of any qualifying words in that or any other paragraph which shows or tends in any manner to show that the testator used the word "heirs" in the sense of "children."

The word "heirs" may or may not be appropriate; this would entirely depend upon the sense in which the testator used it. From the context of the will there is absolutely no ground for a court saying that the word "heirs" was not used by the testator in its primary technical sense.

That the testator was a layman does not appear anywhere in the record, or whether he was learned in the law, as the record is silent upon that point, unless it be the will itself, which shows beyond question that it was prepared by one skilled in legal lore, and unquestionably knew the legal difference between the words "heirs" and "children."

When we find him using the word "heirs" as a designation of those who were to take the appellant's share after death, it can hardly be said that he meant to use the word

"heirs" in any other sense than that in which he had previously used it: that is, its primary legal sense—those who would take real estate if plaintiff should die intestate.

If the court below is right and the word "heirs" was construed to mean those who would take under the statute of distribution—and for instance, suppose the infant Mathilda should die before her father—the widow of the testator, appellant's mother, would then take appellant's entire share, and his brothers and sister, who were the testator's "heirs," would be entirely cut off. Could this have been the testator's intention? Hardly so. That it was the testator's intention that appellant should have only a life estate in the fund may be perfectly true, but that would not in any manner alter the sense in which the word "heirs" was used.

It might be conceded that in 99 out of 100 cases where the "Rule in Shelley's Case" has been applied to a will, the testator's intention has been that the ancestors should take only a life estate. The inquiry has always been, What was his intention as to the remainder? Did he use the word "heirs" as a word of limitation? If not, did he use it in some other sense, and if he did, in what sense did he use it? That is the sole inquiry, and for that reason the fact that a testator intended to give the ancestor only a life estate can in no way throw light upon his intention or show what he meant when using the word "heirs" as a designation of those who were to take a remainder.

Under the tenth paragraph of the will, the ancestor, appellant, and heirs take the same quality of estates; both are equitable. See Hill on Trustees, 288; Perry on Trusts, § 311; *Denton* v. *Denton*, 17 Maryland, 43; *Warner* v. *Sprigg*, 62 Maryland, 14; *Long* v. *Long*, 62 Maryland, 68; *Glover* v. *Condell*, 163 Illinois, 566; see also *Garth* v. *Baldwin*, 2 Vesey, 648; *Engle* v. *Mades*, 25 Wash. L. Rep. 229; *Webb* v. *Webb*, 1 P. Williams, 132; *Robinson* v. *Fitzherbert*, 2 Bro. Ch. Rep. 127.

The cases do not sustain the opinion of the court below to the effect that as the trust is expressly limited to the life estate of Fred. H. Vogt, the remainder to the heirs is a legal estate, and hence there can be no union of the two estates under the "Rule in Shelley's Case." *Denton* v. *Denton*, 17 Maryland, 407; *Owens* v. *Crow*, 62 Maryland, 491, distinguished.

Westcott v. *Edmonds*, 68 Pa. St. 34; *Renzeihauzen* v. *Kaiser*, 48 Pa. St. 351, and *Bacon's Appeal*, 57 Pa. St. 505, cited in appellee's brief, were all cases dealing with trusts relating to real property; neither do cases apply which are suits brought by the *heirs* after the death of the ancestor, claiming that the trust has ceased, as *Denton* v. *Denton; Owens* v. *Crow, supra; Hooper* v. *Felgner*, 80 Maryland, 262; *Long* v. *Long*, 62 Maryland, 33, and *Lee* v. *O'Donnell*, 95 Maryland, 538.

Mannerback's Estate, 133 Pa. St. 342; *Mercer* v. *Hopkins*, 88 Maryland, 292, and *Mercer* v. *Safe Deposit Co.*, 91 Maryland, 102, cited by appellee are not applicable, and do not throw any light upon the case at bar.

To disregard the settled rules of interpretation, sanctioned by a succession of ages and by the decisions of the most enlightened judges, under pretext that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequence.

Mr. J. J. Darlington and *Mr. Leon Tobriner* for appellees.

Mr. Justice McKenna delivered the opinion of the court.

Bill in equity filed in the Supreme Court of the District of Columbia by the children of John L. Vogt to determine the meaning of a clause in the latter's will.

The defendants in the case, appellees here, were Charles Graff and Frederick C. Gieseking, executors and trustees named in the will, and Matilda S. Vogt, infant daughter of one of the complainants, appellant here, Frederick H. Vogt.

The part of the will to be construed is as follows:

"All the rest and residue of my real estate, shall, when my youngest surviving child attains the age of 21 years or one year thereafter in the discretion of my executors, be sold by my executors at public auction after due notice in the news papers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick C. Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death."

Regarding this provision as a simple composition of English words, we should have no difficulty in deciding that the testator intended to give to Frederick H. Vogt a life estate in the designated share. But it is contended that the meaning of the testator is determined otherwise by the rule in Shelley's case. The rule is thus laid down: "Where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the 'heirs' are words of limitation of the estate and not words of purchase." 1 Co. 104; *Daniel* v. *Whartenby*, 17 Wall. 639, 641; *Green* v. *Green*, 23 Wall. 486, 488.

It will be observed that under the rule by a technical circumlocution one estate only is created, though two parts are expressed, a particular estate for life with a remainder to the heirs of him who takes the particular estate. The rule, therefore, has been a fruitful source

of controversy. On the one hand it has been praised as having a substantial foundation and necessarily expressing and enforcing essential legal distinctions in the transfer of property; to be, indeed, the very opposite of a technical rule and one "established through a long course of decisions extending over a great many generations," and declared therefore to be a rule of substance in order to give effect to the intention of the grantor or testator. On the other hand, it is attacked as oftener defeating intention than executing it, being applied as an absolute and peremptory obligation to convey or devise an estate in fee simple even against an express declaration to the contrary. Invective, therefore, has been employed against it, and even ridicule; and English and American judges, while yielding to it, have pronounced it unjust. We, however, need not enter into the field of controversy. Whether it had a legal and substantial foundation when first pronounced or yet has, whether it is a useful rule of property or part of the debris of an ancient system having now only the mischievous vitality of frustrating the intention of a grantor or testator, we need not consider.

It is conceded to be a rule of property in the District of Columbia, and we are brought to the question whether, consistently with it, the intention which we have seen Vogt has expressed may be executed.

The statement of the rule we have given. There are certain conditions attached to it which give precision to its application. One of these is that the remainder after the particular estate must be to heirs of the whole line of inheritable blood, designating those who are to take from generation to generation. And they must be heirs of him who takes the particular estate, and by devolution from him.

This is important to be observed. The heirs must take from the first taker and not be a description of a class taking from the testator, becoming themselves,

"the root of a new succession." *Guthrie's Appeal*, 37 Pa. St. 9. Hargrave, in his Law Tracts, states the test to be "whether the party entailing means to build a succession of heirs on the estate of the tenant for life." If he does not, but intends to describe a class taking from him, the rule does not apply. We proceed to illustrate this.

Kemp v. *Reinhard*, 228 Pa. St. 143, expresses the principle, and its facts bring it into close similarity to the case at bar. In that case the testatrix gave to her son, Jacob E. Kemp, the use and income of seven enumerated properties, "for and during his lifetime." Then followed this clause: "And immediately after the decease of the said Jacob E. Kemp, I give and devise the above-described seven tracts or pieces of land devised to him herein for life to his issue in fee. Should he, however, die without leaving issue living, I give and devise the same unto my son Pierce G. S. Kemp, his heirs and assigns in fee." The court said (p. 147):

"Though the intention of the testatrix may have been to give only a life estate to the appellant, if in the devise there was a limitation of the estate to his heirs to take by devolution from him at his death, her intention is overridden by the rule in Shelley's case; but in every case in which the application of that rule is involved the first question is whether the devisor or grantor intended a limitation of the remainder in fee or in tail as such to the heirs of the first taker, or that there should be the root of a new succession taking directly from the devisor or grantor as purchasers. When the latter intention appears the rule has no place and the intention must be given effect".

And further (p. 147):

"'It is very carefully to be noted, that in searching for the intention of the donor or testator, the inquiry is not whether the remainder-men are the persons who

would have been heirs, had the fee been limited directly to the ancestor. The thing to be sought for is not the persons who are directed to take the remainder, but the character in which the donor intended they should take. In the very many cases in which the question has arisen, whether the rule was applicable, the difficulty has been in determining whether the intention was that the remaindermen should take as heirs of the first taker, or originally as the stock of a new inheritance.' *Guthrie's Appeal*, 37 Pa. 9."

Hall v. *Gradwohl* (1910), 113 Maryland, 293, is also somewhat similar to the case at bar, and we quote the more readily since it is said that the rule in Shelley's case prevails in the District of Columbia because it prevailed in the law of Maryland. After discussing the rule the court said that "it is not a favored" one "in the law of Maryland, although the court will never refuse to apply it in a proper case." And it was decided that where the particular intention of the testator is not to use the words of inheritance in their full legal sense, but "as mere *descriptio personarum* or a particular designation of individuals who were to take as purchasers at his death," the rule should not prevail. The will passed on made certain bequests and devises and then provided: "The balance of my estate to be equally divided among my five children or their heirs, share and share alike," with this proviso: "That the portion to which my daughter Sarah Gradwohl may be entitled shall be invested in some safe stocks or other securities, the said Sarah Gradwohl to receive the income from the same during the term of her natural life, and at her death to be equally divided among her children or legal heirs." The court refused to apply the rule. To apply the rule it was said that the words "children or legal heirs" would have to be treated as words of limitation, that is, as "marking out the extent and duration of her interest." This construction the

court rejected as consonant with "neither reason, policy, justice nor equity," and could only be supported by giving to the words "'legal heirs,' which are superadded to the word 'children,' the arbitrary meaning placed upon them by an artificial rule of law." The court, after an analysis of the will, decided that it plainly manifested a particular intention to use those words as mere *descriptio personarum* as a particular designation of individuals who were to take as purchasers at the death of the testatrix.

The conclusion of the court was based upon the special provision of the will which directed that the portion given to the testatrix's daughter Sarah should be invested in some safe stocks or securities, and that Sarah should "receive the income from the same during the term of her natural life," and should be at her death "equally divided among her children or legal heirs." This language, the court added, manifested a particular intention on the part of the testatrix "to use the words as mere *descriptio personarum*. . . . In such cases, under all of the authorities, the rule in Shelley's case does not apply."

A like intention is expressed in Vogt's will. His real estate, after satisfying particular devises, is directed to be sold when his youngest surviving child shall attain the age of twenty-one years. The proceeds he directs "shall be then divided among my heirs, share and share alike, *and paid over to them, respectively, at once*, except the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick C. Gieseking, as trustees, by them invested, the income therefrom to be paid to said Fred H. Vogt, the principal to be paid to his heirs after his death." If the rule in Shelley's case be applied, it will destroy all of the distinctions that the testator has expressed. The distinctions are radical, and must be looked to in ascertaining his intention. And this was done, as we have seen, in *Hall* v. *Gradwohl*, *supra*, and it was done, too, we may say, in *Kemp* v. *Reinhard*,

supra. The latter case has not the infirmity that counsel for appellant ascribes to some of the earlier Pennsylvania cases of regarding the rule as one of construction, yielding to and not overriding the intention, as, it is contended, its unflinching and dominating character requires.

The intention of the testator, therefore, may have some sway. We may inquire, at least, as to his intention in the use of the word "heirs," whether as taking from him or as taking from the life tenant. The rule "is silent until the intention of the grantor or devisor is ascertained." *Kemp* v. *Reinhard*, *supra*.

Of Vogt's intention we have no doubt. It is made clear by the distinctions to which we have adverted. To his other children their shares are to be delivered immediately upon the sale of the real estate. To appellant there is nothing of his share to be delivered at all. It is to be delivered to others for him, he to receive, not the body of the share, but only the revenue from it. He is separated from it completely. He does not handle it or direct its investment, and after his death, the testator, through trustees he has selected, directs it to be delivered to persons designated by him, or, to use the language of the cases, described by him as taking from him. Opposing reasoning, it is true, might be brought forward, but this court, while asserting and recognizing the peremptory force of the technical terms of the rule, has said: "But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intention of the testator, the former must yield and the latter must prevail." *Daniel* v. *Whartenby*, *supra*.

Another condition of the application of the rule is that the particular estate and the estate in remainder must be of the same quality, both legal or both equitable. The Court of Appeals decided that such condition did not exist and, on that ground, as well as on that which we have discussed, held adversely to appellant. In other words, the

court decided that the estate given to appellant was equitable and the estate devised to the daughter legal, and that, therefore, the estates did not merge. It is admitted that the estate taken by appellant is equitable; the contentions of the parties turn upon the character of the estate given to his daughter. We will not consider the contentions, nor whether the rule is applicable to personal property. We rest our decision on the ground discussed by us.

Judgment affirmed.

WILLIAMS *v.* WALSH, SHERIFF OF CRAWFORD COUNTY, KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 79. Argued December 5, 1911.—Decided January 9, 1912.

A classification as to time that is not arbitrary is not repugnant to the Constitution. The Fourteenth Amendment does not forbid statutory changes to have a beginning and thus discriminate between rights of an earlier and later time. *Sperry & Hutchinson* v. *Rhodes*, 220 U. S. 502.

A state police statute regulating sales, otherwise constitutional, is not unconstitutional under the equal protection clause because it excepts from its operation sales made under existing contracts.

This court cannot take judicial knowledge of details of importations and sales of a commodity even if it can take such knowledge of the fact that such commodity is an article of interstate commerce.

The writ of *habeas corpus* cannot be made to perform the function of a writ of error, nor can it be made the means of obtaining a new trial.

The term "original package" as used in a state statute does not necessarily have the same meaning as when used in some of the decisions of this court.

A law cannot be declared invalid at the instance of one not affected by it.

An article, such as powder, which is dangerous to handle in proportion to the quantity handled, is properly subject to police regulation in

regard to quantity from which harmless articles of commerce are exempt.

The Kansas statute regulating sales of black powder is not unconstitutional as denying equal protection of the law because it excepts from its operation sales made under existing contracts; but whether it offends the commerce clause cannot be determined in a suit in which it does not appear that the party raising the question was affected in that respect.

79 Kansas, 212, affirmed.

THE facts, which involve the constitutionality, under the commerce clause of, and the Fourteenth Amendment to, the Constitution of the United States, of the statute of Kansas regulating the sale of black powder, are stated in the opinion.

Mr. Charles Blood Smith, with whom *Mr. D. B. Holmes* was on the brief, for plaintiff in error:

The act is repugnant to the clause of the Fourteenth Amendment which prohibits a State denying to any citizen the equal protection of the laws. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Magoun* v. *Illinois*, 170 U. S. 283; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

The act is in direct conflict with § 8 of Art. I of the Constitution of the United States, which declares that Congress shall have power to regulate commerce among the several States. *Brown* v. *Maryland*, 12 Wheat. 419; *R. R.* v. *Husen*, 95 U. S. 465; *Minn.* v. *Barber*, 136 U. S. 315; *Leisy* v. *Hardin*, 135 U. S. 100; *Wilkerson* v. *Rahrer*, 140 U. S. 545; *Sawrie* v. *Tennessee*, 82 Fed. Rep. 615; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Rhodes* v. *Iowa*, 170 U. S. 423; *Welton* v. *Missouri*, 91 U. S. 275; *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489.

Mr. John S. Dawson, Attorney General of the State of Kansas, *Mr. S. N. Hawkes*, *Mr. F. S. Jackson* and *Mr. O. T. Boaz* for defendant in error, submitted:

Petitioner was not denied the equal protection of the

laws. The act applies to all persons similarly situated. It covers every sale and delivery made upon any contract entered into after the law took effect. It applies to every person engaging in making any such sale or delivery. It simply does not count as a violation of the law the completion of a contract to deliver made prior to the passage of the law. It does forbid all similar sales and deliveries upon all contracts made by all persons after the law took effect, whether such persons had their contracts or not, or whether such persons had horses and cattle or not. *Warts* v. *Hoagland*, 114 U. S. 615; *Duncan* v. *State of Missouri*, 152 U. S. 382; *Eldredge* v. *Trezevant*, 160 U. S. 469; *Lowe* v. *State of Kansas*, 163 U. S. 88. The case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, has no application to the facts in this case.

Certainly black powder is a substance of such nature that its careless handling under any circumstances is attended with serious danger, and this is particularly so in a coal mine where work is done in darkness. The exercise of the police power of the State of Kansas by virtue of the act in question applies not only to the use of black powder, but also, and more intimately and directly, to the conduct and management of coal mines, and we believe that the courts have clearly and sufficiently accorded to the legislatures the right, under the police power retained by them, to regulate both the subject of the handling of black powder and of carrying on the business of mining for coal. *Foster* v. *Kansas*, 112 U. S. 206; *Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203; *Leisy* v. *Hardin*, 135 U. S. 100.

The question as to the extent of regulation should be determined by the legislature, and so far as the legislature has acted reasonably in its regulation, its laws should be upheld. *Jamison* v. *United States Gas Co.*, 12 L. R. A. 652.

The act in controversy is not void as a regulation of interstate commerce, nor is it in conflict with the commerce clause of the Federal Constitution.

The chief purpose of the law is to make coal mining as safe an occupation as can reasonably be expected, and that is the direct and primary, and probably exclusive, purpose of the law. The purpose is not to regulate the handling of black powder as a trade or business or as a matter of commerce. One of the dangers of coal mining is the use of explosives, and this law simply deals with the use of explosives in the coal mines, for the protection of the mines and persons within them, and not for the purpose of regulating the dealing in the explosives. Laws regulating saloons are proper subjects of police regulation, because saloons, if allowed to be run without regulation, are dangerous; and coal mines have been found very dangerous and destructive to human life when not properly regulated and supervised. The State of Kansas considers this black-powder law one of very great importance to the State and to thousands of miners who are daily working under the ground in the coal mines, and it believes that it has a right to so regulate the conduct of all persons within those mines, or the property that goes into those mines, so as to make them as safe as can reasonably be expected without interfering with the proper management of the mines.

Mr. Justice McKenna delivered the opinion of the court.

A statute of Kansas provides as follows (Laws 1907, c. 250):

"It shall be unlawful for any individual, firm or corporation to sell, offer for sale or deliver for use at any coal mine or mines in the State of Kansas, black powder in any manner except in original packages containing twelve and one-half pounds of powder, said package to be securely sealed; said powder to be delivered by the company to the miner at its powder-house, not more than three hundred

feet from pit-head, unless hereafter otherwise provided by contract; provided, however, this act shall not be construed as in any manner conflicting with any existing contract of sale of black powder."

Plaintiff in error was convicted of violating the statute by selling and delivering to one John Thomas black powder which was not in an original package of 12½ pounds securely sealed, there being no existing contract to sell between the parties. He was condemned to pay a fine of $50 and the costs of the case, and stand committed to the county jail until he should pay the fine or be discharged by law.

In a petition to the Supreme Court of the State in *habeas corpus* to be discharged from custody he alleged the illegality of his conviction and that the statute was null and void because in conflict with the Fourteenth Amendment to the Constitution of the United States and the commerce clause, and also with the constitution of the State of Kansas.

His contentions were not sustained, and he was remanded to custody. 79 Kansas, 212.

Some of the contentions which were made in the state court are abandoned here. "We admit," counsel say, "that the Kansas legislature had the right to determine that the local conditions in the State required that black powder should not be sold and delivered for use in any coal mines in the State except in packages containing exactly twelve and one-half pounds, no more nor less; that precisely that amount of powder was required to be sold to protect the miners that are employed in the coal mines of the State, and that the mere fact that courts or judges may differ as to the wisdom of such legislation would afford no ground for judicial interference, unless the question was in excess of legislative power." It is, however, insisted that there is a limitation of the power of the State, and that the law in question transcends the power of the

State in that (1) it denies to plaintiff in error and other citizens the equal protection of the laws, and (2) is in conflict with the commerce clause of the Constitution of the United States.

We shall consider these objections in their order:

(1) The discriminatory effect of the statute comes, it is urged, from its first section, which directs that it shall not be construed to conflict with existing contracts. "The act thus recognizes," it is said, "the fact at the time it took effect, May 27, 1907, of the existence of contracts" for the delivery of powder in other than the described packages. "It is thus made unlawful," it is said, "for some persons to sell or buy black powder otherwise than in twelve and one-half pounds in original sealed packages, while others may lawfully do the same thing."

We might, indeed, hesitate to assume, as counsel does, from the possibility of the existence of a fact, its actual existence, if by doing so we should have to regard a state law as unconstitutional, but as we do not think the result will follow, we shall assume the existence of the fact. The purpose of the statute is to provide for the safety of coal mining operations, and if it may be said that whatever danger can come from packages of powder will come from them regardless of the date of the contract under which they may be delivered, there are nevertheless other considerations to be taken into account. The statute is criminal. A retrospective operation of it was to be avoided, might indeed be illegal. At any rate, it was a matter properly to be considered by the legislature in distinguishing between contracts made before the passage of the law and those made after its passage. The former might not be numerous, their evil would be temporary; and certainly legislation which makes acts criminal which are done after they are forbidden, and assigns no penalties to acts done in pursuance of obligations legally incurred, is not arbitrary classification. It is not necessary to do more than

repeat what we have said many times, that a classification which is not arbitrary is not repugnant to the Constitution of the United States. We may add that "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus discriminate between the rights of an earlier and later time." *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502, 505.

(2) To make good the contention that the statute of Kansas offends the commerce clause of the Constitution, plaintiff in error refers to an amendment to his petition that the powder sold and delivered by him was enclosed in an original unbroken package, containing twenty-five pounds of powder, imported from the State of Missouri by the Central Coal and Coke Company, of which company he was the agent and representative in selling and delivering. And it is further alleged that black powder has been and is put up by manufacturers thereof, and sold and transported among the States in original packages containing twenty-five pounds.

It is, however, admitted that proof of such facts was not attempted to be made in the justice's court. The case was submitted in that court upon a stipulation that the powder, at the time of its sale and delivery, was not "in an original package, containing twelve and one-half pounds, securely sealed, and that then and there, there was not an existing contract for the sale of black powder, to be used in said mine."

Plaintiff in error insists that the absence of proof of the facts which he alleges is immaterial because, as he urges, "this court will take judicial notice of the matter of common knowledge that black powder is a subject of interstate commerce." But plaintiff in error invokes a broader knowledge, or, rather, a broader knowledge is necessary to sustain his allegations. We must not only take notice that black powder is a subject of interstate commerce in packages of twenty-five pounds, but of the more partic-

ular facts that he was the agent and representative of the Central Coal and Coke Company in selling and delivering the powder, and that the company had imported it in the package in which it was sold. What sources of knowledge have we of such facts? It is true that the stipulation recited that Thomas' purchase of the powder was voluntary, and that it was sold to him "in the usual and ordinary course of business." Of what business, and whose? It will be observed that the stipulation merely negatives the requirements of the statute. It follows the complaint, and states that the powder was not sold in an original package containing twelve and one-half pounds, and that there was not an existing contract. How it was sold is not stated. It is true the Supreme Court supplied the omission as to quantity. In answering an objection (the objection is not made here) that the law was invalid on account of its rigid requirement that a package should contain twelve and one-half pounds, neither more nor less, the court stated that the sale in this case was of twenty-five pounds. The court went no farther, and of the contention that the statute was repugnant to the commerce clause of the Constitution said (p. 222): "The final claim of the petitioner, that the act is in violation of the commerce clause of the Federal Constitution, may not be presented in this record, since the fact of the importation of the package from Missouri did not appear at the trial before the justice." It was certainly within the competency of the court to refuse to consider the contention. The validity of the judgment against plaintiff in error could only be determined by the defense he made, not by the defense he might have made, and which he did not even offer to make. We have often said that the writ of *habeas corpus* cannot be made to perform the office of a writ of error. It certainly cannot be made the means of obtaining a new trial.

It may, however, be said that the Supreme Court ex-

pressed its views of the validity of the Kansas statute under the commerce clause of the Constitution and thereby ruled on the contention of plaintiff in error based on that clause. We do not so understand the opinion of the court. It in no way, nor to any extent, modified its view that the contention was not available to plaintiff in error or intimated that such view was not the basis of its decision.

Plaintiff in error, apprehending this, declares that it is immaterial whether the package of powder sold by him was imported, and insists that the act must be held to be void because it must be considered "as applicable to importations of black powder from other States." The words "original packages" used in § 1 of the statute had, it is said, "a technical meaning well known to the members of the Kansas legislature." In definition of the meaning of those words plaintiff in error cites certain familiar decisions of this court, and, from the definition given in them of "original packages," deduces the conclusion that the words were used in the same sense in the Kansas statute, and hence that the statute must be held as designed to prohibit importations of black powder in other than 12½-pound packages. We are not impressed by the reasoning. The act does not deal with importations, special or general, but only with sales within the State at a specified place, and the delivery at such place of the powder sold in other than a prescribed quantity and in a prescribed package. It may be that powder is imported or put up in the State in such packages. If so, it makes compliance with the law all the easier. Or it may be that the seller may compose the package, securing its integrity in the manner provided by the statute. What the Supreme Court of the State may decide in that regard we do not know, for the point was not made in that court, and the interpretation of the statute invoked.

There is another answer to the contention. A law cannot be declared invalid at the instance of one not affected

by it, and, as we have seen, there was no proof before the justice of the peace that plaintiff in error was an importer of powder. We do not wish to be understood as intimating that if such proof had been made it would have been a defense. Powder is an explosive, dangerous to handle, the degree of danger corresponding to its quantity. It is subject, therefore, to a measure of regulation from which harmless articles of commerce may be exempt. It is said by this court in *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96, 100: "Indeed, it is a principle fully recognized by decisions of state and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable." See further on the same principle, *Foster* v. *Kansas*, 112 U. S. 201, 206; *Plumly* v. *Massachusetts*, 155 U. S. 461; *Austin* v. *Tennessee*, 179 U. S. 343; *Asbell* v. *Kansas*, 209 U. S. 251.

Judgment affirmed.

SOUTHERN RAILWAY COMPANY *v.* REID.

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

No. 487. Argued December 6, 1911.—Decided January 9, 1912.

There are three degrees to which the State exercises power over commerce. First exclusively; second, in the absence of legislation by Congress, until Congress does act; third, where Congress having legislated, the power of the State cannot operate at all.

Although when Congress is silent, the State may legislate in aid of, or

without burdening, interstate commerce, there may at any time be Federal exertion of authority which takes that power from the State.

Although where Congress and the State have concurrent power, that of the State is superseded when the power of Congress is exercised, the action of Congress must be specific in order to be paramount. *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612.

By the specific provisions of the act to regulate commerce, as amended, Congress has taken control of rate making and charging for interstate shipments, and in that respect such provisions supersede state statutes on the same subject; and so *held* that a statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under penalties for failure, conflicts with the requirement of § 2 of the Hepburn Act of July 29, 1906, c. 3591, 34 Stat. 584, forbidding transportation until rates had been fixed and published, and is therefore unenforceable.

As between the Federal Government and the States one authority must be paramount and when it speaks the other must be silent.

No essential power is taken from the States in preserving the balances of the Constitution and giving to Congress the power which belongs to it.

Any middle ground on which state authority might still be preserved after Congress has spoken in regard to interstate commerce is passed when the state regulation burdens such commerce, and the imposition of penalties for failure to receive and transport freight does impose a burden.

Quære whether conceding that a State may impose a penalty does not concede the State to be competent to determine the amount.

153 N. Car. 490, reversed.

THE facts, which involve the validity of a statute of North Carolina affecting common carriers, are stated in the opinion.

Mr. Alfred P. Thom, with whom *Mr. John K. Graves* was on the brief, for plaintiff in error in this case and in No. 80 argued simultaneously herewith (see p. 444, *post*):

The statute contravenes the commerce clause of the Constitution because it seeks to regulate, and if enforced, will impose a burden upon, interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 210; *Gloucester Ferry Co.* v.

Pennsylvania, 114 U. S. 204; *Atl. Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186. See also cases showing where the line is to be drawn in which state statutes were upheld: *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *Richmond &c. R. R. Co.* v. *Patterson Co.*, 169 U. S. 311; *Atl. Coast Line R. R. Co.* v. *Mazursky*, 216 U. S. 122; *West. Un. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364; and in which state statutes, or orders of state commissions were condemned: *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Central of Geo. Ry. Co.* v. *Murphey*, 196 U. S. 194; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Houston &c. R. R. Co.* v. *Mayes*, 201 U. S. 321; *St. Louis &c. R. R. Co.* v. *Arkansas*, 217 U. S. 136.

The question is whether the statute is constitutional as applied to interstate commerce, not whether the imposition of the penalties in these particular cases might have been constitutionally authorized.

One upon whom a penalty has been imposed under the provisions of a statute has an interest which has suffered, and is entitled to challenge the validity of the statute as applied to all cases within its operation. *United States* v. *Reese*, 92 U. S. 214, 222.

The statute is not merely in aid of a common law duty, but is regulating interstate commerce. It rigidly requires the carrier to receive freight whenever tendered. No exception is made for any cause or under any circumstances whatever. *Alsop* v. *Express Co.*, 104 N. Car. 278; *Garrison* v. *Southern Ry. Co.*, 150 N. Car. 575; *Wampum Cotton Mills* v. *Carolina &c. R. R. Co.*, 150 N. Car. 608; *Burlington Lumber Co.* v. *Southern Railway Co.*, 152 N. Car. 70.

The penalties began to accrue immediately upon the refusal to receive; not from the time the rates could be ascertained in the exercise of due diligence.

No duty at common law rests upon a carrier, in the

absence of contract or custom, either to receive freight at or deliver to an industrial siding or non-agency station. Hutchinson on Carriers (3d ed.), § 122; *Louisville &c. R. R. Co.* v. *Flanagan*, 113 Indiana, 488; *Charnock* v. *Tex. & Pac. R. R. Co.*, 194 U. S. 436; *Kellogg* v. *Railway Co.*, 100 N. Car. 158; *Land* v. *Railway Co.*, 104 N. Car. 48.

If there is no duty, in the absence of contract or custom, to receive freight tendered at a non-agency station, it follows that no common law duty rests on the carrier to deliver at or to accept shipments for delivery at such a point.

The statute, as construed by the Supreme Court of the State, imposes a penalty upon the carrier for refusing to receive for transportation, and issue a bill of lading for, a shipment which it is forbidden, on account of no rate having been filed with the Interstate Commerce Commission, from transporting in interstate commerce.

The North Carolina statute imposes a penalty for the refusal to receive freight "whenever tendered" and imposes a penalty of $50 for the first day's delay, and the same amount for each succeeding day *ad infinitum*. It is supplemented by another statute imposing heavy penalties in case the railroad company shall not promptly start and continue to transport the freight after it is received. As construed by the North Carolina court, the inability of the railroad company to deliver in no way excuses it from the necessity of receiving for transportation.

Being placed in this situation it must for its self-protection undertake at all hazards to avoid the risk of the accrual of penalties under the statute, regardless of the consequences to the movement of interstate and other commerce. This being true, any relief which may be thereafter granted by the court from a sense of justice or clemency cannot retroact so as to nullify the burden which has already been placed upon interstate commerce. If this

is a government of laws and not of men, as has been frequently declared by this court, the statute cannot be saved from invalidity by the exercise or by the promised exercise by the judicial department of the State of a power analogous to the pardoning power vested in the executive.

The statute is unconstitutional in that it conflicts with acts of Congress regulating interstate commerce.

No 80 involves matters which took place after the Hepburn Act of June 29, 1906, was passed and approved, and after the national policy had therefore been expressly declared, but before it became effective. No. 487 involves matters which took place after the Hepburn Act became effective.

By the enactment of the Commerce Act, Congress has actually assumed control of the matter of the receipt of goods tendered for interstate transportation.

Conflict and confusion necessarily result from the administration of the state law by the state courts and the Federal law by the Federal tribunals as to the same subject: *Texas &c. R. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; and see § 23 of the act, which was not altered by the Hepburn Act.

Mo. Pac. Ry. Co. v. *Larabee Mills*, 211 U. S. 612, does not affect this case.

After the passage of the Hepburn Act, under the new regulations of that act, Congress expressly took complete control of the business of interstate transportation. It declares that transportation shall be furnished "upon reasonable request therefor," while the state statute requires the carrier to receive freight "whenever tendered."

Even if the statute should be construed to impose the same affirmative duties upon the carrier as are prescribed by Congress in the "reasonable request" clause, the state statute would be invalid as invading the field of which Congress has taken control, and that, too, in a matter

of national scope and importance, admitting of but one uniform system of regulation. *Cooley* v. *Board of Wardens*, 12 How. 299; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Wabash Railway Co.* v. *Illinois*, 108 U. S. 573; *McLean* v. *Denver &c. R. R. Co.*, 203 U. S. 38; *Oklahoma* v. *Kansas Gas Co.*, 221 U. S. 229.

Under § 2 of the Hepburn Act the carrier is expressly forbidden to engage in the transportation, including the receipt, of property unless it has filed and published its rates as required in the act. In the face of this prohibition by Congress, the State cannot validly declare that interstate freight shall be received "whenever tendered," irrespective of whether the carrier has or has not complied with the condition precedent expressly imposed by Congress. Congress says to the carrier which has not published and filed the rates: "Thou shalt not receive"; the State commands: "Thou shalt receive." Which shall the carrier obey? See the provisions of the Carmack Amendment, added to § 20 by the Hepburn Act of 1906, in which Congress in express words regulates the duty of the carrier in the matter of issuing receipts or bills of lading for freight tendered for interstate transportation, and the operation of the state law is thereby excluded.

Mr. Plummer Stewart and *Mr. Jno. A. McRae* for defendants in error in this case and in No. 80 argued simultaneously herewith (see p. 444, *post*):

Section 2131 of the North Carolina Revisal of 1905, penalizing common carriers for refusing to accept freight for shipment, is in the aid of commerce and not a restraint upon it, and is, therefore, a valid exercise of the State's power. *Atl. Coast Line* v. *Mazursky*, 216 U. S. 122; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650.

State enactments of the following nature have been declared valid by this court:

Requiring engineers to be examined with respect to

their ability to distinguish color (*R. R. Co.* v. *Alabama*, 128 U. S. 96); requiring telegraph companies to receive dispatches, to transmit and deliver them with due diligence, as applied to messages outside of the State (*Telegraph Co.* v. *James*, *supra*); forbidding running freight trains on Sunday (*Hennington* v. *Georgia*, 163 U. S. 299); requiring railway companies to fix their rates annually for the transmission of passengers and freight, and to post a printed copy at stations (*Railroad Co.* v. *Fuller*, 17 Wall. 560); regulating the heating of passenger cars and directing guards and guard posts to be placed on bridges and trestles (*Railroad Co.* v. *New York*, 165 U. S. 628).

Interstate shippers will get better service with statutes like the one in question than without.

Freight must be shipped or started on its way before it becomes interstate commerce. *Coe* v. *Errol*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 565; *Match Co.* v. *Ontonagon*, 188 U. S. 94.

The statute is not unconstitutional in that it conflicts with the act of Congress regulating interstate commerce.

The defendant could have received the freight in question for shipment before the rate of freight to be charged for transportation had been filed with the Interstate Commerce Commission, published according to law, etc., without having been guilty of a misdemeanor.

Under § 6 of the act the rates are to be filed when they have been established. Under the agreed facts in this case the joint rates between the points in question had not been established.

The question of whether the carrier would have been liable for negligence of the connecting road, had it issued the bill of lading before a joint rate had been established, is not in this case or properly before the court.

When the carrier refused to receive the freight in question for shipment, it did not set up the excuse that it would be liable for any negligence of the connecting car-

rier, but solely the objection that it did not know the freight rates. At this late day, it cannot be allowed to come in and substitute some other reason or excuse for its failure to perform its common law duty. When the destination is on the line of a receiving carrier, it is the duty of such carrier to receive, transport and deliver within a reasonable time and for reasonable compensation; when the destination is upon the line of the connecting carrier, it is the duty of the initial carrier to receive, transport and deliver to the connecting carrier. The bill of lading under which the shipment in question was carried recognized this.

In No. 487 the shipper did not demand to be allowed to prepay the freight—she only offered to do so. The freight could have been accepted for shipment and shipped and the final carrier could have collected the charges by a sale of the property, if necessary for the purpose. The public would be inconvenienced by any such rules of conducting its business as the common carrier insists upon in this particular case.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is the validity of an act of the State of North Carolina which requires the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and forward the same by a route selected by the person tendering the same, under penalty of forfeiting $50 a day to the aggrieved party for each day of refusal to receive such freight and all damages actually sustained.[1]

[1]"Agents or other officers of railroads and other transportation companies whose duty it is to receive freight shall receive all articles of the

Defendants in error brought suit against plaintiff in error, herein called the railway company, in one of the courts of North Carolina, to recover penalties and damages for the failure of the railway company, in violation of the statute, on dates from September 17 to September 23, 1907, to receive goods tendered to it by Etta C. Reid, defendant in error, at Charlotte, North Carolina, for transportation to a point in the State of West Virginia.

The material facts, as stipulated, are as follows: The railway company is a Virginia corporation, and is a common carrier, and operates a line of railroad from the city of Charlotte to the city of Alexandria, Virginia, and another line to the city of Richmond. Davis is a town in West Virginia, and a terminus of a branch road of the Western Maryland Railroad Company, six miles long, running from a point on the railroad, known as Thomas, to Davis.

The railway company operates no line of railroad or other means of conveyance to Davis, nor does it connect with the Western Maryland Railroad's line.

On the seventeenth of September, 1907, Etta C. Reid tendered to the railway company at its depot in Charlotte, where it usually accepts freight, a lot of household goods

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nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. (Code of North Carolina, 1905, sec. 2631.)

and kitchen furniture and offered to pay the freight charges thereon. She demanded that the company issue to her a bill of lading "reading from Charlotte, in the State of North Carolina, to Davis, in the State of West Virginia, consignee to be Samuel Hammock." The railway company declined to name a rate to be charged for the transportation of the goods, declined to permit her to prepay the freight charges from Charlotte to Davis, declined to receive the goods for shipment, and declined to issue a bill of lading therefor.

She renewed her request on four successive days, and, with each demand, the company refused to comply. On September 23, 1907, the company named the sum of $34.08 as the amount necessary to prepay the freight charges on the shipment from Charlotte to Davis, and thereupon she paid the said sum and the company issued a bill of lading to her.

On September 17, 1907, no through and joint rate of freight had been established by the railway company and the Western Maryland Railroad Company and other roads which the shipment would have to pass over going from Charlotte to Davis, "and no such rates had been filed with the Interstate Commerce Commission and no rate of freight had been established or filed with the Interstate Commerce Commission, or published, covering shipments between said points." On that day, when Etta C. Reid made her demand of the railway company, the company's agent advised her that there was no established rate for the shipment, that no rate had been filed or published, that he did not know the rate, that he had no authority to receive the goods or the freight charges thereon to destination and no authority to issue a bill of lading reading "final destination, Davis, in the State of West Virginia."

The agent wired the officer having charge of such matters to obtain authority to name a through and joint rate,

to receive the shipment and issue a bill of lading. Immediately thereafter the officers of the company took up with the officers of the companies over whose lines the shipment of freight would have to move the establishment of a rate, with the result that a rate was established. On Monday, September 23, 1907, the local agent was informed of such rate and given authority to receive the shipment and to issue a bill of lading. Thereupon the company received the shipment, accepted the amount of freight in accordance with the joint and through rate, and issued the bill of lading.

There is, and was at the date of the tender of the goods, a telegraph office at Davis. Mrs. Reid remained at Charlotte for the time mentioned awaiting the establishment of the rate.

It is stipulated that she was damaged in the sum of $25, for the recovery of which and the penalties prescribed by the statute she asked the court to adjudge.

The railway company resisted the demand and contended that to hold that the act was applicable to it would violate the commerce clause of the Constitution of the United States.

Judgment was awarded to defendants in error as prayed, and it was affirmed by the Supreme Court of the State, two members of the court dissenting. 153 No. Car. 490.

This statement indicates the questions which are presented for solution and the principles upon which the solution of them depends. It hardly needs to be stated that transportation of property between the States is interstate commerce, and may be of Federal rather than of state jurisdiction. We say may be of Federal jurisdiction, for interstate commerce in its practical conduct has many incidents having varying degrees of connection with it and effect upon it over which the State may have some power. As to the extent of the power and the occasions for its exercise, controversies have arisen, and in deciding which

the power of the State over the general subject of commerce has been divided into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the State cannot act at all. *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 655.

These divisions, however, express but the extreme boundaries of the subject. Something more definite is necessary for the decision of the opposing contentions in the case at bar. The Supreme Court of the State was of the view that the statute simply regulated a duty which preceded the entry of the goods in interstate commerce, and concluded, therefore, that the statute was "neither an interference with nor a burden upon interstate commerce." And it decided that the execution of this duty was not precluded by the provision of the Interstate Commerce Act requiring a schedule of tariffs to be established and charged. It was said by the court that it was the duty of the railway company to file such schedule, and that the company could not justify the violation of its common law duty by the neglect of its statutory duty.

The case, however, is not quite in such narrow compass. There is something more to be considered than the accumulation of defaults, if there be defaults. It is undoubtedly the duty of a railway company to receive freight when tendered for transportation. It may, besides, have other obligations, but it does not follow that it is within the power of the State to enforce them. There may be a Federal exertion of authority which takes from a State the power to regulate the duties of interstate carriers or to provide remedies for their violation. This is realized by defendants in error, and they assert that the state statute is in aid of commerce, and not an interference with or burden upon it, and therefore must be sustained as a valid exer-

cise of the State's power, citing *Atlantic Coast Line R. R. Co.* v. *Mazursky*, 216 U. S. 122; *Western Union Tel. Co.* v. *James*, 162 U. S. 650.

In those cases, and in the later case of *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S. 406, the principle is expressed that "there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those engaged in interstate commerce." Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable. In the Telegraph Company cases there was a failure to transmit or deliver telegrams, in violation of the duty so to do imposed by the particular state statutes. In the railroad case a statute of the State of South Carolina which required carriers to settle within a specified time claims for loss of or damages to freight while in their possession within the State was sustained against the objection that it was an interference with interstate commerce. In none of the cases, however, was there any Federal legislation upon the subject involved, and in all of them such circumstance was stated as an element of decision. The circumstance is important, and we are brought to the inquiry whether it exists in the present case.

It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri Pacific Railway Co.* v. *Larabee Mills*, 211 U. S. 612, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule

that Congress by nonaction leaves power in the States over merely incidental matters. "In other words," and we quote from the opinion (p. 623), "the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the commission the control of the State over those incidental matters remains undisturbed." The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared (p. 624) to be a common law duty which the State might, "at least in the absence of Congressional action, compel a carrier to discharge."

The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?

It is not possible to epitomize the act by giving a more particular designation than that it was designed to regulate interstate commerce. Something more was certainly intended by it than the mere ordaining or the supervision of the movement of goods. In a certain general way traffic would be regulated by railroad and shipper, but their powers were not equal. The railroads had the

greater power, and might and did exercise it in unreasonable charges and in discriminations. The potent instrument for this was the difference in the rate charged for transportation or by secret rebates if the charge was not discriminating in the first instance. Hence we said, in *Texas & Pacific Ry.* v. *Abilene Oil Co.*, 204 U. S. 426, 437: "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates." To that end, it was further said, schedules of rates were required to be established and published, and departure from the rates established, except in the manner authorized by the act, was forbidden under criminal penalties, and any injury to persons was provided to be redressed through application to the Commission or to the courts. And it is provided that "if no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation."

The Commission is given the power to determine and prescribe the manner in which the schedules required by the act are to be kept. And it is enacted that, unless otherwise provided, no carrier "shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act."

It is evident, therefore, that Congress has taken control of the subject of rate making and charging. All of the particular details we cannot set forth without extensive quotation from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared, unreasonableness in the rates and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight and in facilities fur-

nished. The power which has been given to the Commission to secure those results we have set forth in *Texas &c. Ry. Co.* v. *Abilene Oil Co. supra*, and in *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481. In the first case it was said (p. 439): "It is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law." After citing cases, it was further said (p. 439): "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination." In that case it was decided that a shipper could not maintain an action at common law in a state court on the ground that a rate established in accordance with the Interstate Commerce Act was unreasonable. In the second case was considered the power of the Commission under the amendments of 1906, and it was decided that on the principles announced in the *Abilene case*, and from a consideration of the amendments and their purpose to supply the defects of the act and enlarge the powers of the Commission, the distribution of coal cars by the railroad company among shippers was a matter involving preference and discrimination, and within the competency of the Interstate Commerce Commission to consider, and that the courts could not interfere with such distribution until after action by the Commission. This was resolved notwithstanding § 23 of the act gave jurisdiction to the Circuit and District Courts of the United States to command, at the suit of one aggrieved, a common carrier "to move and trans-

port the traffic or to furnish cars or other facilities for transportation." And transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery and handling of property transported, and such transportation the carrier must "provide and furnish upon reasonable request therefor." (Section 1, paragraph 2, of the act, as amended June 29, 1906, by the Hepburn Act, 34 Stat. 584, c. 3591.) Section 20 of the latter act requires the carrier to issue a bill of lading for an interstate shipment, and makes the carrier liable for the loss of or damage to property while on its own line, and also while on the lines over which the property may pass.

There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of. We are, therefore brought to consider what the statute of North Carolina provides. Leaving out qualifications with which we are not concerned, the act requires railroad companies to receive freight for transportation whenever tendered at a regular station and forward the same over the route selected by the person offering the shipment. Fifty dollars a day is the penalty prescribed for refusal, and all the damages incurred.

The particular act which was held to violate the statute was refusing the tender of goods for shipment from Charlotte, North Carolina, to Davis, West Virginia, that is, a tender for interstate shipment, and a demand coincidentally for a bill of lading covering the shipment explicitly stating the origin of the shipment at Charlotte and its destination at Davis. The Supreme Court of the State decided, as we have seen, that the statute deals with a common law duty simply, one which attaches before freight enters into interstate commerce, and hence concluded as

follows: "The statutory enforcement under penalty of the common law duty to accept freight 'whenever tendered' is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce." We are unable to agree with the conclusion. It would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted. See, in this connection, *Houston & Texas Cent. R. R. Co.* v. *Mayes*, 201 U. S. 321. In the term "transportation," we have seen, Congress has included "all services in connection with the receipt . . . of property transported." And this certainly imposes the obligation to receive the property as well as to carry it, one of the obligations the carrier must perform "upon reasonable request therefor." Other provisions of the same import and direction might be quoted. Conditions put on the receipt of articles at the railroad station may be conditions upon the traffic, and necessarily are within the regulating power of Congress. Their inducement and aim may be to secure a prompter performance of duty by the carrier, and so far beneficent. But that is not the question. The question is, Where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the Interstate Commerce Act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a "through route," must be established, filed and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of in-

juries received by shippers is given through the Interstate Commerce Commission. See *Robinson* v. *B. & O. R. R. Co.* (appears in next number). By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties.

We cannot assume that it was without consideration of its necessity that Congress enacted § 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem, Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulation be not exclusive, this situation is presented: If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the States' and to Congress the power which belongs to Congress.

But if there be a middle ground, it certainly can be argued that the cases establish that it is passed when the

state regulation burdens interstate commerce, and whether a regulation has such effect may be determined by its sanctions. If a penalty of $50 for refusing to receive freight "when tendered" be no burden on interstate commerce beyond the power of a State to impose, would a penalty of $100 or $1,000 likewise be no burden? May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina statute, it is to be remembered, is independent of the damage received, and what excuses or defenses may be offered the decisions of the court leave in doubt. The statute seems to permit none. The case at bar illustrates somewhat its peremptory character, and the case which was argued with this (*Southern Railway Company* v. *Reid and Beam*, *post*, p. 444,) still more so. The plaintiffs in that action sued for $750 for refusal to receive and forward a carload of shingles and recovered $350, although one of them testified that they "never lost a cent." The circumstance was declared by the court, citing a prior case, to be immaterial, as the penalties were "not given wholly on the idea of making pecuniary compensation to the party injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment." The policy of the statute, then, is to require the acceptance of freight "when tendered," with daily accumulating penalties upon refusal to do so. If such power be conceded, what is the limit of its exercise, either as to conditions or penalties?

One other contention remains to be noticed. It is said that there is not presented in the case the dilemma of alternative penalties, for the Hepburn Act, it is pointed out, requires a schedule of rates to be filed only "when the through route and joint rate have been established," and that none were established in the case at bar and that, therefore, the railway company was not put to a choice of obligations and subjected to punishment however it might

choose. But it is also provided that "if no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation." There is nothing in the record to show that there were such established separate rates and that separately established rates were published and kept open for inspection. Indeed, the record shows that a through rate had to be fixed by the several carriers in the through route.

It was only because of the obligation imposed by the Hepburn Act that the railway company refused to receive the goods tendered to it and the agent of the company informed defendant in error that he was without power to comply with her demand. He promptly acted in the matter when the lines over which the freight had to pass established a joint rate. He then received the goods, issued a bill of lading therefor, "and the shipment went forward to its destination."

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

SOUTHERN RAILWAY COMPANY *v.* REID & BEAM.

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

No. 80. Argued December 6, 1911.—Decided January 9, 1912.

Southern Railway Co. v. *Reid*, *ante*, p. 424, followed to effect that legislation of Congress in regard to matters of interstate commerce need not be inhibitive, but only to occupy the field, in order to supersede state statutes on the same subject. *Northern Pacific Ry. Co.* v. *Washington*, *ante*, p. 370.

This case is controlled by and decided on authority of *Southern Railway Co.* v. *Reid*, *ante*, p. 424, notwithstanding certain differences in fact.

153 N. Car. 753, reversed.

THE facts, which involve the validity of a statute of North Carolina affecting common carriers, are stated in the opinion.

Mr. Alfred P. Thom, with whom *Mr. John K. Graves* was on the brief, for plaintiff in error in this case and in No. 487 argued simultaneously herewith (see p. 425, *ante*).

Mr. Plummer Stewart and *Mr. Jno. A. McRae* for defendants in error in this case and in No. 487 argued simultaneously therewith (see p. 429, *ante*).

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves a consideration of the statute of North Carolina passed on in No. 487, and was argued and submitted therewith. The question, then, only is whether the principles there expressed apply to it.

The action was brought by defendants in error, a copartnership, against the plaintiff in error, a railway company and a common carrier, for penalties under the statute, which is set out in the opinion in No. 487, to recover the sum of $50 a day for fifteen days for failing and refusing for such time to receive a carload of shingles tendered to the company at Rutherfordton, North Carolina, for shipment to one James Haddox, at Scottsville, Tennessee.

The case was tried before a jury, which rendered a verdict for the plaintiff firm (defendants in error) for the sum of $350, upon which judgment was duly entered. It was

affirmed by the Supreme Court, two of the members of the court dissenting as in No. 487. 150 N. Car. 753.

The statute is attacked on the same ground as in case No. 487. The facts, as recited by the Supreme Court, are as follows: Defendants in error having received an order for a carload of shingles from Haddox at Scottsville, Tennessee, applied at Rutherfordton to the railway company for a car. It was furnished and loaded, shipping instructions given, prepayment of the freight tendered and a bill of lading demanded. The agent of the company refused to give the bill of lading or ship the goods, assigning as a reason that he did not know where Scottsville was nor the road to it. Defendants in error demanded that the goods be shipped, and told the agent that they would pay any additional amount found to be due, and requested that when the agent got ready to ship to telephone them and they would come over and pay the freight due. Another agent "came to take over the agency, and being told, on inquiry of plaintiffs (defendants in error), about the carload of shingles and what the trouble was," he asked for instructions, which were given him, and on July 19th the freight was paid, the bill of lading given, and the shingles shipped as directed, "arriving at their destination without further let or hindrance." Defendants in error testified that they had received no pecuniary injury by reason of the delay, and that the first agent "still had charge of the depot when the shingles were shipped."

There was evidence offered on the part of the railway company that Scottville was an industrial siding on the Knoxville & Augusta Road eight or ten miles out of Knoxville, established for the convenience of persons shipping brick from that point, and that bills of lading for goods shipped to and from that point were made out at Rockford, a regular station, two miles distant. It was testified that since the consolidation of the East Tennessee & Virginia Railroad with the old Richmond & Danville, the

railway company (plaintiff in error) had paid all of the employés of the Knoxville & Augusta Road their salaries.

The statute was attacked by the railway company in its requests for certain instructions, the refusal to give which was sustained by the Supreme Court. The court intimated that, as had been held in a former opinion, the commerce clause of the Constitution was not involved in the case on the ground "that the penalty [under the statute] accrues before the 'freight is accepted for transportation,' and on the principle applied in the case of *Coe* v. *Errol*, 116 U. S. 517." But the court, conceding, *arguendo*, "that the goods when tendered for transportation to another State, as to matters involved in such transportation, and in reference to these penalty statutes, should be considered and dealt with as interstate commerce," was of opinion that the contention of the railway company could not be sustained, and concluded, after a careful discussion of cases in this court and in the state court, that the statute did not burden interstate commerce, and that, "in the absence of inhibitive congressional legislation, or of interfering action on the part of the Interstate Commerce Commission, the statute in question is a valid regulation in direct and reasonable enforcement of the duties incumbent on defendant as a common carrier."

We have shown in the opinion in No. 487, *ante*, p. 424, that there need not be directly "inhibitive congressional legislation," but congressional legislation which occupies the field of regulation and thereby excludes action by the State. *Northern Pacific Ry. Co.* v. *State of Washington*, *ante*, p. 370.

The facts in this case are somewhat different from those in No. 487 and require to be noticed. The majority of the court found that it did not appear from the testimony that the railway company had not filed its schedule of rates with the Interstate Commerce Commission to Scottville, Tennessee, the court observing that it could "hardly be

seriously contended that the difference between Scottville, Tenn., and Scottsville, Tennessee is of the substance." The court further said: "The presumption is that the company has complied with the law. And if it were otherwise, we are of opinion that the act of Congress, and the orders of the Commission made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and does not constitute such interfering action. See *Harrell* v. *Ry.*, 144 N. C., pp. 540–541."

We have set forth in No. 487 our reasons for holding otherwise.

Judgment reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice LURTON does not agree with the court as to the facts of this case, and for that reason does not think that it falls under No. 487. He, therefore, dissents.

TREAT, TREASURER OF COCONINO COUNTY, ARIZONA, *v.* GRAND CANYON RAILWAY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 86. Argued December 8, 11, 1911.—Decided January 9, 1912.

Where it is inherently legal and protects private rights, the construction given a local statute by the Supreme Court of a Territory will be followed by this court, unless there is such manifest error as to warrant reversal.

In this case this court follows the construction, given to a territorial statute of Arizona by the Supreme Court of that Territory, that an exemption from taxation of certain railroad property went with the land and extended to assigns of the first road.

12 Arizona, 69, 117, affirmed.

THE facts are stated in the opinion.

Mr. Elias S. Clark and *Mr. William C. Prentiss*, with whom *Mr. Henry F. Ashurst* was on the brief, for appellants:

The exemption laws do not amount to a contract protected by the constitutional guarantee. *Wisconsin &c. Co.* v. *Powers*, 191 U. S. 379.

Although these acts confer the exemption upon the constructing company, its successors and assigns, the words successors and assigns are not words of contract, but merely expressions of legislative intent to be considered and construed in connection with the expression of legislative intent to be found in the statute under which the purchasing company derives its franchise and authority to succeed the constructing company.

Even if these acts amounted to contracts with the constructing companies, the constitutional guarantee would extend only to those companies, and whether or not the exemption would pass to a successor or assign would likewise depend on the legislative intent to be determined in the same manner. *Rochester R. R. Co.* v. *Rochester*, 205 U. S. 236.

Section 8 of the railroad law (No. 3) of Arizona of 1897, is effective to deprive a corporation created under Act No. 3 of 1897 of the power to succeed to an exemption from taxation under then existing or future law of the Territory of Arizona.

This is also rendered clear by the legislative history of Act No. 3. Section 8 was not in the bill as introduced, but was inserted as an amendment while the bill was under consideration in the Council. See Journal of the Legislative Assembly of Arizona, 1897, Council Bill No. 3, pp. 321 and 346; see also Act No. 28, of 1897.

The trial court reached the conclusion that the property of the railway company was not exempt from taxa-

tion under existing law, for the reason that such exemption as its predecessor in interest, the Sante Fe and Grand Canyon Railway Company, may have had, did not pass to the plaintiff under and by virtue of its purchase of the latter's property. *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 617; *Chesapeake & Ohio Railway Co.* v. *Miller*, 114 U. S. 176. The Supreme Court held otherwise.

The rule that in case of doubt regarding the meaning of a territorial statute, this court will lean to the construction placed upon the same by the Supreme Court of the Territory has no application to this case, as it cannot be reasonably claimed that any doubt exists of the legislative intent to deny exemption from taxation to companies purchasing railroad property and franchises at judicial sale. But should doubt be suggested, and the claim be made that it is such as should incline the court to lean to the construction given by the court below, then under the settled rule that doubt must be resolved against the exemption, the effect is the same as though the legislative intent to deny the exemption were unmistakable, and the ruling of the court below resolving the doubt in favor of the exemption was clearly wrong.

Mr. Robert Dunlap, with whom *Mr. T. J. Norton* and *Mr. Gardiner Lathrop* were on the brief, for appellee.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill brought by the Railway Company, the appellee, to restrain the collection of taxes from which it says that it is exempt. The facts in brief are these: A predecessor of the appellee, the Santa Fe and Grand Canyon Railroad Company, between August, 1899, and October, 1900, built over fifty-six miles of the road concerned. In July, 1901, this road was sold on foreclosure sale to pur-

chasers who organized the appellee and in August conveyed the road to it. The new company finished the road to the edge of the Grand Canyon and laid out stations and hotel grounds at the end. In 1906 the Territorial Board undertook to levy the tax complained of. The Supreme Court held that the appellee was exempt. 12 Arizona, 69; 95 Pac. Rep. 187; 12 Arizona, 117; 100 Pac. Rep. 438.

The railroad company was organized under Act No. 3, February 8, 1897, of the Territory (Laws 1897, p. 5) which authorized such corporations to be formed for the purpose of buying the property of railroads sold on foreclosure, and to buy and exercise "all the rights, privileges, franchises, immunities and powers" of their predecessors. By § 7 such corporations were to have all rights, immunities, &c., then or thereafter given to any railroad organized under the general laws; but by § 8 it was provided that the act should not be construed "to give to any corporation created under it, any exemption from taxation created by any existing or future exemption laws of the Territory of Arizona." The question does not stand on this act alone, however, and the cases discussed in *Rochester Railway Co.* v. *Rochester*, 205 U. S. 236, for by a later statute of March 16, 1899, No. 68 (Laws 1899, p. 79) "for the purpose of inducing and encouraging the construction of railroads" it was provided that the "property used or necessary in the construction and operation of railroads," of roads thereafter constructed, "whether owned or operated by a person or persons, association or railway corporation, his their or its successors or assigns," should be exempt from all manner of taxation for ten years from the date of the act. The Supreme Court held that this exemption was *in rem*, so to speak, went with the land, and extended to the assigns of the first road.

No doubt a strong argument can be made and was made for a different view, based on the passage before and on the date of the act of 1897 of statutes like that of 1899.

But the considerations that prevailed also are cogent and so obvious as not to need statement. Moreover, the question is not whether the later statute constituted a contract, *Damon* v. *Hawaii*, 194 U. S. 154, 160; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379. The courts of the Territory have given to the railroad the rights that it claims, as against the territorial authorities seeking to levy the tax. The only question is whether any sufficient reason appears for not following the construction given to a local statute by the territorial court, when that construction is inherently reasonable, is at least the first to strike the mind, and is one that protects private rights. It is enough to answer that, on the principle followed so far as may be by this court, there is no such manifest error as to warrant us in reversing the decision below. *Fox* v. *Haarstick*, 156 U. S. 674, 679. *English* v. *Arizona*, 214 U. S. 359, 361, 363.

Judgment affirmed.

GANDIA *v.* PETTINGILL.

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

No. 97. Argued December 14, 1911.—Decided January 9, 1912.

In the absence of express malice or excess, publication of actual facts is not libellous, and in case of mere excess without express malice the only liability is for damages attributable to the excess; and refusal of the trial court to charge to this effect is error.

Quære: whether attributing to a person conduct that is lawful can be libellous.

The stricter practice is to note the exceptions before the jury retires; but if all the exceptions are noted in open court after jury returns and no wrong is suffered, an exception will not be sustained on that ground.

4 Porto Rico Fed. Rep. 383, reversed.

THE facts are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. William Hitz* and *Mr. H. H. Scoville* were on the brief, for plaintiffs in error:

It was error in law on the part of the trial judge to refuse to permit counsel for defendant below to state, while the jury was yet at the bar, his exceptions to such portions of the court's instructions to the jury as seemed to him to be objectionable either in matter of law or in matter of fact. *Phelps* v. *Mayer*, 15 How. 160; *United States* v. *Breitling*, 20 How. 252; *Dredge* v. *Forsyth*, 2 Black, 563, 564; *Bram* v. *United States*, 168 U. S. 532, 571.

The rule has been frequently reiterated and followed in the inferior Federal courts. *Stone* v. *United States*, 64 Fed. Rep. 667, 677; *Little Rock Granite Co.* v. *Dallas Co.*, 66 Fed. Rep. 522; *Johnson* v. *Garber*, 73 Fed. Rep. 523; *Merchants' Bank* v. *McGraw*, 76 Fed. Rep. 930, 935; *New England Co.* v. *Cathicolicon Co.*, 79 Fed. Rep. 294, 295; *West. Un. Tel. Co.* v. *Baker*, 85 Fed. Rep. 690; *Greene* v. *United States*, 154 Fed. Rep. 401, 412; *Accident Assn.* v. *Fulton*, 79 Fed. Rep. 423; *Dalton* v. *Moore*, 141 Fed. Rep. 311, 314; *Mining Co.* v. *Firment*, 170 Fed. Rep. 151; *Mann* v. *Dempster*, 179 Fed. Rep. 837.

In *Perez* v. *Fernandez*, 202 U. S. 80, 91, this court spoke of the difficulty of undertaking to establish a common-law court and system of jurisprudence in a country hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence.

In the case at bar, however, the Porto Rican legislature by statutory enactment had "established" the civil action to recover damages for libel and slander and had carefully defined each of such offenses, had established certain rules for the guidance of the courts in the administration of such actions, and had declared in precise phrase

when the existence of malice might or might not be presumed, and had provided by § VI, that if the plaintiff be a public employé, and the libel refers to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges.

Under the generally established American law in every instance of slander, either verbal or written, malice is an essential ingredient, and whenever substantially averred and the language, either written or spoken, is proved as laid, its existence will be inferred by the law until, in the event of denial, the proofs be overthrown or the language itself be satisfactorily explained.

Under the Porto Rican law publications or communications of certain specified classes (see § 4) are expressly excluded from any presumption or inference of malice—an exception to the law of inference being (see § 5) cases of injurious communications or writings "made without justifiable motive and addressed to persons other than to a relative within the third degree or other persons specifically identified."

Under the American law words prejudicial in a pecuniary sense, *e. g.*, implying unfitness of a person in office, or improper conduct on his part in connection therewith, are said to be actionable *per se*, whereas, under the Porto Rican law (see § 6), if the plaintiff be a public employé and the alleged libel refers to acts connected with the conduct of his office, judgment shall be rendered for the defendant if he prove the truth of his charges.

Under the American law, in a criminal prosecution for libel, the truth of the charges made constitutes no defense: *White* v. *Nichols*, 3 How. 266; *Dorr* v. *United States*, 195 U. S. 138; although it is otherwise in the civil action to recover damages for libel.

Under the Porto Rican law the truth of the matters, written or spoken, of any public employé, is a complete defense to an action of libel and would equally seem to

constitute a defense in the case of private individuals in the absence of evidence tending to show that the publication had been "made without justifiable motive."

At no time did the plaintiff either deny or seek to disprove the truth in matter of fact of any of the statements contained in said publications; on the contrary, he expressly admitted the truth thereof.

The Porto Rican act of March 9, 1905 (Laws of Porto Rico, 1905–1906, p. 123), expressly declares: "Sec. 1. That the fiscal of the Supreme Court, *District Attorneys* and municipal judges are hereby prohibited from engaging in the practice of the law."

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

The complaint set forth a publication against plaintiff which was libellous *per se*. The language used showed a clear intent to injure plaintiff in his profession as a lawyer and to induce the public to believe that he was intentionally and continuously violating the law and guilty of unprofessional conduct.

The law of libel as it exists in most of the States is applicable in Porto Rico, § 568, Rev. Stat. of 1902; and as to what are libels actionable *per se*, see *White* v. *Nichols*, 3 How. 266, 285, 291.

Any publication tending to injure a plaintiff in his business or profession is actionable *per se*. *Peck* v. *Tribune Co.*, 214 U. S. 185; see also *Tillotson* v. *Cheetham*, 3 John. 56; *Tawney* v. *Simonson &c. Co.*, 109 Minnesota, 341; *Lathrop* v. *Sundberg*, 55 Washington, 144; *Kidder* v. *Bacon*, 74 Vermont, 263; *Wefford* v. *Meeks*, 129 Alabama, 349; *Burt* v. *Newspaper Co.*, 154 Massachusetts, 238; *Culmer* v. *Canby*, 41 C. C. A. 302; *Davis* v. *Shepstone*, 11 App. Cases 187.

The court below, instead of committing error to the prejudice of the defendant below, ruled more favorably to

him than the law required when it excluded from the consideration of the jury in estimating damages the amount of the plaintiff's salary from the date of his removal to the end of his term of office. *Sunley* v. *Insurance Co.*, 132 Iowa, 123; *Kidder* v. *Bacon, supra.*

The publications were not justifiable. It is quite different to say that charges are *justified* and *justifiable* than to say that they are *true* as charged. One is a matter of the opinion of the pleader, the other a matter of fact susceptible of proof. It is one thing to say that charges of "improper and immoral conduct" "are based upon facts"; quite another to say that such charges are each and every one of them *true in fact*—and to specify the facts which support each and all of them. The rule of justification is strict to that very extent. The justification must be as broad as the libel. And equally so that such a defense must specify facts, not be limited to generalities and conclusions. Newell on Slander and Libel (2d ed.), 796; *Morning Journal Assn.* v. *Duke*, 63 C. C. A. 459; *Com'l Pub. Co.* v. *Smith*, 79 C. C. A. 410; *Kansas City Star Co.* v. *Carlisle*, 47 C. C. A. 384.

If there was error it was harmless or without prejudice, and whether cured by instructions to the jury or in any other manner will not be considered cause for reversal. *Drumm-Flato Com. Co.* v. *Edmisson*, 208 U. S. 534; *Texas & P. Ry. Co.* v. *Volk*, 151 U. S. 73; *Hartford &c. Co.* v. *Unsell*, 144 U. S. 439; *N. Y., L. E. & W. R. R. Co.* v. *Madison*, 123 U. S. 524; *So. Ry. Co.* v. *St. Louis &c. Co.*, 82 C. C. A. 614; *Gilmore* v. *McBride*, 84 C. C. A. 274.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for libels and comes here upon a bill of exceptions after a verdict for the plaintiff. The alleged libels consist of a series of articles in a Porto Rican news-

paper, La Correspondencia. These articles stated that the plaintiff, Pettingill, while United States Attorney for Porto Rico, carried on a private practice also, and even acted as a lawyer on behalf of persons bringing suit against the Government of Porto Rico. It seems that, if the plaintiff had been an officer of the local government, he would have been forbidden the practice by the local law, and the articles convey the idea that if the practice is not prohibited also by the law for United States officials, it ought to be, especially as the Island is charged with a salary for the Attorney. The conduct of Mr. Pettingill in the above particulars is described as a monstrous immorality, a scandal, &c., &c. In the view that we take it is not necessary to state the charges here in detail, but it should be observed that in the declaration the plaintiff alleged that while United States Attorney he had a large private practice, and implied, as in his evidence he stated, that a part of this practice consisted of suits against the local government. So there was no issue on the matter of fact.

So far as the facts were concerned, the publication of them alone was not libellous. For apart from the question whether attributing to the plaintiff conduct that was lawful, as the plaintiff says, could be a libel, *Homer* v. *Engelhardt*, 117 Massachusetts, 539, he was a public officer in whose course of action connected with his office the citizens of Porto Rico had a serious interest, and anything bearing on such action was a legitimate subject of statement and comment. It was so at least in the absence of express malice, a phrase needing further analysis, although not for the purposes of this case. Therefore the only question open for consideration were the motives of the publication and whether the comment went beyond reasonable limits, which, of course, the defendant denied. But so far as we see from reading the charge, the judge did not approach the case from this point of view. For after saying to the jury

that fair comment upon the actions of public officials was privileged he went on "But you are instructed that in this case . . . [the articles] are what is known in law as libellous per se. . . . Therefore, in any event you must find for the plaintiff upon that issue and give him such damages as you may believe from all the facts and circumstances in the case he is entitled to," and after that proceeded to direct them only as to the conditions for finding punitive damages also. It is at least doubtful whether this instruction meant that the comments were excessive as matter of law. It rather would seem from the previous explanations given to the jury of the independence of United States officials notwithstanding the source of their salaries, and the instructions that the plaintiff's acts were lawful, that the defendant in order to justify himself would have to prove that they were wrong in law, and that his inability to do so might be considered as aggravation of the damages to be allowed, that the latter considerations alone were the ground for what we have quoted from the charge.

However this may be, what we have said is enough to show that the mind of the jury was not directed to what was the point of the case. We do not see how, making reasonable allowance for the somewhat more exuberant expressions of meridianal speech, it could be said as matter of law that the comments set out in the declaration went beyond the permitted line, and we think it at least doubtful whether the plaintiff would not have got all if not more than all that he could ask if he had been allowed to go to the jury on that issue. In the absence of express malice or excess the defendant was not liable at all, and in the case of mere excess without express malice the damages, if any, to which he was entitled were at most only such as could be attributed to the supposed excess. But what really hurt the plaintiff was not the comment but the fact. The witnesses for the plaintiff said that the people of Porto

Rico considered the acts charged immoral, and the statute referred to showed that such was their conception of public duty. It was peculiarly necessary therefore to instruct the jury that so far as the publication of facts disapproved by the community was concerned the plaintiff could not recover for it, however technically lawful his conduct might have been, except as we have stated above. Instructions were requested on the point, and the refusal to give them was excepted to, as also was the corresponding charge. Without nice criticism of the form of the requests it is enough to say that they were so nearly correct as to call the judge's attention to the matter and to require a different explanation of the defendant's rights.

An exception was taken to the judge's sending the jury out before the counsel for the defendant had stated all of his exceptions to the charge. The judge had told the counsel that he would not instruct the jury otherwise than as he had, and he allowed all the exceptions to be taken in open court after the jury had retired. No doubt it is the stricter practice to note the exceptions before the jury retires, (the judge of course having power to prevent counsel from making it an opportunity for a last word to them). *Phelps* v. *Mayer*, 15 How. 160. But in this case they were noted at the trial, in open court, *United States* v. *Breitling*, 20 How. 252; and in the circumstances stated the defendant suffered no wrong, so that we should not sustain an exception upon this ground.

Judgment reversed.

UNITED STATES *v.* McMULLEN ET AL., ADMINISTRATORS.

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

No. 100. Argued December 13, 14, 1911.—Decided January 9, 1912.

Under the provisions of the contract in this case for possible extensions of time, the sureties on the bond which was part of the contract were not discharged by reason of the extensions which were granted pursuant to the contract.

Where there is a penalty for avoidable delay in performance of a government contract, sureties are not discharged because the Government does not take steps against the contractor to collect the penalties.

Quære, whether where the contractor is given a right to extension of time if the Secretary of Navy approves, the Secretary is to be regarded as a third party or as representing the United States.

Annulling a contract by the Government does not mean in this case that the Government rescinded or avoided it, but that it would proceed no further with the contractor and would charge him with the difference in cost caused by his default.

When the Government relets a contract after default, the price for which it is relet must be assumed to be reasonable in absence of evidence to the contrary, and this is especially so when the difference is less than the sum stipulated as liquidated damages.

When the Government relets a contract, the sureties are not relieved because there are differences in the terms which diminish the cost of the work as relet.

A government contract is not unenforcible for want of certainty and mutuality because it allows changes by the United States, subject to provisions for change of compensation where proper.

The amount of work to be done under a government contract depends upon the appropriations made by Congress for carrying on the work, and this is implied whether expressed in the contract or not.

Where the answer does not deny that the contract was signed by the United States and the contract declares that it is, and it is signed by the Chief of Bureau of Yards and Docks, there is admission by implication that it was signed by the United States and is sufficient.

167 Fed. Rep. 460; 93 C. C. A. 96, reversed.

THE facts, which involve the liability of contractors and sureties upon a contract with the United States for dredging and a bond given for completion thereof, are stated in the opinion.

The Solicitor General for the United States.

Mr. Burke Corbet, with whom *Mr. John R. Selby* and *Mr. Edward J. Lynch* were on the brief, for defendants in error:

The time of performance was extended without the consent of sureties, and thereby they are discharged. *Miller* v. *Stewart*, 9 Wheat. 680; *Reese* v. *United States*, 9 Wall. 13; Fed. Cas. No. 9591; *Driscoll* v. *Winters*, 122 California, 66.

The only rule for the construction of a surety's obligation to perform a contract of suretyship is that of *strictissimi juris*. *Guarantee Co.* v. *Pressed Brick Co.*, 191 U. S. 416; *United States* v. *American Surety Co.*, 200 U. S. 197; see also *A. T. & D. Co.* v. *Laurinburg*, 163 Fed. Rep. 695; *Henry* v. *Artona Ins. Co.*, 79 Pac. Rep. 42; *Boppart* v. *Illinois Surety Co.*, 126 S. W. Rep. 771; *Lonergan* v. *S. A. L. & T. Co.*, 104 S. W. Rep. 1067; *Smith* v. *United States*, 2 Wall. 235; *United States* v. *McIntyre*, 11 Fed. Rep. 597; *United States* v. *Freel*, 186 U. S. 309.

A change in the time of performance of a contract is a material change, and will release sureties. *Earnshaw* v. *Boyer*, 60 Fed. Rep. 528; *Rowan* v. *Sharp's Rifle Mfg. Co.*, 33 Connecticut, 1; *United States* v. *Freel*, 92 Fed. Rep. 299; *S. C.*, aff'd 186 U. S. 309; *United States* v. *Howell*, Fed. Cas. No. 15,405; *Lane* v. *Scott*, 57 Texas, 367; *United States* v. *De Visser*, 10 Fed. Rep. 642; *Whitcher* v. *Hall*, 5 B. & C. 269; *Samuel* v. *Howarth*, 3 Merivale, 272; *Todd* v. *School Dist.*, 40 Michigan, 294; *Judah* v. *Zimmerman*, 22 Indiana, 388; *Barber* v. *Burrows*, 51 California, 404; *Fidelity Dep. Co.* v. *United States*, 137 Fed. Rep. 866.

It is the alteration of the contract, not the increase of

risk, that discharges the surety. *Victor Co.* v. *Scheffler*, 61 California, 532.

The special language in *United States* v. *Gleason*, 175 U. S. 588, 603, distinguishes it from this case; see *Davis* v. *La Crosse Assn.*, 99 N. W. Rep. 351; *Curry* v. *Olmstead*, 59 Atl. Rep. 392; *Stubbings* v. *World's Col. Exp. Co.*, 110 Ill. App. 210; *Phœnix Bridge Co.* v. *United States*, 38 Ct. Cl. 492.

The courts construe very strictly language claimed to be a consent in advance by the sureties to changes in the contract. Brandt on Suretyship, 3d ed., § 423; *Miller* v. *Spain*, 41 Oh. St. 376; *United States* v. *Freel*, 186 U. S. 309; *Plunket* v. *Davis Sewing Machine Co.*, 36 Atl. Rep. 115; *Lodge* v. *Kennedy*, 73 N. W. Rep. 523.

In the cases relied on by appellant there was a distinct provision that the owner should have power to alter the plans and specifications, and that such alterations should not in any manner invalidate the contract. In none of the cases was there a provision, as there is in this case, that the changes should be made in writing and signed by the parties, where the sureties are such parties: such were the cases of *Chester* v. *Leonard*, 68 Connecticut, 495; *Wehr* v. *St. Matthews Cong.*, 47 Maryland, 177; *U. S. F. & G. Co.* v. *United States*, 191 U. S. 416; *Am. Sur. Co.* v. *San. Ant. Loan & Tr. Co.*, 98 S. W. Rep. 387; *Reissaus* v. *White*, 106 S. W. Rep. 607; *Hayden* v. *Cook*, 34 Nebraska, 670; 52 N. W. Rep. 165.

The United States, in so far as it contracts with private individuals, is subject to the same laws, and its contracts are to be construed as though made by private individuals. *United States* v. *Boswick*, 94 U. S. 66; *Adle* v. *Metoyer*, 1 La. Ann. 254.

The change of the time of performance amounted to a new contract on that point.

While part of the contract was yet to be performed, the parties by mutual agreement changed one of its terms

and substituted a new term on that point. See cases *supra.*

The original contract does not provide for extensions of time.

It is only where the original contract provides that one of the parties *shall*, not *may*, in certain cases make a change, or provides that no change made shall invalidate the contract, is the surety bound when the change is made. Such are the cases of *Pascault* v. *Cochran*, 34 Fed. Rep. 358; *St. Louis Brewing Co.* v. *Hayes*, 71 Fed. Rep. 110; *Glass Co.* v. *Matthews*, 89 Fed Rep. 828; *Mattingly* v. *Riley*, 49 S. W. Rep. 799; *Stevens* v. *Pendleton*, 83 Michigan, 342; *N. Y. Life Ins. Co.* v. *Loomis*, 100 Wisconsin, 17; *Stein* v. *Jones*, 18 Ill. App. 543; *Western Bldg. Co.* v. *Fitzmaurice*, 7 Mo. App. 283; *Standard Co.* v. *Stone*, 35 N. Y. App. Div. 62; *People's Lumber Co.* v. *Gilliard*, 136 California, 55.

In every case on which the court below relied the contract contains a provision by which contractor binds himself to make change if desired. See *Village* v. *Leonard*, 68 Connecticut, 495; 37 Atl. Rep. 397; *De Mattos* v. *Jordan*, 15 Washington, 378; 46 Pac. Rep. 402; *Northern Light Lodge* v. *Kennedy*, 73 N. W. Rep. 524; *Beers* v. *Wolf*, 116 Missouri, 179; 22 S. W. Rep. 620; *Hayden* v. *Cook*, 34 Nebraska, 670; 52 N. W. Rep. 165.

The contract in the case at bar did not contemplate supplementary agreements extending the time for performance, within the meaning of the rule in these cases, nor within the meaning of any rule counsel has found.

The liability of a surety is never to be extended by implication. *Reese* v. *United States*, 9 Wall. 14.

If the contract is construed so as to provide for changes as to time and other points, such changes could only be made by agreement signed by sureties. *Beers* v. *Wolf*, 22 S. W. Rep. 620, *supra; Lodge* v. *Kennedy*, 73 N. W. Rep. 524; *Eldridge* v. *Fahr*, 59 Mo. App. 44; *Killoren* v. *Meehan*, 55 Mo. App. 427, and other cases *supra.*

The contract was changed by the action of the Government in agreeing that no materials should be deposited on shore.

Very slight changes in the requirements of contracts have been held to release the sureties. *United States* v. *Corwinne*, Fed. Cas. No. 14,871; *United States* v. *Tillotson*, Fed. Cas. No. 16,524; *United States* v. *Case*, Fed. Cas. No. 14,743; *Zeigler* v. *Hallahan*, 131 Fed. Rep. 205. *Cambridge Sav. Bk.* v. *Hyde*, 131 Massachusetts, 77, does not apply.

Whenever it becomes the right of the owner to complete at expense of contractor it is not necessary that the strict letter of the contract be followed. In those cases, however, the work to be done was a certain specific construction and the changes were in details of the materials or methods to be used in the construction, and it was shown that the construction was actually substantially completed as contracted for. Where that is not the case, the surety is discharged; see *Chesapeake Transit Co.* v. *Walker & Son*, 158 Fed. Rep. 850; *United States* v. *Corwinne*, Fed. Cas. No. 14,871.

The United States, having annulled the contract without reservation of right to complete the work and charge the cost of completion to contract, such cost cannot be recovered as moneys expended.

When a contract proper and specifications attached thereto are in conflict, the contract proper, or signed portion of the whole, governs. *Meyer* v. *Berlandi* (Minn., 1893), 53 Minnesota, 59; *Palladino* v. *New York*, 10 N. Y. Supp. 66; *Demarest* v. *Haide*, 52 N. Y. Sup. Ct. 398.

Viewing the action as one for damages for breach of contract, the United States has failed to show amount of damages. 13 Cyc. 162, 192; 8 Am. & Eng. Encyc. of Law, 556. See also *Insley* v. *Shepard*, 31 Fed. Rep. 869; *Goldboro* v. *Moffitt*, 49 Fed. Rep. 273, reversed, 52 Fed. Rep. 560; *Stillwell &c. Co.* v. *Phelps*, 130 U. S. 520; *Von*

Dorn v. *Mengedoht*, 59 N. W. Rep. 800; *Savage* v. *Glenn*, 10 Oregon, 440; *Anderson* v. *Nordstrum*, 61 N. W. Rep. 1132.

The rule is not the difference between contract cost and the actual cost; but the difference between contract cost and the reasonable cost or necessary cost. This distinction is pointed out in *State* v. *Ingram*, 27 No. Car. (5 Ired.) 441; *Cincinnati Ry. Co.* v. *Carthage*, 35 Oh. St. 631; *Fletcher* v. *Milburn Mfg. Co.*, 35 Mo. App. 321.

It has not been shown here whether or not the United States ever completed this work of construction. *Chesapeake Transit Co.* v. *Walker & Son*, 158 Fed. Rep. 850.

It cannot be said that because the accepted bid was the lowest obtainable by the advertisement made that it was reasonable for the completion of the work under the original contract, for it was not a bid to do the same or substantially the same work. *Goldsboro* v. *Moffitt*, 49 Fed. Rep. 213; *New York* v. *Second Ave. Ry. Co.*, 55 Am. Rep. 839; *Kidd* v. *McCormick*, 83 N. Y. 391; *Brown* v. *United States*, 152 Fed. Rep. 964.

The contract with the New York Dredging Company was unenforcible against it for uncertainty and want of mutuality. 7 Am. & Eng. Encyc. of Law, 116; 9 Cyc. 248; *Pulliam* v. *Schimpf*, 19 So. Rep. 428; *Davie* v. *Lumberman's Min. Co.*, 53 N. W. Rep. 625.

The United States is seeking to enforce a unilateral contract in which it is the promisee. One party to the contract cannot be liable in damages when the other is not. 7 A. & E. Encyc. of Law, 114; 9 Cyc. 327; *Dorsey* v. *Packard*, 12 How. 126.

An agreement is not binding on either party unless both are bound. In the case at bar the United States was not bound to anything whatever. *Morrow* v. *Southern Express Co.*, 28 So. Rep. 998; *Jordan* v. *Indianapolis Water Co.*, 61 N. E. Rep. 12; *Vogel* v. *Pekoc*, 42 N. E. Rep. 386; *Crane* v. *Crane & Co.*, 105 Fed. Rep. 869.

There was no means whereby the burden on the

Dredging Company could be ascertained at all, the quantity of dredging being left absolutely to be determined by United States. *Harvester King Co.* v. *Mitchell Co.*, 89 Fed. Rep. 173; *American Cotton Oil Co.* v. *Kirk*, 68 Fed. Rep. 791; *Dennie* v. *Slyfield*, 117 Fed. Rep. 474.

The case at bar is easily distinguishable from cases cited in *Crane* v. *Crane*, 105 Fed. Rep. 869, where agreements to furnish such supplies as may be needed during a certain period for business or manufacture have been upheld.

In the case at bar the United States could vary the amount of work to be done to any extent, could vary the location of area to be dredged to any extent, and in fact, as is shown, decided to have performed only 149,000 cubic yards instead of one million, and claims that the contract is performed. *Cold Blast Transp. Co.* v. *Kansas &c. Co.*, 114 Fed. Rep. 81.

The contract was void for uncertainty and want of mutuality.

The rule that where a contract on its face assumes to provide for all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, *Shipman* v. *United States*, 18 Ct. Cl. 146, does not apply to this case.

It would be unconscionable to hold that United States could advertise for bids for a certain work of dredging approximately one million cubic yards, so as to form a deep water basin, thirty feet deep, on a marked area; accept a bid based on that amount of work; and then hold the contractor to a contract for dredging a very much smaller quantity at the same rate because the appropriation was not sufficient to pay for the work as originally planned, for which bid was submitted.

Plaintiff in error cannot now be heard on the question of the claim for liquidated damages urged in the Circuit Court, such claim having been disallowed by that court.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit upon a contract for dredging and a bond made part of the contract, both executed by the New York Dredging Company as principal and by the defendants in error as sureties. The plaintiff got judgment in the Circuit Court, but in the Circuit Court of Appeals the judgment was reversed on the ground that the time for performance had been extended, and was ordered to be entered for the defendants. 167 Fed. Rep. 460. 93 C. C. A. 96. The contract provided that if, during the progress of the work, any changes in the plans or specifications should be deemed desirable by the Government, the changes in compensation should be ascertained in stated ways. The work was to begin within thirty days from the date of the contract, October 25, 1897, and to be completed in sixteen calendar months from the same date. In case of unavoidable delays, through accident, storm, or other act of Providence, the contractor was to notify the officer in charge of the occurrence &c., to provide for an investigation. In case of avoidable delays no extension of time would be recommended except on condition that the contractor bear specified costs and other expenses, to be deducted from the money coming due to it under the contract. No extension of time was to be granted except upon the authority of the Secretary of the Navy. In case of delay beyond the period fixed by the contract deductions of fifty dollars per day might be made in the discretion of the Secretary of the Navy as liquidated damages. In case of the contractor's failure in any respect to perform the contract the United States reserved the option to declare it void without prejudice to its right 'to recover for defaults herein or violations hereof,' and might recover as liquidated damages a sum equal to the penalty of the bond ($30,000).

The contractor began its preparations on the spot on

November 26, 1897, and began actual dredging in the following March. It was bound to finish by February 25, 1899. In January, 1899, it asked for an extension of time on account of storms, accidents, unforeseen hardness of material and other difficulties. On February 15 the time was extended by the Secretary of the Navy to December 30, 1899. But in about two months the contractor stopped work and asked leave to dump in deep water instead of on shore. This was refused. There were another application and refusal and further correspondence, and finally leave was granted on February 21, 1900. The contractor, however, did no more work after April, 1899. On May 25, 1901, the Navy Department declared the contract void, and a new contract was made, after advertisement in the required way, by which a third party was employed to complete the work at the lowest rate that the Government could get by such a bid. The damages allowed in the Circuit Court were the difference in cost between the old contract and the new; viz. $25,588.02 with interest, or $33,389.52 in all.

The defence is rested mainly on the extension of time, it not appearing that the sureties assented to the change otherwise than by the contract, which, it is said, merely recognizes what was true without it, that the contractor might ask for more time and the Government grant it if so minded. It is argued that the expression of the obvious does not alter the general rule of law. But the question is not what was possible but what was contemplated as not improbable, and we are of opinion that the sureties were not discharged. There is no sacrosanct prohibition of change as against them; the law has no objection to it if they assent. Whether they have done so or not is simply a question of construction and good sense, taking words and circumstances into account. If we should assume in their favor that in this case there could be no change without mutual agreement, still in our opinion this contract so

definitely contemplated what the nature of the work made manifest, that it might be necessary or very convenient to extend the time; that the sureties must be taken to have contemplated it also as permissible against themselves. In *United States* v. *Freel*, 186 U. S. 309, 317, it was recognized that a clause similar to the one to which we have referred concerning the case of the United States deeming changes desirable would authorize some changes of plan without discharging the sureties. It is true that that contract contained a proviso that no change of the kind should affect the validity of the contract, which of course it would not in any event if the contractor agreed to it. But the sureties, so far as appears, signed the bond only and were sued upon that. The proviso did not affect their case. See also *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 424.

It is urged that the last mentioned section dealing with changes deemed desirable by the Government requires that they, as well as the increased or diminished compensation, must be agreed to in writing by the parties to the contract before they are begun; and it is suggested that this requires the consent of the sureties. We do not read it so. We think that so far as this clause goes it contemplates an imperative right on the part of the Government to make a change, but requires a writing as a condition of going on. See Rev. Stat., § 3744. The same notion is repeated in the specifications with even more definite assumption that the Government may make changes if its sees fit. "Should it be to the interest of the Government to make any changes in the plans . . . the . . . compensation is to be determined" &c. So again the Government reserves an unqualified right to change the limits of the dredging and the points of deposit. Moreover, comparing the clause with the specifications, which more or less repeat the provisions, as we have said, and deal with the contractor *eo nomine*, we should be inclined to construe

the word parties as meaning the contractor and the United States. But we do not delay upon this, as the case must be decided on the provisions dealing expressly with extension of time, and we have referred to the other clauses simply to show that in other particulars, as well as time, the sureties were going into an undertaking which was subject to contingencies of several sorts. It was limited by the appropriations available. It might be modified in plan. The limits of dredging might be changed. Necessity or convenience might require an extension of time.

We should be inclined to suppose that the extension was allowed as an unavoidable delay. But if it was allowed as an avoidable one, it does not appear that the Government did not enforce the condition as to the costs to be borne by the contractor, and if it took no steps to collect them the sureties were not concerned. The contract was not altered, and insistance by the United States would have done them no good.

The construction that we adopt is fortified by the provision for deductions of $50 per day for delay beyond the period fixed for the end of the work. For even though this fell only on the contractor it created a necessity for extension in possible cases, to which the sureties must be deemed to have assented rather than expose their principal to such a risk. Manifestly if the construction now contended for by them had been written in it would have created a strong motive against relaxations that would have let them off. We deem what we had said sufficient to justify our conclusions without considering the argument of the Solicitor General that the contractor was given a right to the extension of time if the Secretary of the Navy decided for it, and that the Secretary of the Navy is to be regarded as a third party and stranger to the contract rather than as representing the United States. See *United States* v. *Gleason*, 175 U. S. 588. Of course if the Secre-

tary be so regarded the contractor's right is made out, as the extension would be independent of the will of the other party to the contract, the United States.

The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract, as it was said. The infelicity of the word annul has been adverted to and its meaning explained heretofore. If notice had been given before the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 340. *United States* v. *O'Brien*, 220 U. S. 321, 328. At the time when the notice was given it was merely a ceremony to mark the point of default as a preliminary to employing some one else. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get some one else to complete the work and to charge the defendants with the reasonable difference in cost. Indeed this right was expressly stipulated in the specifications, if during the progress of the work a board should recommend that the contract be 'annulled' on the ground that it would not be completed in time. The cost to the United States was the least for which it could get the work done under the conditions upon which the Government was bound to contract, and must be assumed to have been reasonable in the absence of any evidence to the contrary. *New York* v. *Second Avenue R. R. Co.*, 102 N. Y. 572. *Baer* v. *Sleicher*, 153 Fed. Rep. 129. 82 C. C. A. 281. It was less than the sum stipulated as liquidated damages. *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

The objection that the second contractor does not appear to have completed the work intended to be accomplished

by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.

As little need be said in answer to the argument that there was no enforcible contract for want of certainty and mutuality. The power to change details reserved by the United States did not make the contract any the worse, and there were full provisions for ascertaining a change in compensation where any such change was proper. There was nothing warranting an enlargement of the plan beyond the channel of Beaufort River, or the purpose indicated. The contract estimated the amount of material to be removed, and as there were different prices per yard for earth and rock, this amount was expressly made subject to the appropriations, as without expression would have been implied. See Rev. Stat., § 3733. There was some suggestion at the bar that the contract was not signed by the United States. The answer does not deny it, but by implication admits it. The contract says that it is made by the United States by E. O. Matthews, Chief of the Bureau of Yards and Docks, and it is signed by E. O. Matthews, Chief of the Bureau of Yards and Docks, which is enough. The matter does not seem to us to need discussion at greater length.

Judgment of Circuit Court of Appeals reversed.
Judgment of Circuit Court affirmed.

CUBA RAILROAD COMPANY *v.* CROSBY.

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

No. 124. Argued December 18, 1911.—Decided January 9, 1912.

In dealing with rudimentary contracts, or torts made or committed abroad, courts may assume a liability to exist if nothing to the contrary appears, but they cannot assume that the rights and liabilities are fixed and measured in the same manner in foreign countries as they are in this.

With rare exceptions, the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it.

The extension of hospitality of our courts to foreign suitors must not be made a cover for injustice to defendants of whom they may be able to lay hold.

There is no general presumption that the law of Cuba as inherited from Spain and as since modified is the same as the common law.

While as between two common-law countries the common law may be presumed to be the same in one as in the other, a statute of one would not be presumed to be the statute of the other.

A trial court of the United States cannot presume that the same obligation rests upon an employer in Cuba as in this country to repair defects in machinery called to his attention, or in case of failure to repair to be deprived of the fellow-servants defense. Such a rule of law, if existent in a foreign jurisdiction, must be proved.

170 Fed. Rep. 369; 95 C. C. A. 539, reversed.

THE facts are stated in the opinion.

Mr. Howard Mansfield for petitioner:

The courts of the United States should not take cognizance of an alleged cause of action for a foreign tort where the rights of the parties under the foreign law cannot be certainly and definitely ascertained, and where

the foreign tribunal is equally available to both parties. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 129.

The rule is that the *lex loci delicti* determines whether or not there is a cause of action. *Machado* v. *Fontes* (1897), L. R. 2 Q. B. 231; *Phillips* v. *Eyre* (1876), L. R. 6 Q. B. 1; *Coyne* v. *Southern Pac. Co.* (1907), 155 Fed. Rep. 683; Minor's Conflict of Laws, § 202; Dicey on the Conflict of Laws; Moore's Notes, 659, 667; Cooley on Torts, 3d ed., 900; *Mexican Central Ry. Co.* v. *Chantry*, 136 Fed. Rep. 316; *Mexican Cent. Ry. Co.* v. *Eckman*, 205 U. S. 538.

The last two cases dispose of the *dictum* in *Scott* v. *Lord Seymour*, 1 H. & C. 219, relied on by the Circuit Court, and by the majority of the Circuit Court of Appeals.

Federal courts will not take cognizance of a common tort which arose in a civil law jurisdiction, unless the acts complained of gave rise to an obligation in the jurisdiction where the alleged cause of action arose.

There can be no presumption that the common law extends to Cuba.

In the case of a country not settled by England or English colonists there is no presumption that the common law prevails there or that rights given by the common law exist in such country; and our courts must take judicial notice that Cuba was not settled by England or her colonists, but that it formed part of the Spanish possessions and that the civil law obtains there, and that that law is wholly statutory. *Davison* v. *Gibson*, 56 Fed. Rep. 443; *Savage* v. *O'Neil*, 44 N. Y. 298; *Aslanian* v. *Dostumian*, 174 Massachusetts, 328; *Mex. Cent. Ry. Co., Ltd.*, v. *Chantry*, 136 Fed. Rep. 316.

There can be no presumption, nor any ruling in the absence of pleading or proof, that the act alleged gave rise to a cause of action in the foreign country. *Evey* v. *Mexican Cent. R. R. Co.*, 81 Fed. Rep. 294; *Slater* v. *Mexican Natl. R. R. Co.*, 194 U. S. 120; *Stewart* v. *Baltimore &*

Ohio R. R. Co., 168 U. S. 445; *Atchison &c. Ry. Co.* v. *Sowers*, 213 U. S. 55; *Am. Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.* (1908), 164 Fed. Rep. 869; *Farrell* v. *Farrell*, 142 App. Div. 605; *McLeod* v. *Railroad Company*, 58 Vermont, 727.

The plaintiff Crosby, having alleged a transitory action arising in a civil law country, but failing to plead or prove that the acts complained of gave rise to any *obligatio*, the judgments below were clearly erroneous. *Mexican Cent. R. R. Co.* v. *Eckman*, 205 U. S. 538; 156 Fed. Rep. 1023; *Chouquette* v. *Mexican Cent. R. R. Co.*, 156 Fed. Rep. 1022; *Slater* v. *Mex. Natl. R. R. Co.*, 194 U. S. 120.

Where the act complained of happened in a foreign jurisdiction and a right of action is alleged to have arisen therefrom, the law of the forum and the remedy of the forum must in some degree resemble the law of the wrong and its remedy. *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190; *Herrick* v. *Minn. & St. L. Ry. Co.*, 31 Minnesota, 11; *Parrot* v. *Mexican Central Ry. Co.*, 207 Massachusetts, 184; Story on Conflict of Laws, 7th ed., § 637.

The precise presumptions requisite to sustain the judgments below have no proper legal basis. *Andrecsik* v. *N. J. Tube Co.*, 73 N. J. Law, 664; *District of Columbia* v. *McElligott*, 117 U. S. 621.

The rule applied by the courts below that the plaintiff was relieved from the assumption of risk of injury due to the defective machinery after he had noticed the defect and received from the superintendent a promise to remedy the defect, is not applicable, since that rule can properly be applied only to cases where the servant is *necessarily* exposed to the dangers of that particular machinery. *Roccia* v. *Black Diamond Mining Co.*, 121 Fed. Rep. 451 (1903); *Showalter* v. *Fairbanks Co.*, 60 N. W. Rep. 257; *Cincinnati &c.* v. *Robertson*, 139 Fed. Rep. 519; *Crookston Lumber Co.* v. *Boutin*, 149 Fed. Rep. 680; *Cooperage Co.* v. *Headrick*, 159 Fed. Rep. 680.

Mr. Benjamin M. Weinberg, with whom *Mr. Edwin L. Kalish* was on the brief, for respondent:

If the law of the State or country in which the injury occurred is opposed to the public policy of the State or country in which the action is brought, that law will not be followed. *Scott* v. *Seymour*, 1 H. & C. 219; *Morisette* v. *Can. Pac. Ry. Co.*, 76 Vermont, 267; *Walsh* v. *N. Y. & N. E. Ry. Co.*, 160 Massachusetts, 571; *Whitford* v. *Panama R. R. Co.*, 25 N. Y. 465.

It was immaterial that the plaintiff failed to prove his right of recovery under the Cuban law, as the court will presume, until otherwise proven, that the law of the place where the injury was inflicted, if such injury is predicated on the invasion of a generally known right, is the same as that prevailing in the trial forum. Jones on Evidence, 2d ed., § 84; Whart. Conflict Laws, §§ 778, 1531; 13 Am. & Eng. Enc. Law, 2d ed. 1060; 9 Enc. Pl. and Pr. 543; *Monroe* v. *Douglass*, 5 N. Y. 447; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 113, 129; *Savage* v. *O'Neil*, 44 N. Y. 298; *Sokel* v. *People*, 212 Illinois, 238; *The Scotland*, 105 U. S. 24. See also *Brown* v. *Gracey*, Dow. and Ry. N. P. 41; 16 Eng. Com. Law, 462*n.*; *Linton* v. *Moorehead*, 209 Pa. St. 646; *Scott* v. *Lord Seymour*, 1 H. & C. 219; *The Halley*, L. R. 2 P. C. 193; *Whitford* v. *Panama R. R. Co.*, 25 N. Y. 465; *Hynes* v. *McDermott*, 82 N. Y. 41; *Mackey* v. *Mexican Central R. R. Co.*, 78 N. Y. Supp. 966; *Pratt* v. *Roman Catholic Orph. Asy.*, 20 App. Div. 352; *S. C.*, affirmed, 166 N. Y. 592; *Carpenter* v. *Grand Trunk R. R. Co.*, 72 Maine, 388; *Woodrow* v. *O'Connor*, 28 Vermont, 776; *McLeod* v. *Conn. R. R. Co.*, 58 Vermont, 727; *State* v. *Morrill*, 68 Vermont, 60; *Loaziza* v. *Superior Court*, 85 California, 11; *Wickersham* v. *Johnson*, 104 California, 407; *Chase* v. *Alliance Ins. Co.*, 9 Allen, 311; *Aslanian* v. *Dostumian*, 174 Massachusetts, 328; *Mittenhal* v. *Mascagni*, 183 Massachusetts, 19; *Dainese* v. *Hale*, 91 U. S. 13; *Davison* v. *Gibson*, 56 Fed. Rep. 443; *Mexican Cent. R. R. Co.*

v. *Marshall*, 91 Fed. Rep. 933; *Mexican Cent. R. R. Co.* v. *Glover*, 107 Fed. Rep. 365.

In the absence of proof to the contrary and until the foreign law has been actually shown, the law of the land is to be applied. Dicey, Conflict of Laws, 2d ed. (1908), 39; *The M. Moxham*, 1 P. D. 107; *The Halley*, L. R. 2 P. C. 193; *Philips* v. *Eyre*, 4 L. R. Q. B. 225; 6 L. R. Q. B. 1 (1869); *Machado* v. *Fontes*, 2 L. R. Q. B. 542 (1897), also cited as 2 Q. B. (C. A.) 231–233 (1897); *Parrot* v. *Mexican Cent. R. R. Co.*, 207 Massachusetts, 184.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for the loss of a hand through a defect in machinery, in connection with which the defendant in error, the plaintiff, was employed. The plaintiff had noticed the defect and reported it, and, according to his testimony, had been promised that it should be repaired or replaced as soon as they had time, and he had been told to go on in the meanwhile. The jury was instructed that if that was what took place the defendant company assumed the risk for a reasonable time, and, in effect, that if that time had not expired the plaintiff was entitled to recover. The jury found for the plaintiff. The accident took place in Cuba, and no evidence was given as to the Cuban law, but the judge held that if that law was different from the *lex fori* it was for the defendant to allege and prove it, and that as it had pleaded only the general issue the verdict must stand. 158 Fed. Rep. 144. The judgment was affirmed by a majority of the Circuit Court of Appeals. 170 Fed. Rep. 369. 95 C. C. A. 539.

The court below went on the ground that in the absence of evidence to the contrary it would "apply the law as it conceives it to be, according to its idea of right and justice; or, in other words, according to the law of the forum." We regard this statement as too broad, and as having been wrongly applied to this case.

It may be that in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared. *Parrot* v. *Mexican Central Railway Co.*, 207 Massachusetts, 184. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. See *Bean* v. *Morris*, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights.

The language of Mr. Justice Bradley in *The Scotland*, 105 U. S. 24, with regard to the application of the *lex fori* to a case of collision between vessels belonging to different nations and so subject to no common law, referred to that class of cases and no others, and was used only in coming to the conclusion that foreign vessels might take advantage of our Limited Liability Act. See also *The Chattahoochee*, 173 U. S. 540, 550. Other exceptional cases are referred to in *American Banana Co.* v. *United Fruit Co.*, *ubi supra*, such as those arising in regions having no law that civilized countries would recognize as adequate. But as to causes of action arising in a civilized country the disregard of the foreign law occasionally indicated by some English judges before the theory to be applied was quite worked out must be disregarded in its turn. The

principle adopted by the decisions of this court is clear. See also Dicey, Confl. of Laws, 2d ed., 647 *et seq.*

We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold.

In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.*, 164 Fed. Rep. 869. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails obviously the limits must be narrower still. *Savage* v. *O'Neil*, 44 N. Y. 298. *Crashley* v. *Press Publishing Co.*, 179 N. Y. 27, 32, 33. *Aslanian* v. *Dostumian*, 174 Massachusetts, 328, 331.

Even if we should presume that an employé could recover in Cuba if injured by machinery left defective through the negligence of his employer's servants, which

would be going far, that would not be enough. The plaintiff recovered, or, under the instructions stated at the beginning of this decision, at least may have recovered, notwithstanding his knowledge and appreciation of the danger, on the strength of a doctrine the peculiarity and difficulties of which are elaborately displayed in the treatise of Mr. Labatt. 1 Labatt, Master & Servant, ch. 22, esp. § 424. To say that a promise to repair or replace throws the risk on the master until the time for performance has gone by, or that it does away with or leaves to the jury what otherwise would be negligence as matter of law is evidence of the great consideration with which workmen are treated here, but cannot be deemed a necessary incident of all civilized codes. It could not be assumed without proof that the defendant was subject to such a rule.

There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. *The Maggie Hammond*, 9 Wall. 435. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt.

Judgment reversed.

PORTO RICO SUGAR COMPANY *v.* LORENZO.

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

No. 154. Argued December 22, 1911.—Decided January 9, 1912.

A contract will be read in the light of well known conditions; a contract made in Porto Rico to grind sugar cane will be presumed to be a contract to grind in the grinding season.

What the grinding season is in a particular locality may be established by parol evidence.

Nothing in the contract under consideration in this case takes it out of the ordinary rule that performance of an absolute undertaking is not excused by such occurrences as breaking of machinery, etc.

5 Porto Rico Fed. Rep. 96, affirmed.

THE facts, which involve the construction of sugar grinding contracts in Porto Rico, are stated in the opinion. Plaintiff in error was defendant below.

Mr. Hannis Taylor, with whom *Mr. C. M. Boerman* was on the brief, for plaintiff in error.

There was no brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon notarial contracts to grind all the plaintiff's sugar cane raised upon specified plantations let to him for a certain number of zafras or grinding seasons ending in 1912. The breaches alleged are failure to grind the cane, 'during the months of January to June,' 1908, and to furnish the necessary cars and men to handle the cane as agreed. At the trial it was proved that the cane was ready to be ground and should have been ground between the months of January and the first weeks of June, but that a large part of the crop was ground in the latter part of June and through July

to the great damage of the plaintiff. A failure to furnish the proper number of cars for a part of the time also was established. The contract did not fix a period within which the grinding should be done otherwise than by reference to the zafras to which it extended, and it was objected by demurrer, requests for ruling and exceptions to evidence that as the written agreement was silent it could not be made more definite by parol. But the court ruled the other way and sustained a verdict of $15,000 for the plaintiff, whereupon the case was brought to this court.

It appears to us not to need extended argument to show that the court was right. A contract to grind sugar cane implies on its face, if read with any knowledge of the business, that it has reference to seasons, and that it is more definite than a simple grammatical interpretation of the words would express. An illustration suggested at the argument brings it home to those of us whose experience has been in the North. A contract to reap a field of wheat with no mention of time would not leave the contractor free to choose his own time. The grinding of cane must be done in the grinding season, and a contract to grind is a contract to grind in the grinding season. Parol evidence may be necessary to show what that season is in a given place, as it constantly is in order to translate words and the implications of words into things; but the season when ascertained is the limit by the very meaning of the words used, when used in a business contract made with regard to one of the great industries of the world.

A part of the delay seems to have been caused by the repeated breaking down of the machinery, but nothing appears to take the case out of the ordinary rule that performance of an absolute undertaking is not excused by facts of that sort. Nothing else in the case seem to us to call for remark. The trial was conducted fairly and intelligently, and the defendant must bear the loss.

Judgment affirmed.

PETERS *v.* BROWARD.[1]

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

No. 49. Argued November 8, 1911.—Decided January 9, 1912.

Under the law of Florida, as declared by its highest court, where there is a variance between the title of a bill as enrolled and promulgated and the title of the act as shown by the journals, the latter will control.

While the judgment of the highest court of the State in a case may not be *res judicata* of the case at bar, the parties and land affected not being the same, if in deciding it the court announces what the law of the State is and whether a particular statute was or was not validly enacted under the state constitution, this court will follow it as an authoritative announcement of the law of the State.

Whether a particular state law has been passed by the legislature in such manner as to become a valid law under the state constitution is a state and not a Federal question, and Federal courts must follow the adjudications of the state court.

Although the decision of the state court holding a particular law to be unconstitutional may not have been rendered until after rights based thereon had arisen, if the highest court simply followed a rule laid down before such rights had arisen, the decision in the later case is binding upon the Federal courts.

Where the state courts have held that the journals of the legislature can be examined to determine whether an act has been validly passed, it is the duty of one proposing to rely upon the act to examine the journals, and he cannot plead ignorance of the law as an excuse for not doing so.

This court cannot hold that an act is constitutional under the state law because the defect on which the state court declared it to be unconstitutional occurred through mistake, when the state court has passed on that question and held the act unconstitutional even under such condition.

Although the case may be a hard one, those who expend money on the faith of an invalid act cannot obtain redress from the courts but must apply to the legislature.

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[1] Original docket title Peters *v.* Gilchrist.

An act of the State of Florida, incorporating a railroad company and granting it aid, having been held unconstitutional by the highest court of that State because the journal showed that it was an act to incorporate only, and only one subject can be embraced in one act, the Federal courts are bound to follow that decision, and to hold that Trustees of the Internal Improvement Fund had no power to convey land under that act, and that the grantees have no title to any of the lands claimed thereunder.

THE facts, which involve the title to land in Florida under an act of the legislature of that State, are stated in the opinion.

Mr. John Stevens Maxwell, with whom *Mr. Thomas F. McGarry* was on the brief, for appellant:

In order to entitle the defendants to raise the question here raised, a plea alleging matter, which, if appearing on the face of the bill, would have been a good cause of demurrer, should have been resorted to, or the bill should have been answered. *Griffing* v. *Gibb,* 2 Black,519.

Even if plaintiff's rights are to be determined entirely by the validity, or invalidity of the act of May 24, 1893, and the journals of the legislature are to control or furnish the evidence of its title and the regularity of its enactment, or otherwise, proof must be taken as to what constitutes the journals and the entries required to be made therein by the constitution of the State; and any errors, or mistakes, may be shown in order to conform the journals to the exact facts. *State* v. *Mason,* 9 So. Rep. 776, 787, 804; *Koehler* v. *Hill,* 14 N. W. Rep. 738, 742.

To overcome the presumption that the act was properly enacted the contrary must be shown by clear and indisputable proof.

In those jurisdictions where resort may be had to the legislative journals and where enrolled bills signed by the presiding officers and governor are not conclusive when

it appears from the journals that some constitutional requirement was not observed, which was not required to be entered on the journal, it will be presumed that what was commanded to be done was in fact done. 26 Am. & Eng. Ency. Law, 541; *State* v. *Hocker* (Fla.), 18 So. Rep. 767; *Field* v. *Clark*, 143 U. S. 649; *Potter* v. *Lainhart*, 33 So. Rep. 251, 257; Cooley, Const. Lim. 168.

It is competent for plaintiff to prove that the short abbreviated title to the bill was the result of a mistake or omission. *Walnut* v. *Wade*, 103 U. S. 683, 692.

The case is not *res judicata* because of the former ruling of the state court. The rule both in the Florida courts and the United States courts is that a judgment or decree upon demurrer is an adjudication only of the rights of the parties upon the allegations of the pleading demurred to, and will not preclude the assertion of the right under other material allegations not appearing in the former suit. *Gilman* v. *Rives*, 10 Pet. 301; *Gould* v. *E. & C. R. R. Co.*, 91 U. S. 526; *Wiggins Ferry Co.* v. *Ohio &c. R. R. Co.*, 142 U. S. 410; *Florida Southern Ry. Co.* v. *Brown*, 23 Florida, 104.

This court is not bound by the finding of the Supreme Court in the *Atlantic Lumber Company Case*, that the act was not in fact validly passed. *Morris* v. *Mason*, 9 So. Rep. 776; *Wilkes County* v. *Coler*, 180 U. S. 506, 520.

The journals cannot be held conclusive evidence of the title of the bill as introduced, without denying the opportunity of showing the real facts, which amounts to deprivation of property without due process of law. The rule is the same as that as to tax titles. Cooley on Taxation, 356. See also Black on Tax Titles, § 253; *Kelly* v. *Herrall*, 20 Fed. Rep. 895; *Abbott* v. *Lindenbower*, 42 Missouri, 162; *Bannon* v. *Burnes*, 39 Fed. Rep. 895; *Ewart* v. *Davis*, 76 Missouri, 356; *McReady* v. *Sexton*, 29 Iowa, 356.

The defendants' attitude is this: An act of the legisla-

ture in form and title complying with all legal requirements was introduced and validly enacted into law; it was accepted by all parties as valid and hundreds of thousands of dollars were expended under it by the predecessors in interest of the plaintiff and thousands of acres of land were earned by them under it, and certificates given them of this fact. Yet because the confessedly hasty, careless and inaccurate entries in the legislative journals, for convenience abbreviated the title of the act conferring these rights, it is conclusively presumed to be void and plaintiff's rights defeated, notwithstanding the actual existence of the rights and the long acquiescence therein of all parties in interest.

Such a ruling denies to this court as a court of equity the exercise of the wide and well established power which it possesses to correct mistakes and to adjudge rights of the parties as they really are. *State* v. *Jacksonville Terminal Co.*, 41 Florida, 363; *Hope* v. *Mayer*, 72 Georgia, 246; *Connor* v. *Green Pond R. R. Co.*, 23 So. Car. 427; *Schuyler County* v. *Rock Island R. R. Co.*, 25 Illinois, 181, 183; *Mahomet* v. *Quackenbush*, 117 U. S. 511; *Fireman's Association* v. *Loundsbury*, 21 Illinois, 511; *People* v. *Mahany*, 13 Michigan, 481; Cooley on Const. Lim. 205.

It would have been unnecessary to make the title broader than the actual title, and the other provisions are surplusage. But their presence does not invalidate the act, as they relate to matters germane to the object of the act. *State* v. *Jacksonville Terminal Co.*, 41 Florida, 363; *State* v *Arnold*, 140 Indiana, 628.

A liberal rule of construction should be applied when the constitutionality of legislative enactments is questioned, and every reasonable doubt should be resolved in favor of the constitutionality of the act. *Holton* v. *State*, 28 Florida, 308; *Duval County* v. *Jacksonville*, 36 Florida, 196; *State* v. *Hocker*, 36 Florida, 358.

Only such legislative acts should be overthrown as are

clearly and obviously offensive to their spirit and meaning. See cases *supra.*

The State and trustees are equitably estopped, under the circumstances set out in the bill, and admitted by the demurrers. They will not now be permitted to set up the unconstitutionality of the act. And the Federal courts will exercise their own independent judgment upon the subject. *Pleasant Township Co.* v. *Ætna Life Ins. Co.*, 138 U. S. 67, 72; *Burgess* v. *Seligman*, 107 U. S. 20, 23.

Where there had been no decision at all of a state court as to the constitutionality of an act before rights had been acquired thereunder, the Federal court will exercise its own independent judgment as to the validity and obligations of contracts made under the act before the state court held it unconstitutional. *Anderson* v. *Santa Anna*, 116 U. S. 356, 362.

Mr. William S. Jennings and *Mr. William A. Blount*, with whom *Mr. A. C. Blount, Jr.*, was on the brief, for appellees.

Mr. Justice Lurton delivered the opinion of the court.

The complainant, Richard G. Peters, through mesne conveyances, asserts an equitable title to some two hundred thousand acres of swamp or overflowed lands in the State of Florida, being a part of the congressional grant of September 28, 1850, to the State of Florida. By state legislation the title to the lands so granted was vested in the Governor of the State and four other state officials and their successors in office, as trustees, for the purposes set forth in an act of June 6, 1855, entitled "An act to provide for and encourage a liberal system of internal improvement in this State."

The title asserted is based upon a grant in aid of the

construction of a railroad, found in a legislative act of May 24, 1893, printed in the session laws of Florida for 1893 (Ch. 4267, No. 153, p. 223). That act purports to incorporate the Atlantic, Suwanee River and Gulf Railway Company, and authorizes it to construct and operate a railway between certain points within the State. The ninth and tenth sections read as follows:

"SEC. 9. That the State of Florida, for the purpose of aiding the construction of said railroad, its branches and extensions, hereby grants unto said company ten thousand acres of land for each mile of railroad it may construct, of the lands granted to the State of Florida, under the Act of Congress of September 28th, 1850, and which are commonly known as the swamp and overflowed lands; said lands to be deeded to the said company by the Trustees of the Internal Improvement Fund, as fast as each five miles of said road or any of its branches are graded, crosstied and rails laid thereon.

"SEC. 10. That upon the filing of a certificate of the completion of any five miles of said road or any of its branches, signed by the engineer and president of the said company, it shall be the duty of the Trustees of the Internal Improvement Fund to require the State Engineer or some other competent person to examine and inspect each five miles of road so completed; and on such person's or the State Engineer's report that the five miles are completed as certified, it shall be the duty of the Trustees of the Internal Improvement Fund to issue deeds to the said corporation, as required in the foregoing section; *Provided,* That the said corporation, its successors and assigns, shall have the privilege of requiring and having from the Trustees of the Internal Improvement Fund a certificate authorizing and entitling it to locate the lands which it may at any time have earned and become entitled to as aforesaid; and whenever and as often as the said corporation shall file with the Trustees of the Internal Improve-

ment Fund a plot and survey of the lands located by it in pursuance of a certificate given it by the Trustees as herein provided, the said Trustees shall set apart and upon demand execute unto said corporation, its successors or assigns, a deed conveying unto it the lands described in said plot and survey, from the swamp and overflowed lands granted to the State of Florida by the Act of Congress of September 28, 1850; *Provided*, That nothing in this Act contained shall make the State of Florida liable by reason of any deficiency there may exist in the public lands belonging to the State under and by virtue of the Act of Congress of September 28, 1850."

By the eighteenth section of said act it was provided that the railway company should receive the same quota of land on account of the construction of any part of the projected line by the Atlantic, Suwanee River and Gulf *Railroad* Company, theretofore incorporated for the same general purpose, upon receiving a conveyance of such constructed railroad.

The bill avers that the said railway company constructed twenty miles of railway, including about five miles conveyed to it by the predecessor company above referred to, which had been inspected and certified to the Trustees of the Internal Improvement Fund by the state engineer, and that the company, in the exercise of the privileges conferred by the tenth section of the act, had demanded and received from said trustees certificates "authorizing and entitling it to locate lands" so earned, and to receive from the said trustees a deed conveying to it, its successors or assigns, the lands so located. It is then averred that the certificates, together with survey and map of locations had been regularly filed with the trustees, and a deed demanded, but that the trustees refused to make such deed and later conveyed the lands so located, or the greater part thereof, to the defendant Neil G. Wade, who had full notice of appellant's title, and who

subsequently conveyed the same to the defendant the Southern Timber and Naval Stores Company, who, it is alleged, also had full notice of the prior right of the said Atlantic, Suwanee River and Gulf Railway Company, and its assigns, including the present complainant.

The prayer of the bill is that the Southern Timber and Naval Stores Company be adjudged to hold same in trust for complainant and required to convey same to him. In the alternative, the bill asks a decree against the Trustees of the Internal Improvement Fund for the value of said lands, or for the money received by the trustees for said lands, and for general relief.

The bill was dismissed upon demurrer.

It is evident from the facts stated that the origin and foundation of the title asserted by the bill to the state lands now held by the Southern Timber and Naval Stores Company is the land grant made or proposed in the Florida act of May 24, 1893. But that act, in another litigation between different parties, was held null and void in so far as its land grant clauses are concerned. *Wade* v. *Atlantic Lumber Co.*, 51 Florida, 628. The ground of this holding was that the title of the act, as shown by the journals of the two houses, was not broad enough to include a grant of public lands. The constitution of the State includes a provision against more than one subject in the same bill, that subject to be indicated by the title. Thus, the sixteenth section of Article III of the Florida constitution reads as follows:

"Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

The title of the act in question, as it is found in the published Session Acts of 1893, is as follows:

"An act to Incorporate the Atlantic, Suwanee River and Gulf Railway Company, *to Grant Said Corporation certain Privileges and to Aid the Construction thereof.*"

The title, as shown by the journals of both houses, was in these words:

"A bill to be entitled an act to incorporate the Atlantic, Suwanee River & Gulf Railway Company."

Thus, the title, as shown by the journals, gives no notice that the bill grants public lands as an aid to construction, but purports to be no more than an incorporating act, while the act, as officially promulgated, bears a title expressing its contents.

But when there is a variance between the title of a bill as enrolled and promulgated and the title of the act as shown by the journals, the latter will control under the express decision of the highest court of the State of Florida. *Wade* v. *Atlantic Lumber Co.*, 51 Florida, 628.

In that case the Atlantic Lumber Company asserted title to certain swamp lands located under certificates issued to the Atlantic, Suwanee River and Gulf Railway Company, by authority of this act of May 24, 1893, which lands had been deeded to the defendant Neil G. Wade by the Trustees of the Internal Improvement Fund. The defendant Wade demurred to the bill upon the ground that the act of May 24, 1893, the sole source of the superior title asserted by the Atlantic Lumber Company, was invalid in so far as it included a land grant, because the title of the act did not express that purpose of the bill.

The Florida court took judicial notice of the journals of the Florida legislature, and finding the journal title to be as set out above, held the title of the act insufficient under the constitution to embrace a grant of public lands in aid of the company incorporated.

We shall pass by the suggestion that the judgment in the case referred to is an adjudication binding upon the parties to this suit as to the title or equities here in litigation, it not sufficiently appearing that the parties or the lands in suit are the same. Neither shall we stop to consider the effect of that decision and opinion as absolutely

determining the invalidity of the act of May 24, 1893, as against parties not then before the court. It is enough for the purposes of this case that we shall hold that case to be an authoritative announcement of the law of Florida in these respects: first, that under the constitution of that State an act entitled an act to incorporate a particular railway company does not bear a title sufficiently broad to embrace a grant of public land in aid of the construction of the authorized railway; and, second, that when the journals speak and show a variance between the journal title and the title of a bill as enrolled and promulgated, the journal title must control.

The question as to whether a particular law has been passed in such manner as to become a valid law under the constitution of the State is a state and not a Federal question. Courts of the United States are therefore under obligation to follow the adjudications of the courts of the State whose law is in question. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *Leeper* v. *Texas*, 139 U. S. 462, 467; *Wilkes County* v. *Coler*, 180 U. S. 506.

The only authority which the Trustees of the Internal Improvement Fund had for the issuance of the certificates now held by the appellant, or for their location upon the public land of the State, or the execution of a deed to the locator, proceeds from this act. If that enactment be invalid the trustees had no authority to issue such certificates, and no authority to make the deed which was demanded for lands located by means of such certificates. Yet this very enactment has been declared invalid by the highest court of the State upon an examination by that court of the journals of the legislature showing a variance between the title of the bill as enrolled and the title shown by the journal. It would be a most remarkable occurrence if now, upon the same journals, we should hold that the bill had a sufficient title and was a valid law.

It is true that the issues in the case of *Wade* v. *Atlantic*

Lumber Company were raised by demurrer. But the question of whether the enactment was a valid law is a judicial question. In the case of the *State of Florida* v. *Brown*, 20 Florida, 407, a case decided ten years before this act was passed, it was held that the courts would examine the journals of the legislature and would hold a law invalid if from such journals it appeared that the law in question had not been constitutionally enacted. See also *State ex rel.* v. *Green*, 36 Florida, 154. In view of the cases cited, we find the Florida court saying, in *Wade* v. *Atlantic Lumber Company*, that "this court is firmly committed to the holding that when the journals speak, they control."

The suggestion that the rights of the appellant, or his assignors, arose before the decision in *Wade* v. *Atlantic Lumber Company*, and that the case is therefore one in which this court should exercise an independent judgment under the authority of such cases as *Burgess* v. *Seligman*, 107 U. S. 20, is without merit.

The rule appealed to is not applicable, because the highest court of the State had, before the acquirement of any rights, laid down the rule that if the journals of the legislature should show that a law had not been validly enacted, the fact would be fatal. It was therefore incumbent upon persons proposing to rely upon the act of May 24, 1893, to examine the journals. Indulgence cannot be claimed because they did not know the law or did not make such examination. There is, therefore, no reason for declining to follow the case of *Wade* v. *Atlantic Lumber Company*. In *Ottawa* v. *Perkins*, cited above, Mr. Justice Bradley, speaking for this court upon a similar question, said (p. 268):

"But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue on the subject, except

by demurrer to the declaration. This court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the constitution of Illinois that no act can be deemed a valid law, unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States."

But appellants say that the bill alleges that the title of the bill when introduced was that shown by the enrolled bill, and that it retained that title throughout each legislative stage, and that the other title endorsed on the bill and spread upon the journals was one made through inadvertence or mistake. They further say that the demurrer admits this to be true. But in point of law, evidence of the facts stated would not help the matter. The Florida court, in *Wade* v. *Atlantic Lumber Company*, *supra*, denied a rehearing of the original case, sought for the purpose of inducing a modification of the opinion and decree to enable the complainant Wade to show the very facts now averred in the present bill. To this that court said (51 Florida, 639):

"The appellee also asks that the decree be modified to enable the petitioner to show that the title to the bill as actually introduced into the House and at all subsequent stages was in the form as now published, and that the fact of the shorter form appearing in the Journals was due to the mistake or carelessness of the clerks. To grant this request would be to permit uncertain parol evidence to countervail the legislative journals and would produce overwhelming uncertainty as to the validity, force or effect of every law upon the statute books; if admitted

for the purpose of sustaining an act, it would be equally admissible to overthrow an act and cannot be permitted."

We need not deal with the argument that the grant operated to pass the title to the lands located without more, since the invalidity of the act disposes of every right which might otherwise proceed from it.

Neither does the bill state any facts which authorize us to hold that the Trustees of the Internal Improvement Fund made any contract in reference to granting aid in the construction of the Atlantic, Suwanee River and Gulf Railway by virtue of their general power under the act of September 28, 1850, vesting title to the state swamp lands in them. Every act averred to have been done by them was but a step in pursuance of the power which was sought to be conferred by the act of May 24, 1893. Their subsequent conveyance of the lands upon which the certificates issued by them to the railway company was in pursuance of a sale made by them to Neil G. Wade, and their refusal to make a deed of the same lands to the railway company, or its assigns, was based upon the invalidity of the enactment under which such deed was claimed. They incurred, neither personally nor officially, any responsibility for their conduct in the matter.

The case of the railway company and their assigns is a hard one. They went forward under an enactment which was invalid, and have made large expenditures upon the faith of a law which they assumed was valid. But the consequences are not remediable save by an appeal to the legislative power. The proceeds of the sale of the lands located under the void certificates to Wade are not charged with any lien or equity by any of the facts stated in the bill.

The decree of the Circuit Court must be in all things

Affirmed.

HUSE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 74. Argued November 17, 1911.—Decided January 9, 1912.

A mail service contractor cannot claim that he accepted a contract under misapprehension when between the time of his proposal and its acceptance he took a temporary contract for carriage of the identical mails contracted for.

A contract for delivery of all mails at Union Station, Omaha, was properly construed by the Postmaster General as including mail delivered by three railroads not in the schedule, it appearing, however, that the mail so delivered had formerly been delivered by one of the railroads mentioned in the schedule and were included in a route specified in the contract.

A mail service contractor whose contract had been cancelled for failure to perform sued in the Court of Claims for balance due and for damages for cancellation; that court held he was not entitled to judgment for the balance due because it appeared that the contract was properly cancelled and that the Government had sustained damages in excess of the balance due. In this court, *held:* that as the objection that the balance due could not, in the absence of a counterclaim pleading, be offset against the damages sustained by the Government had not been raised in the Court of Claims, that court rightly offset it, and the objection cannot be raised for the first time on appeal in this court.

Quære: Whether the rules of practice in the Court of Claims would not permit the offset to be made in absence of any pleading setting up counterclaim or offset.

44 C. Cl. 19, affirmed.

THE facts, which involve the construction of a contract for screen-wagon mail service in Omaha, Nebraska, are stated in the opinion.

Mr. Edwin C. Brandenburg, with whom *Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* were on the brief, for appellant:

The carrying of mails arriving over roads not men-

tioned in the advertisement for proposals was an extra service for which the appellant was entitled to compensation. *Woolverton* v. *United States,* 27 C. Cl. 292; *Knox* v. *United States,* 30 C. Cl. 59; *Woolverton* v. *United States,* 34 C. Cl. 247, distinguished; and see *Utah Stage Co.* v. *United States,* 39 C. Cl. 420; affirmed, 199 U. S. 422.

If the contract on its face did not, by its special provisions, require the appellant to carry the mail arriving over roads not mentioned, or under the general provision relating to additional service, then as the contract specifies the particular roads transporting the mail which the appellant was to carry, parol evidence was inadmissible for the purpose of showing that the contract required appellant to carry mail brought to Omaha over other roads not mentioned.

By its own terms the contract excluded the mail brought into the Union Station over roads not mentioned in the advertisement and it was not competent to extend, by parol evidence, the duty of the appellant to such roads; and further, if such evidence was competent, it shows the appellant fully performed his duty as to making inquiry and that after so doing he was not informed and had no knowledge that the Government, by its advertisement, expected him to carry mail arriving over roads not mentioned therein.

On the facts as found by the court below, the action of the Postmaster General in annulling the appellant's contract was without right and unlawful.

At the time the Postmaster General annulled this contract the Government itself was in default in respect of the only obligation it assumed, to wit, the payment of the stipulated compensation, and being in default, it had no right to annul the contract. *Mason* v. *Thompson,* 94 Minnesota, 472; *Graf* v. *Cunningham,* 109 N. Y. 372; *Hatton* v. *Johnson,* 83 Pa. St. 222; *Meyers* v. *Gross,* 59 Illinois, 439.

As the United States itself was in default, it had no

right to annul the contract unless such annulment be treated as the exercise of the right to terminate the contract at any time upon allowing the contractor an additional month's pay. If so treated, judgment should have been rendered for the appellant.

The record discloses no fault on the part of the appellant. It wholly fails to show any failure on his part to make due inquiry as to the service expected of him, or knowledge in advance of executing the contract, of the relations between the Union Pacific Railroad and the other railroads not mentioned in the advertisement. *Otis* v. *United States*, 20 C. Cl. 315.

Reasonably construed, and strictly construed certainly so, the service required of the appellant was not covered by his contract.

Whether or not the contract was properly annulled, the appellant is entitled to judgment for services rendered.

No counterclaim was filed and no damages have been assessed by the Auditor for the Post-Office Department. To offset the amount found to be due the appellant, therefore, it was necessary for the defendant, as with any other litigant, to file a counterclaim if it intended to insist upon one, particularly where, as in this case, the loss sustained by the defendant, if any in fact was sustained, arose after the annulment of the contract. Upon that issue, if presented, the appellant would have been entitled to be heard and was, as a matter of right and justice, entitled to be apprised by the pleadings.

Mr. Assistant Attorney General Thompson, with whom *Mr. George M. Anderson* was on the brief, for the United States:

No fraud or deception was practiced on appellant as to the quantity of mails to be carried under his contract to and from the Union Station.

The obligation rests upon every man of reasonable

prudence and intelligence to properly inform himself before incurring any liability under a proposed contract, and unless fraud or deception has been employed in inducing him to enter into the contract, he will be held to have so informed himself. *Dair* v. *United States*, 14 Wall. 1, 6; *Dickerson* v. *Colgrove*, 100 U. S. 578.

The Postmaster General has the right to require suitable equipment of appellant before commencement of his service under his contract.

The Postmaster General was the judge of the proper equipment to be furnished by appellant before commencing the services, and, in the absence of bad faith, his right to annul the contract upon appellant's refusal to provide suitable equipment cannot now be assailed. *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Cal. & Oreg. Land Co.*, 148 U. S. 31.

The Postmaster General had the right to annul appellant's contract for refusal to obey his instruction.

Appellant failed to comply with reasonable requirements, and in accordance with the terms of the agreement, the Department annulled the contract. *Slavens* v. *United States*, 196 U. S. 229.

The right of the Postmaster General to annul the contract for failure on the part of the appellant to comply with the instructions of the Department clearly embraced the right to withhold payment for services already performed and to relet the contract at appellant's expense.

The opinion of the court below presents a careful and clear analysis of what the contract contained. There are no complications about the facts. It is shown that owing to the failure of appellant to perform his contract in accordance with the terms and requirements thereof the Government sustained a loss of over $14,000.

MR. JUSTICE LURTON delivered the opinion of the court.

The appellant had a four-year contract, commencing

July 1, 1902, for screen-wagon mail service between the post-office and railway mail stations at Omaha, Nebraska. On May 20, 1903, the Postmaster General cancelled the contract and relet it to other parties. Thereupon appellant brought this suit in the Court of Claims, asserting that he had faithfully performed his agreement, but that he had been required to carry mails to and from three railway companies not included in his contract. That his equipment was ample for the service he contracted to render, but that he had been ordered to provide equipment adequate to the excessive service demanded, and that the cancellation of his contract was therefore unauthorized. His suit was to recover, first, the balance due under the contract as construed by the Department; second, the reasonable value of the excess service he had, under protest, been compelled to render; third, the loss of profit resulting from the wrongful annulment of his contract; and, finally, the loss sustained in disposing of equipment which had been bought for the purpose of carrying out his contract.

As is the case with mail contracts, the manner and means of performance were carefully prescribed and power was reserved to the Postmaster General to require other and further facilities if it should be found necessary for the good of the service. The power of the Postmaster General to supervise and the duty of the contractor to conform to his regulations were plainly written down. That vigilant and prompt service might be enforced, he was given the right to make deductions, by way of fines, from compensation earned, for defects in equipment or negligence in the performance of the service. For repeated failures in performance or acts of neglect, or disobedience to orders, he was given power to annul the contract without impairing the right of the Government to recover damages for non-performance.

The findings of the court below as to the repeated

failures of the appellant in the performance of his contract, the inadequacy of his equipment, and his disobedience to the requirements that he should enlarge and improve his facilities, make it clear that the Postmaster General did not act arbitrarily, nor exceed the power reserved, by the infliction of fines or the final cancellation of the agreement on May 20, 1903. When the contract was cancelled it was directed that compensation due should be withheld and the contract relet at the contractor's expense. This reletting was at a price of some $14,000 in excess of what the cost would have been if appellant had performed his agreement. The court below found that when the contract was annulled there was due appellant $2,984.72. For this a judgment was asked, but denied, the court below finding that the loss to the Government as a result of reletting the contract was greatly in excess of the amount due to appellant. His petition was therefore dismissed.

If the contract, fairly construed, exacted the amount of service which the Department claimed, the case of appellant must fail, in view of the facts found as to his insufficient performance, and the loss resulting to the Government from the necessity of reletting the unfinished term of the agreement.

The Postmaster General construed the contract as requiring appellant to receive from and deliver to all railroads using the Union Station at Omaha. This construction required him to receive from and deliver to three railroad companies, not specified in the contract, namely, the Wabash, the Chicago and Northwestern and the Chicago, Milwaukee and St. Paul. The case must, therefore, turn upon the question as to whether the service contemplated by his contract included mails to and from the railways mentioned.

Coming, then, to the service required by the contract. The proposal for the Omaha mail-wagon service and its acceptance were according to a printed official form. This

proposal and acceptance, making the contract proper, refer to and make the public advertisement of the Postmaster General for proposals a part of the agreement, and from it the service contemplated is discovered. That advertisement included certain "instructions to bidders," of which they were required to take notice. Among other things, these "instructions" included the following provision:

"The foregoing schedules show approximately the service as performed during the week named in the statement of service for each route. Bidders, however, must personally inform themselves of the amount and character of the service that will be required during the contract term, beginning with July 1, 1902. Bidders and their sureties are warned that they should familiarize themselves with the terms of the contract, schedules of service, and instructions contained herein before they shall assume any liabilities as such bidders or sureties, to prevent misapprehension or cause of complaint thereafter."

Under the heading "Union Station," in the schedule referred to, there appear the names of four railroad companies opposite the words "Union Station," applicable to each of the named companies, thus: "Union Station; Illinois Central R. R. Co. (143077); Union Pacific R. R. Co. (157001); Chicago, Rock Island and Pacific Rwy. Co. (157064); Missouri Pacific Rwy. Co. (157075)."

It will be noticed that the named railroads bringing mail into the Union Station do not include the Wabash, the Chicago and Northwestern, or the Chicago, Milwaukee and St. Paul. Notwithstanding this omission, appellant was required to carry to and from the Union Station the mails delivered there by these three companies and to be delivered there from the post office to be carried by the same companies. This appellant did under protest, and upon this his suit is grounded.

But the explanation and answer is simple: Originally,

the contract routes of these companies terminated at the Union Pacific transfer at Council Bluffs, Iowa, where the mail was transferred to the Union Pacific Railway and carried into Omaha. After the construction of the Union Station, each of these companies procured the right to carry their mail over the Union Pacific Railway into the Union Station. This saved delay in transfer. The court below found that "the trains so performing said service were known and treated by the Post-Office Department as mail trains of the Union Pacific Railroad Company, route No. 157,001, and were operated under the rules of said Union Pacific Railroad Company, and payment was made therefor to the said Union Pacific Company. All weights of mail carried by said three roads were credited to the Union Pacific Railroad route and weighed thereon. The screen-wagon contractor under the preceding advertisement and contract, which were similar to the one in this case, carried mails to and from the trains of said three roads as part of his contract, and these facts were known to persons having knowledge of the service."

This had for many years been the method of handling the mails carried by the three companies referred to when appellant made his proposal. True, he says he did not know it; but the advertisement warned him of the necessity of making himself familiar with the "terms of the contract, schedule of services and instructions herein before they should assume any liabilities as such bidders or sureties, to prevent misapprehension." Among the facts found is this:

"Prior to submitting said proposal the claimant carefully read the advertisement and instructions to bidders and familiarized himself with their terms, and knew that the trains of the Chicago and Northwestern Railroad, the Chicago, Milwaukee and St. Paul Railroad, and the Wabash Railroad entered the Union Station at Omaha, and to further inform himself as to the amount and character

of the service to be performed he consulted the postmaster and superintendent of mails at Omaha, who called his attention to the Instructions to Bidders, also a Mr. Anderson, who had been in charge of the work under a former contract, who explained to him the three depots, including the Union Station, and the mail to be taken from them and the number of wagons it would take to perform the service."

Knowing of the manner in which the mails carried by the three railroads in question were handled, acquired after the contract was signed, is not of course, fatal to his contention that the contract did not include that mail matter. It does, however, appear that after his proposal had been accepted and before the beginning of performance he actually took a temporary contract, for the carriage of the identical mails, so that when he entered upon his own regular contract he was fully aware of the conditions. This must, at least, weaken the force of his going forward under protest. But aside from this information, the advertisement and instructions warned him to familiarize himself with the situation by personal investigation and inquiry. This he asserted he had done, for in his printed proposal he stated that, "This proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service and also after careful examination of the conditions attached to said advertisement and with intent to be governed thereby."

But it is urged that appellant is at least entitled to a judgment for $2,984.72, which the court below found to be the amount due when the contract was terminated. This contention is based upon the absence of any pleading setting up as a counterclaim or set-off the difference between the cost of the service under the reletting and the entire contract price for the full term under appellant's contract. But no such objection seems to have been made in the Court of Claims. That court had all the facts be-

fore it. It found that there was due on May 20, 1903, for services under the contract prior thereto $2,984.72. But it found, on the other hand, that at that date the contract had been lawfully annulled and that the necessary reletting had resulted in a loss to the Government of a very much larger sum. Upon this showing it properly concluded that the amount due was more than offset by the loss resulting from reletting at a higher price. How it might be if this objection had been seasonably made, it is not an error for which this court will reverse when not made until upon appeal. In *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, 212, a like objection was made as to claims coming from the Court of Claims, and this court said:

"The petition sets forth, among other things, that the Postmaster General wrongfully and unlawfully withheld the $12,532.43 out of moneys due petitioner, which was, therefore, entitled to recover the full amount; and to each and every allegation of the petition the government interposed a general traverse. It is now said that a counterclaim or set-off should have been pleaded, but the record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand."

Judgment affirmed.

ROBINSON *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 17. Submitted April 28, 1911.—Decided January 9, 1912.

By the Act to Regulate Commerce, Congress has provided a system for establishing, maintaining, and altering rate schedules and of redressing injuries, and committed to a single tribunal authority to investigate complaints, enforce conformity to prescribed standards, and order reparation to injured parties for non-conformity with those standards.

No action for reparation for exactions for railroad freight payments can be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Interstate Commerce Commission. The rule laid down in *Texas & Pacific Railway Co.* v. *Abilene Oil Co.*, 204 U. S. 426, as to suits for recovery of unreasonable rates, applies also to suits for recovery of rates as discriminatory.

Section 14 of the Act to Regulate Commerce, making decisions of the Interstate Commerce Commission as published in the official reports competent evidence, does not relieve a party relying on a decision from putting it in evidence—or require courts to take judicial notice thereof—the statute relieves from expense and inconvenience in connection with producing evidence, but it does not otherwise change the rules of evidence.

In this case *held* that an action could not be maintained for discriminatory exaction on coal rates of fifty cents a ton when loaded from wagons and not from tipples, as the complaint had not shown that the schedule had been the subject of complaint to the Interstate Commerce Commission and held by it to be discriminatory.

64 W. Va. 406, affirmed.

THE facts, which involve the validity of charges of common carriers on coal shipments and whether illegal discrimination existed, are stated in the opinion.

Mr. Charles H. Leeds for plaintiff in error.

Mr. H. L. Bond, Jr., *Mr. W. Irvine Cross* and *Mr. A. Hunter Boyd, Jr.*, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In February, March and May, 1903, Robinson, the plaintiff in error, shipped eleven carloads of coal from Fairmont, West Virginia, to points in other States, over the railroad of the Baltimore and Ohio Railroad Company, the defendant in error, and paid the rate thereon which was prescribed in a schedule published and filed conformably to the act to regulate interstate commerce and then in full force. By this schedule the rate was fifty cents more per ton when the coal was loaded into the car from wagons than when the loading was from a tipple. Robinson's shipments came under the higher rate, and the charges paid by him were $150.00 in excess of what would have been exacted if his coal had been loaded from a tipple. Conceiving that the schedule unjustly discriminated between shipments loaded from tipples and those loaded from wagons, he brought, in the Circuit Court of Marion County, West Virginia, on April 19, 1906, an action against the railroad company to recover the excess so paid. The case was heard upon an agreed statement of facts, which set forth, with some detail, the matters just stated and recited that it embodied "all the facts and evidence in the cause." But the statement did not disclose, or even suggest, that the schedule had been the subject of a complaint to the Interstate Commerce Commission or had been found by the Commission to be unjustly discriminatory, or that the railroad company had been ordered by the Commission to desist from giving effect to the schedule or to make reparation to Robinson or any other shipper because of prior exactions thereunder. Being of opinion that, upon the agreed statement, Robinson was not en-

titled to recover, the court entered a judgment dismissing his action, and that judgment was affirmed by the Supreme Court of Appeals of the State. 64 W. Va. 406. He then sued out this writ of error upon the ground that, by the judgment of affirmance, he was denied rights specially set up under the act to regulate interstate commerce.

The first question to be considered is, whether, consistently with the provisions of that act, Robinson could maintain his action for reparation in the absence of an order by the Interstate Commerce Commission finding that the established schedule whereby the additional fifty cents per ton was exacted was unjustly discriminatory, determining what reparation should be made because of prior exactions thereunder, and directing the carrier to desist from such discrimination in the future, and to make the reparation indicated. It was contended by him in the Supreme Court of Appeals of the State, and is contended now, that the question should be answered in the affirmative because of the provision in § 22 (Act of 1887) that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." But it must be ruled otherwise, and for these reasons:

The act, c. 104, 24 Stat. 379; c. 382, 25 Stat. 855; c. 61, 28 Stat. 643; c. 708, 32 Stat. 847, whilst prohibiting unreasonable charges, unjust discriminations and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them

while they remained in effect, invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative of the prohibitions of the act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation, by an action in the Circuit Court of the United States, if the carrier failed to comply with it.

Thus, for the purpose of preventing unreasonable charges, unjust discriminations and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any non-conformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared

rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure.

In the case of *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440, where such a right was asserted and denied, it was said by this court:

"Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might

be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other, and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper.

Of course, the provision in § 22, as also the provision in § 9, must be read in connection with other parts of the act and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Commission. *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co., supra*, pp. 442, 446.

The next question to be considered is, whether judicial notice should have been taken of the decision of the Commission in *Glade Coal Co.* v. *Baltimore & Ohio Railroad Co.*, wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28, 1904, and authoritatively published in 10 I. C. C. 226, but was not mentioned in the pleadings or in the agreed statement of facts. In the Su-

preme Court of Appeals of the State it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in § 14 of the act (25 Stat. 855), which reads: "The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be *competent evidence* of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof."

Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. The ruling, therefore, was not in contravention of the statute.

The result, however, would have been the same had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made, but that is without bearing here.

It follows that the judgment must be affirmed, and it is so ordered.

Affirmed.

UNITED STATES *v.* BARNES.

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

No. 565. Argued October 24, 1911.—Decided January 9, 1912.

The maxim *expressio unius est exclusio alterius* is a rule of construction and not of substantive law, and serves only as an aid in discovering legislative intent when not otherwise manifest.

The mention in the Oleomargarine Act of August 2, 1886, c. 840, 24 Stat. 209, § 3, of certain specified sections of the Revised Statutes, which relate to special taxes, as applicable to the special taxes imposed by § 3, may exclude other sections relating to special taxes but does not exclude as inapplicable to the collection of the taxes imposed by, and enforcement of, the Oleomargarine Act, § 3177, Rev. Stat., which is general in its terms, and relates to all articles and objects subject to internal revenue tax.

In view of the custom of embodying National legislation in codes and systematic collections of general rules, it is the settled rule of decision of this court that subsequent legislation upon a subject covered by a previous codification carries the implication that general rules are not superseded by such subsequent legislation except where it clearly appears.

Where there is a codification of revenue laws to prevent fraud, the inference is that subsequent legislation is auxiliary to the earlier, and only in case of manifest repugnancy will it be construed as an abrogation thereof. *Wood* v. *United States*, 16 Pet. 342, 363.

THE facts, which involve the construction of the Oleomargarine Act of 1886, and the applicability of § 3177, Rev. Stat., are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States:

Oleomargarine is an "article or object subject to tax" to which § 3177 of the Revised Statutes applies, and there is nothing in the Oleomargarine Act to warrant its exclusion.

By conferring special and limited authority upon the internal revenue officers in respect to the manufacture or

sale of oleomargarine, Congress cannot be held to have intended to deny them the ordinary powers possessed by them as revenue officers.

Clearly, in the absence of any provision in the Oleomargarine Act expressly or by clear implication negativing the view, these general powers and duties of the revenue officers must be held to apply in the enforcement of that act.

To hold otherwise is to say that the oleomargarine business alone is to be exempted from the necessary and salutary provisions of the law for the enforcement of internal revenue taxes and the prevention of fraud in respect thereto. *United States* v. *Fisher*, 2 Cranch, 386; *The Brig Ann*, 9 Cranch, 289.

The Oleomargarine Act of 1886, being a revenue act, *In re Kollock*, 165 U. S. 526, 536, should be construed together with the general statutes relating to collection of and the prevention of frauds upon the revenue, especially as it contains no adequate provisions on that subject and would be practically inoperative otherwise. *Saxonville Mills* v. *Russell*, 116 U. S. 13, 21.

The departmental construction is that general internal revenue statutes apply in oleomargarine cases. T. D. Int. Rev., No. 1266; 26 Op. A. G. 282.

The construction given to a statute by those charged with the duty of executing it will be given great weight by the court if the true construction be doubtful. *United States* v. *Hammers*, 221 U. S. 220, 228.

The judicial construction of the statute is that general internal revenue statutes are applicable in oleomargarine cases. *United States* v. *Thomas Fitzsimmons*, Dis. C. U. S. for Dist. of Michigan (not reported); *Hastings* v. *Herold*, 184 Fed. Rep. 759; *Rosencrans* v. *United States*, 165 U. S. 257, 262.

The decisions cited in the opinion below are inapplicable or erroneous.

Mr. Henry M. Johnson for defendants in error:

In analogous cases, provisions of the Revised Statutes have been held inapplicable. *In re Archer*, 9 Benedict, 428.

As to the applicability of § 3176 to taxes imposed under the Succession Tax Law, see *Wright* v. *Blakeslee*, 101 U. S. 174.

Congress has always regarded it as necessary, where it considered it desirable for the machinery of § 3177 and the three preceding sections to apply to some new object of taxation, to so state specifically and in unmistakable terms. See the War Revenue Act, 30 Stat. 466, and Income Tax Act, § 34, Act August 28, 1894, 28 Stat. 557, § 36 of same act on p. 559.

The applicability of the part of the act of June 30, 1864, of which § 3177 is a part, to the Oleomargarine Law has been raised in five cases, two of which went to different Circuit Courts of Appeal, sixth and eighth circuits, and in all of those cases the courts held that the act of 1864 did not apply to the Oleomargarine Law. See *In re Kearne*, 64 Fed. Rep. 481; *In re Kinney*, 102 Fed. Rep. 468; *Schafer* v. *Craft*, 144 Fed. Rep. 908; *S. C.*, on appeal, 153 Fed. Rep. 176; *S. C.*, on reconsideration, 154 Fed. Rep. 1002; *Grier* v. *Tucker*, 150 Fed. Rep. 658; *S. C.*, on appeal, 160 Fed. Rep. 611. All of above cases were cited with approval in *United States* v. *Lamson*, 165 Fed. Rep. 83.

The provisions in question from their very nature have no application to taxes imposed under the Oleomargarine Law.

Even if departmental construction is in accordance with the contention that general internal revenue statutes apply in oleomargarine cases, the rule of giving weight to the construction given by those whose duty it has been to apply the statute is never applied where the intention of the law-making body is to be gathered from the act itself. The rule urged is not a controlling rule, but a rule which is only applicable where the construction of

the statute is in doubt and some rule is needed to turn the evenly balanced scale.

Here it is evident that it was the clear intention of the law-making body that § 3177 should not apply to taxes imposed under the Oleomargarine Law.

The Commissioner of Internal Revenue cannot, by a construction which he places upon an act, extend a penal statute by implication. Penalties are never extended by implication. *United States* v. *Harris*, 177 U. S. 395; *Elliott* v. *Railroad Co.*, 95 U. S. 573; *Erskine* v. *Railway Co.*, 94 U. S. 619; *The Ben R.*, 134 Fed. Rep. 785; *United States* v. *Eaton*, 144 U. S. 677.

No mere omission or failure to provide for contingencies will justify judicial addition to a statute. *United States* v. *Goldenberg*, 168 U. S. 103; *Glover* v. *United States*, 164 U. S. 295; *McKee* v. *United States*, 164 U. S. 287.

The construction of a tariff act by the Treasury Department is not conclusive upon either party, and the collector is not justified by such instructions in imposing duties not warranted by law. *Leming* v. *Marshall*, 15 Fed. Cases, 8243; *Balfour* v. *Sullivan*, 17 Fed. Rep. 233; and see also *United States* v. *Allen*, 14 Fed. Rep. 263; *Dollar Savings Bank* v. *United States*, 19 Wall. 227; *Wright* v. *Blakeslee*, 101 U. S. 174.

The Oleomargarine Law contains adequate provisions for its enforcement, and the failure of Congress, when it incorporated certain provisions of the so-called general internal revenue laws into the Oleomargarine Act, to incorporate § 3177, clearly evidenced an intention of Congress that said section should not be applicable.

Mr. Justice Van Devanter delivered the opinion of the court.

The sole question presented for decision by this writ of error is, whether Rev. Stat., § 3177, is applicable to the col-

lection or enforcement of the specific tax imposed on oleomargarine by the act of August 2, 1886, c. 840, 24 Stat. 209. In the District Court a negative answer to the question was given, and an indictment drawn and returned upon the contrary view was held bad upon demurrer. To a right appreciation of the question it is essential that a brief outline be given of the internal revenue laws, of which § 3177 is a part, and of the later Oleomargarine Act.

Title XXXV of the Revised Statutes is a codification and consolidation, according to an orderly arrangement, of all the then existing laws relating to internal revenue. It is subdivided into chapters, each embracing cognate sections bearing upon a particular branch of the general subject. The first two chapters, one dealing with the officers of internal revenue and the other with assessments and collections, are, with minor exceptions, general in their terms and application. The third chapter deals with "special taxes" exacted of those who engage in designated classes of business, such as rectifying or selling distilled spirits and manufacturing or selling cigars; other chapters deal separately with specific taxes imposed upon particular articles or objects, such as distilled spirits and cigars, and the final chapter comprises provisions common to several objects of taxation. Section 3177 is a part of the second chapter, dealing with assessments and collections, and reads:

"Any collector, deputy collector, or inspector may enter, in the day-time, any building or place where *any articles or objects subject to tax* are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers

may enter them while so open, in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector, deputy collector, or inspector, in the execution of any power and authority vested in him by law, or shall forcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court."

It will be perceived that the section is comprehensive in its terms and evidently designed to promote the enforcement of the revenue laws as to "any articles or objects subject to tax."

The act of August 2, 1886, is a revenue law of the same class as those embodied in Title XXXV of the Revised Statutes. It imposes a specific tax on oleomargarine and "special taxes" on those who engage in its manufacture or sale, and contains several administrative and penal provisions. But it does not purport to be independent of other legislation or complete in itself. On the contrary, it plainly contemplates the existence of an established system of revenue laws to which resort shall be had in carrying it into effect. Section 3, which imposes the special taxes, declares that §§ 3232 to 3241, and 3243, of the Revised Statutes "are, so far as applicable, made to extend to . . . the *special taxes imposed by this section*, and to the persons upon whom *they* are imposed."

It is the express extension of those sections to the special taxes imposed by the Oleomargarine Act which gives rise to the question before stated. The position taken by the defendants in error, and sustained by the District Court, is, that that extension of particular sections is an implied exclusion of all others. *Expressio unius est exclusio alterius.*

We are unable to assent to that position. The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not. In the instance now before us too much is claimed for it. The sections named in § 3 of the Oleomargarine Act are a part of chapter 3 of Title XXXV of the Revised Statutes. They relate exclusively to special taxes and are so restricted in their terms that it is at least doubtful that they could be applied to any special taxes not imposed by that chapter, unless expressly extended to them. To illustrate, § 3232, which precedes the others and is more or less a key to their meaning, declares: "No person shall be engaged in or carry on any trade or business *hereinafter mentioned* until he has paid a special tax therefor in the manner *hereinafter provided.*" On the other hand, the sections in chapters 1 and 2 are, with minor exceptions, so general in their terms as to leave no doubt of their applicability to taxes imposed by subsequent legislation containing no provision to the contrary. In other words, the difference between the sections named and those in chapters 1 and 2 discloses an occasion for affirmatively extending the operation of the former and no occasion for mentioning the latter. It also is apparent that the Oleomargarine Act will measurably fail of its purpose if the general provisions of chapters 1 and 2 are not applicable to the taxes which it imposes; for, as before indicated, it does not in itself provide a complete or effective scheme for their enforcement. Neither does it contain any provision for the redress of those from whom such taxes are erroneously or illegally exacted, although the settled policy of the Government long has been to afford relief from all such exactions, as is shown by §§ 3220, 3226, 3227 and 3228 in chapter 2. These omissions are cogent evidence that it is intended that recourse shall be had to the

general provisions of chapters 1 and 2, save as in the Oleomargarine Act it may be provided otherwise.

Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. Thus, in *Wood* v. *United States*, 16 Pet. 342, 363, where a question arose as to what effect should be given a general provision of an early customs law in view of a later enactment upon that subject, it was said: "And it may be added that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud, should be deemed repealed, merely because in subsequent laws other powers and authorities are given to the custom-house officers, and other modes of proceeding are allowed to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary inference in all such cases is, that the legislature intends the new laws to be auxiliary to, and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions, to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former." In *Saxonville Mills* v. *Russell*, 116 U. S. 13, 21, it was said, in disposing of a like

question: "It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it, in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress." And in *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166, 167, where the question was, whether general statutes defining the powers of the officers of the Land Department were applicable to a grant of public lands by a subsequent act of Congress, it was said: "While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general powers vested in that department. . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

We conclude that, while the express extension of particular sections in chapter 3, dealing with special taxes, to the like taxes imposed by § 3 of the Oleomargarine Act may operate as an implied exclusion of the other sections in that chapter, it does not in any wise restrict or affect the operation of any of the general sections in chapters 1 and 2. And as § 3177 is a part of chapter 2, is general in its terms, and does not appear to be repugnant to any provision in the Oleomargarine Act, we think the ques-

tion first above stated must be answered in the affirmative.

The cases of *Craft* v. *Schafer*, 154 Fed. Rep. 1002; *Tucker* v. *Grier*, 160 Fed. Rep. 611, and *Hastings* v. *Herold*, 184 Fed. Rep. 759, although not involving § 3177, disclose some contrariety of opinion in the lower Federal courts upon the matter principally discussed herein, and we deem it appropriate to observe that our conclusion has been reached only after a careful consideration of those cases.

Reversed.

SOLIAH *v.* HESKIN ET AL., DRAIN COMMISSIONERS OF TRAILL COUNTY, NORTH DAKOTA.

ERROR TO THE DISTRICT COURT OF TRAILL COUNTY, STATE OF NORTH DAKOTA.

No. 76. Argued December 5, 1911.—Decided January 9, 1912.

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people.

The Fourteenth Amendment does not invalidate an act authorizing an appointed board to determine whether a proposed drain will be of public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as in this case, notice is given and an opportunity to be heard afforded the landowner before the assessment becomes a lien against his property.

The Fourteenth Amendment does not deprive a State of the power to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of the drain.

THE facts are stated in the opinion.

Mr. Edward Engerud, with whom *Mr. P. G. Swenson* was on the brief, for plaintiffs in error.

The court declined to hear further argument, but *Mr. J. S. Watson* filed a brief for defendants in error.

Memorandum opinion by direction of the court. MR. JUSTICE LAMAR.

Under the North Dakota statute (ch. 23, Political Code; Rev. Codes 1905) the County Commissioners are authorized to appoint a Drainage Board in each county. On the petition of six persons, owning land to be affected, or of a sufficient number to show a public demand where the drain is intended to benefit a township, the board makes a preliminary examination. If it finds that the drain is for the public good and will cost less than the benefits, "notice containing a copy of the petition is published and an opportunity to be heard upon the matters pertaining thereto afforded the owners of all lands to be affected." "If it shall appear that there was sufficient cause for the making of such petition, and that the proposed drain will not cost more than the amount of the benefit," the board shall establish the drain. Their assessment of benefits is subject to review, but, when confirmed, is final, and is then extended on the tax list and collected as other taxes—the amount assessed to any township is required to be included in its first general tax levy thereafter.

The plaintiffs in error, owning land in Mayville and Morgan Townships, North Dakota, brought proceedings to enjoin a Drainage Board appointed by County Commissioners from making and collecting special assessments against plaintiffs in error and the townships for their proportion of the cost of a drain ordered to be constructed.

The Supreme Court of the State held that, while taxes could only be levied by elected officers, special assessments

for benefits conferred by such drains might be imposed by appointed officers, and that the statute afforded due process of law. So far as the Federal questions are concerned, the judgment must be affirmed. For—

1. The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people. *Dreyer* v. *Illinois*, 187 U. S. 71; 83; *Prentis* v. *Atlantic Coast Line R. R.*, 211 U. S. 210; *County of Mobile* v. *Kimball*, 102 U. S. 691, 706; *Fallbrook District* v. *Bradley*, 164 U. S. 112, 167.

2. Neither does that Amendment invalidate an act authorizing an appointed board to determine whether a proposed drain will be of public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property. *Ibid.*

3. Nor does that Amendment deprive a State of the power to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of the drain. *Ibid; Bauman* v. *Ross*, 167 U. S. 548, 589–593; *County of Mobile* v. *Kimball*, 102 U. S. 691, 703–704.

Affirmed.

KEENEY, AS ADMINISTRATOR, *v.* COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS, STATE OF NEW YORK.

No. 81. Argued December 6, 1911.—Decided January 9, 1912.

The statute of New York of 1896, providing for a transfer tax on property passing by deed of a resident intended to take effect in possession or enjoyment at or after the death of the grantor, is not unconstitutional as taking property without due process of law nor does it deny the equal protection of the law by arbitrary classification of the subject-matter or by different rates of taxation depending on the relationship of the beneficiaries to the grantor.

The privilege of acquiring property by trust instrument, taking effect on the death of the grantor, is as much dependent on the law as that of acquiring property by inheritance and is subject to taxation by the State.

Where a state tax on the transfer of property does not offend the Constitution of the United States, its validity must be determined by the law of the State.

An excise on transfers does not become an *ad valorem* tax on the property conveyed because the amount is based on the value of such property. *Magoun* v. *Illinois Trust Bank*, 170 U. S. 283.

The Fourteenth Amendment does not diminish the taxing power of the State or deprive the State of the power to select subjects for taxation, but only requires that the citizen be given opportunity to be heard on questions of liability and value, and be not arbitrarily denied equal protection.

The Fourteenth Amendment does not require a State to tax all transfers because it taxes some transfers.

While there can be no arbitrary classification without denying equal protection of the law, there need not be great or conspicuous differences in order to justify a classification.

A State may impose a graduated tax on transfers of personal property by instrument taking effect on the grantor's death without violating the equal protection clause.

One assessed at the lowest rate under a graduated tax statute cannot

object to the constitutionality because others are taxed at the higher rate.

A statute imposing a graduated tax would not necessarily be held unconstitutional as to the initial rate, even if the provisions as to the higher rates were unconstitutional.

A State may impose a transfer tax based on personal property passing under a trust deed to take effect at the grantor's death if the property had its situs in that State when the deed was made.

Where the power to tax exists, the State may fix the rate and say when and how the amount shall be ascertained and paid, and if the personal property has its situs in the State when the deed is made, it may tax a transfer of personal property under a trust deed to a resident of the State to take effect at the grantor's death, although the personal property at that time may be without the State.

194 N. Y. 281, affirmed.

On June 13, 1903, Susan A. Keeney, a resident of New York, being in good health, executed in Kings County a deed, whereby she conveyed a cattle ranch in Texas and certain stocks and bonds to the Fidelity Trust Company of Newark, New Jersey, in trust, to hold the same during her lifetime, and to divide the net income equally between herself and her three children, two of whom reside out of the State of New York. The deed further provided that after her death the trustees should pay the entire income, or transfer the property, to her children, or their issue, on terms and limitations not material to this investigation. In the deed she "reserved the right to revoke or alter the whole or any part of the trust conveyance, at any time after six months notice in writing." She died March 29, 1907, being at the time a resident of Kings County, leaving an estate of the value of $25,000 and the three children as sole heirs at law.

In tax proceedings the proper officers found that the stocks and bonds were of the then value of $773,600, one-fourth ($193,400) being for the use of Mrs. Keeney for life, and the remainder to her children, being intended to take effect at her death. It was held that their in-

terest was subject to the tax imposed by the New York statute of 1896 (May 27, 1896, Laws 1896, v. 1, c. 908, § 220, Subd. 1, 3), which provides:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal . . . or of any interest therein or income therefrom, in trust or otherwise. . . . (3) When the transfer is of property made by a resident or by a non resident, when such non resident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death."

Mrs. Keeney's administrator and children appealed on the ground that the taxable transfer act of New York, in so far as it imposes a tax upon property transferred *inter vivos*, violated the Fourteenth Amendment, in that it took the property without due process of law, and the different rates of taxation and classification were of such discriminatory a character as to deny the equal protection of the law.

The judgment was affirmed. The case is here on writ of error from the final order of the Surrogates' Court, entered in pursuance of the mandate of the Court of Appeals. 194 N. Y. 281.

Mr. George F. Canfield, with whom *Mr. Karl T. Frederick* was on the brief, for plaintiffs in error:

Even if the State was taxing a transfer of property (an assumption contrary to fact) the transfer in this case was strictly a conveyance *inter vivos*, and was in no sense testamentary. The tax must therefore be sharply distinguished from an inheritance tax. *Ridden* v. *Thrall*, 125 N. Y. 572; *Basket* v. *Hassel.*, 107 U. S. 602; *Knowlton* v. *Moore*, 178 U. S. 41; *United States* v. *Perkins*, 163 U. S. 625; *Matter of Brandreth*, 169 N. Y. 437; *Billings* v. *Illinois*, 188 U. S. 97; *Matter of Pell*, 171 N. Y. 48.

A tax upon the special form of transfers *inter vivos* covered by this act is unconstitutional because arbitrarily discriminatory and not based upon any legal or natural classification bearing any legally reasonable relation to the subject. *Nichol* v. *Ames*, 173 U. S. 509.

The tax in this case upon all remainders limited to take effect in possession after the death of the grantor is not imposed under the taxing power proper of the State, and cannot be upheld as an exercise thereof because it is based upon a classification which has no reasonable relation to taxation. *Frazer* v. *McConway Co.*, 82 Fed. Rep. 257; *Hatch* v. *Reardon*, 184 N. Y. 431; affirmed, 204 U. S. 152; *Farringdon* v. *Mensching*, 187 N. Y. 8; *Matter of Brandreth*, 169 N. Y. 437.

The tax cannot be upheld under the general regulative or police power of the State, because it is not imposed for the purpose of regulating or promoting any of those interests of society which may be regulated or promoted under the police power.

That line of reasoning is entirely untenable; because such an object does not come fairly within the scope of the regulative or police power of the State; is not limited to cases having any connection at all with the subject of inheritance taxation; and, even if limited to cases which might be availed of for the purpose of escaping taxation, the act would be entirely ineffective and useless to prevent the accomplishment of such a purpose. *Barbier* v. *Connelly*, 113 U. S. 27; *Mugler* v. *Kansas*, 123 U. S. 623; *Matter of Graves*, 52 N. Y. (Misc.) 433; *Matter of Edgerton*, 35 N. Y. App. Div. 125; *S. C.*, affirmed, 158 N. Y. 671.

The assumption that the tax is upon the transfer of property is contrary to fact. No such tax was imposed in this case, and the section of law under which the tax was imposed does not in effect provide for a tax upon "a transfer" of property but only upon "a coming into possession" of property previously transferred. *Matter of Gould*, 156

N. Y. 423; *Mugler* v. *Kansas*, 123 U. S. 623; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Neal* v. *Delaware*, 103 U. S. 370; *Ex parte Virginia*, 100 U. S. 339; *Re Seaman*, 147 N. Y. 69; *Hatch* v. *Reardon*, 184 N. Y. 431; *Farrington* v. *Mensching*, 187 N. Y. 8; *Matter of Brandreth*, 169 N. Y. 437.

A tax upon the coming into possession of property is unconstitutional because it deprives appellants of their property without due process of law and denies to them the equal protection of the laws. *Matter of Pell*, 171 N. Y. 48.

The tax upon the coming into possession of the property in this case is also bad because the property was situated and the coming into possession took place in a State other than New York, and of the three persons beneficially interested in the property, two were non-residents of that State. The State, therefore, had no jurisdiction over such property. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Matter of Pell*, 171 N. Y. 48.

Mr. William Law Stout for defendant in error:

The enactment of rules, regulations and principles governing the transmission of property by will, intestacy or other conveyances testamentary in character and effect are within the exclusive province of the State. This court will look to the statutes of the State for the rules governing the descent and testamentary transfer, alienation and succession of property. This court will not only adopt but is bound by the decisions of the highest courts of the States as to the effect and interpretation of wills and instruments of title. *Orr* v. *Gilman*, 183 U. S. 278, 283, 290; *De Vaughn* v. *Hutchinson*, 165 U. S. 566, 570; *Clarke* v. *Clarke*, 178 U. S. 186, 190; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Yazoo & Miss. Valley R. R. Co.* v. *Adams*, 181 U. S. 580, 583; *Eastern B. & L. Assn.* v. *Ebaugh*, 185 U. S. 114, 132; *L. & N. R. R. Co.* v. *Melton*, 218 U. S. 36; *Leffingwell* v. *Warren*, 2 Black, 599, 603; *Randall* v. *Brig-*

ham, 7 Wall. 523, 541; *Morley* v. *Lake Shore R. R. Co.*, 146 U. S. 162, 167; *Moffitt* v. *Kelly*, 218 U. S. 400, 405.

This court will also be bound by the decision of the highest court of the State that there is nothing in the statute or its enforcement in conflict with the constitution of the State, and that the proceedings taken therein for its ascertainment did not deprive the plaintiffs in error of their property without due process of law within the meaning of the state constitution. *Met. St. Ry. Co.* v. *Tax Commrs.*, 199 U. S. 1, 47; *Orr* v. *Gilman*, 183 U. S. 278, 283; *Carpenter* v. *Pennsylvania*, 17 How. 452; *Wallace* v. *Meyers*, 38 Fed. Rep. 184.

The interpretation and construction placed by the highest court of the State upon its statutes is conclusive upon this court. *Smiley* v. *Kansas*, 196 U. S. 447; *Hibben* v. *Smith*, 191 U. S. 310; *Blackstone* v. *Miller*, 188 U. S. 189, 207; *Watson* v. *Maryland*, 218 U. S. 173; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 151; *Tilt* v. *Kelsey*, 207 U. S. 43, 56; *Lindsley* v. *Natural Gas Co.*, 220 U. S. 61.

The only question left to this court is whether the statute as interpreted by the highest court of the State is in violation of the Federal Constitution. *Mo. & Kan. R. R. Co.* v. *Haber*, 169 U. S. 613.

By the decisions of the courts of New York the intention of the grantor, vendor or donor must be found. This is the test of the alleged gift. The enjoyment for life of the former owner is a determining feature; necessarily the character of the gift is determined by the acts of the owner; the withholding of this possession and enjoyment of the corpus or any determinable part thereof, determines how much thereof is applicable to the statute. *Matter of Brandreth*, 169 N. Y. 437; *Matter of Green*, 153 N. Y. 223; *Matter of Crueger*, 66 N. Y. Supp. 636; *Matter of Cornell*, 170 N. Y. 423; *Matter of Skinner*, 106 App. Div. 217; *Matter of Palmer*, 117 App. Div. 360; *Matter of Ballard*,

76 App. Div. 207; *Matter of Bostwick*, 160 N. Y. 489; *Matter of Keeney*, 194 N. Y. 281.

The Fourteenth Amendment does not affect or control the States in the exercise of their sovereign authority to regulate inheritances and to determine the persons or objects upon which an inheritance tax shall be imposed. *Campbell* v. *California*, 200 U. S. 94.

The tax upon the right to testamentary successions is not in contravention or in violation of any provision of the Constitution of the United States. *Carpenter* v. *Pennsylvania*, 17 How. Pr. 456; *Mager* v. *Grima*, 8 How. Pr. 490; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 33; *Blackstone* v. *Miller*, 183 U. S. 189, 201; *Billings* v. *Illinois Trust Co.*, 188 U. S. 97, 104; *Chanler* v. *Kelsey*, 205 U. S. 466; *Moffitt* v. *Kelly*, 218 U. S. 400, 405.

The right to take property by devise or descent is a creature of the law and not a natural gift; since it is a privilege granted and conferred by the State, the State may confer particular rights of succession, but with them impose conditions, limitations, classifications, and impositions upon the right of each particular succession granted. Cases *supra* and *Plummer* v. *Coler*, 178 U. S. 115; *United States* v. *Perkins*, 163 U. S. 625, 628; *Wallace* v. *Meyers*, 38 Fed. Rep. 184; *Matter of Hoffman*, 143 N. Y. 329, 331; *In re Cullum*, 145 N. Y. 593.

The highest court of the State of New York has construed the statute imposing this tax as a tax upon the right to particular succession, and not upon the property. *In re Swift*, 137 N. Y. 77, 88; *In re Merriam*, 141 N. Y. 479, 484; *In re Hoffman*, 143 N. Y. 329, 331; *In re Cullum*, 145 N. Y. 593; *In re Sherman*, 153 N. Y. 1, 6; *In re Dows*, 167 N. Y. 227, 232; *In re Vanderbilt*, 172 N. Y. 69, 72.

The interpretation of the tax as one upon the right of testamentary successions has been uniformly recognized by this court. Cases *supra* and *Louisville & Nashville R.*

R. Co. v. *Melton*, 218 U. S. 36; *United States* v. *Fox*, 94 U. S. 315.

This court will take it to have been found that the possession or enjoyment of the property passed to the plaintiffs in error, at the death of Susan A. Keeney, and that the statute was applicable to the right of succession of the plaintiffs in error to the remainders therein which vested in possession and enjoyment at her death. Cases *supra* and *Williams* v. *Arkansas*, 217 U. S. 79; *Watson* v. *Maryland*, 218 U. S. 173; *Gulf, Col. & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Board of Education* v. *Illinois*, 203 U. S. 553, 563; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Orr* v. *Gilman*, 183 U. S. 278, 287; *Cahen* v. *Brewster*, 203 U. S. 552; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251.

The classification of remainders which take effect in possession and enjoyment at or after the death of the grantor, donor or vendor, wherein the beneficial enjoyment of the property is reserved to the grantor, donor or vendor, is not unreasonable, unjust or arbitrary. Cases *supra* and *Heath-Milligan Co.* v. *Worst*, 207 U. S. 338, 354.

The Constitution does not, generally speaking, control the power of the State to select and classify subjects of taxation. Cases *supra* and *Cahen* v. *Brewster*, 203 U. S. 543, 549; *Orr* v. *Gilman*, 183 U. S. 278, 287; *Provident Savings Institution* v. *Malone*, 221 U. S. 661, 666.

The cases cited sustain the proposition that the statute imposing a tax upon the transfer of this class of remainders, limited to vest in possession and enjoyment at the death of the donor, the former owner of the property, and which cannot vest at any other time or upon any other contingency, does not deprive the plaintiffs in error of any of their rights or any of the privileges and immunities of citizens of the United States, nor does it violate the Fourteenth Amendment or any provision of the Constitution

of the United States. See also *McMillen* v. *Anderson*, 95 U. S. 37.

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

So much of the New York statute, as imposes an inheritance tax, was sustained in *Plummer* v. *Coler*, 178 U. S. 115, and in several decisions of the Court of Appeals of that State. But the plaintiffs insist that there is a radical difference between an inheritance tax and one on transfers *inter vivos*. The first, they say, is an excise, imposed on a privilege; while that complained of here is really on property, though called a tax on a transfer. They argue that inheritance taxes have been sustained on the ground (*United States* v. *Perkins*, 163 U. S. 625), that no one has the natural right to acquire property by will or descent, and if the State permits such acquisition, it may require the payment of a tax as a condition precedent to the right of using that privilege. On the other hand, they contend that the right to convey, or come into possession, does not depend upon a statutory or taxable privilege, but is a right incident to the ownership of property, and that the tax imposed by the statute on that right is in effect a tax on the property itself, and void because lacking in the elements of uniformity and equality required in the assessment of property taxes.

But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by

inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes. Some statutes go further than that of New York, and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever.

This was true under the Internal Revenue Act of 1864 (June 30, 1864, 13 Stat. 223, c. 173). It imposed a succession tax on "all dispositions of real estate, taking effect upon the death of any person." It was not apportioned, and would have been void if a tax on property. But it was held that "it was not a tax on land," since "the succession or devolution of the real estate is the subject matter of the tax . . . whether . . . effected by will, deed or law of descent." *Scholey* v. *Rew*, 23 Wall. 331, 347, cited and followed, *Knowlton* v. *Moore*, 178 U. S. 41, 78–81.

Wherever the amount of a tax is, as here, to be measured by the value of property, it has been earnestly argued that it was to tax the property itself, and that to ignore that feature is to put the name above the fact. But when the State decides to impose such a tax the amount must be determined by some standard. To require the same amount to be paid on all transfers is not so fair as to impose the burden in proportion to the value of the property. An excise on transfers therefore does not lose that character because the amount to be paid is determined by the values conveyed. In view of the decisions in *Magoun* v. *Illinois Trust Bank*, 170 U. S. 283, and other cases already cited, it is unnecessary to review the arguments *pro* and *con*, and again point out the distinction which has been made and sustained between excises and ad valorem taxes. We therefore accept the conclusion of the Court of Appeals of New York that the statute of

that State imposing a tax on the transfers of property "intended to take effect in possession or enjoyment at or after the death of grantor" is "not a property tax, but in the nature of an excise tax on the transfer of property." 194 N. Y. 281.

The validity of the tax must be determined by the laws of New York. The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch* v. *Reardon*, 204 U. S. 152, 159), that it must tax all transfers, or that all must be treated alike.

It is true that in New York it is as lawful to create an estate for life, with remainder after the death of grantor, as it is to convey in fee, or with remainder after the death of a third person, or on the happening of a particular event. But there is a difference in law as well as in practical effect between these various estates. Every encouragement is given to making conveyances in fee. But, from an early date, public policy has been opposed to the private interest which impelled men to withdraw property from the channels of trade and tie it up with limitations intended, among other things, to secure to the beneficiary the use of the property, while at the same time removing it, to some extent, from liability for his debts. The favored transfers in fee need not be taxed with the latter, even though the law permits their creation. These latter estates also differ among themselves. Where the grantor makes a transfer of property to take effect on the death of a third person, it might, under the ruling in *Scholey* v. *Rew*, *supra*, be taxed as a devolution or succession. But under such an instrument the grantor does not retain the use and power during

his own lifetime, the remainder does not fall in at his death, and such conveyances would not be so often resorted to as a means of evading the inheritance tax. 194 N. Y. 287. They are not so testamentary in effect as those transfers wherein the grantor provides that the property shall go to his children, or other beneficiary, at and after his death.

The New York statute recognizes this difference. It imposes a tax on transfers by descent, or will, which take effect at the death of the testator; and then a tax upon transfers made in contemplation of death. It was but logical to take the next step, and tax transfers intended to take effect at or after the death of the grantor—even though that event was not actually impending when the deed was signed.

There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the Fourteenth Amendment is concerned, the State could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event.

As to the other discriminatory features which, it is alleged, operate to deny the equal protection of the law, it is sufficient to say that it is now well settled that the State may impose a graduated tax in this class of cases. *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 298. The plaintiffs in error being children of the grantor were assessed at the lowest rate. They are, therefore, not in a position to take advantage of the fact that transfers to collaterals and strangers in blood are, by this act, taxed at a higher rate. The entire statute would not be invalidated

even if that feature should ultimately be held to be discriminatory and void. 194 N. Y. 286.

The real estate and tangible property in Texas were not within the taxing jurisdiction of the State of New York, and there was no effort to tax the transfer of that property. *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430; *Tax on Foreign Held Bonds*, 15 Wall. 301, 319. It is urged that on the same principle the stocks and bonds could not be taxed because they were in New Jersey in the hands of a trustee holding title and possession, by virtue of a deed made three years before the grantor died.

But the statute does not impose a tax on the property, but on the transfer. The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made. At that time the grantor was a resident of the State of New York. This personal property there had its situs. She there made a transfer, which was taxable, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the State to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of grantor in 1907, does not present any Federal question.

Affirmed.

JOHNSON *v.* COLLIER.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 104. Argued December 14, 15, 1911.—Decided January 9, 1912.

The bankrupt is not divested of his property by filing a petition in bankruptcy. He is still the owner, holding in trust, pending the appointment and qualification of the trustee, whose title then relates back to the date of adjudication.

Until the election of the trustee, the bankrupt may institute and maintain a suit on any cause of action possessed by him.

161 Alabama, 204, affirmed.

M. B. JOHNSON, as executor, recovered judgment against B. T. Collier, in the City Court of Gadsden, Ala. Execution thereon was levied July 20, 1906, on certain personal property.

Under a provision of the Alabama statute, Collier immediately filed with the sheriff a claim of exemption. On the same day he filed, in the proper District Court of the United States, a voluntary petition in bankruptcy, including this property in his schedule of assets. Notwithstanding the claim of exemption, the sheriff sold the property at public outcry on July 30, 1906.

Thereafter, on a date not shown by the record, Collier was adjudicated a bankrupt. On August 8, 1906, before a trustee was elected, he brought suit against both Johnson and the sheriff for damages, on the theory that the sale of the property after the filing of the claim of exemption made them trespassers *ab initio*. The defendants filed a plea, in which they set up the pendency of the bankruptcy proceedings, and alleged that Collier had no title to the cause of action which was in *gremio legis* until the election of the trustee, and for that reason he could not maintain a suit

for damages occasioned by the unlawful sale of property included in the schedule of assets. A demurrer to this plea was sustained. The jury found a verdict in favor of Collier, which the trial court refused to set aside. This ruling was affirmed, and the case is here on writ of error from that judgment of the Supreme Court of Alabama.

Mr. George D. Motley for plaintiffs in error.

Mr. Amos E. Goodhue for defendant in error.

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

The trustee, with the approval of the court, may prosecute any suit commenced by the bankrupt prior to the adjudication. (§ 11, c.) But the statute is otherwise silent as to the right of the bankrupt himself to begin a suit in the time which intervenes between the filing of the petition and the election of the trustee. There is a conflict in the conclusions reached in the few cases dealing with this question. *Rand* v. *Sage*, 94 Minnesota, 344; *Rand* v. *Iowa Central R. Co.*, 186 N. Y. 58; *Gordon* v. *Mechanics' Insurance Co.*, 120 Louisiana, 441.

While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes "vested by operation of law with the title of the bankrupt" as of the date of adjudication. (§ 70.)

Until such election the bankrupt has title—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so.

There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. *Thatcher* v. *Rockwell*, 105 U. S. 467.

If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some States the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice. *Rand* v. *Iowa Central R. Co.*, 186 N. Y. 58; *Southern Express Co.* v. *Connor*, 49 Georgia, 415.

There was no error in holding that the bankrupt had title to the cause of action and could institute and maintain suit thereon.

Affirmed.

INTERSTATE COMMERCE COMMISSION *v.* UNION PACIFIC RAILROAD COMPANY.

SAME *v.* NORTHERN PACIFIC RAILWAY COMPANY.

SAME *v.* GREAT NORTHERN RAILWAY COMPANY.

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

Nos. 451, 452, 453. Argued October 18, 19, 1911.—Decided January 9, 1912.

The Act to Regulate Commerce makes the findings of the Interstate Commerce Commission as to reasonableness of a rate *prima facie* correct. *Cincinnati &c. Ry.* v. *Interstate Commerce Commission*, 206 U. S. 154.

Orders of the Interstate Commerce Commission are final unless beyond the power that the Commission can constitutionally exercise; beyond its statutory power, or based upon a mistake of law.

An order of the Commission, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support its conclusions; or if the authority was exercised in an absolutely unreasonable manner.

This court, in determining the validity of an order of the Interstate Commerce Commission, confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider expediency, nor will it consider facts further than to determine whether there was sufficient evidence to support the order.

Where, as in this case, there is testimony as to value of the roads, amounts expended, dividends, ratio of earnings and expenses, and other matters, there is evidence to support the conclusions and the findings of the Commission on such facts are conclusive.

Reasonableness of railroad rates cannot be proved by categorical answers like those given in regard to value of articles of merchandise; too many elements are involved which require consideration.

Quære: whether the maintenance of an admittedly low rate for a long time raises a presumption of reasonableness because the carriers realized a profit thereon.

An order of the Interstate Commerce Commission is not to be considered by itself alone, but must be considered in the light of all the testimony, and when carriers themselves maintain a ratio of difference, a rate fixed by the Commission maintaining the same ratio of difference cannot be said to be beyond its power.

An order of the Interstate Commerce Commission within its power cannot be held invalid because it appears that possibly the Commission considered other subjects than the reasonableness of the rate; and in this case, *held* that an order fixing a rate on lumber was not invalid because the Commission examined into the effect of the rate on the lumber business and on the industries of the various points affected.

THESE three appeals are brought by the Interstate Commerce Commission from a decree enjoining a reduction of lumber rates named in tariffs filed by the Great Northern, the Northern Pacific and the Union Pacific Railroads.

The tariffs under consideration involve rates on lumber from the coast, Spokane District, and Montana-Oregon points to St. Paul, Omaha and Chicago. It is admitted that the rates on shingles, hemlock, cedar and other forest products have a fixed relation to those on fir lumber, and that the differentials from Spokane and the Montana-Oregon territory have a like fixed relation to those from the coast.

The summary of these very lengthy records will therefore be limited to a statement of those facts bearing directly on the pivotal question as to the validity of the order fixing a rate of forty-five cents per hundred pounds on fir lumber from the coast to St. Paul.

In 1893 the rate, from the coast, on fir lumber, over the two northern lines to St. Paul, was fixed at 40 cents, and since 1901 the rate to Omaha at 50 cents.

In 1907 the three carriers concurrently filed new tariffs, making the rate from the coast to St. Paul 60 cents, to Omaha 55 cents and to Chicago 60 cents. Thereupon

various corporations filed complaints before the Commission, alleging that the proposed rates were unreasonable and would seriously affect the lumber industry. The carriers emphatically denied both of these allegations and, in explanation of the causes leading up to the advance, showed that when the Great Northern was completed to the coast, about 1893, almost all of the freight shipped over its line went from the east to the west—cars being hauled back empty to St. Paul, its eastern terminus. In order to correct this expensive and unremunerative situation, the Great Northern decided to put in a rate on lumber so low that mill men on the Pacific coast might compete with dealers in white and yellow pine, in the Chicago market, 2,500 miles distant. It thereupon reduced the existing rate to 40 cents. That cut was met by the Northern Pacific which also reached St. Paul, but the Union Pacific at that time made no change in its rate. The reduction opened up new markets, and was soon followed by heavy shipments of lumber to the east. The business grew steadily, and prior to the filing of the tariffs in 1907, the empty car movement had been completely reversed—many cars being hauled empty from St. Paul to the coast and returning to the east loaded with lumber.

Traffic increased to such an extent that it became necessary to open up new tunnels, construct additional passing tracks and reduce grades and curves. There was a constant increase in gross earnings, but the carriers contended that there had been such an enormous and disproportionate increase in the cost of operation, that it was absolutely necessary to discontinue the unremunerative 40 cent rate and advance it to 50 cents, which they insisted was just and reasonable.

There was no finding as to the effect on gross earnings which would result from the proposed advance of ten cents. But, as the Great Northern, in one year, hauled 1,765,095,997 tons one mile, equivalent to about 30,000

cars, of the average load of 58,000 pounds, transported 2,000 miles from the coast to St. Paul, the advance of ten cents per hundred, or $58 per car, would represent a gross annual increase, for that company alone, of $1,740,000.

An immense amount of evidence was offered by both parties in support of their respective contentions. The Commission rendered an elaborate opinion (14 I. C. C. 1), and concluded by finding that the old rates were just and reasonable and should be restored to all points on and west of the Pembina line, which ran from the Canadian line almost due south through Fargo, Omaha, to Port Arthur, Texas. As Omaha was on this line, the effect of that part of the order was to prohibit the 55 cent advance, and to restore the old rate of 50 cents to Omaha, which had been in force since 1901. As to rates east of the Pembina line the Commission held that "they might reasonably be somewhat increased, but not more than five cents per hundred, to be graded up so as to reach the maximum increase at . . . St. Paul; . . . the rate from the Missouri river crossings should be graded up, the maximum increase of five cents reached at the Mississippi river. Chicago rates should apply to all points between the Mississippi . . . and Chicago."

The carriers thereupon filed separate bills to enjoin this order, and repeated therein the contentions made before the Commission; averred that the old 40 cent rate to St. Paul and the 50 cent rate to Omaha were not only unremunerative, but proportionately so much lower than rates on other merchandise as to amount to an unjust discrimination; alleged that the prosperous condition of the lumber business did not require or justify a further maintenance of this low rate; and, among other things, insisted (1) that the order was beyond the power of the Commission, because entered without any evidence, or finding, that the rates fixed by the carriers were unjust or unreasonable; and (2) was void because the Commission

erroneously held, as a matter of law, that the long continuance of the old rate, during a period when the carriers' total income was sufficient to pay dividends, raised the presumption that the old rates were reasonable.

The Commission demurred and, in its answer, averred that evidence was introduced showing, and tending to show, that the advanced rates were unreasonable; and that, after a full hearing, it was of opinion that the rates complained of were unreasonable, and entered its order accordingly; that the determination of that question involved the exercise of a discretion committed solely to the Commission, and that the "courts ought not and could not review its judgment, and finding, unless it be made clearly to appear that the orders complained of transcend the pale of legitimate regulation."

The cases were referred to a Master, who reported that the allegations of discrimination were not only too general, but that there was no evidence upon which any ruling could be predicated on that subject; that the substance of the bill was that the rates put in by the Commission were confiscatory, and, as to that, held that the evidence was not sufficient to warrant the court in setting aside so much of the order as restored the rates to, and west of, the Pembina line. There was some evidence that the cost of hauling freight over the Union Pacific was greater than over the northern lines, because it crossed the mountains at a point 2,000 feet higher than they did. But the Master found, as a fact, that the traffic conditions were substantially the same over the three roads, and that the distance from the coast to Omaha was 1,800 miles and to St. Paul 2,052 miles. He thereupon held, as a matter of law, that when the Commission fixed 50 cents as a reasonable rate to Omaha over the shorter route, it necessarily followed that the lower rate of 45 cents, over the longer route to St. Paul, was not only unreasonable but unjust.

And even "though the rate might not be confiscatory,

yet an order which, on its face, is inherently inconsistent with the fundamental principles of rational justice, and perverts the spirit and intent of the Interstate Commerce Act, though in form within the limits of delegated power, is, in fact, beyond those limits and is an unlawful order, and one which results in the taking of property without due process of law." He recommended that the court should enjoin so much of the order as permitted an advance of only five cents to points east of that line.

The Commission, and each of the carriers, filed many exceptions to the report, as to which the Circuit Court passed the following order: "All the exceptions to the report of the Master must be overruled. Those which challenge his finding that the reduction, by the Interstate Commerce Commission, of the 50 cent rate on lumber to St. Paul and other points east of the Pembina line, was arbitrary, and so palpably unjust and unreasonable, and so discriminatory that it was beyond the power of the Commission, are overruled; on the ground that this action of the Commission was beyond its power, or so palpably and gravely unjust and unreasonable as to be beyond the substance, if not beyond the form, of its power."

Mr. Luther M. Walter and *Mr. Jesse C. Adkins* for appellant.

Mr. Hale Holden, with whom *Mr. Charles Donnelly* and *Mr. F. C. Dillard* were on the brief, for appellees.

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

These appeals raise the single question as to whether, in making the 45 cent rate, the Commission acted within or beyond its power. As the statute makes its finding *prima facie* correct (*Cincinnati &c. Ry.* v. *Interstate Commerce Commission*, 206 U. S. 142, 154), it will be more con-

venient to consider the case from the standpoint of the carriers, who first insist that the order was void because made without evidence, or finding, that the 50 cent rate was unreasonable.

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com.* v. *Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S. 538, 544; *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final;

not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

2. We proceed, then, to a consideration of the carriers' contention that the order was void because made without any testimony that the 50 cent rate of 1907, to St. Paul, was unreasonable. We find that, as far back as 1893, the rate on fir lumber was reduced to 40 cents, on the theory that after a carrier had been paid for transporting a carload of freight from the east to the west, it was better to haul it back loaded with lumber at 40 cents, thereby earning something, than to take it back empty and get nothing. But if, after the empty car movement had been reversed, the carrier had to be at the expense of hauling cars empty to the west for the purpose of returning them loaded with lumber at the unremunerative rate of 40 cents, there would be a double loss—it got nothing for hauling the empty car from St. Paul to the coast, and it derived no profit for hauling it back at the low rate. They contend that this situation, in connection with the enormous increase in the cost of operation, not only justified but required an advance over the 40 cent rate. And this view of the testimony seems to have been taken by the two commissioners who dissented. If there was no other evidence, the Commission's order could not be sustained.

But these facts do not stand alone. In the first place there was no appeal from the Master's finding that:

"The carriers concede that they are unable to determine the cost of this traffic, in and of itself; and that they are unable to say, with any satisfactory accuracy whether or not they make a profit upon it; but they have all conceded that, in their judgment, speaking as experts, the lumber traffic has not been confiscatory and has not been performed for less than cost."

This concession, of course, does not cover the question at issue, but it does fix a starting point. It establishes an important fact in dealing with the difficult question of determining what is a reasonable rate on a particular article. Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50 cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40 cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. There was evidence that during the fourteen years, when the 40 cent rate was in force, the carriers had, by proper management and without wasteful economies, kept their properties in a high state of efficiency, and after paying all the costs of operation, maintenance, depreciation, fixed

charges and sinking funds, had been able to pay reasonable dividends.

There was evidence as to the value of the road, the amounts expended in betterments and paid out in dividends, ratio between the increased earnings and increased expenses, with many tables and estimates tending to show the cost of hauling empty cars, fully loaded cars, and those carrying an average load.

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. There was then, under the statute, nothing for the companies to do except to comply with the order—or, act on the suggestion thrown out in the Commission's answer, and apply for a rehearing, in reliance upon its power and duty to modify its order if the new evidence warranted such change.

3. When the bills were filed the carriers insisted that the order was the result of a mistake of law, in that the Commission held that the long maintenance of the 40 cent rate raised a presumption that it was reasonable, because the carriers had been earning a reasonable profit. But we need not consider whether, under such circumstances, the maintenance of the admittedly low rate raised any presumption of reasonableness; or, if so, whether it is not neutralized by the presumption of right conduct by the carrier as primary ratemaker (*Interstate Com. Com.* v. *Chicago &c.*, 209 U. S. 108, 119). For whatever influenced the Commission in restoring the rates to the Pembina line

—as to which there is now no appeal—it is evident that as to points east of that line they did not act on any presumption that the old 40 cent rate was reasonable. On the contrary, they acted directly contrary to any such presumption, and instead of maintaining the old rate, allowed a new and higher rate to St. Paul, permitting an advance of five cents per hundred, or 12½ per cent, or between $500,000 and $1,000,000 per annum, to the Great Northern road alone.

4. And this brings us to a consideration of the Master's finding, approved by the Circuit Court, that in fixing a rate of 45 cents to St. Paul, the order on its face was void because, with traffic conditions over the three roads practically the same, the Commission allowed the high rate of 50 cents to the short route and the low rate of 45 cents to the long route. It was argued that when the Commission had adjudged that a rate of 50 cents for 1,800 miles was reasonable, it was manifestly unreasonable to allow a rate of 45 cents for 2,052 miles, and that such order was so palpably unjust and unreasonable as to be beyond the substance, if not beyond the form, of the Commission's power.

It does not follow, as a matter of law, that rates should be the same for the same distance over two different roads, and this would be especially true if the cost of transportation was greater over the Union Pacific than over the Northern lines because it crossed the mountains 2,000 feet higher than they.

But, with the Master's finding that traffic conditions were practically the same, it might be that the order would appear unreasonable on its face, if it fixed the high rate over the short route and the low rate, with less revenue, per ton, per mile, over the long route. But the order cannot be considered by itself alone. It must be read in the light of the entire record, including the important fact that the carriers themselves, in making their rates, made a similar difference between the long and the short line.

By their own tariffs they clearly show that they did not consider mere distance a controlling factor in fixing the rates now under attack. And this is not exceptional, for it appears that they make rates from basing points to common points, with the result that two cars of lumber, of the same weight, may be shipped from the same place, over the same line, at the same rate to different points, although the distance one car is hauled may be several hundred miles greater than the other.

But the fact that the carriers themselves, in 1893, 1901 and 1907, charged more to Omaha than to St. Paul is a much weightier fact in considering this attack on the order. In making the difference between these two cities the Commission only did what the carriers themselves had done, under their old and new rates. After 1901, the rate to Omaha was 50 cents and the rate to St. Paul, over the longer route was 40 cents. In the 1907 tariff, now under consideration, the rate to Omaha, over the short route, was fixed by them at 55 cents; and that to St. Paul, for the longer route, was fixed at 50 cents. This was a difference of 5 cents in favor of the short route. The Commission made the same difference in favor of the same road.

This difference is supported by what the record shows as to rates to points on the Pembina line. Inasmuch as no appeal was taken from the refusal to enjoin their restoration, we may assume that all parties admit these rates to be reasonable. But there was a difference as to rates to points on this line which shows that the per mile ratio cannot be regarded as a necessary standard. For example, the rate to Omaha, on the lower part of this line was 50 cents, while the rate to points on the northern end was 40 cents. This was a difference of 20 per cent in favor of Omaha, although there was no such difference in the distance. Again, timber shipped from the coast to St. Paul, passed through this 40 cent point on the northern end of

the Pembina line. The distance from the coast to St. Paul was one-eighth greater, and the advance allowed was one-eighth, or five cents over the 40 cent rate.

It is quite true that the carriers may do what they could not be compelled to do. But it is not to be assumed that they made and continued these different rates between these two cities arbitrarily and without reason. It was proper for the Commission to consider the weight and the character of these reasons and the causes which prompted and justified the carriers in charging these different rates. When the Commission maintained the same ratio of difference as that made by the carriers themselves, it cannot be fairly said that such an order was so arbitrary as to be palpably and gravely unjust, and beyond the substance, if not the form, of its power.

5. A final point remains to be considered, although it involves an issue not presented by the pleadings, not included in the Master's report and not passed on by the Circuit Court. It is, however, argued that on this appeal the record may be searched and the decree affirmed because, in making its order, the Commission was influenced solely by a consideration of the effect of the advance in rates on the lumber industry.

It does appear that the lumber men, in their complaints before the Commission, alleged that the advanced rates were unreasonable; and, apparently on the theory that the injurious effect on their business would sustain that contention, they alleged that the new rate would destroy the lumber industry. Issue seems to have been joined on both propositions, and there were mutual criminations and recriminations of prosperity—the lumber men insisting that the railroads had made large profits under the old rate, and did not need the advance, which would destroy the ability of the lumber men to ship lumber to the east.

The carriers, on the other hand, contended that the 40 cent rate had opened up new markets and developed the

lumber business to a point where it had become enormously profitable, and would continue so under the advanced rates, because white pine had practically disappeared from the market, and that the increased price of lumber more than made up for the increased cost of timber and labor.

It is true, also, that the Commission examined into the effect of the old and the new rate on carrier and lumber men alike. But we do not find that it made the order because of the effect on the lumber industry. In the *Willamette Case* (219 U. S. 445), counsel for the mill men admitted that the rate there under attack was reasonable in and of itself, but insisted that statements of officers and action of the carrier operated to estop the road from raising a low rate up to a reasonable rate.

Nothing of the sort is found here. The rates were attacked as unreasonable, and, on evidence already referred to, the Commission found that the old rates to the Pembina line were reasonable and could not be changed, but that there might be a reasonable increase to points east of that line, not to exceed five cents.

While there is language in the opinion which, looked at alone, might suggest that the Commission was attempting to decide more than the single question as to what was a reasonable rate, yet, taking the opinion as a whole, it affirmatively appears that the Commission confined itself to the exercise of its statutory powers to fix rates. In its opinion it did discuss the issue of prosperity presented by mill men and carriers alike, but held (p. 14) that—

" . . . This controversy cannot be determined wholly upon the ground that complainants have enjoyed the lower rate for many years and that interests have been built up thereunder, and that loss of business investments, profits and markets will result under the increased rates. It must be determined on the justness or reasonableness of the rates in controversy. . . . If the old

rates were too low to be just and reasonable, complainants [mill men] cannot urge their loss as a ground for maintaining them; if the old rates were just and reasonable, the defendants cannot justify the advance on the ground of the prosperity of the lumber business."

Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumptions arising from the long continuance of the low rate, when the carrier was earning dividends; nor that there was no evidence to support the finding. If so, the Commission acted within its power and, in view of the statute, its lawful orders cannot be enjoined. The decree, therefore, must be

Reversed.

FITZ GERALD *v.* THOMPSON.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 849. Submitted December 18, 1911.—Decided January 15, 1912.

Where the record plainly shows that to convert a party defendant into a party plaintiff would be wholly inconsistent with the relief which it is the object of the suit to obtain, the court will not realign such defendant as a plaintiff so as to enable another defendant to remove the case to the Federal court.

Where, as in this case, the plaintiffs charge one of the defendants with repudiation of obligations and ask his removal as trustee, the claim made at the instance of a co-defendant seeking to remove the case, that he should be realigned as a party plaintiff, is manifestly frivolous.

THE facts are stated in the opinion.

Mr. Samuel Untermyer, with whom *Mr. William J. Sturgis* and *Mr. Irwin Untermyer* were on the brief, in support of the motion.

Mr. William A. Stone, with whom *Mr. Michael J. Ryan* and *Mr. James Gay Gordon* were on the brief, in opposition thereto.

Memorandum opinion by direction of the court. By MR. CHIEF JUSTICE WHITE.

The object of this suit was to enforce a trust created by the plaintiff in error for the benefit of his wife and three minor children, to declare a lien on certain property dedicated to the purposes of the trust, for the removal of two trustees, etc. Josiah V. Thompson, one of the trustees, was a plaintiff, and joined with him were the wife and minor children of Fitz Gerald, the latter represented by their guardian *ad litem*. The remaining trustees were made defendants, individually and in their capacity as trustee and as partners.

All the plaintiffs except the minor children were citizens of Pennsylvania. The minor children were aliens and resided in Ireland. Lenhart, one of the defendants, was a citizen of Pennsylvania, while Fitz Gerald, his co-defendant, was an alien and a British subject. Fitz Gerald applied to remove to the United States court on the ground that on properly aligning the parties to the controversy, his co-defendant Lenhart was a plaintiff, and that as the residence of the guardian *ad litem* was controlling so far as the interest of the minors was concerned, the controversy was one between citizens of Pennsylvania on the one hand and Fitz Gerald, an alien, on the other. The further contention was urged that the cause was embraced in the clause of § 1 of the Removal Act of 1887–8 (March 3, 1887, 24 Stat. 552, c. 373) conferring original jurisdiction

upon Circuit Courts of controversies "between citizens of a State and foreign states, citizens, or subjects," and that the following clause of the second section of the act was applicable:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of that State."

The trial court denied the application and subsequently granted the relief prayed by the bill. On appeal the Supreme Court of the State of Pennsylvania affirmed the decree, and in the opinion delivered held that no error was committed in denying the application to remove. Because of this latter ruling the cause was brought here. The defendants in error now move to dismiss the writ.

The right to remove from the state court which was asserted had no legal foundation. Lenhart was charged with a repudiation of his obligations as trustee by a refusal to apply the trust funds as required by the trust agreement. Not only was an accounting by him asked and an injunction prayed to prevent him from disposing of the partnership property which was dedicated to the trust, but his removal as trustee was also sought. Under these circumstances it is plain on the face of the record that no possible rearrangement of the parties could have been made converting Lenhart into a party plaintiff which would be consistent with the relief which it was the object of the suit to obtain. In this state of the case the assertion that there was a denial of a Federal right by the overruling of the application to remove is so manifestly frivolous and devoid of merit as not to form the basis of jurisdiction and to render it necessary to grant the motion to dismiss.

Writ of error dismissed.

HERRERA *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 89. Argued December 11, 12, 1911.—Decided January 15, 1912.

War makes the citizens or subjects of one belligerent enemies of the government, citizens and subjects of the other.

During the war with Spain Cuba was enemy's country; and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, and their property enemy's property and subject to seizure, confiscation and destruction.

Property in the harbor after the capitulation of Santiago remained enemy property, and seizures thereof by the United States were acts of war.

Nothing in the President's proclamation of July 13, 1898, militated against the right of the United States to confiscate enemy's property for the use of the army of occupation.

There is a distinction between the capture of an enemy's port in a war with a foreign country, and the restoration of national authority over territory in a civil war and in the protection of property after capture. *The Venice*, 2 Wall. 258, distinguished.

There is a distinction between a seizure of private property of an enemy for immediate use of the army and the taking of such property as booty of war. *Planters Bank* v. *Union Bank*, 16 Wall. 483.

Under the prohibitions of the Tucker Act, the Court of Claims has no jurisdiction for claims for seizures made in Santiago after its capitulation in violation of the President's proclamation of July 13, 1898, or of the laws of war.

Right of Spanish subjects against the United States for indemnity for illegal seizures and detention of property during the war of 1898 was taken away by the treaty of peace. *Hijo* v. *United States*, 194 U. S. 315.

43 Ct. Cl. 430, affirmed.

THE facts, which involve the jurisdiction of the Court of Claims and the liability of the United States for use of enemy vessels seized during the war with Spain, are stated in the opinion.

Mr. Howard Thayer Kingsbury and *Mr. Crammond Kennedy*, with whom *Mr. Frank D. Pavey* was on the brief, for appellants:

The President's instructions of July 13, 1898, govern the case at bar; and, while they were framed to meet the situation created by the capitulation of Santiago, they are in accordance with the laws of war defining the reciprocal rights and obligations of the occupying power and the inhabitants of the occupied territory—see decision of Sir William Scott (Lord Stowell) in the prize cases at capitulation of Genoa, 4 Robinson, Adm. Reps. 388. If the shipping was seized before the capitulation and not released by any of the articles, it could be held by the captor for condemnation or ransom, but if the seizure was made after that time, it would be considered, not as the exercise of any rights of war but as mere lawless rapine and plunder. See also 3 Phillimore's Int. Law, 3d ed. 192.

As to legal effect of military occupation on the inhabitants and their property in the occupied territory, see *The Venice*, 2 Wall. 258, a vessel seized after capture of New Orleans, in which it was held that the vessel though undoubtedly enemy's property at the time she was anchored in Lake Pontchartrain, could not be regarded as remaining such after the sixth of May.

This opinion was unanimous, and it has been cited by this court with approval in the following cases: *The Baigorry*, 2 Wall. 481; *The Reform*, 3 Wall. 617; *The Peterhoff*, 5 Wall. 60; *Ouachita Cotton*, 6 Wall. 531; *The Grapeshot*, 9 Wall. 131; *United States* v. *Padelford*, 9 Wall. 541; *Levy* v. *Stewart*, 11 Wall. 253; *Mail Co.* v. *Flanders*, 12 Wall. 134; *Hamilton* v. *Dillin*, 21 Wall. 94; *Desmare* v. *United States*, 93 U. S. 611; *Burbank* v. *Conrad*, 96 U. S. 301; *Clark* v. *United States*, 99 U. S. 496.

In *Cross* v. *Harrison*, 16 How. 164, it was held that the formation of the civil government in California,

when it was effected, was the lawful exercise of belligerent right over a conquered territory, and that this power is given by the law of nations for the purpose of protecting the inhabitants of the occupied territory and their persons and property. And it is for this reason that, both under the common law and the law of nations, conquered states or districts retain their old laws until the conqueror or military occupant thinks fit to alter them. See *Planters Bank* v. *Union Bank*, 18 Wall. 483.

All of the most recent authors concur in this view. See especially Les Requisitions Militaires du Temps de Guerre by Ch. Pont, 85, 86; Latifi's "Effect of War on Property," London, 1909, 30; Bernier, "De l'Occupation Militaire," 108; Kent's Comm. 14th ed. 92.

The rules and regulations prescribed by the President in his instructions of July 13, 1898, to the Secretary of War, were in accordance with the laws governing the firm and permanent occupation of enemy territory, apart from the fact of capitulation (as distinguished from capture by assault), or from the fact that the capitulated territory was held by the United States "in trust for the people of Cuba." *Neely* v. *Henkle*, 180 U. S. 109, 120. These rules were substantially the same as those formulated by the Brussels Conference in 1874 for the military occupation of enemy territory and incorporated in 1899 into the "Convention as to the Laws and Customs of War on Land," adopted at The Hague, to which the United States and all the leading powers of the world have become parties.

These rules are substantially the same as Lieber's Code (General Order, No. 100), any differences being due to the fact that the latter were prepared for the conduct of the Army of the United States in a civil war in which the enemy was regarded as traitors and rebels and not (as in an international war) where each side is respected as doing its duty to its own country. General Orders No. 101

were issued specifically to govern the situation resulting from the capitulation of Santiago. As to effect of such orders see *United States* v. *Eliason*, 16 Pet. 291, 302.

As to sanctity of private property during war, as recognized by the United States, see treaty with Prussia of 1788, Art. XXIII, and treaty of 1848 with Mexico, in which both countries "solemnly pledged themselves to each other and the world" to observe the same rules "upon the entrance of the armies of either nation into the territories of the other."

Two centuries earlier the sanctity of private property was stated in the strongest terms by Grotius (De Jure Belli et Pacis, Lib. III, Ch. XX, § VII, par. 1).

In the code of Moses, barbarous as it was, a very much more humane treatment was prescribed for enemies who surrendered. (Deut. XX: 10–14.)

The claimants were not Spanish subjects in the sense of the treaty, and their claims were not released by Spain to the United States. *Hijo* v. *United States*, 194 U. S. 315, does not apply to this case.

There was no way provided in the treaty by which persons born in the island—the people of Cuba—like the claimants in No. 90, could preserve Spanish nationality and allegiance which they threw off when they declared their independence in 1895 and of which they were relieved (so far as the United States was concerned) by the declaration of their independence in and by the Joint Resolution of Congress of April 20, 1898. The claimants in No. 89 could have retained their Spanish nationality and allegiance under Art. IX, but they refused to do so because they had cast in their lot with the people of Cuba, thus becoming under the constitution of Cuba citizens of that republic by naturalization.

When an act is done at one time and it operates upon the thing as if done at another time, it is said to do so by relation. 2 Bouvier's Dic., Rawle's Revision, 864; 24

Am. & Eng. Ency. Law, 2d ed. 275. The doctrine of relation as to the commencement of the existence and responsibility of states, also as to their title to their territory, and the citizenship of their people, applies to Cuba.

As the revolution succeeded, and the republic became recognized, its acts from the commencement of its existence are upheld as those of an independent nation. *Williams* v. *Bruffy*, 96 U. S. 176. See also *Harcourt* v. *Gaillard*, 12 Wheat. 524, 527; *M'Ilvaine* v. *Coxe's Lessee*, 4 Cranch, 209, 212; *Underhill* v. *Hernandez*, 168 U. S. 250, 253, citing *United States* v. *Rice*, 4 Wheat. 246; *Fleming* v. *Page*, 9 How. 603; *Thorington* v. *Smith*, 8 Wall. 1; *Ford* v. *Surget*, 97 U. S. 594; *Dow* v. *Johnson*, 100 U. S. 158; *United States* v. *Trumball*, 48 Fed. Rep. 94. See also *Inglis* v. *Sailors Snug Harbor*, 3 Pet. 99.

Children born in Santiago after the capitulation, while the United States was holding the capitulated territory "in trust for the people of Cuba" were not Spaniards by birth.

For application of the doctrine of relation in international arbitrations, see *Heny's Case* in Ralston's Rep. 17; The *Dix Case*, Ralston's Rep. 8; the *Puerto Cabello Railway Company Case*, Ralston's Rep. 458; the *Bovallins* and *Hedlund Cases*, Ralston's Rep. 952. For other cases see 4 Moore's Int. Arb'ns, No. 4330.

The releases in both cases were obtained under duress. *Swift Co.* v. *United States*, 111 U. S. 28; *Maxwell* v. *Griswold*, 10 How. 242, 256; *Adams* v. *United States*, 20 Ct. Cl. 115; *Bostwick* v. *United States*, 94 U. S. 53; *Rush* v. *United States*, 35 Ct. Cl. 239; *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17.

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

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition in the Court of Claims for the recovery of $88,200 for the value of the use and profits of which claimants were deprived, as it is alleged, by the taking and detention of a certain steamship by the United States during the war with Spain, and for the loss of certain property belonging to and a part of such steamship alleged to be "fairly worth" the sum of $5,000, amounting in all to the sum of $93,200.

Claimants base their right to recover upon an implied contract arising from the facts which we shall presently detail. Opposing this view, the Government contends that the property was enemy property seized for military uses and that, besides, the record does not show a "convention between the parties" or circumstances from which a contract could be implied, and that therefore the case is one sounding in tort and claimants have no right of recovery.

The court found as a conclusion of law from the facts, "on the authority of the case of *Hijo* v. *United States*, 194 U. S. 315, that the claim herein is one arising from the capture and use of a vessel as an act of war, and the court is therefore without jurisdiction, and the petition is dismissed."

The claimants, at the time the steamship was taken, composed a commercial partnership, doing business under the firm name of Herrera Nephews. They were born in Spain, and, under the Spanish régime in Cuba, were Spanish subjects residing in Havana. After the treaty they did not, in accordance with its terms, preserve their allegiance to Spain.

On the sixteenth day of July, 1898, the Spanish forces then occupying the territory constituting the division of Santiago, including the city and port of that name, capitu-

lated to the United States in accordance with the terms of a military convention which provided that all hostilities between the American and the Spanish forces in that district should cease and that the Spanish forces should be returned, at the expense of the United States, to Spain. Actual hostilities ceased with the surrender of Santiago.

The United States military authorities seized and captured the steamer *San Juan* on the seventeenth of July, 1898, she having been held in the harbor by its blockade by the United States naval authorities. Prior to that date she had been used to transport Spanish troops, munitions of war and supplies for the Spanish troops from place to place. After her capture she was used for like service for American troops and indigent Cubans until November, 1898, a period of 115 days. The reasonable value of her use was $150 per day, amounting to the sum of $17,250, no part of which has been paid to claimants.

After the surrender of Santiago and the seizure of the steamship, the Secretary of War, on July 18, 1898, in pursuance of the proclamation of the President of July 13, 1898, issued General Order No. 101, which, among other things, provided that "Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. . . .

"Private property taken for the use of the Army is to be paid for, when possible, in cash, at a fair valuation, and when payment in cash is not possible receipts are to be given."

This order was promulgated in Cuba, July 20, 1898.

On November 8, 1898, the Quartermaster-General of the Army telegraphed to R. A. C. Smith, the representa-

tive and attorney-in-fact of claimants, that it was proposed to return the "captured steamer" to owners, and asked him to wire their names. Smith answered on the twelfth "that claimants agreed to accept the vessel, reserving their right to make claim." On the fifteenth the War Department notified Smith that the Government was ready to deliver the vessel to her owners upon condition that a receipt be given showing that she was accepted with full knowledge and understanding that the Secretary of War did not consider that any allowance was due the owners on account of her use, she being captured property, or for any damage sustained by her while she was in the possession of the United States, and that any claim subsequently made should be a matter for future consideration by the War Department. The terms were rejected and she remained in the possession of the United States.

On April 25, 1899, the Quartermaster at Santiago, on instructions from the War Department, wrote claimants' agent that if they did not receive the steamer "in accordance with the conditions hereinafter expressed," she would be delivered to the Department of the Quartermaster of the Army and retained as property of the United States.

On the seventeenth claimants accepted her and gave the following receipt:

"Received this 17th day of May, 1899, at Santiago, Cuba, from Maj. John T. Knight, quartermaster, U. S. Army, chief quartermaster Department of Santiago, the steamship *San Juan,* which vessel is accepted with the full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damages sustained while the vessel has been in possession of the United States Government, the return of the vessel being a generous act on the part of the United States Government, and that any claim subse-

quently made for such use and damages shall be a matter for future consideration of the War Department.

"And we name and authorize our agents in Santiago de Cuba—Messrs. Gallego, Mesa & Co., of said city—to receive and take possession of said steamship *San Juan.*"

They also executed a paper which recited that it was given in consideration of the prompt return of the vessel to claimants, and that released the Government and its officers and agents "from all manner of actions, damages, claims and demands whatsoever" on account of her seizure, detention and use.

From the time that the Quartermaster-General of the Army proposed to return the vessel until May 17, 1899, a period of 190 days, the vessel, though retained by the United States, was not used. During said period the United States kept a watchman on board, who was paid $45 per month. The compensation claimants are entitled to, if any, for such period, taking into account that the vessel was not used, would be $125 per day, or $23,750.

Upon the return of the vessel to claimants, tools and implements of the value of $232.50 were missing, but it is not shown by whom they were taken. No other property is shown to have been taken possession of by the United States. The steamer, when returned, appeared to have been in as good condition as when taken into possession, ordinary wear and tear excepted.

As we have seen, the Court of Claims rested its decision on the case of *Hijo* v. *United States*, 194 U. S. 315, and that case also is the main reliance of the Government's argument. Claimants, however, contend that the *Hijo Case* is distinguishable from that at bar.

The action there was brought to recover the value of the use of a vessel belonging to Spanish subjects and taken by the United States in the port of Ponce, Porto Rico, when that city was captured by the United States army and

navy on July 28, 1898. The vessel was used by the quartermaster until some time in April, 1899, when she was ordered to be returned to the owner, if all claims for damages for use or detention should be waived. The condition was refused, and the vessel was subsequently abandoned and was wrecked in a hurricane. We quote the following from the statement of facts in the opinion: "The vessel was never in naval custody nor condemned as prize. When seized it was a Spanish vessel, carried a Spanish flag, and its owner, captain and crew were all Spanish subjects. It did not come within any of the declared exemptions from seizure set forth in the proclamation of the President of April 26, 1898. 30 Stat. 1770. A claim filed in the War Department in February, 1900, for its use, was rejected."

The Court of Claims dismissed the petition on the ground that the vessel was properly seized as enemy property and its use was by the war power for war purposes. This court sustained the judgment and the principles upon which it was based.

A question of jurisdiction became prominent in the case. The action was brought in the District Court of Porto Rico, and the court could only have had jurisdiction under the Tucker Act, so called, which provides for the bringing of suits against the United States. March 3, 1887, 24 Stat. 505, c. 359. In other words, as expressed in the act, omitting grounds of action with which the case was not concerned, that court was given jurisdiction of suits "upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort." Considering whether the action was of that nature, this court said that there was no element of contract in the case, for nothing was done or said by the officers of the United States from which could be implied an agreement or obligation to pay for the use of the vessel; and declared, further, that according to

established principles of law, its owners, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations, and that therefore the vessel was to be deemed enemy's property. "It was seized," it was said, "as property of that kind, for purposes of war, and not for any purposes of gain." In further emphasis of this conclusion, it was added: "The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained . . . against the United States."

It was also decided that the claim of the plaintiff in the action was embraced in the stipulation in the treaty of peace between Spain and the United States, by which they "mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. . . ." That effect, it was declared, must be given to the treaty, even though the Tucker Act could have been construed to authorize the suit, upon the ground that each being equally the supreme law of the land, the last in date must prevail in the courts.

Before comparing that case with the case at bar we may take a glance at *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 306, where it was decided that, Cuba being "enemy's country," even "an American corporation doing business in Cuba was during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to

be seized and confiscated by the United States in the progress of the war then being prosecuted."

The action in that case was in the Court of Claims to recover from the United States the alleged value of certain property destroyed in Cuba during the war with Spain, by order of the officer commanding the United States troops operating in the locality of the property, the purpose of the order being "to destroy all places of occupation or habitation which might contain fever germs." The buildings destroyed were 66 in number and were used in connection with mining operations and the manufacture of iron and steel products.

The destruction of the buildings was considered as an act of war and sustained as such. It was also decided, that, even on the supposition that such destruction was wrongful and unnecessary a tort was committed, and though committed in the interest of the United States, there was no element of contract and the action was not one of which the Court of Claims could "take cognizance, whatever other redress was open to the plaintiff."

We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemy's property and subject to seizure, confiscation and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies of the government and of the citizens or subjects of the other. *The Venice*, 2 Wall. 258, 274; *White* v. *Burnley*, 20 How. 235, 249.

These consequences, it is insisted, are averted in the case at bar by two important circumstances: that Santiago, unlike Porto Rico, was not captured but capitulated,

and by the explicit direction of the proclamation of the President of July 13, 1898, promulgated in Cuba on the twentieth. The argument is that those circumstances modified the general rule, and that the property of claimant ceased to be "hostile" and passed "under the sovereignty" of the United States, and as inviolable as other property under the jurisdiction of the United States, and, if taken for public use, an obligation to make compensation would be implied. *The Venice*, 2 Wall. 258, and other cases are adduced to support the contention. It was decided in *The Venice* that after the surrender of New Orleans its military occupation by the Federal forces "drew after it the full measure of protection to persons and property consistent with a necessary subjection to military government." The limitation is important. The case is not as broad as the contention which it is cited to support. It was concerned with the restoration of the authority of the United States over a part of the United States which had been in a state of insurrection, and in such case, that is, in districts occupied by national troops, it was "the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject in most respects to treatment as enemies." Such occupation, it was said, did not "restore peace, or, in all respects, former relations;" but it replaced "rebel by national authority," and recognized, "to some extent, the conditions and the responsibility of national citizenship." In emphasis of the same view, it was said: "As far as possible the people of such parts of the insurgent States as came under national occupation and control were treated as if their relations to the National Government had never been interrupted."

The Ouachita Cotton, 6 Wall. 521, does not change the ruling in *The Venice* from an expression of the special policy of the Government indicated by its legislation to a declaration of law necessarily following from the military occupation of even enemy country. It was an obvious

application of the principles of *The Venice* to hold that, with the restoration of the national authority, "from that time its citizens were clothed with the same rights of property, and were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection, as the inhabitants of the loyal States," and that "such is the result of the application of well settled principles of public law." To the same effect is *Desmare* v. *United States*, 93 U. S. 605, 611. Nor was there any intention to enlarge the ruling in *The Venice* in *United States* v. *Padelford*, 9 Wall. 531.

The case of *The Grapeshot*, 9 Wall. 129, 132, is also cited by claimants, and some of its language demands notice. The question involved was the legality of a provisional court for the State of Louisiana established by the President after New Orleans and parts of the State had been occupied by the national troops. Expressing the purpose of the National Government the court said that it was "neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the reëstablishment of legitimate authority." It was further said that it was the duty of the Government, "wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice." To this was added the following: "The duty of the National Government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.

But it was not intended to express a limitation upon

the undoubted belligerent right to use and confiscate all property of an enemy and to dispose of it at will. *Miller* v. *United States*, 11 Wall. 268, 305. *The Venice*, and cases like it, expressed and enforced limitations to a certain extent upon such right growing out of the policy of the Government. It may be, as said by Kent (1 Kent, 92), that "The general usage now is, not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for capitulation." It may also be, as further said by the learned commentator, that "if the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, . . . he violates the modern usages of war." Id. 92 and 93.

If the record presented such a case the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power cannot be enlarged by its emotions. Besides, we must regard the seizure of the *San Juan* as an exertion of the war power, and by this we do not mean as mere "booty of war," and the comments made in *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 495, in regard to an attempt by the commander at New Orleans, fifteen months after the occupation of the city by the National Government, to confiscate the indebtedness of one of the banks to the other, do not apply. We only mean that the seizure was for the immediate use of the army, a right recognized in that case, for we do not accept the view contended for by claimants that with the surrender of Santiago and the cessation of active operations in the Santiago district enemy property lost such character and was not subject to such right of capture. The war

was flagrant elsewhere, and in such case *Planters' Bank* v. *Union Bank* is authority for the right, not against it. It was there decided that the military commander at New Orleans "had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the Government, or the effect of congressional action." Such pledge and effect existed, it was held, citing the case of *The Venice*. It may be said the indebtedness was not absolutely exempt from confiscation as enemy's property, but only that it was not, under the particular circumstances, "subject to military seizure as booty of war." And "booty of war" was distinguished from "a seizure for immediate use of the army." This is a distinction important to observe, and is recognized explicitly or implicitly in all of the cases and references contained in the able argument of counsel. It accommodates, when its full range is properly understood, the necessities of the conqueror and the personal and property rights, if they may be called such, of the conquered. And there is nothing in the President's proclamation of July 13, 1898, which militates against it. But suppose we should grant the contrary. Suppose we should grant to the *San Juan* the broadest immunity from seizure or detention. We are then brought to consider the quality of the act of the officers of the army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation; if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the Tucker Act against the jurisdiction of the Court of Claims. They are in the situation of the claimant in *Hijo* v. *United States* and *Juragua Iron Co.* v. *United States*. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract and the action is one of which the Court of Claims could not take jurisdiction, whatever

other redress is open to claimants. Indeed, we might have rested this branch of the case on those cases, both for the requirements of the Tucker Act and the rights and powers of belligerents, conqueror or conquered. We have restated the propositions declared only in deference to the earnestness and force of the argument of claimants' counsel. And we rest the case on those propositions and do not enter into a consideration of the citizenship of claimants, whether born in Spain and Spanish subjects when their vessel was seized, or Cuban by relation to the time either of the declaration of Cuban independence or of its recognition by Congress, as contended. If Spanish subjects, under the authority of *Hijo* v. *United States*, their right of indemnity for the seizure and use of their vessel was taken away by the treaty between Spain and the United States.

Judgment affirmed.

DIAZ *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 90. Argued December 11, 12, 1911.—Decided January 15, 1912.

Herrera v. *United States*, *ante*, p. 558, followed as to the nature and effect of, and liability of the United States for, seizures and detention of vessels in Santiago harbor after the capitulation in 1898.

The President's proclamation of July 13, 1898, was not intended to supersede the laws of war, to interfere with the seizure, confiscation, or destruction of property necessary for the operation of war, or to attach to the necessary appropriation of such property by military officers the obligations and remedies of contracts.

43 Ct. Cl. 444, affirmed.

THE facts, which involve the jurisdiction of the Court

of Claims and the liability of the United States for the use of enemy vessels seized during the war with Spain, are stated in the opinion.

Mr. Howard Thayer Kingsbury and *Mr. Crammond Kennedy*, with whom *Mr. Frank D. Pavey* was on the brief, for appellants.

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

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was argued and submitted with No. 89, *Herrera* v. *United States*, just decided, *ante*, p. 558. As in that case the findings of fact recite the pendency of the war between the United States and Spain, the capitulation of Santiago and the cessation of hostilities in that district between the contending forces, the seizure and capture by the military authorities of the United States of the steamer Thomas Brooks, among other vessels and lighters, on the seventeenth day of July, 1898, she then being owned by claimants, and her use for the transportation of troops and munitions of war until September 6th of the same year, a period of fifty-seven days, the United States paying the cost of operating the steamer. Prior to her seizure she had been used to transport Spanish troops and munitions of war. The full and reasonable value of her use was $125 per day, amounting to the sum of $6,375, no part of which has been paid.

The other vessels seized and captured were small vessels and lighters, which were used for a time and later returned on the advice or opinion of the Judge-Advocate General of the Army. Their use was paid for by the Government on

some amicable terms. Also, after September 6, 1898, the claimants were, by some amicable agreement between them and the Quartermaster in charge at Santiago, permitted to use and operate the Thomas Brooks at their own expense, they agreeing to transport in her troops and munitions of war and other supplies at one-half the transportation rates. This was done, and the claimants were paid for the service.

On the eighteenth of January, 1899, after the vessel had been turned over to claimants, they executed a receipt and released all claims in the form set out in *Herrera et al.* v. *United States*.

It was also found by the court as follows, being No. 5 of the findings:

"At the same time, to wit, July 17, 1898, the military forces of the United States took possession of two wharves, the Muelle Lus and the San Jose, with their warehouses and sheds, belonging to claimants, and used the same for the purpose of loading, unloading and storing Government supplies, and in facilitating the movements of troops from July 17, 1898, to March 1, 1899, a period of seven and one-half months, for which use no rental was paid, though the claimants presented bills therefor monthly; and after the Government had surrendered the possession of said wharves the chief quartermaster, Department of Santiago, offered the claimants $4,000 in full payment for the use thereof during said period, which was refused; and later payment was denied on the ground that the claim was for unliquidated damages (see opinion Judge Advocate General, Dec. 23, 1901, page 83, Senate Doc. 318, 57th Congress, 1st Sess.). During said period said wharves were not used exclusively by the United States, but commercial steamers were permitted to land there and they were used by the merchants of the city of Santiago when such use did not interfere with the handling of Government stores. It does not appear that claimants received any

compensation from commercial steamers or merchants of the city for such use during said period.

"From time to time said wharves and warehouses were repaired by the United States, and claimant company was employed by the United States at $32 per day to dredge alongside of same for about three months. Said wharves were returned to claimants in nearly as good condition as when the United States took possession of them.

"The reasonable value of the use of said wharves and warehouses for the period they were used by the United States forces, together with any damage caused thereto by reason of said use, was $7,300."

The President's proclamation of July 13, 1898, is found as in the *Herrera Case*.

The Court of Claims dismissed the petition on the authority of *Hijo* v. *United States*, 194 U. S. 315, and the *Herrera Case*.

Claimants urge nothing in this case, because one of them is a British subject, except on the principles expressed in *The Venice*, and of those principles we have commented in the *Herrera Case*. Nor can much be urged on account of the settlement made by the officers of the United States with claimants for the services rendered after the surrender of the vessel and the settlement made for some smaller vessels and lighters, or the tender of payment of $4,000 by the Quartermaster at Santiago for the use of the wharves as set out in Finding V. Indeed, counsel say that "the intention to pay must be the officially declared intention of the Government, evidenced in the cases at bar by the rules and regulations prescribed by the President and promulgated by the Secretary of War in General Orders No. 101, and not the mere temporary mental processes of this or that subordinate officer who happened to be Quartermaster at the time and on the spot, and ignorant or disregardful of the law of the case as laid down by the President." The necessities of the case require claimants to

take that position; but we need not repeat what we said in No. 89 of those orders or of the proclamation. It is not possible to hold that the proclamation of the President was intended to supersede the laws of war and attach to every appropriation by the military officers conducting operations of war the obligations and remedies of contracts. It could not have been the intention of the President to prevent the seizure of property when necessary for military uses, or to prevent its confiscation or destruction. For the reasons for this conclusion we refer to the opinion in the *Herrera Case.*

Judgment affirmed.

EX PARTE IN THE MATTER OF LEAF TOBACCO BOARD OF TRADE OF THE CITY OF NEW YORK, PETITIONER.

APPLICATION FOR LEAVE TO FILE PETITION.

Original. Motion for leave to file petition. Submitted December 4, 1911.—Decided December 11, 1911.

One who is not a party to the record and judgment is not entitled to appeal therefrom.

The action of the lower court in refusing to permit the movers to become parties to the record in this case is not susceptible of being reviewed by this court on appeal; or indirectly, under the circumstances of this case, by mandamus.

The merely general nature and character of the petitioners' interest in this proceeding is not such as to authorize them to assail the action of the court below. This is the more obvious as the act of the court which is assailed has been accepted by the parties to the record.

THE petitioner states in its petition that it is a corporation of the State of New York and "is composed of more than seventy-five business concerns engaged in the business of selling leaf-tobacco to manufacturers of tobacco products. That the said concerns are vitally in-

terested, both directly on their own account and indirectly on the account of the customers to whom they sell and offer to sell leaf tobacco, in the proper determination by the Circuit Court of the United States for the Southern District of New York of the matter of the dissolution and disintegration of the Combination found by this Honorable Court to exist among the American Tobacco Company and the other defendants in the cause entitled, 'United States of America *vs.* American Tobacco Company,' which cause, upon appeal from the said Circuit Court, was decided by this Honorable Court on May 29, 1911," and reported at 221 U. S. 106. It also states that in pursuance of such decision the said cause was remanded to the said Circuit Court with directions to enter a decree in conformity therewith and to take such further steps as may be necessary to fully carry out the directions therein, and "that the decree entered in this cause by the Circuit Court is not in compliance with the mandate of this court."

The petitioner prayed that leave be granted to file with this court a petition praying for the following relief:

1. That a writ of mandamus issue to the judges of the said Circuit Court of the United States for the Southern District of New York, directing them to vacate and set aside the said decree, and to enter a decree in conformity with the opinion and mandate of this court.

2. That a writ of prohibition issue directed to the said judges, prohibiting them from proceeding to put the said decree into effect and from granting the further and supplemental remedies and relief therein provided for.

3. That a writ of certiorari issue requiring the said judges to return and certify to this court all the proceedings had before them in the said cause since the filing of the mandate of this court in the court below, with all documents and evidence on which they may have acted in determining the form of their said decree.

4. That a writ of mandamus issue requiring the said

judges to permit your petitioner to intervene in said cause, and to be joined as a party thereto, with the right to appeal from said decree or otherwise proceed in said cause as such party.

5. That pending the hearing and decision of said petition and of the return thereto, all proceedings by the defendants or any of them looking to the execution of the plan of dissolution described in said decree, be stayed.

Mr. Felix H. Levy and *Mr. Benjamin N. Cardozo* for petitioner:

If the decree of the Circuit Court fails to give effect to the mandate of this court, the wrong is one that may properly be redressed at the instance of this petitioner. *Matter of Eastern Cherokees*, 220 U. S. 83.

Where a public duty exists, a citizen has such an interest in its performance as entitles him to the protection of the writ of mandamus. In such cases it matters not that he be not a party to the record. *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 354; 26 Cyc. 401; *Attorney-General* v. *Boston*, 123 Massachusetts, 460; *Mayor &c. of London* v. *Cox*, L. R. 2 H. L. 239, 278; *Chambers* v. *Green*, L. R. 20 Eq. Cas. (1875), 552, 554.

If the decree be repugnant to the mandate, mandamus is the appropriate remedy. *Matter of Eastern Cherokees*, 220 U. S. 83; *In re Potts*, 166 U. S. 263; *In re City Bank*, 153 U. S. 246; *Stewart* v. *Salomon*, 97 U. S. 361; *Tyler* v. *Magwire*, 17 Wall. 253, 282.

In re Sandford Fork & Tool Co., 160 U. S. 247, is not applicable here so as to defeat the right to mandamus.

If the writ of mandamus be refused, the petitioner and the public are without a remedy. There can be no appeal, because the petitioner was not a party to the suit, and the Circuit Court denied a motion for leave to intervene. See *Virginia* v. *Rives*, 100 U. S. 313, 323.

The decree is repugnant to the mandate, and perpetu-

ates a monopoly which this court declared should be destroyed.

The decisions in the *Northern Securities Case* and the *Standard Oil Case* are inapplicable here.

The court has power to impose any terms that it thinks just upon the defendants, as a condition of securing exemption from the appointment of a receiver and the issuance of an injunction against interstate traffic.

If the petitioner is not entitled to the writs prayed for as a matter of right, it is at least entitled as a friend of the court to bring the variance between the decree and the mandate to the court's notice; and the court has power of its own motion to remedy the wrong. *Stewart* v. *Salomon*, 97 U. S. 361; *Ladd* v. *Stevenson*, 112 N. Y. 325, 332; 23 Cyc. 948.

PER CURIAM: Leave to file petition denied.

1. One who is not a party to a record and judgment is not entitled to appeal therefrom. *Bayard* v. *Lombard*, 9 How. 530; *Indiana* v. *Liverpool, London & Globe Ins. Co.*, 109 U. S. 168; *Ex parte Cockroft*, 104 U. S. 578.

2. The action of the court below in refusing to permit the movers to become parties to the record is not susceptible of being reviewed by this court on appeal, or indirectly, under the circumstances here disclosed, by the writ of mandamus. *In re Cutting*, 94 U. S. 15, and see *Credits Commutation Co.* v. *United States*, 177 U. S. 311.

3. The merely general nature and character of the interest which the movers allege they have in the papers here filed is not in any event of such a character as to authorize them in this proceeding to assail the action of the court below. This is more obvious in this case since the act of the court which is assailed has been accepted by those who are parties to the record. *United States* v. *Union Pacific R. R. Co.*, 105 U. S. 262; *Elwell* v. *Fosdick*, 134 U. S. 500.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE COMMERCE COURT.

No. 846. Motion for order to maintain the *status quo* pending appeal. Submitted October 30, 1911.—Decided November 6, 1911.

Where this court considers it proper the *status quo* will be maintained pending an appeal from the judgment of the Commerce Court sustaining an order of the Interstate Commerce Commission; and the enforcement of the order in question will be suspended pending the appeal, on the appellant giving a bond for the amount and in the form prescribed by this court.

THE facts are stated in the opinion.

Mr. John Lee Webster for the appellants in support of the motion.

The Attorney General, Mr. Blackburn Esterline and *Mr. Charles W. Needham* for the appellees in opposition:

The final decree dismissing the bill dissolved the preliminary injunction. 22 Cyc. 981; 1 Joyce on Injunctions, §§ 330*b*, 330*c*; 10 Ency. Pl. and Pr. 1029; *Hovey* v. *MacDonald*, 109 U. S. 150, 158, 161; *Sweeney* v. *Handley*, 126 Fed. Rep. 97, 99.

When the preliminary injunction has thus been dissolved it cannot be revived except by a new exercise of judicial power, and the appeal from the final decree dismissing the bill does not affect the dissolution of the injunction. *Knox County* v. *Harshman*, 132 U. S. 14; *Leonard* v. *Ozark Land Co.*, 115 U. S. 465; *Hovey* v. *MacDonald*, 109 U. S. 150, 161.

A supersedeas cannot be granted in view of § 2 of the act creating the Commerce Court, of June 18, 1910, 36 Stat. 542.

The order of the Interstate Commerce Commission will

expire in less than three months. If this court further suspends the order of the Commission, the order will expire before any final judgment can possibly be entered by this court on the merits, and the appellees will have avoided complying with the same while it lasted.

The giving of a bond would avail nothing. The Interstate Commerce Commission and the United States are the appellees. If the appellees are named as the obligees of the bond, such a bond would be ineffective as to the passengers traveling between Council Bluffs and Omaha. As the nickels pass into the possession of the company, it is at once beyond the power of the passengers ever to prove the payments and recover them back.

PER CURIAM: Upon the authority of Revised Statutes, § 716; *Ex parte Milwaukee Railroad Co.*, 5 Wall. 188; *Leonard* v. *Ozark Co.*, 115 U. S. 465, 468; *In re Classen*, 140 U. S. 200, 207; *In re McKenzie*, 180 U. S. 536, 549; *United States* v. *Shipp*, 203 U. S. 563, 573; and upon full consideration of the facts bearing upon the propriety of the appellants' motion for an order to maintain the *status quo* pending this appeal, it is ordered that the enforcement of the order of the Interstate Commerce Commission entered November 27, 1909, and drawn in question in this case, be, and it is, suspended and enjoined during the pendency of this appeal, upon condition that within 10 days herefrom the appellants execute unto the Interstate Commerce Commission and file in this cause a good and sufficient bond in the sum of $10,000, with sureties to be approved by the clerk of this court, and conditioned that the appellants will promptly pay any and all damages which may be suffered by their several passengers and intended passengers by reason of the granting or continuance of this order if it is adjudged ultimately that the order of the Interstate Commerce Commission, drawn in question in this case, is a valid one.

All other *per curiam* opinions, decisions on petitions for writs of certiorari, and orders disposing of cases in vacation between the end of October Term, 1910, and April 1, 1912, will appear in Volume 223, United States Reports.

The Rules of the Supreme Court of the United States as revised and promulgated December 22, 1911, are contained in an Appendix to this volume, following page 668, *post*.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

ORDER.

It is ordered that the Rules of this Court[1] be amended as follows, viz:

Rule 6.[1]

Strike out Section 2, and insert the following:

2. Forty-five minutes on each side shall be allowed to the argument of a motion, and no more, without special leave of the Court, granted before the argument begins.

Strike out Section 5, and insert the following:

5. The Court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as are provided for in cases of motions to dismiss under paragraph 4 of this rule. Although the Court upon consideration of a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the Court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing

[1] These rules are superseded by the rules promulgated December 22, 1911. See Appendix, *post*, to this volume.

of such causes one-half hour will be allowed each side for oral argument.

Rule 22.[1]

Strike out Section 3, and insert the following:

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the Court, granted before the argument begins. But in cases certified from the Circuit Courts of Appeals, cases involving solely the jurisdiction of the court below, and cases under the Act of March 2, 1907, 34 Stat. 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: *Provided, always:* That a fair opening of the case shall be made by the party having the opening and closing arguments.

(Promulgated October 23, 1911.)

SUPREME COURT OF THE UNITED STATES.

THURSDAY, JANUARY 11, 1912.

The Chief Justice announced the following order of the court:

Order: It is ordered by the court that the mandates in all cases decided prior to January 1, 1912, which, under the law as it existed before that time, should have been directed to the circuit courts of the United States, be directed to the appropriate district courts of the United States.[2]

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[1] These rules are superseded by the rules promulgated December 22, 1911. See Appendix, *post*, to this volume.

[2] See Chapter X of Act to Codify, Revise and Amend the Laws Relating to the Judiciary, approved March 3, 1911, c. 231, 36 Statutes at Large, 1087.

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2. *On bond under Materialmen Act of 1894; where brought.*

Under the Materialmen Act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, an action for performance of a bond given under such act can only be instituted in the district in which the contract was to be performed. *Ib.*

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APPEAL AND ERROR.

1. *Who may appeal.*

One who is not a party to the record and judgment is not entitled to appeal therefrom. *Ex parte Leaf Tobacco Board of Trade*, 578.

2. *Who may appeal.*

The merely general nature and character of the petitioners' interest in this proceeding is not such as to authorize them to assail the action of the court below. This is the more obvious as the act of the court which is assailed has been accepted by the parties to the record. *Ib.*

3. *Action of lower court in respect of parties not reviewable.*

The action of the lower court in refusing to permit the movers to become parties to the record in this case is not susceptible of being reviewed by this court on appeal; or indirectly, under the circumstances of this case, by mandamus. *Ib.*

4. *Maintaining status quo pending appeal.*

Where this court considers it proper the *status quo* will be maintained pending an appeal from the judgment of the Commerce Court sustaining an order of the Interstate Commerce Commission; and

the enforcement of the order in question will be suspended pending the appeal, on the appellant giving a bond for the amount and in the form prescribed by this court. *Omaha & C. B. St. Ry. Co.* v. *Interstate Com. Comm.*, 582.

5. *Reversible error; when denial of motion for judgment not prejudicial.*
Where the effect of the denial of plaintiff's motion for judgment is simply to postpone consideration of the subject until the trial, plaintiff's interests are not prejudiced and there cannot be reversible error. *Kinney* v. *United States Fidelity Co.*, 283.

6. *Supersedeas; essential prerequisite under § 1007, Rev. Stat.*
Section 1007, Rev. Stat., makes the allowance of a writ of error, and the lodgment thereof in the office of the clerk within sixty days after date of judgment, an essential prerequisite to the granting of a supersedeas. Nothing in § 6 or § 11 of the Judiciary Act of 1891 affects the provisions of § 1007, Rev. Stat., in this respect. *Title Guaranty Co.* v. *General Electric Co.*, 401.

7. *Supersedeas; time within which writ of error must be lodged to be basis for.*
An order cannot control a subject to which it cannot lawfully extend; and a stay order, granted to give the defeated party an opportunity to apply to this court for certiorari, does not operate to extend the time within which the writ of error must be lodged in order to be the basis for a supersedeas. *Ib.*

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BANKRUPTCY.

1. *Actions by bankrupt.*

Until the election of the trustee, the bankrupt may institute and maintain a suit on any cause of action possessed by him. *Johnson* v. *Collier*, 538.

2. *Adjudication; duty of court as to.*

It is the duty of the bankruptcy court to promptly determine the question of adjudication and to proceed with the selection of a trustee and administration of the estate; and it cannot, even if for the benefit of creditors, deny an adjudication and hold jurisdiction over the estate for the purpose of allowing some of the creditors to effect a reorganization and distribution of the property. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.

3. *Adjudication; denial; effect on jurisdiction.*

With the denial of adjudication the jurisdiction of the bankruptcy court ends and the property becomes subject to ordinary methods and jurisdiction of courts of competent jurisdiction. *Ib.*

4. *Appeal from District Court for Porto Rico; right of.*

There is no appeal to this court from an order disallowing a claim made by the District Court of the United States for Porto Rico sitting as the bankruptcy court. *Tefft, Weller & Co.* v. *Munsuri*, 114.

5. *Appeal; assumption of jurisdiction in cases not provided for by act.*

The fact that no method of review is prescribed by the statute in certain cases does not justify this court in disregarding the statute and assuming jurisdiction where none exists. *Ib.*

6. *Review; modes under Bankruptcy Act not affected by § 35 of act of 1900 relative to Porto Rico.*

The provisions for review of judgment of the Supreme Court of the United States for Porto Rico in § 35 of the act of April 12, 1900, 31 Stat. 85, c. 191, do not affect the exclusive modes of review specifically provided for in the Bankruptcy Act. *Ib.*

7. *Appellate jurisdiction by implication; scope of provisions of § 25 of Bankruptcy Act.*

The express provisions of § 25 of the Bankruptcy Act for the exercise of appellate jurisdiction by implication exclude the right to exer-

cise jurisdiction over a subject not delegated by that or some other statute. *Ib.*

8. *Review; order disallowing claims not reviewable under § 24b of Bankrupty Act.*

Tefft, Weller & Co. v. *Munsuri, ante,* p. 114, followed to effect that the express provisions for review contained in the Bankruptcy Act are controlling, and that review by this court under § 24*b* of an order disallowing claims is not authorized by the act. *Munsuri* v. *Fricker,* 121.

9. *Bankrupt's status as to property; effect of filing petition.*

The bankrupt is not divested of his property by filing a petition in bankruptcy. He is still the owner, holding in trust, pending the appointment and qualification of the trustee, whose title then relates back to the date of adjudication. *Johnson* v. *Collier,* 538.

10. *Controversy within meaning of § 24a of Bankruptcy Act.*

An order of the bankruptcy court disallowing a claim is a step in the proceeding, and not a controversy arising in the proceeding within the meaning of § 24*a*. (*Coder* v. *Arts,* 213 U. S. 234; *Hewit* v. *Berlin Machine Works,* 194 U. S. 296.) *Tefft, Weller & Co.* v. *Munsuri,* 114.

11. *Filing petition; effect of.*

The filing of a petition in bankruptcy is a *caveat* to all the world, and, in effect, an attachment and injunction. (*Mueller* v. *Nugent,* 184 U. S. 1, 14.) *Acme Harvester Co.* v. *Beekman Lumber Co.,* 300.

12. *Immunity of witness under Bankruptcy Act; scope of.*

The provisions in the Bankruptcy Act compelling testimony do not confer an immunity wider than that conferred by the Constitution itself. *Glickstein* v. *United States,* 139.

13. *Immunity afforded by subd. 9 of § 7, act of 1898; prosecution for perjury not within.*

Subdivision 9 of § 7 of the Bankruptcy Act of 1898 and the immunity afforded by it are not applicable to a prosecution for perjury committed by the bankrupt when examined under it. *Ib.*

14. *Trustee; subrogation to rights under liens of judgments confessed by bankrupt prior to filing of petition in bankruptcy; priority of liens over rights of vendor under contract of conditional sale.*

A bankrupt, in Illinois, within a few days of filing a petition in volun-

tary bankruptcy, confessed judgments upon which executions were issued and returned unsatisfied but no actual levy was made; thereafter and before filing the petition he transferred goods in his possession to the vendor thereof, who claimed they had been delivered on conditional sales; the trustee began subrogation proceedings to preserve the liens of the judgments for the benefit of the estate, to which the judgment creditors assented, and also commenced proceedings to compel redelivery of the goods transferred on ground that lien of judgments inured to estate; the trustee had also claimed a right to recover the goods on the ground of unlawful preference; *held*, that under the law of Illinois, delivery to the sheriff of the executions on the judgments operated without levy to create liens upon the property of the judgment debtor within the county. Such liens were paramount to rights in the property possessed by the vendor under contracts of conditional sale. The effect of the subrogation order was to render inoperative as a preference in favor of the judgment creditors the liens obtained through the executions and to preserve such liens as of the date of filing the petition for the benefit of the estate. (*First National Bank* v. *Staake*, 202 U. S. 141.) Liens of execution creditors, as they exist when a petition of involuntary bankruptcy is filed, cannot be subsequently destroyed by acts of the creditors to the prejudice of the estate. As the holder of the goods had not been prejudiced by the proceedings to recover for unlawful preference, the trustee was not barred from asserting the lien of the judgments on the same goods for the benefit of the estate. *Rock Island Plow Co.* v. *Reardon*, 354.

See JURISDICTION, A 13.

BILL OF EXCEPTIONS.

See PRACTICE AND PROCEDURE, 1, 2, 19.

BONDS.

See ACTIONS, 2;
CONTRACTS, 5;
PRINCIPAL AND SURETY.

BRIDGES.

See MARITIME LAW, 5;
RAILROADS, 1, 2, 4.

BURDEN OF PROOF.

See EQUITY.

CARRIERS.

See CATTLE QUARANTINE ACT; CONSTITUTIONAL LAW, 1, 2, 3; INTERSTATE COMMERCE; RAILROADS; STATES, 17.

CASES APPLIED.

Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, applied in *Robinson* v. *Baltimore & Ohio R. R. Co.*, 506.

CASES APPROVED.

Edelstein v. *United States*, 149 Fed. Rep. 636, approved in *Glickstein* v. *United States*, 139.

Wechler v. *United States*, 158 Fed. Rep. 579, approved in *Glickstein* v. *United States*, 139.

CASES DISAPPROVED.

In re Logan, 102 Fed. Rep. 876, disapproved in *Glickstein* v. *United States*, 139.

In re Marx, 102 Fed. Rep. 679, disapproved in *Glickstein* v. *United States*, 139.

CASES DISTINGUISHED.

Connecticut Mutual Ins. Co. v. *Schaefer*, 94 U. S. 457, distinguished in *Grigsby* v. *Russell*, 149.

In re Wood and Henderson, 210 U. S. 246, distinguished in *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.

National Steamship Co. v. *Tugman*, 106 U. S. 118, distinguished in *Anderson* v. *United Realty Co.*, 164.

Old Dominion Steamship Co. v. *Virginia*, 198 U. S. 299, distinguished in *Southern Pacific Co.* v. *Kentucky*, 63.

The Venice, 2 Wall. 258, distinguished in *Herrera* v. *United States*, 558.

Warnock v. *Davis*, 104 U. S. 775, distinguished in *Grigsby* v. *Russell*, 149.

CASES EXPLAINED.

Virginia v. *West Virginia*, 220 U. S. 1, explained in *Virginia* v. *West Virginia*, 17.

CASES FOLLOWED.

Arnett v. *Reade*, 220 U. S. 311, followed in *Mutual Loan Co.* v. *Martell*, 225.

Ayer & Lord Tie Co. v. *Kentucky*, 202 U. S. 409, followed in *Southern Pacific Co.* v. *Kentucky*, 63.

Bacon v. *Walker*, 204 U. S. 311, followed in *Mutual Loan Co.* v. *Martell*, 225.

Chicago, B. & Q. Ry. Co. v. *Drainage Commissioners*, 200 U. S. 591, followed in *Mutual Loan Co.* v. *Martell*, 225.

Chicago, B. & Q. Ry. Co. v. *McGuire*, 219 U. S. 549, followed in *Mutual Loan Co.* v. *Martell*, 225.

Cincinnati &c. Ry. v. *Interstate Commerce Commission*, 206 U. S. 154, followed in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 541.

Clayton v. *Utah*, 132 U. S. 632, followed in *Berryman* v. *Whitman College*, 334.

Coder v. *Arts*, 213 U. S. 234, followed in *Tefft, Weller & Co.* v. *Munsuri*, 114.

Cummings v. *Chicago*, 188 U. S. 410, followed in *Gring* v. *Ives*, 365.

Daniel v. *Whartenby*, 17 Wall. 639, followed in *Vogt* v. *Graff and Vogt*, 404.

First National Bank v. *Staake*, 202 U. S. 141, followed in *Rock Island Plow Co.* v. *Reardon*, 354.

Garfield v. *Goldsby*, 211 U. S. 249, followed in *Turner* v. *Fisher*, 204.

Hagar v. *Reclamation District*, 111 U. S. 708, followed in *Turner* v. *Fisher*, 204.

Hays v. *Pacific Mail Steamship Co.*, 17 How. 596, followed in *Southern Pacific Co.* v. *Kentucky*, 63.

Herrera v. *United States*, 222 U. S. 558, followed in *Diaz* v. *United States*, 574.

Hewit v. *Berlin Machine Works*, 194 U. S. 296, followed in *Tefft, Weller & Co.* v. *Munsuri*, 114.

Hijo v. *United States*, 194 U. S. 315, followed in *Herrera* v. *United States*, 558.

Hovey v. *Elliott*, 167 U. S. 414, followed in *Turner* v. *Fisher*, 204.

In re Sanford Fork & Tool Co., 160 U. S. 257, followed in *Turner* v. *Fisher*, 204.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42, followed in *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 215.

Iowa Central v. *Iowa*, 160 U. S. 393, followed in *Turner* v. *Fisher*, 204.

Johnson v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388, followed in *Martin* v. *West*, 191.

Laurel Hill Cemetery v. *San Francisco*, 216 U. S. 358, followed in *Mutual Loan Co.* v. *Martell*, 225.

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 532, followed in *Lewers & Cooke* v. *Atcherly*, 285.

Macfadden v. *United States*, 213 U. S. 288, followed in *Chicago Junction Ry. Co.* v. *King*, 222.

Magoun v. *Illinois Trust Bank*, 170 U. S. 238, followed in *Keeney* v. *New York*, 525.

Mellen v. *Moline Iron Works*, 131 U. S. 352, followed in *Lewers & Cooke* v. *Atcherly*, 285.
Missouri Pacific Ry. Co. v. *Larabee Mills*, 211 U. S. 612, followed in *Southern Ry. Co.* v. *Reid*, 424.
Mueller v. *Nugent*, 184 U. S. 1, followed in *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.
New Orleans Water Works v. *Louisiana Sugar Refining Co.*, 125 U. S. 38, followed in *Interurban Ry. Co.* v. *Olathe*, 187.
Northern Pacific Ry. Co. v. *Washington*, 222 U. S. 370, followed in *Southern Ry. Co.* v. *Reid & Beam*, 444.
Origet v. *United States*, 125 U. S. 243, followed in *Kinney* v. *United States Fidelity Co.*, 283.
Rector v. *Bank*, 200 U. S. 405, followed in *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.
Redfield v. *Windom*, 137 U. S. 636, followed in *Turner* v. *Fisher*, 204.
Red River Cattle Co. v. *Needham*, 137 U. S. 632, followed in *Enriquez* v. *Enriquez* (*No. 2*), 127.
Roller v. *Holly*, 176 U. S. 399, followed in *Turner* v. *Fisher*, 204.
Southern Ry. Co. v. *Reid*, 222 U. S. 424, followed in *Southern Ry. Co.* v. *Reid & Beam*, 444.
Southern Ry. Co. v. *United States*, 222 U. S. 20, followed in *Chicago Junction Ry. Co.* v. *King*, 222; *Northern Pacific Ry. Co.* v. *Washington*, 370.
Sperry & Hutchinson v. *Rhodes*, 220 U. S. 502, followed in *Williams* v. *Walsh*, 415.
Tefft, Weller & Co. v. *Munsuri*, 222 U. S. 114, followed in *Munsuri* v. *Fricker*, 121.
The Winnebago, 205 U. S. 354, followed in *Martin* v. *West*, 191.
United States v. *Keitel*, 211 U. S. 370, followed in *United States* v. *Munday*, 175.
Wood v. *United States*, 16 Pet. 342, followed in *United States* v. *Barnes*, 513.

CASES QUALIFIED AND LIMITED.

Armstrong v. *Fernandez*, 208 U. S. 324, qualified and limited in *Tefft, Weller & Co.* v. *Munsuri*, 114.

CATTLE GRAZING.

See PUBLIC LANDS, 7, 8.

CATTLE QUARANTINE ACT.

Carriers affected. Section 2 of act of March 3, 1905, construed.
The provisions of § 2 of the act of March 3, 1905, 33 Stat. 1264, c. 1496, forbidding receipt for transportation of live stock from quarantined

points in any State or Territory into any other State or Territory, do not apply to the receipt of live stock by a connecting carrier for transportation wholly within the State in which it is received, even though the shipment originated at a quarantined point in another State. *United States* v. *Baltimore & Ohio S. W. R. R. Co.*, 8.

CIRCUIT COURTS.

See JURISDICTION, C.

CIRCUIT COURTS OF APPEALS.

See JURISDICTION, A 10, 11, 12.

CIVIL SERVICE EXAMINATIONS.

See FRAUD, 2.

CLAIMS AGAINST THE UNITED STATES.

See JURISDICTION, E; LACHES; PRACTICE AND PROCEDURE, 5, 6; WAR, 8, 9.

CLASSIFICATION FOR REGULATION.

See CONSTITUTIONAL LAW, 8–14, 21; PRACTICE AND PROCEDURE, 22.

CLASSIFICATION FOR TAXATION.

See CONSTITUTIONAL LAW, 7, 16.

CLASSIFICATION OF IMPORTS.

See CUSTOMS LAW, 2.

COAL LANDS.

See PUBLIC LANDS, 2–6.

CODES.

See STATUTES, A 12, 13.

COLLISION OF VESSELS.

See MARITIME LAW, 4, 5.

COMMERCE.

See CATTLE QUARANTINE LAW; CONSTITUTIONAL LAW, 1, 2, 3; INTERSTATE COMMERCE; STATES, 2, 3.

COMMERCE COURT.

See APPEAL AND ERROR, 4.

COMMON LAW.

See LOCAL LAW;
MUNICIPAL CORPORATIONS, 1.

COMMUNITY PROPERTY.

See SALES, 3.

CONDITIONAL SALES.

See BANKRUPTCY, 14.

CONFISCATION.

What amounts to taking of property.

To take away an essential use of property is to take the property itself. *Curtin* v. *Benson*, 78.

See WAR, 3–9.

CONFLICT OF LAWS.

See INTERSTATE COMMERCE, 18, 19, 20;
STATES, 2, 3, 9, 10, 16, 17, 18.

CONGRESS, ACTS OF.

See ACTS OF CONGRESS.

CONGRESS, POWERS OF.

See CONSTITUTIONAL LAW, 1, 3;
COPYRIGHTS, 3;
INTERSTATE COMMERCE, 7, 19;
STATES, 4, 10, 16, 17.

CONSTITUTIONAL LAW.

1. *Commerce clause; power of Congress under; dangers which may be obviated.*

The power of Congress under the commerce clause of the Constitution is plenary and competent to protect persons and property moving in interstate commerce from all danger, no matter what the source may be; to that end, Congress may require all vehicles moving on highways of interstate commerce to be so equipped as to avoid danger to persons and property moving in interstate commerce. *Southern Ry. Co.* v. *United States*, 20.

2. *Commerce clause; state statute not invalid as interference with interstate commerce.*

When the interruption of interstate commerce by reason of the en-

forcement of a state statute otherwise constitutional is incidental only, it will not render the statute unconstitutional under the commerce clause of the Constitution. *Martin* v. *West*, 191.

3. *Commerce clause; state statute incidentally affecting use of vessel engaged in interstate commerce, not invalid.*

A state statute which gives a lien upon all vessels, whether domestic or foreign and whether engaged in interstate or intrastate commerce, for injuries committed to persons and property within the State and providing that the lien for non-maritime torts be enforced in the state courts and which is not in conflict with any act of Congress, does not offend the commerce clause of the Constitution because it incidentally affects the use of a vessel engaged in interstate commerce; and so held as to §§ 5953 and 5954 of the Code of the State of Washington. *Ib.*

See STATES, 2, 3.

Contracts. See STATES, 5.

4. *Due process of law; validity of statute of limitations.*

A state statute of limitations allowing only a little more than a year for the institution of a suit to recover his personal property by a party who has not been heard from for fourteen years and for whose property a receiver has been appointed is not unconstitutional as depriving him of his property without due process of law; and so held as to the provisions to that effect of the Revised Laws of Massachusetts, c. 144, for distribution of estates of persons not heard of for fourteen years and presumably dead. *Blinn* v. *Nelson*, 1.

5. *Due process of law; legislation for maintenance of social order; what constitutes.*

Legislation reasonably adapted to the maintenance of social order, affording hearing before judgment, and not affirmatively forbidden by any constitutional provision, does not deny due process of law. *City of Chicago* v. *Sturges*, 313.

6. *Due process of law; equal protection of the law; validity of the mob and riot indemnity law of Illinois.*

The act of Illinois of 1887 indemnifying owners of property for damages by mobs and riots is not unconstitutional as depriving cities of their property without due process of law because liability is imposed irrespective of the power of the city to have prevented the violence; nor is it unconstitutional as denying equal protec-

tion of the law because it discriminates between cities and unincorporated subdivisions of a county. *Ib.*

7. *Due process of law; equal protection of the law; validity of New York transfer tax law of 1896.*

The statute of New York of 1896, providing for a transfer tax on property passing by deed of a resident intended to take effect in possession or enjoyment at or after the death of the grantor, is not unconstitutional as taking property without due process of law nor does it deny the equal protection of the law by arbitrary classification of the subject-matter or by different rates of taxation depending on the relationship of the beneficiaries to the grantor. *Keeney* v. *New York*, 525.

8. *Due process of law; equal protection of the laws; validity of Massachusetts statute regulating assignments of future wages.*

The statute of Massachusetts making invalid assignments for security for debts of less than $200 of wages to be earned unless accepted in writing by the employer, consented to by the wife of the assignor, and filed in a public office, is not unconstitutional as depriving the borrower or the lender of his property without due process of law, nor is it unconstitutional, as denying equal protection of the law, because certain classes of financial institutions are exempted from its provisions. It is a legitimate exercise of the police power and there is a basis for the classification. *Mutual Loan Co.* v. *Martell*, 225.

See Infra, 27, 29.

9. *Equal protection of the law; recognition of degrees of evil.*

Legislation may recognize degrees of evil without denying equal protection of the laws. *Mutual Loan Co.* v. *Martell*, 225.

10. *Equal protection of the laws; classification within.*

Whether a state statute denies equal protection of the laws by reason of classification depends upon whether there is a basis for the classification. *Finley* v. *California*, 28.

11. *Equal protection of the laws; classification of punishment for crimes within.*

There is a proper basis for classification of punishment for crimes between convicts serving life terms in the state prison and convicts serving lesser terms. *Ib.*

12. *Equal protection of the laws; classification of punishment for crime; validity of § 246 of California Penal Code.*

Section 246 of the Penal Code of California inflicting the death penalty

for assaults with intent to kill committed by life term convicts in the state prison is not unconstitutional under the equal protection clause of the Fourteenth Amendment because its provisions are not applicable to convicts serving lesser terms. *Ib.*

13. *Equal protection of the laws; classification not offensive to provision.*
Whether or not a classification merely between all corporations and partnerships and individuals offends the equal protection clause, a classification of corporations operating railroads and individuals does not offend that provision of the Constitution. *Aluminum Co.* v. *Ramsey*, 251.

14. *Equal protection of the laws; classification not offensive to provision.*
Although the state court may have applied the statute to plaintiff in error merely as a corporation, if the record shows that it is a corporation of a kind properly classified by the statute and there is equality within that class, the statute will not be held invalid as repugnant to the equal protection clause of the Constitution. *Ib.*

15. *Equal protection of the law; validity of graduated tax on transfers.*
A State may impose a graduated tax on transfers of personal property by instrument taking effect on the grantor's death without violating the equal protection clause. *Keeney* v. *New York*, 525.

16. *Equal protection of the law; differences to justify classification.*
While there can be no arbitrary classification without denying equal protection of the law, there need not be great or conspicuous differences in order to justify a classification. *Ib.*

17. *Equal protection of the law; classification in taxation.*
The Fourteenth Amendment does not require a State to tax all transfers because it taxes some transfers. *Ib.*

18. *Equal protection of the law; exceptions in police statute; validity of Kansas black powder law.*
The Kansas statute regulating sales of black powder is not unconstitutional as denying equal protection of the law because it excepts from its operation sales made under existing contracts; but whether it offends the commerce clause cannot be determined in a suit in which it does not appear that the party raising the question was affected in that respect. *Williams* v. *Walsh*, 415.

19. *Equal protection of the law; application of Fourteenth Amendment to statutory changes.*
A classification as to time that is not arbitrary is not repugnant to the Constitution. The Fourteenth Amentment does not forbid

statutory changes to have a beginning and thus discriminate between rights of an earlier and later time. (*Sperry & Hutchinson* v. *Rhodes*, 220 U. S. 502.) *Ib.*

20. *Equal protection of the law; police statute; validity of exceptions in.*
A state police statute regulating sales, otherwise constitutional, is not unconstitutional under the equal protection clause because it excepts from its operation sales made under existing contracts. *Ib.*

21. *Equal protection of the law; validity of classification between cities and unincorporated subdivisions of a county.*
Equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be merely an arbitrary mandate. A classification between cities and unincorporated subdivisions of a county is a reasonable one within the equal protection clause of the Fourteenth Amendment. *City of Chicago* v. *Sturges*, 313.

See Supra, 6, 7, 8;
Infra, 29;
STATES, 1.

22. *Fallibility of.*
Constitutional law, like other mortal contrivances, has to take some chances of occasionally inflicting injustice in extraordinary cases. *Blinn* v. *Nelson*, 1.

Fourth Amendment. See MALICIOUS PROSECUTION.

23. *Self-incrimination; measure of protection provided by Fifth Amendment.*
The constitutional guarantee of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony, even though the testimony when given may serve to incriminate the witness provided complete immunity be accorded. *Glickstein* v. *United States*, 139.

24. *Self-incrimination; punishment for perjury not within immunity.*
The sanction of an oath and imposition of punishment for false swearing are inherent parts of the power to compel giving testimony and are prohibited by immunity as to self-incrimination. *Ib.*

25. *Self-incrimination; immunity not a license to commit perjury.*
The immunity afforded by the Fifth Amendment relates to the past; it is not a license to the person testifying to commit perjury either

under the provisions as to the giving of testimony in § 860, Rev. Stat., or of the Bankruptcy Act of 1898. *Ib.*

26. *States; effect of Fourteenth Amendment on power over local officer.*
The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people. *Soliah* v. *Heskin*, 522.

27. *States; effect of Fourteenth Amendment to invalidate act providing for creation of drains and assessments therefor.*
The Fourteenth Amendment does not invalidate an act authorizing an appointed board to determine whether a proposed drain will be of public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as in this case, notice is given and an opportunity to be heard afforded the landowner before the assessment becomes a lien against his property. *Ib.*

28. *States; effect of Fourteenth Amendment to deprive State of taxing power.*
The Fourteenth Amendment does not deprive a State of the power to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of the drain. *Ib.*

29. *States; effect of Fourteenth Amendment on taxing powers of.*
The Fourteenth Amendment does not diminish the taxing power of the State or deprive the State of the power to select subjects for taxation, but only requires that the citizen be given opportunity to be heard on questions of liability and value, and be not arbitrarily denied equal protection. *Keeney* v. *New York*, 525.
See STATES.

30. *Generally; test of constitutionality of power.*
Whether a power is within constitutional limits is to be determined by what can be done under it, not what may be done. *Curtin* v. *Benson*, 78.
See SAFETY APPLIANCE ACTS, 1.

CONSTRUCTION OF STATUTES.

See STATUTES, A.

CONTRACTS.

1. *Construction; well known conditions considered.*
A contract will be read in the light of well known conditions; a contract made in Porto Rico to grind sugar cane will be presumed to be a contract to grind in the grinding season. *Porto Rico Sugar Co.* v. *Lorenzo*, 481.

2. *Government; quœre as to parties.*
Quœre, whether where the contractor is given a right to extension of time if the Secretary of Navy approves, the Secretary is to be regarded as a third party or as representing the United States. *United States* v. *McMullen*, 460.

3. *Government; annulling; meaning of.*
Annulling a contract by the Government does not mean in this case that the Government rescinded or avoided it, but that it would proceed no further with the contractor and would charge him with the difference in cost caused by his default. *Ib.*

4. *Government; reletting after default; presumption as to reasonableness of price.*
When the Government relets a contract after default, the price for which it is relet must be assumed to be reasonable in absence of evidence to the contrary, and this is especially so when the difference is less than the sum stipulated as liquidated damages. *Ib.*

5. *Government; reletting; effect on sureties.*
When the Government relets a contract, the sureties are not relieved because there are differences in the terms which diminish the cost of the work as relet. *Ib.*

6. *Government; want of certainty and mutuality.*
A government contract is not unenforcible for want of certainty and mutuality because it allows changes by the United States, subject to provisions for change of compensation where proper. *Ib.*

7. *Government; amount of work dependent upon appropriations.*
The amount of work to be done under a government contract depends upon the appropriations made by Congress for carrying on the work, and this is implied whether expressed in the contract or not. *Ib.*

8. *Government; execution; admission by pleading.*
Where the answer does not deny that the contract was signed by the

United States and the contract declares that it is, and it is signed by the Chief of Bureau of Yards and Docks, there is admission by implication that it was signed by the United States and is sufficient. *Ib.*

9. *Evidence to establish time of performance.*
When the grinding season is in a particular locality may be established by parol evidence. *Porto Rico Sugar Co.* v. *Lorenzo*, 481.

10. *For sale of real estate; sufficiency under statute of frauds.*
The contract to sell involved in this case being clear enough to indicate to lawyer and layman the purchaser, the seller, and land and the terms, it satisfies the statute of frauds, Code, District of Columbia, § 1117. *Lenman* v. *Jones*, 51.

11. *Mail service contracts; estoppel of contractor to claim misapprehensions as to requirements.*
A mail service contractor cannot claim that he accepted a contract under misapprehension when between the time of his proposal and its acceptance he took a temporary contract for carriage of the identical mails contracted for. *Huse* v. *United States*, 496.

12. *Mail service contracts; delivery of mails, service contemplated.*
A contract for delivery of all mails at Union Station, Omaha, was properly construed by the Postmaster General as including mail delivered by three railroads not in the schedule, it appearing, however, that the mail so delivered had formerly been delivered by one of the railroads mentioned in the schedule and were included in a route specified in the contract. *Ib.*

13. *Mail service; cancellation by Government; offsetting claim for balance due against damages sustained by Government; practice.*
A mail service contractor whose contract had been cancelled for failure to perform sued in the Court of Claims for balance due and for damages for cancellation; that court held he was not entitled to judgment for the balance due because it appeared that the contract was properly cancelled and that the Government had sustained damages in excess of the balance due. In this court, *held:* that as the objection that the balance due could not, in the absence of a counterclaim pleading, be offset against the damages sustained by the Government had not been raised in the Court of Claims, that court rightly offset it, and the objection cannot be raised for the first time on appeal in this court. *Ib.*

14. *Breach; damages and offsets; practice in Court of Claims; quære as to.*
Quære: Whether the rules of practice in the Court of Claims would not permit the offset to be made in absence of any pleading setting up counterclaim or offset. *Ib.*

15. *Option; agreement to sell as.*
An agreement to sell at a price paid with right of redemption within a specified period with further agreement not to redeem if an additional sum be paid within that period simply amounts to an option. *Sandoval* v. *Randolph*, 161.

16. *Performance; excuses for non-performance.*
Nothing in the contract under consideration in this case takes it out of the ordinary rule that performance of an absolute undertaking is not excused by such occurrences as breaking of machinery, etc. *Porto Rico Sugar Co.* v. *Lorenzo*, 481.

17. *Specific performance of contract of sale; right of purchaser from vendee.*
One who purchases from the vendee before completion of the contract to sell, not only the property but all rights of the vendee connected therewith, becomes the equitable owner of the property to the same extent as the original vendee and can compel specific performance of the original contract. *Lenman* v. *Jones*, 51.

18. *Specific performance of contract of sale; parties to suit to compel.*
The original vendee against whom no relief is asked and who has to the extent of his interest complied with the contract is not a necessary party to a suit brought by the subvendee against the original vendor to compel specific performance. *Ib.*

19. *Specific performance; effect of misunderstanding by vendor as to absolute nature of contract.*
The vendor is not relieved of a contract to sell, absolute as to him, because he thought it gave the purchaser an option, but did not require him, to purchase. *Ib.*

20. *Specific performance; effect of ignorance by vendor of identity of real vendee.*
In the absence of fraud, ignorance of who the real vendee is does not relieve the vendor from specific performance of a contract to sell real estate. *Ib.*

See COURTS, 3; PUBLIC WORKS, 1;
JURISDICTION, A 5, 6, 7, 14, 15; STATES, 5.

CONTROVERSIES BETWEEN STATES.

See STATES, 6, 7.

COPYRIGHTS.

1. *Infringement; exhibition of moving pictures based on author's work as dramatization thereof.*

An exhibition of a series of photographs of persons and things, arranged on films as moving pictures and so depicting the principal scenes of an author's work as to tell the story is a dramatization of such work, and the person producing the films and offering them for sale for exhibitions, even if not himself exhibiting them, infringes the copyright of the author under Rev. Stat., § 4952, amended by the act of March 3, 1891, c. 565, 26 Stat. 1106. *Kalem Co.* v. *Harper Brothers*, 55.

2. *Infringement; quœre as to medium employed in such reproduction.*

Quœre: Whether there would be infringement if the illusion of motion were produced from paintings instead of photographs of real persons, and also *quœre* whether such photographs can be copyrighted. *Ib.*

3. *Power of Congress under Constitution; validity of § 4952, Rev. Stat., as amended.*

Rev. Stat., § 4952, as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, confines itself to a well-known form of reproduction and does not exceed the power given to Congress under Art. I, § 8, cl. 8 of the Constitution, to secure to authors the exclusive right to their writings for a limited period. *Ib.*

CORPORATIONS.

See CONSTITUTIONAL LAW, 13, 14; TAXES AND TAXATION, 9;
FEDERAL QUESTION, 2; TERRITORIES, 1, 2.

COURT OF CLAIMS.

See CONTRACTS, 14;
JURISDICTION, E;
PRACTICE AND PROCEDURE, 5, 6.

COURTS.

1. *Federal; when bound by state court's construction of state statute.*

An act of the State of Florida, incorporating a railroad company and granting it aid, having been held unconstitutional by the highest court of that State because the journal showed that it was an act

to incorporate only, and only one subject can be embraced in one act, the Federal courts are bound to follow that decision, and to hold that Trustees of the Internal Improvement Fund had no power to convey land under that act, and that the grantees have no title to any of the lands claimed thereunder. *Peters* v. *Broward*, 483.

2. *Federal; when bound by decision of state court rendered subsequent to accrual of rights under statute involved.*

Although the decision of the state court holding a particular law to be unconstitutional may not have been rendered until after rights based thereon had arisen, if the highest court simply followed a rule laid down before such rights had arisen, the decision in the latter case is binding upon the Federal courts. *Ib.*

3. *Foreign contracts and torts; assumption as to existence of liability.*

In dealing with rudimentary contracts, or torts made or committed abroad, courts may assume a liability to exist if nothing to the contrary appears, but they cannot assume that the rights and liabilities are fixed and measured in the same manner in foreign countries as they are in this. *Cuba R. R. Co.* v. *Crosby*, 473.

4. *Foreign laws; presumption as to; necessity for proof of.*

A trial court of the United States cannot presume that the same obligation rests upon an employer in Cuba as in this country to repair defects in machinery called to his attention, or in case of failure to repair to be deprived of the fellow-servants defense. Such a rule of law, if existent in a foreign jurisdiction, must be proved. *Ib.*

5. *Foreign suitors; limitation of hospitality to.*

The extension of hospitality of our courts to foreign suitors must not be made a cover for injustice to defendants of whom they may be able to lay hold. *Ib.*

See BANKRUPTCY, 2, 3;
FEDERAL QUESTION, 3;
INTERSTATE COMMERCE, 13;
INTERSTATE COMMERCE COMMISSION;
JUDICIAL NOTICE;
JURISDICTION;
MARITIME LAW, 6;
PRACTICE AND PROCEDURE;
REMEDIES, 4;
REMOVAL OF CAUSES;
TAXES AND TAXATION, 7.

CREEK INDIANS.

See INDIANS, 1;
MANDAMUS, 3.

CRIMINAL LAW.

1. *Notice; when manifestly not jurisdictional.*

Where a statute provides for notice in one case and permits prosecutions without notice in another case it shows that there was no intent to make notice jurisdictional. *United States* v. *Morgan*, 274.

2. *Relation of statutory provisions to offense charged.*

Congress will not be supposed to make the same offense indictable and punishable under either of two distinct provisions under which the procedure and the penalties are different. *United States* v. *Stever*, 167.

3. *Application of §§ 3894, 5480, Rev. Stat.*

Sections 3894 and 5480, Rev. Stat., each apply to different offenses and are to be construed as legislation *in pari materia*. *Ib.*

4. *Limitation of application of § 3894, Rev. Stat.*

Section 3894, Rev. Stat., relates particularly to lottery schemes, and the general words "concerning schemes devised for the purpose of obtaining money or property by false pretenses" are limited to schemes having a similitude to lotteries and other like schemes particularly described and do not extend to the general schemes to defraud covered by § 5480, Rev. Stat. *Ib.*

See BANKRUPTCY, 13; CONSTITUTIONAL LAW, 11, 12, 24, 25; FRAUD; PURE FOOD AND DRUG ACT; STATUTES, A 10, 11, 15, 16.

CUBA.

See LOCAL LAW (CUBA); WAR, 3.

CUSTOMS LAW.

1. *Similitude clause in act of 1897; what within.*

Section 7 of the Dingley Tariff Act of June 24, 1897, c. 11, 30 Stat. 159, known as the similitude clause, does not require that there shall be similarity of material, quality, texture and use in all four particulars, but a substantial similarity in one particular may be adequate to classify an article thereunder. *United States* v. *Eckstein*, 130.

2. *Similitude clause; classification of imitation horsehair under.*

Imitation horsehair was properly classified under the similitude clause with cotton yarn enumerated in paragraph 302 of the Tariff Act

instead of with silk yarn under paragraph 385, there being a substantial similitude with the former both as to material and use, even if not as to quality or texture. *Ib.*

DAMAGES.

See LIBEL;
MUNICIPAL CORPORATIONS, 3;
PRINCIPAL AND AGENT, 1.

DECREES.

See JUDGMENTS AND DECREES.

DEFENSES.

See MANDAMUS, 3.

DELEGATION OF POWER.

See GOVERNMENTAL POWERS AND FUNCTIONS, 3.

DEPARTMENT OF AGRICULTURE.

See PURE FOOD AND DRUG ACT, 1, 2.

DINGLEY TARIFF ACT.

See CUSTOMS LAW.

DISTRICT ATTORNEYS.

See PURE FOOD AND DRUG ACT, 2.

DISTRICT COURTS.

See JURISDICTION, A 17, 18; D;
MARITIME LAW, 3.

DISTRICT OF COLUMBIA.

See CONTRACTS, 10;
ESTATES OF DECEDENTS, 1.

DIVERSITY OF CITIZENSHIP.

See JURISDICTION, C 3, 4.

DRAMATIZATION.

See COPYRIGHTS, 1, 2.

DUE PROCESS OF LAW.
See CONSTITUTIONAL LAW, 4–8;
INDIANS, 1, 2.

DUTIES ON IMPORTS.
See CUSTOMS LAW.

EIGHT-HOUR LAW.
See PUBLIC WORKS, 2, 3.

EMPLOYER AND EMPLOYÉ.
See COURTS, 4.

ENEMIES.
See WAR, 2, 3.

ENEMY'S COUNTRY.
See WAR, 1, 3.

ENEMY'S PROPERTY.
See WAR, 4, 5, 6.

ENROLLMENT OF INDIANS.
See INDIANS, 1, 2;
MANDAMUS.

EQUITY.
Right to relief in; onus of establishing want of right.
While one must come into equity with clean hands, a defendant invoking the rule on the ground that plaintiff is praying for relief with an improper object in view must establish that fact. *Curtin* v. *Benson*, 78.
See JUDGMENTS AND DECREES, 2;
PARTNERSHIP, 3.

EQUAL PROTECTION OF THE LAWS.
See CONSTITUTIONAL LAW, 6, 7, 8, 9–21;
STATES, 1.

EQUITABLE TITLES.
See WILLS, 1, 2.

ESTATES.

See TAXES AND TAXATION, 19.

ESTATES OF DECEDENTS.

1. *Rule in Shelley's case as rule of property; question for court.*

The rule in Shelley's case is a rule of property in the District of Columbia, and the question for this court to determine is not whether it has or has not a legal foundation, or is or is not a useful rule of property, but whether it applies to the case in controversy. *Vogt* v. *Graff and Vogt*, 404.

2. *Rule in Shelley's case; when not applicable.*

Where the testator directs that on the sale of his real estate the proceeds be divided and paid over to his heirs at once, except the share of a specified heir which shall be paid to trustees to be by them invested, the income thereon to be paid to such heir, the principal to be paid to his heirs after his death, the application of the rule in Shelley's case would destroy the radical distinctions intended by the testator, and the rule does not apply. *Ib.*

3. *Rule in Shelley's case; intention of testator paramount.*

Notwithstanding the peremptory force of the rule in Shelley's case, where there are explanatory and qualifying expressions showing a clear intention of the testator to the contrary, the rule must yield and the intention prevail. (*Daniel* v. *Whartenby*, 17 Wall. 369.) *Ib.*

4. *Rule in Shelley's case; condition as to quality of estates.*

A condition of the rule in Shelley's case is that the particular estate and the estate in remainder must be of the same quality, both legal or both equitable, and where the former is equitable and the latter is legal, the rule does not apply and the two estates do not merge. *Ib.*

5. *Remainder; quære as to character.*

Quære: Whether in the case at bar the estate in remainder is legal or equitable. *Ib.*

6. *Rule in Shelley's case; quære as to personalty.*

Quære: Whether the rule in Shelley's case is applicable to personal property. *Ib.*

See CONSTITUTIONAL LAW, 7, 15, 17;
JUDGMENTS AND DECREES, 3;
WILLS.

ESTOPPEL.

See CONTRACTS, 11;
SALES, 2, 3.

EVIDENCE.

Limitation of, to purpose for which introduced.

Evidence, inadmissible generally but admitted by the court below for a particular purpose, cannot be extended by this court beyond the limited purpose of its introduction. *Curtin* v. *Benson*, 78.

See CONSTITUTIONAL LAW, 23–25;
CONTRACTS, 9;
COURTS, 4;
INTERSTATE COMMERCE, 3, 10, 11;
JURISDICTION, A 8.

EXCEPTIONS.

See PRACTICE AND PROCEDURE, 3, 4.

EXCISES.

See TAXES AND TAXATION, 1.

EXECUTORS AND ADMINISTRATORS.

See PARTNERSHIP, 7.

EXEMPTION FROM TAXATION.

See TERRITORIES, 1, 2;
TAXES AND TAXATION, 2.

FACTS.

See INTERSTATE COMMERCE COMMISSION, 1, 2;
PRACTICE AND PROCEDURE, 5, 6, 7.

FEDERAL COURTS.

See COURTS, 1, 2;
FEDERAL QUESTION, 3.

FEDERAL QUESTION.

1. *Frivolous; when not affording basis for jurisdiction.*

In this case the Federal question relied upon is so absolutely without merit, and the grounds are so frivolous, as not to afford a basis for exercise of jurisdiction, and the writ of error is dismissed. *Gring* v. *Ives*, 365.

2. *Involution in application to foreign corporations of state statute increasing liability.*

Although a statute increasing the liability of corporations may, as to corporations of the State, be an exercise of the reserved power to alter, amend and repeal, the application of that principle as to foreign corporations depends on many considerations and involves Federal questions. *Aluminum Co.* v. *Ramsey*, 251.

3. *Validity of state law under state constitution not a Federal question.*

Whether a particular state law has been passed by the legislature in such manner as to become a valid law under the state constitution is a state and not a Federal question, and Federal courts must follow the adjudications of the state court. *Peters* v. *Broward*, 483.

See JURISDICTION, A 10, 11, 12, 14.

FIFTH AMENDMENT.

See CONSTITUTIONAL LAW, 23, 25.

FINDINGS OF FACT.

See INTERSTATE COMMERCE COMMISSION, 1, 2;
PRACTICE AND PROCEDURE, 5, 6, 7.

FOREIGN CORPORATIONS.

See FEDERAL QUESTION, 2.

FOREIGN LAWS.

See COURTS, 3, 4.

FOREIGN SUITORS.

See COURTS, 5.

FORGERY.

See FRAUD, 2.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW, 17, 19, 26–29.

FOURTH AMENDMENT.

See MALICIOUS PROSECUTION.

FRAUD.

1. *Defrauding United States; essentials of crime.*

It is not essential to charge or prove an actual financial or property

loss to make a case of defrauding the United States. *United States* v. *Plyler*, 15.

2. *Defrauding United States; offenses within § 5418, Rev. Stat.; forging Civil Service vouchers.*

Section 5418, Rev. Stat., prohibits the forging of written vouchers required upon examination by the Civil Service Commission of the United States, and presenting such vouchers to the Commissioners. *Ib.*

See CRIMINAL LAW, 4.

FRIVOLOUS QUESTION.

See FEDERAL QUESTION, 1;
JURISDICTION, A 18;
REMOVAL OF CAUSES, 3.

GOVERNMENTAL POWERS AND FUNCTIONS.

1. *Power of legislature to impose obligations and responsibilities otherwise non-existent.*

The general principles of law that there is no individual liability for an act which ordinary human care and foresight could not guard against and that loss for causes purely accidental must rest where it falls, are subject to the legislative power which, in the absence of organic restraint, may, for the general welfare, impose obligations and responsibilities otherwise non-existent. *City of Chicago* v. *Sturges*, 313.

2. *Duty of government to protect life, liberty and property.*

Primarily government exists for the maintenance of social order and is under the obligation to protect life, liberty and property against the careless and evil-minded. *Ib.*

3. *Delegation of legislative power; what amounts to.*

A requirement by the legislature that illuminating oils must be safe, pure, and afford a satisfactory light, establishes a sufficient primary standard, and remitting to the proper state board the establishment of rules and regulations to determine what oils measure up to those standards does not amount to a delegation of legislative power. *Red "C" Oil Co.* v. *North Carolina*, 380.

See CONSTITUTIONAL LAW, 30;
PUBLIC LANDS, 1;
STATES.

GOVERNMENT CONTRACTS.

See ACTIONS, 2;
CONTRACTS, 2–8.

GRAIN ELEVATORS.

See INTERSTATE COMMERCE, 2, 5, 7.

HABEAS CORPUS.

Functions of writ.

The writ of *habeas corpus* cannot be made to perform the function of a writ of error, nor can it be made the means of obtaining a new trial. *Williams* v. *Walsh*, 415.

HARLAN, J., IN MEMORIAM.

See P. V, *ante*.

HAWAII.

See JUDGMENTS AND DECREES, 1.

HORSEHAIR.

See CUSTOMS LAW, 2.

HOURS OF LABOR.

See PUBLIC WORKS, 2, 3;
STATES, 16, 17.

IGNORANCE OF THE LAW.

See PLEADING.

ILLUMINATING OILS.

See GOVERNMENTAL POWERS AND FUNCTIONS, 3.

IMITATION HORSEHAIR.

See CUSTOMS LAW, 2.

IMMUNITY OF WITNESSES.

See BANKRUPTCY, 12, 13;
CONSTITUTIONAL LAW, 24, 25.

IMPAIRMENT OF CONTRACT OBLIGATIONS.

See JURISDICTION, A 5, 6, 14, 15.

IMPORTS.

See CUSTOMS LAW.

INDIANS.

1. *Enrollment; rights acquired by; prerequisites to deprivation of.*

Where, under the provisions of acts of Congress, and after a hearing, the names of relators were duly entered as Creek Freedmen by

blood on the rolls made and approved by the Secretary of the Interior, rights were acquired of which the freedmen could not be deprived without that character of notice and opportunity to be heard essential to due process of law. (*Garfield* v. *Goldsby*, 211 U. S. 249.) *Turner* v. *Fisher*, 204.

2. *Enrollment; removal from; sufficiency of notice of hearing.*

Notice to the attorney of such freedmen, given a few hours before the hearing of a motion to strike their names, on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process. (*Roller* v. *Holly*, 176 U. S. 399, 409; *Hagar* v. *Reclamation Dist.*, 111 U. S. 708; *Iowa Central* v. *Iowa*, 160 U. S. 393; *Hovey* v. *Elliott*, 167 U. S. 414.) *Ib.*

See MANDAMUS, 2, 3, 5.

INFRINGEMENT OF COPYRIGHT.

See COPYRIGHTS, 1, 2.

INJUNCTION.

See JURISDICTION, D.

INSPECTION CHARGES.

See TAXES AND TAXATION, 3–6.

INSURANCE.

1. *Condition as to avoidance of policy on non-payment of premiums; effect of.*

A condition in an insurance policy that it shall be void for non-payment of premiums means only that it shall be voidable at option of the company. *Grigsby* v. *Russell*, 149.

2. *Assignment of policy not within rule as to insurable interest.*

The rule of public policy that forbids the taking out of insurance by one on the life of another in which he has no insurable interest does not apply to the assignment by the insured of a perfectly valid policy to one not having an insurable interest. *Ib.*

3. *Assignment of policy, validity of.*

In this case, *held*, that the assignment by the insured of a perfectly valid policy to one not having any insurable interest but who paid a consideration therefor and afterwards paid the premiums thereon was valid and the assignee was entitled to the proceeds from the insurance company as against the heirs of the deceased. *Ib.*

4. *Insurable interest; effect of cessation of, on validity of policy.*

A valid policy of insurance is not avoided by a cessation of insurable interest even as against the insurer unless so provided by the policy itself. *Conn. Mut. Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Warnock* v. *Davis*, 104 U. S. 775, distinguished. *Ib.*

5. *Assignment of policy; rights of assignee as against those of insured's administrator.*

Where there is no rule of law against paying to an assignee who has no insurable interest in the life of the insured, and the company waives a clause in the policy requiring proof of interest, the rights of the assignee are not diminished by such clause as against the insured's administrator. *Ib.*

INTERSTATE COMMERCE.

1. *What constitutes.*

A train moving and carrying freight between two points in the same State, but which is hauling freight between points one of which is within and the other without the State, or hauling it through the State between points both without the State, is engaged in interstate commerce and subject to the laws of Congress enacted in regard thereto. (*Southern Railway Co.* v. *United States*, 222 U. S. 20.) *Northern Pacific Ry. Co.* v. *Washington*, 370.

2. *Discriminations; rebates; allowance to owners of elevators handling own grain, held not illegal.*

Contracts made by various railroads for elevation expenses of grain at points of transshipment at rates not exceeding those fixed by the Commission as reasonable, *held* not to be illegal discriminations or rebates when paid to owners of elevators on their own grain although such owners perform services other than those paid for at the same time to their own advantage. *Interstate Commerce Commission* v. *Diffenbaugh*, 42.

3. *Evidence; reports of Commission as.*

Section 14 of the Act to Regulate Commerce, making decisions of the Interstate Commerce Commission as published in the official reports competent evidence, does not relieve a party relying on a decision from putting it in evidence—or require courts to take judicial notice thereof—the statute relieves from expense and inconvenience in connection with producing evidence, but it does not otherwise change the rules of evidence. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 506.

4. *Preferences; when apparently fair rule held unreasonable and unfair.*
A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail. *Union Pacific R. R.* v. *Updike Grain Co.*, 215.

5. *Preferences; unreasonable discrimination by carrier in compensating for elevation of grain.*
In this case *held*, that the Union Pacific Railroad Company could not refuse to pay the owner of an elevator located on other railroads compensation for elevating grain similar to that paid to owners of elevators located on its own railroad on account of failure to return cars within an arbitrary and unreasonable time fixed by the Union Pacific; but also *held* that such cars should be returned within a reasonable time in order to entitle the parties rendering service to compensation therefor. *Ib.*

6. *Rates; compensation contemplated by Interstate Commerce Act; power of Commission.*
The Interstate Commerce Act does not attempt to equalize fortune, opportunities or abilities; it contemplates payment of reasonable compensation by carriers for services rendered, and instrumentalities furnished, by owners of property transported, the only power of the Commission being to determine the maximum of such compensation. *Interstate Commerce Commission* v. *Diffenbaugh*, 42.

7. *Rates; compensation of shippers for elevation of grain; right of carrier to accord.*
Interstate Commerce Commission v. *Diffenbaugh, ante*, p. 42, followed to effect that under the Interstate Commerce Law, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, 590, elevation of grain is included in transportation, and, subject to the power of the Commission to determine the reasonableness of the payments, carriers can compensate owners of grain in transit for elevation services rendered in connection therewith. *Union Pacific R. R.* v. *Updike Grain Co.*, 215.

8. *Rates; compensation by carrier for services rendered in transportation; right of carrier to withhold.*
Although a carrier may have had an ulterior motive in establishing a general rate of compensation for services rendered to it in connection with goods in transit, the real consideration is the service rendered; and even if the carrier does not realize the desired

benefit it cannot deprive one actually rendering the service of the compensation on the ground of non-compliance with regulations of an association of which the carrier is a member and over which the party rendering the service has no control. *Ib.*

9. *Same.*

A carrier must treat all alike. It cannot pay one shipper for services rendered to his goods in transit, and, by enforcing an arbitrary rule, deprive another shipper rendering similar services of compensation therefor. *Ib.*

10. *Rates; reasonableness; proof of.*

Reasonableness of railroad rates cannot be proved by categorical answers like those given in regard to value of articles of merchandise; too many elements are involved which require consideration. *Interstate Com. Comm.* v. *Union Pacific Ry. Co.*, 541.

11. *Rates; reasonableness; quœre as to presumption of.*

Quœre: Whether the maintenance of an admittedly low rate for a long time raises a presumption of reasonableness because the carriers realized a profit thereon. *Ib.*

12. *Rate regulation; scope of authority conferred by Act to Regulate Commerce.*

By the Act to Regulate Commerce, Congress has provided a system for establishing, maintaining, and altering rate schedules and of redressing injuries, and committed to a single tribunal authority to investigate complaints, enforce conformity to prescribed standards, and order reparation to injured parties for non-conformity with those standards. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 506.

13. *Rates; actions for reparation; when maintainable.*

No action for reparation for exactions for railroad freight payments can be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Interstate Commerce Commission. The rule laid down in *Texas & Pacific Railway Co.* v. *Abilene Oil Co.*, 204 U. S. 426, as to suits for recovery of unreasonable rates, applies also to suits for recovery of rates as discriminatory. *Ib.*

14. *Rates; action for discriminatory exaction; when maintainable.*

In this case *held* that an action could not be maintained for discriminatory exaction on coal rates of fifty cents a ton when loaded

from wagons and not from tipples, as the complaint had not shown that the schedule had been the subject of complaint to the Interstate Commerce Commission and held by it to be discriminatory. *Ib.*

15. *Sales by agent in State other than that of manufacture not interstate commerce transactions.*

Where the relation of principal and agent exists between one selling goods in one State which are manufactured in another State and the manufacturer, sales made by the former within his own State are not interstate commerce transactions but are subject to the taxing power of the State. *Banker Brothers Co.* v. *Pennsylvania*, 210.

16. *Same; effect of payment by purchaser of freight from place of manufacture.*

Where the transaction of sale of an article manufactured in another State is wholly intrastate, as between vendor and vendee, it does not become interstate and immune from state taxation because the purchaser pays freight from the place of manufacture or because the purchaser obtains a warranty direct from the manufacturer. *Ib.*

17. *State interference; when goods at rest and subject to state laws.*

In this case *held*, that goods manufactured in another State and delivered only, in pursuance of contract, after payment of draft attached to bill of lading, are at rest and subject to the laws of the State while in the hands of the consignee before delivery by him to a purchaser from him, notwithstanding the consignee only ordered them after a contract with the purchaser had been made. *Ib.*

18. *State interference; when state statute superseded by Federal legislation.*

Southern Railway Co. v. *Reid*, *ante*, p. 424, followed to effect that legislation of Congress in regard to matters of interstate commerce need not be inhibitive, but only to occupy the field, in order to supersede state statutes on the same subject. (*Northern Pacific Ry. Co.* v. *Washington*, *ante*, p. 370.) *Southern Ry. Co.* v. *Reid & Beam*, 444.

19. *State interference; effect of act of Congress to supersede state legislation; validity of North Carolina law relative to carriers.*

By the specific provisions of the act to regulate commerce, as amended, Congress has taken control of rate making and charging for in-

terstate shipments, and in that respect such provisions supersede state statutes on the same subject; and so *held* that a statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under penalties for failure, conflicts with the requirement of § 2 of the Hepburn Act of July 29, 1906, c. 3591, 34 Stat. 584, forbidding transportation until rates had been fixed and published, and is therefore unenforceable. *Southern Ry. Co.* v. *Reid*, 424.

20. *State interference; when middle ground of state authority passed.*

Any middle ground on which state authority might still be preserved after Congress has spoken in regard to interstate commerce is passed when the state regulation burdens such commerce, and the imposition of penalties for failure to receive and transport freight does impose a burden. *Ib.*

See CATTLE QUARANTINE ACT; CONSTITUTIONAL LAW, 1, 2, 3; JUDICIAL NOTICE; SAFETY APPLIANCE ACTS; STATES, 2, 3, 16, 17.

INTERSTATE COMMERCE COMMISSION.

1. *Findings; conclusiveness of.*

The Act to Regulate Commerce makes the findings of the Interstate Commerce Commission as to reasonableness of a rate *prima facie* correct. (*Cincinnati &c. Ry.* v. *Interstate Commerce Commission*, 206 U. S. 154.) *Interstate Com. Comm.* v. *Union Pacific Ry. Co.*, 541.

2. *Findings; conclusiveness of.*

Where, as in this case, there is testimony as to value of the roads, amounts expended, dividends, ratio of earnings and expenses, and other matters, there is evidence to support the conclusions and the findings of the Commission on such facts are conclusive. *Ib.*

3. *Orders; finality of.*

Orders of the Interstate Commerce Commission are final unless beyond the power that the Commission can constitutionally exercise; beyond its statutory power, or based upon a mistake of law. *Ib.*

4. *Orders may be set aside, when.*

An order of the Commission, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property

without due process of law; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support its conclusions; or if the authority was exercised in an absolutely unreasonable manner. *Ib.*

5. *Orders; validity of; power in fixing rates.*

An order of the Interstate Commerce Commission is not to be considered by itself alone, but must be considered in the light of all the testimony, and when carriers themselves maintain a ratio of difference, a rate fixed by the Commission maintaining the same ratio of difference cannot be said to be beyond its power. *Ib.*

6. *Orders fixing rates; considerations in determining validity.*

An order of the Interstate Commerce Commission within its power cannot be held invalid because it appears that possibly the Commission considered other subjects than the reasonableness of the rate; and in this case, *held* that an order fixing a rate on lumber was not invalid because the Commission examined into the effect of the rate on the lumber business and on the industries of the various points affected. *Ib.*

See APPEAL AND ERROR, 4;
INTERSTATE COMMERCE, 3, 6, 12, 13, 14;
PRACTICE AND PROCEDURE, 18.

JUDGMENTS AND DECREES.

1. *Attacking decisions of Board of Land Commissioners of Hawaii; mode of.*

This court sustains the rule laid down by the Supreme Court of Hawaii that decisions of the Board of Land Commissioners of 1845 could not be attacked except by direct appeal to the Supreme Court of Hawaii as provided by law. *Lewers & Cooke* v. *Atcherly*, 285.

2. *Reëxamination of decree sought to be executed.*

Where one asks the aid of a court of chancery in executing a former decree, he takes the risk of opening such decree for reëxamination. (*Lawrence Manufacturing Co.* v. *Janesville Cotton Mills*, 138 U. S. 532.) *Ib.*

3. *Scope of decree establishing will.*

A decree establishing a will may determine who is entitled to testator's property without determining that a particular property belonged to the inheritance. *Ib.*

4. *Stay order for rehearing and one for purposes of certiorari differentiated.*

There is a difference between a stay order for purposes of rehearing,

which prevents a judgment from becoming final, and one granted to enable an application to be made for certiorari which does not prevent the judgment from becoming final. *Title Guaranty Co.* v. *General Electric Co.*, 401.

See APPEAL AND ERRORS, 4; BANKRUPTCY, 14; INTERSTATE COMMERCE COMMISSION, 3–6; JURISDICTION, A 1, 13, 22, 23; PRACTICE AND PROCEDURE, 8, 11, 18; RAILROADS, 4.

JUDICIAL NOTICE.

Of importations and sales of commodity.

This court cannot take judicial knowledge of details of importations and sales of a commodity even if it can take such knowledge of the fact that such commodity is an article of interstate commerce. *Williams* v. *Walsh*, 415.

See INTERSTATE COMMERCE, 3; PRACTICE AND PROCEDURE, 17; PUBLIC WORKS, 4.

JURISDICTION.

A. OF THIS COURT.

1. *Judgments and decrees reviewable under Judiciary Act of 1891.*

The Judiciary Act of 1891 affords by one method or the other an opportunity for review by this court of every judgment or decree of a lower court which the Judiciary Act contemplated should be reviewed by this court. *Brown* v. *Alton Water Co.*, 325.

2. *Of direct appeal from Circuit Court of judgment on mandate from Circuit Court of Appeals.*

This court may not by indirection do that which it cannot do directly; and cannot, therefore, review on direct appeal a judgment of the Circuit Court on the question of jurisdiction based on a decision of the Circuit Court of Appeals which it was the imperative duty of the Circuit Court to follow, and which is not, and cannot be, before this court for review by appeal. *Ib.*

3. *Same.*

Where the Circuit Court dismisses for want of jurisdiction, and the Circuit Court of Appeals does not deem the question of jurisdiction should be certified to this court but reverses and remands with directions to take jurisdiction, and this court refuses certiorari, a direct appeal will not lie to this court from the judgment of the Circuit Court based on the decision of the Circuit

Court of Appeals which it was the imperative duty of the Circuit Court to follow. *Ib.*

4. *Under § 5 of Judiciary Act of 1891; when jurisdiction of Circuit Court in issue.*

Jurisdiction of the Circuit Court is in issue under § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, whenever the power of the court to hear and determine the cause as defined or limited by the Constitution or statutes of the United States is in controversy; and that covers a case where the jurisdiction of the particular Circuit Court is questioned under the statute prescribing the form and place of the action. *United States* v. *Congress Construction Co.*, 199.

5. *Jurisdictional amount; amount in controversy where impairment of contract of exemption from taxation in issue.*

The amount in controversy where the question is whether a contract of exemption from taxation has been impaired by subsequent legislation is measured by the value of the right to be protected and not by a mere isolated element, such as the tax for a single year. *Berryman* v. *Whitman College*, 334.

6. *Same.*

In this case the jurisdictional value of amount in controversy *held* to exceed $2,000, although the actual tax, the collection whereof was sought to be enjoined on the ground that its imposition impaired the obligation of a legislative contract, was less than $2,000. *Ib.*

7. *Same.*

Cases, in which the jurisdictional value of amount in controversy is limited to the single tax involved, reviewed and distinguished. *Ib.*

8. *Same; evidence to establish requisite amount.*

Where the record shows that the jurisdictional value is not made out by a preponderance of evidence, the appeal will be dismissed. (*Red River Cattle Co.* v. *Needham*, 137 U. S. 632.) *Enriquez* v. *Enriquez* (*No. 2*), 127.

9. *Same; sufficiency of amount in controversy.*

Under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 695, this court can only review judgments of the Supreme Court of the Philippine Islands where the value in controversy exceeds $25,000; and in this case it does not appear that the value of real property affected equals that amount. *Ib.*

10. *Of appeal from Circuit Court of Appeals on ground of constitutional question involved.*

Where the constitutional question is not advanced by the defendant until the trial it does not give jurisdiction of an appeal to this court from the Circuit Court of Appeals. (*Macfadden* v. *United States*, 213 U. S. 288.) *Chicago Junction Ry. Co.* v. *King*, 222.

11. *Of appeal from Circuit Court of Appeals when action based on Federal statute.*

Where the cause of action is based on a statute of the United States there is an appeal to this court from the judgment of the Circuit Court of Appeals. *Ib.*

12. *Of appeal from Circuit Court of Appeals; practice when case rests on Federal statute but does not involve its interpretation.*

Although there may be jurisdiction because the cause of action rests on a statute of the United States, where none of the contentions directly invoke the interpretation of the statute, but merely the question whether, on the evidence, there was a right of recovery, the case is of the character of cases in which it was the purpose of the Judiciary Act of 1891 to make the judgment of the Circuit Court of Appeals final, and this court will only examine the record to see if plain error has been committed; and if that is not apparent, it will, as in this case, affirm the judgment. *Ib.*

13. *When right claimed under judgment of Federal court denied.*

The denial of a right claimed under the judgment of a Federal court lays the foundation for a review in this court, and where the state court proceeds to judgment on the ground that bankruptcy proceedings against the defendant had been concluded by denial of adjudication and the injunction against suits in the state court thereby dissolved this court has jurisdiction. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.

14. *Federal question wanting where state court gives no effect to a subsequent law claimed to impair prior contract.*

When the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract claimed to have been impaired, the case stands as though the subsequent law had not been passed and this court has no jurisdiction. (*New Orleans Water Works* v. *Louisiana Sugar Refining Co.*, 125 U. S. 38.) *Missouri & Kansas I. Ry. Co.* v. *Olathe*, 187, 191.

15. *Same.*

Where a franchisee refuses to pay the agreed compensation on the ground that a subsequent ordinance deprived it of a part of the franchise granted, but the state court decides that it has had substantially everything and that compensation is due without regard to the part affected, no effect is given to the subsequent ordinance, no question of impairing the obligation of the contract is involved, and there being no Federal question this court has no jurisdiction under §§ 709, Rev. Stat. *Ib.*

16. *Where state court bases jurisdiction on its own construction of Federal statute.*

Where the state court bases its jurisdiction entirely on the construction given a Federal statute by it adversely to contention of plaintiff in error, this court has jurisdiction to review the judgment. (*Rector* v. *Bank*, 200 U. S. 405.) *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.

17. *To review judgment of District Court for Porto Rico when jurisdictional amount not involved.*

Under the act of April 12, 1900, c. 191, 31 Stat. 85, this court cannot review a judgment of the District Court of the United States for Porto Rico where the amount in controversy is less than five thousand dollars, unless the validity or interpretation of an act of Congress is brought in question, or a right claimed thereunder is denied. *Aran* v. *Zurrinach*, 395.

18. *Same; when Federal question raised too frivolous.*

Not every mere question of irregularity in applying the law of the United States arising in the court below confers a right of review on this court which otherwise would not exist; and where, as in this case, there is generality of statement and absence of specification to sustain the objections raised, in regard to qualifications and drawing of jurors in Porto Rico and the application of the Federal statutes thereto, the questions raised will be regarded as too frivolous to sustain jurisdiction, and the writ of error will be dismissed. *Ib.*

19. *To review judgments of Supreme Court of Philippine Islands; jurisdictional amount.*

Under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 695, this court can only review judgments of the Supreme Court of the Philippine Islands where the value in controversy exceeds $25,000; and where only a half interest of property is affected, jurisdic-

tion does not exist unless the value of such half interest exceeds that amount. *Enriquez* v. *Enriquez*, 123.

20. *Same; sufficiency of affidavit to show jurisdictional amount.*
An affidavit that the value of the real property involved in the action exceeds $25,000 is not sufficient to confer jurisdiction where only a one-half interest is affected and the context of the affidavit gives rise to the inference that the statements as to value relate to the entire property and not to a half interest therein. *Ib.*

21. *Same; insufficient amount shown by record.*
In this case resort to the record shows that the value of the interest in the property affected is less than the jurisdictional amount. *Ib.*

22. *Finality of judgment sought to be reviewed.*
Unless it appears from the record that the judgment sought to be reviewed finally determines the cause this court is without jurisdiction. *Missouri & Kansas I. Ry. Co.* v. *Olathe*, 185.

23. *Finality of judgment; judgment sustaining demurrer without dismissal of suit, not final.*
Where the judgment sought to be reviewed affirms the judgment below but merely sustains the demurrer without dismissing the suit, so that the cause is left standing in the lower court for further proceedings, it is not a final judgment reviewable by this court. *Ib.*

See BANKRUPTCY, 5, 7, 8;
FEDERAL QUESTION;
STARE DECISIS, 2.

B. OF CIRCUIT COURTS OF APPEALS.

See Supra, A 12.

C. OF CIRCUIT COURTS.

1. *Amount in controversy for purposes of; when aggregate of several demands the test.*
When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Troy Bank* v. *G. A. Whitehead Co.*, 39.

2. *Amount in controversy; when aggregate of several demands sufficient.*
The Circuit Court has jurisdiction of a suit brought by several plaintiffs to enforce a vendor's lien equally securing notes aggregating more than $2,000 held by them and which neither can enforce in the absence of the other, even though the claim of each plaintiff is less than $2,000. *Ib.*

3. *Diversity of citizenship; arrangement of parties by court.*
In determining whether diversity of citizenship exists to give jurisdiction it is the duty of the Circuit Court to arrange the parties with respect to the actual controversy looking beyond the formal arrangement made by the bill. *Helm* v. *Zarecor*, 32.

4. *Diversity of citizenship; arrangement of parties in controversy over control of corporation.*
Where, as in this case, the controversy over the control of a corporation transcends the rivalry of those claiming to be members of its board of control and the corporation itself is a mere instrumentality or title holder, it is properly made a party defendant and should not be aligned as a party plaintiff merely because the plaintiffs belong to the same faction that claims the power to appoint the members of the board of control. *Ib.*
See Supra, A 4.

D. Of District Court.

To issue ex parte injunction to restrain proceeding in state court.
There is no power in the District Court to issue an *ex parte* injunction, without notice or service of process, attempting to restrain a creditor suing in a State outside the jurisdiction of the District Court. Ancillary jurisdiction in aid of the jurisdiction of the District Court exists under the act of June 25, 1910, c. 412, 36 Stat. 838. *Re Wood & Henderson*, 210 U. S. 246, distinguished. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.
See Supra, A 17, 18;
Maritime Law, 3.

E. Of Court of Claims.

Of claims for seizures during Spanish-American war.
Under the prohibitions of the Tucker Act, the Court of Claims has no jurisdiction of claims for seizures made in Santiago after its capitulation in violation of the President's proclamation of July 13, 1898, or of the laws of war. *Herrera* v. *United States*, 558.

F. Of Bankruptcy Courts.
See Bankruptcy, 2, 3, 4.

G. Of State Courts.
See Removal of Causes, 1, 4.

H. Generally.
See Actions, 1, 2;
Criminal Law, 1.

LABOR.
See Public Works, 2, 3.

LACHES.

Imputation to grantee of laches of grantor in respect of claim to property purchased by United States.

Where the reference to the Court of Claims, as in this case, is not to determine whether the grantor of a claimant of a part interest in real estate purchased by the United States had a valid title at the time the United States took possession, but whether the claimant has acquired a valid title to the property, with provision that the United States may plead any defense, the conduct of claimant's grantor is to be considered; and if such grantor was guilty, as in this case, of gross laches, claimant cannot recover. *Hussey* v. *United States*, 88.

See Partnership, 7;
Sales, 3.

LAND ENTRIES.
See Public Lands, 2–5.

LAWS OF WAR.
See War.

LEGACIES.
See Estates of Decedents;
Taxes and Taxation, 19.

LEGAL INSTRUMENTS.
See States, 8.

LEGISLATION.

Test of validity.

Legislation cannot be judged by theoretical standards but must be

tested by the concrete conditions inducing it. *Mutual Loan Co.* v. *Martell*, 225.

See CONSTITUTIONAL LAW, 9; LOCAL LAW (FLA.); COURTS, 1; PRACTICE AND PROCEDURE, 15; STATES, 1.

LEGISLATIVE POWER.

See CONSTITUTIONAL LAW, 23; GOVERNMENTAL POWERS AND FUNCTIONS, 1–3; STATES, 1.

LEVEES.

See PUBLIC WORKS, 3, 4.

LEX LOCI.

Liability of parties fixed by.

With rare exceptions, the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. *Cuba R. R. Co.* v. *Crosby*, 473.

LIBEL.

1. *Excess without malice; liability for.*

In the absence of express malice or excess, publication of actual facts is not libellous, and in case of mere excess without express malice the only liability is for damages attributable to the excess; and refusal of the trial court to charge to this effect is error. *Gandia* v. *Pettingill*, 452.

2. *What constitutes; quære as to.*

Quære: Whether attributing to a person conduct that is lawful can be libellous. *Ib.*

LIBERTY OF CONTRACT.

See STATES, 5.

LIENS.

See BANKRUPTCY, 14; CONSTITUTIONAL LAW, 3.

LIMITATION OF ACTIONS.

See CONSTITUTIONAL LAW, 4.

LIVE-STOCK.

See CATTLE QUARANTINE ACT.

LOCAL LAW.

Common-law countries; identity of statute law not presumed. While as between two common-law countries the common law may be presumed to be the same in one as in the other, a statute of one would not be presumed to be the statute of the other. *Cuba R. R. Co.* v. *Crosby*, 473.

California. Penal Code, § 246, assaults by convicts (see Constitutional Law, 12). *Finley* v. *California*, 28.

Cuba; analogy to common law not assumed. There is no general presumption that the law of Cuba as inherited from Spain and as since modified is the same as the common law. *Cuba R. R. Co.* v. *Crosby*, 473.

District of Columbia. Statute of Frauds, Code, § 1117 (see Contracts, 10). *Lenman* v. *Jones*, 51. Rule in Shelley's case (see Estates of Decedents). *Vogt* v. *Graff and Vogt*, 404.

Florida. Legislation; effect of variance between bill and act. Under the law of Florida, as declared by its highest court, where there is a variance between the title of a bill as enrolled and promulgated and the title of the act as shown by the journals, the latter will control. *Peters* v. *Broward*, 483.

See COURTS, 1.

Hawaii. Mode of reviewing decisions of Board of Land Commissioners (see Judgments and Decrees, 1). *Lewers & Cooke* v. *Atcherly*, 285.

Illinois. Mob and riot act of 1887 (see Constitutional Law, 6). *City of Chicago* v. *Sturges*, 313. Judgment liens (see Bankruptcy, 14). *Rock Island Plow Co.* v. *Reardon*, 354.

Kansas. Sales of black powder (see Constitutional Law, 18). *Williams* v. *Walsh*, 415.

Massachusetts. Assignments of wages (see Constitutional Law, 8). *Mutual Loan Co.* v. *Martell*, 225. Distribution of estates of absentees (see Constitutional Law, 4). *Blinn* v. *Nelson*, 1.

New York. Transfer tax law of 1896 (see Constitutional Law, 7). *Keeney* v. *New York*, 525.

North Carolina. Oil inspection law of 1909 (see Taxes and Taxation, 3). *Red "C" Oil Co.* v. *North Carolina*, 380. Regulation of transportation of freight by common carriers (see Interstate Commerce, 19). *Southern Ry. Co.* v. *Reid*, 424.

Washington. Liens on vessels for torts committed, Code, §§ 5953, 5954 (see Constitutional Law, 3). *Martin* v. *West*, 191.

LOCAL OFFICERS.

See CONSTITUTIONAL LAW, 26.

LOTTERIES.

See CRIMINAL LAW, 4.

MAIL SERVICE CONTRACTS.

See CONTRACTS, 11, 12, 13.

MALICIOUS PROSECUTION.

Safeguards of Fourth Amendment.

Citizens are furnished the surest safeguards against malicious prosecutions by the Fourth Amendment. *United States* v. *Morgan*, 274.

MANDAMUS.

1. *Nature of writ and who entitled.*

But mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands. *Turner* v. *Fisher*, 204.

2. *To require Secretary of Interior to restore names to Indian enrollment.*

In the absence of other controlling facts, the Secretary of the Interior could have been required by mandamus to restore the names of those thus arbitrarily stricken off without notice. (*Garfield* v. *Goldsby*, 211 U. S. 249.) *Ib.*

3. *Defense to writ to compel Secretary of Interior to restore names to Indian enrollment.*

Although the petition for the writ alleged that relators were freedmen duly enrolled and denied the truth of the testimony on which their names were stricken off, yet where the answer of the Secretary referred to that testimony and alleged, "on information and belief,

that the relators were not freedmen members or members by blood or marriage of the Creek Nation, and that their enrollment had been procured by fraud," a defense was stated, proof of which would have defeated the right to a restoration of relators' names, even though they had been improperly stricken from the rolls without due process. (*Redfield* v. *Windom*, 137 U. S. 636, 646; *In re Sanford Co.*, 160 U. S. 257.) *Ib.*

4. *Defense; pleading and practice; effect of election to stand on general demurrer to answer which is overruled.*

Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused. (*In re Sanford Co.*, 160 U. S. 257.) *Ib.*

5. *Futility of issuance of writ.*

To have issued the writ would have involved the useless thing of requiring relators' names to be reëntered, and in other proceedings having their names stricken because the original enrollment had been procured by fraud, thus admitted by the demurrer. *Ib.*

See APPEAL AND ERROR, 3.

MARITIME LAW.

1. *Limitation of liability by vessel owners; policy of Congress as to.*

The policy of Congress in enacting statutes in regard to the liability of vessel owners has been to encourage investment in ships and to that end to relieve the owners from liabilities that are not the result of their own fault, negligence or privity. *Richardson* v. *Harmon*, 96.

2. *Same. Effect of § 18 of act of June 26, 1884.*

Section 18 of the act of June 26, 1884, 23 Stat. 57, c. 121, adds to the claims against which vessel owners can limit their liability and includes those arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves them liable for their own faults, neglect and contracts. *Ib.*

3. *Same; where tort non-maritime.*

The owners of a vessel colliding by its own fault with a structure on land can limit their liability for the damages done to their interest in the vessel although such a collision may not be a maritime tort, and the District Court has jurisdiction to entertain a petition to that effect. *Ib.*

4. *Torts; determination of whether tort maritime or non-maritime.*
Whether a tort be maritime or non-maritime must be determined by the character and locality of the injured thing at the time the tort was committed, and subsequent facts as to location furnish no criterion. (*Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388.) *Martin* v. *West*, 191.

5. *Torts; collision of vessel with bridge non-maritime.*
Where a vessel by its own fault collides with and injures a bridge which is essentially a land structure and which is maintained and used as an aid to commerce on land, the tort is non-maritime. *Ib.*

6. *Torts; availability of remedy provided by state statute.*
The remedy for a non-maritime tort provided by the state statute can be pursued in the state court against the vessel committing it, even though the statute gives a lien on the vessel. *Ib.*

MARSHALS.
See WRIT AND PROCESS.

MASTER AND SERVANT.
See COURTS, 4.

MATERIALMEN.
See ACTIONS, 2.

MAXIMS.
Expressio unius est exclusio alterius.
The maxim *expressio unius est exclusio alterius* is a rule of construction and not of substantive law, and serves only as an aid in discovering legislative intent when not otherwise manifest. *United States* v. *Barnes*, 513.
See EQUITY.

MERGER OF ESTATES.
See ESTATES OF DECEDENTS.

MISTAKE.
See CONTRACTS, 19.

MOBS AND RIOTS.
See CONSTITUTIONAL LAW, 6;
MUNICIPAL CORPORATIONS, 1, 2.

MOVING PICTURES.

See COPYRIGHTS, 1, 2.

MUNICIPAL CORPORATIONS.

1. *Duty of protecting property from mob violence; imposition by State of creation.*

It is a familiar rule of the common law that the State which creates subordinate municipal governments and vests in them police powers essential to preservation of law and order may impose upon them the duty of protecting property from mob violence and hold them liable for loss caused by such violence. *City of Chicago* v. *Sturges*, 313.

2. *Liability for damage by mob violence.*

Liability of the municipality for property destroyed by mob violence rests upon reasonable grounds of public policy and operates to deter the lawless destruction of property. *Ib.*

3. *Counties; liability for mob violence; imposition by State not unreasonable.*

It is not unreasonable for a State to make a county liable for damages sustained by sufferers whose property is not within any incorporated city. *Ib.*

See CONSTITUTIONAL LAW, 6, 21, 28.

NATIONAL PARKS.

See PUBLIC LANDS, 7, 8, 9.

NAVIGABLE WATERS.

State power concerning structures in; effect of act of March 3, 1899, 30 Stat. 112.

The act of March 3, 1899, c. 425, § 10, 30 Stat. 1121, 1151, authorizing establishment of harbor lines was not intended, and did not operate, to paralyze all state power concerning structures of every character in navigable waters within their borders, or to automatically destroy property rights previously acquired under sanction of state authority. (*Cummings* v. *Chicago*, 188 U. S. 410.) *Gring* v. *Ives*, 365.

NEW TRIAL.

See HABEAS CORPUS.

NOTICE.

See BANKRUPTCY, 11; INDIANS, 1, 2;
CRIMINAL LAW, 1; JURISDICTION, D.

OBSTRUCTIONS TO NAVIGATION.
See NAVIGABLE WATERS.

OIL INSPECTION LAWS.
See STATES, 19.

OFFENSES.
See CRIMINAL LAW.

OFF-SET.
See CONTRACTS, 13, 14.

OLEOMARGARINE ACT.
Special taxes; § 3177, Rev. Stat., not excluded.
The mention in the Oleomargarine Act of August 2, 1886, c. 840, 24 Stat. 209, § 3, of certain specified sections of the Revised Statutes, which relate to special taxes, as applicable to the special taxes imposed by § 3, may exclude other sections relating to special taxes but does not exclude as inapplicable to the collection of the taxes imposed by, and enforcement of, the Oleomargarine Act, § 3177, Rev. Stat., which is general in its terms, and relates to all articles and objects subject to internal revenue tax. *United States* v. *Barnes*, 513.

ONUS PROBANDI.
See EQUITY.

OPTIONS.
See CONTRACTS, 15, 19;
PRINCIPAL AND AGENT, 3.

ORIGINAL PACKAGE.
See WORDS AND PHRASES.

PARTIES.
See APPEAL AND ERROR, 1, 2, 3;
CONTRACTS, 2, 8, 18;
COURTS, 5;
JURISDICTION, C 3, 4;
PRACTICE AND PROCEDURE, 20, 21, 22;
REMOVAL OF CAUSES, 2, 3;
STATES, 1.

PARTNERSHIP.
1. *Equality of partners; claims for services by surviving partner not favored.*
The law implies equality between partners and does not favor claims

of the survivor for services rendered after dissolution of the firm and which lead to efforts to prove disparity. *Consaul* v. *Cumming*, 262.

2. *Duty of partners; right of survivor to additional compensation for completing business of firm.*

Each partner is bound to devote himself to the firm's business and there is no implied obligation on the part of the other partners to pay him more than his proportion for performing his duty; and this rule applies to a surviving partner completing the business of the firm. *Ib.*

3. *Surviving partners not entitled to compensation for winding up affairs of firm.*

While equity at times makes exceptions to the general rule that a surviving partner is not allowed compensation for winding up the affairs of the copartnership, this case does not fall within such exceptions. *Ib.*

4. *Limited; dissolution; effect of lunacy or death of partner; compensation to which survivor entitled.*

A limited partnership formed by two lawyers to prosecute claims against the Government, one of whom had already secured the claims and the other of whom was to attend to the prosecution, *held* not to be one in which either the lunacy or death of the former would amount to a dissolution or entitle the survivor to extra compensation for prosecuting the claims after such events to a successful conclusion, the partnership gains being payable *in solido* and dependent upon success, and the record showing that the deceased partner did not at any time aid materially in the prosecution of the claims and was not expected to. *Ib.*

5. *Accounting by surviving partner of law firm prosecuting claims.*

A surviving partner of a law firm prosecuting claims under powers of attorney from the claimants to the deceased partner cannot retain the business individually and claim that the powers to the deceased partner were revoked by his death; he must account to the representatives of the deceased partner for his share of the fees. *Ib.*

6. *Same; interest chargeable.*

If the defendant should have previously accounted, but wantonly refused or neglected so to do, interest is properly chargeable from the filing of the bill. *Ib.*

7. *Accounting; laches not imputed to administrator of deceased partner who delays demand until realization of assets.*

A curator and administrator of a deceased member of a partnership, who has no power of sale, is not chargeable with laches because he waits until the surviving partner has realized the assets of the copartnership before demanding an account. The interests of his ward and intestate are founded in contract and cannot be destroyed by mere non-action. *Ib.*

See SALES, 3.

PENAL STATUTES.

See STATUTES, A 15, 16.

PENALTIES AND FORFEITURES.

See CONSTITUTIONAL LAW, 11, 12;
PRINCIPAL AND SURETY, 2;
STATES, 11.

PERJURY.

See BANKRUPTCY, 13;
CONSTITUTIONAL LAW, 24, 25;
STATUTES, A 11.

PERSONAL PROPERTY.

See ESTATES OF DECEDENTS, 6;
TAXES AND TAXATION, 15, 16.

PHILIPPINE ISLANDS.

See JURISDICTION, A 9, 19, 20.

PHOTO-PLAYS.

See COPYRIGHTS, 1, 2.

PLEADING.

Ignorance of the law not available as defense where court has pointed way to knowledge.

Where the state courts have held that the journals of the legislature can be examined to determine whether an act has been validly passed, it is the duty of one proposing to rely upon the act to examine the journals, and he cannot plead ignorance of the law as an excuse for not doing so. *Peters* v. *Broward*, 483.

See CONTRACTS, 8, 13, 14;
MANDAMUS, 4.

POLICE POWER.

Test of validity of police regulations.

The validity of police regulations depends upon the circumstances of each case, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. (*Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 591.) *Mutual Loan Co.* v. *Martell*, 225.

See CONSTITUTIONAL LAW, 8;
MUNICIPAL CORPORATIONS, 1;
STATES, 12–20.

PORTO RICO.

See BANKRUPTCY, 4, 5, 6;
CONTRACTS, 1;
JURISDICTION, A 17, 18.

POSTMASTER GENERAL.

See CONTRACTS, 12.

POWDER.

See STATES, 20.

PRACTICE AND PROCEDURE.

1. *Bill of exceptions; effect of absence from record.*

Occurrences at the trial cannot be considered if the record contains no bill of exceptions. *Kinney* v. *United States Fidelity Co.*, 283.

2. *Bill of exceptions; sufficiency of.*

A paper in the record signed by the plaintiff is not a bill of exceptions although styled exceptions to charge of jury and purporting to be initialed by the trial judge. (*Origet* v. *United States*, 125 U. S. 243.) *Ib.*

3. *Exceptions; when to be noted.*

The stricter practice is to note the exceptions before the jury retires; but if all the exceptions are noted in open court after jury returns and no wrong is suffered, an exception will not be sustained on that ground. *Gandia* v. *Pettingill*, 452.

4. *Exception to statement of account not made in lower court not available in this court.*

If a defendant did not except to a ruling fixing a date for calculating interest on an account, and asked to be allowed interest on ad-

vances from the same date, he is deemed to have acquiesced in the ruling, and cannot complain of it in this court. *Consaul* v. *Cummings*, 262.

5. *Findings of fact by Court of Claims; sufficiency; when cause remanded for additional findings.*

Where the right of one claiming under a contract with the United States depends on whether the government inspector acted in good or in bad faith in refusing to allow the work to proceed, the findings of the Court of Claims should be specific in this respect; and if not, the case will be remanded with directions to make specific findings. *Ripley* v. *United States*, 144.

6. *Same.*

Findings, which simply state that the inspector in immediate charge of the work acted with knowledge, other inspectors being also referred to in the findings, and which do not make a direct and unequivocal finding as to the good or bad faith of the inspector in giving the orders, do not conform to the order of this court heretofore made in this case, 220 U. S. 491, and the case is remanded for further compliance therewith. *Ib.*

7. *Finding by state court of termination of bankruptcy proceeding not conclusive on this court.*

A finding by the state court that bankruptcy proceedings had been concluded by denial of adjudication does not conclude this court on writ of error to review the judgment of the state court. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 300.

8. *Following lower court's decision as to conflicting decrees.*

Of two former decrees adjudicating title to real estate, the Supreme Court of Hawaii having found that the earlier was right and bound all interests and that the later was wrong, this court affirms, seeing no reason for not following the local court. *Lewers & Cooke* v. *Atcherly*, 285.

9. *Following state court's construction of state statute.*

Whether a state statute providing remedies for damages to property within the State includes those to specified classes of property is for the state court to determine, and this court accepts the construction so given. (*The Winnebago*, 205 U. S. 354.) *Martin* v. *West*, 191.

10. *Following state court's construction of state statute.*

The question of validity of a state statute under the state constitution

is foreclosed in this court by the decision of the highest court of the State. *City of Chicago* v. *Sturges*, 313.

11. *When state court's adjudication as to validity of state statute followed though not res judicata.*

While the judgment of the highest court of the State in a case may not be *res judicata* of the case at bar, the parties and land affected not being the same, if in deciding it the court announces what the law of the State is and whether a particular statute was or was not validly enacted under the state constitution, this court will follow it as an authoritative announcement of the law of the State. *Peters* v. *Broward*, 483.

12. *Effect of decision by state court that act of State is unconstitutional on right of this court to hold it constitutional.*

This court cannot hold that an act is constitutional under the state law because the defect on which the state court declared it to be unconstitutional occurred through mistake, when the state court has passed on that question and held the act unconstitutional even under such condition. *Ib.*

13. *Following territorial court's construction of local statute.*

Where it is inherently legal and protects private rights, the construction given a local statute by the Supreme Court of a Territory will be followed by this court, unless there is such manifest error as to warrant reversal. *Treat* v. *Grand Canyon Ry. Co.*, 448.

14. *Same.*

In this case this court follows the construction, given to a territorial statute of Arizona by the Supreme Court of that Territory, that an exemption from taxation of certain railroad property went with the land and extended to assigns of the first road. *Ib.*

15. *Deference to tribunals on the spot in respect of necessity for legislation.*

This court recognizes the propriety of deferring to tribunals on the spot and will not oppose its notions of necessity to legislation adopted to accomplish a legitimate public purpose. (*Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358.) *Mutual Loan Co.* v. *Martell*, 225.

16. *Weight given to decision of court on the spot.*

Great weight should be attributed to the decision of the court on the spot, especially when ancient law is involved, such as existed in Hawaii before the annexation. *Lewers & Cooke* v. *Atcherly*, 285.

17. *Scope of inquiry as respects operation of statute.*

This court cannot determine what the actual operation of a statute will be after its enactment by going outside the record and taking judicial knowledge of what has happened since the filing of the transcript here. *Red "C" Oil Co.* v. *North Carolina*, 380.

18. *Scope of review in determining validity of orders of Interstate Commerce Commission.*

This court, in determining the validity of an order of the Interstate Commerce Commission, confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider expediency, nor will it consider facts further than to determine whether there was sufficient evidence to support the order. *Interstate Com. Comm.* v. *Union Pacific Ry. Co.*, 541.

19. *Record; bill of exceptions; disposition of case when evidence insufficient to support.*

Even if a part of the record were treated as a bill of exceptions if all matters therein depend for their solution upon examination of evidence not in the record, this court will affirm, not having any means for determining whether reversible error arose from the action of the court. *Kinney* v. *United States Fidelity Co.*, 283.

20. *Who may attack validity of law.*

A law cannot be declared invalid at the instance of one not affected by it. *Williams* v. *Walsh*, 415.

21. *Who may attack constitutionality of statute.*

One assessed at the lowest rate under a graduated tax statute cannot object to the constitutionality because others are taxed at the higher rate. *Keeney* v. *New York*, 525.

22. *Who may not object to constitutionality of classification for regulation.*

One within a distinct class which is properly subject to classification cannot question the constitutionality of the classification on the ground that it is too broad and includes others outside of that class. *Aluminum Co.* v. *Ramsey*, 251.

See CONSTITUTIONAL LAW, 18; CONTRACTS, 13, 14; COURTS, 1; ESTATES OF DECEDENTS, 1; EVIDENCE; FEDERAL QUESTION; JURISDICTION, A 8, 12.

PREFERENCES.

See INTERSTATE COMMERCE, 4, 5, 9.

PRESUMPTIONS.

See CONTRACTS, 3;
COURTS, 3, 4;
INTERSTATE COMMERCE, 11;
LOCAL LAW;
STATUTES, A 8, 9, 17;
TAXES AND TAXATION, 6.

PRINCIPAL AND AGENT.

1. *Agent's liability for secret profits; form of action.*

A principal betrayed by his agent into paying for property an excess over the price for which the agent obtains it may declare in assumpsit without relying upon fraud and deceit in an action for damages. *Sandoval* v. *Randolph*, 161.

2. *Same.*

An agent who makes a secret profit in the execution of his agency may be compelled to disgorge in an action upon implied promise. *Ib.*

3. *Agent's right to avail of option antedating employment and make profit on purchase.*

Where one agrees to act as agent to purchase property at not exceeding a specified price, he cannot avail of an unexpired option antedating the employment to purchase the property at a less price himself and make the difference. *Ib.*

See INTERSTATE COMMERCE, 15;
SALES, 1.

PRINCIPAL AND SURETY.

1. *Discharge of surety by extension of time.*

Under the provisions of the contract in this case for possible extensions of time, the sureties on the bond which was part of the contract were not discharged by reason of the extensions which were granted pursuant to the contract. *United States* v. *McMullen*, 460.

2. *Discharge of surety; effect of failure to enforce penalties for delay.*

Where there is a penalty for avoidable delay in performance of a government contract, sureties are not discharged because the Government does not take steps against the contract to collect the penalties. *Ib.*

PROCESS.

See WRIT AND PROCESS.

PROPERTY RIGHTS.

See BANKRUPTCY, 9;
CONSTITUTIONAL LAW, 4;
PUBLIC LANDS, 1, 7, 8.

PUBLICATIONS.

See LIBEL.

PUBLIC HEALTH.

See STATUTES, A 17.

PUBLIC LANDS.

1. *Powers of United States over; limitation of.*

Even if the United States can exercise over public lands the powers of a sovereign as well the rights of a proprietor, there are limitations; neither can be exercised to destroy essential uses of private property. *Curtin* v. *Benson*, 78.

2. *Coal land entries; application to Alaska of § 2350, Rev. Stat.*

Section 2350, Rev. Stat., is, by §§ 1 and 4 of the act of April 28, 1904, 33 Stat. 552, c. 1772, continued in force in the District of Alaska, and prohibits more than one entry of coal land by or for the same person or association of persons. *United States* v. *Munday*, 175.

3. *Coal land entries; policy of Congress in restricting.*

The policy adopted by Congress of restricting one coal land entry to each qualified entryman was to prevent monopolization of coal lands by securing to every citizen the right to obtain for himself one tract of not exceeding one hundred and sixty acres. *Ib.*

4. *Coal land entries; restriction to one not affected by entryman's right to assign.*

A policy to confine the entryman to one entry is not affected by the fact that Congress leaves him free to assign a location made in good faith. (*United States* v. *Keitel*, 211 U. S. 370.) *Ib.*

5. *Coal land entries; construction of statutes relative to.*

All the statutes affecting coal land entries—act of March 3, 1873, 17 Stat. 607, c. 279, now §§ 2347–2349, Rev. Stat.; act of June 6, 1900, 31 Stat. 658, c. 996, and act of April 28, 1904, 33 Stat. 525, c. 1772—are in *pari materia* and must be read together, and no part of the earlier acts is to be regarded as inoperative unless no other construction of the later legislation is reasonable. *Ib.*

6. *Coal lands in Alaska; object of act of 1904.*
The single object of the act of 1904 in regard to coal lands in Alaska was to provide for the sale of unsurveyed coal lands, and it becomes inoperative as soon as the lands are surveyed. *Ib.*

7. *National Parks; limitation of Federal control over lands within.*
It is beyond the power of the Secretary of the Interior or the superintendents of national parks under his control to limit the uses to which lands within the parks held in private ownership may be put; and so held as to regulations prohibiting grazing cattle on private lands within the Yosemite Park until such lands have been defined and marked by an agreed understanding. *Curtin* v. *Benson*, 78.

8. *National parks; duty and liability of owners of land within; quære.*
Quære: Whether owners of lands within National Park limits can be required to fence their lands, or whether the trespassing of their cattle on other lands can be made a criminal offense. *Ib.*

9. *National parks; application of orders of Secretary of Interior; quære.*
Quære: Whether an order of the Secretary of the Interior in regard to park lands can be construed as extending to toll roads constructed under authority of the State. *Ib.*

PUBLIC OFFICERS.
See TORTS.

PUBLIC POLICY.
See INSURANCE, 2;
MUNICIPAL CORPORATIONS, 2.

PUBLIC WORKS.

1. *Contractor bound by terms of statute.*
A contractor for public works has the statute before him and can govern himself accordingly. There is no hardship in holding him to its terms. *United States* v. *Garbish*, 257.

2. *Hours of service on; emergencies contemplated by act of August 1, 1892.*
Under the act of August 1, 1892, 27 Stat. 340, c. 352, restricting service of laborers employed on public works of the United States to eight hours a day except in cases of extraordinary emergency, the exception does not relate to contemplated emergencies necessarily inhering in the work, or to mere requirements of business con-

venience or pecuniary advantage, but only those exceeding the common degree. *Ib.*

3. *Hours of service on; emergencies contemplated by act of 1892; levee work.*

An intention of Congress to exempt from provisions of a general statute declaring a public policy a conspicuous public work, such as repairing levees of the Mississippi river, would undoubtedly have been expressed; and *held*, that the continuing necessity of prompt completion of the work on such levees cannot be classed as an extraordinary emergency within the meaning of the Eight Hour Law of 1892. *Ib.*

4. *Levee work; quære as to judicial notice of necessity for.*

Quære, to what extent the court can take judicial knowledge of necessity for and conditions of a public improvement such as Mississippi river levees. *Ib.*

See ACTIONS, 2.

PURE FOOD AND DRUG ACT.

1. *Hearing in Department of Agriculture not prerequisite to prosecution under.*

It is not a condition precedent to prosecutions for violation of the Pure Food and Drug Act that an investigation or hearing be had in the Department of Agriculture. *United States* v. *Morgan*, 274.

2. *Prosecutions under; who subject to. Sections 771, 1022, Rev. Stat., not repealed by.*

Section 4 of the Pure Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 678, does not repeal Rev. Stat., §§ 771 or 1022, making it the duty of the district attorney to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, nor does it limit him to prosecute only those offenders who have had a hearing before the Department of Agriculture. *Ib.*

QUARANTINE.

See CATTLE QUARANTINE ACT.

RAILROADS.

1. *Bridges over Mississippi and Missouri rivers; use of; approaches as parts of structures.*

The object of the provisions in acts of July 25, 1866, 14 Stat. 244, c. 246, and of February 24, 1871, 16 Stat. 430, c. 67, for the con-

struction of railway bridges across the Mississippi and Missouri rivers was that the trains of all railroads terminating at the rivers should be allowed to cross on reasonable terms, and for the more perfect connection of railroads running to the bridges on either side of the river; and, the statutes being construed in that light, the approaches on both sides of the river must be regarded as parts of the structures. *Union Pacific R. R.* v. *Mason City &c. R. R.*, 237.

2. *Bridges; approaches as parts of.*
A railroad bridge can be of no use to the public unless united with the necessary appurtenances for public accommodation. *Ib.*

3. *Bridges; distance within expression "at or near."*
A distance of four miles in the scheme of the Union Pacific Railroad may be reasonably within the expression "at or near." *Ib.*

4. *Bridges; right of use; scope of decree in 199 U. S. 160.*
The decree of the Circuit Court affirmed by this court in 199 U. S. 160, gave to the Mason City and Fort Dodge R. R. Company the right to cross the Union Pacific bridge over the Missouri river and this included the use of main and passing tracks over and approaching the bridge to the extent necessary to constitute a continuous line from the terminus at Council Bluffs to the point at Omaha mentioned therein, but the decree did not give the Mason City Road any rights to use other tracks and terminal facilities of the Union Pacific Railroad. *Ib.*

See CATTLE QUARANTINE ACT;
CONSTITUTIONAL LAW, 1, 2, 3, 13;
SAFETY APPLIANCE ACTS.

RATES.

See INTERSTATE COMMERCE, 6–14, 19;
INTERSTATE COMMERCE COMMISSION, 1, 4, 5, 6.

REAL PROPERTY.

See CONTRACTS, 10.

REBATES.

See INTERSTATE COMMERCE, 2, 5.

RECORD ON APPEAL.

See JURISDICTION, A 21, 22;
PRACTICE AND PROCEDURE, 1, 2, 19.

REMEDIES.

1. *Determination of character, when.*

What relief shall be accorded to one who may sustain injury by the failure of a State to protect his rights under the Constitution, cannot be determined before there has been such failure. *Red "C" Oil Co.* v. *North Carolina*, 380.

2. *Source of relief open to one complaining of regulations promulgated by state board.*

Where one complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, he should seek relief by applying to that board to modify them. *Ib.*

3. *Redress against enforcement of state police statute.*

A state police statute cannot be declared invalid because in the opinion of this court it does not accord with sound policy. The appeal for redress must be to the law-making power. *Ib.*

4. *When legislature and not courts to be looked to.*

Although the case may be a hard one, those who expend money on the faith of an invalid act cannot obtain redress from the courts but must apply to the legislature. *Peters* v. *Broward*, 483.

See MARITIME LAW, 6.

REMOVAL OF CAUSES.

1. *Duty of state court when cause removable.*

Where there is a separable controversy and requisite diversity of citizenship it is the duty of the state court to accept the petition and bond and proceed no further in the case; trial and judgment thereafter by the state court would be *coram non judice* unless its jurisdiction over the cause be restored. *Anderson* v. *United Realty Co.*, 164.

2. *Realignment of parties for purpose of.*

Where the record plainly shows that to convert a party defendant into a party plaintiff would be wholly inconsistent with the relief which it is the object of the suit to obtain, the court will not realign such defendant as a plaintiff so as to enable another defendant to remove the case to the Federal court. *FitzGerald* v. *Thomson*, 555.

3. *Same.*

Where, as in this case, the plaintiffs charge one of the defendants with repudiation of obligations and ask his removal as trustee, the claim made at the instance of a co-defendant seeking to remove

the case, that he should be realigned as a party plaintiff, is manifestly frivolous. *Ib.*

4. *Recovery by state court of jurisdiction over cause as to defendants not entitled to remove.*

The state court may recover jurisdiction over a cause which has been removed by defendants having separable controversy, and where plaintiff has an order entered dismissing it against the removing defendants and other defendants having like ground of removal reciting that in consideration of such dismissal the petition for removal is withdrawn, the state court has jurisdiction to proceed against the remaining defendants. *National Steamship Co.* v. *Tugman*, 106 U. S. 118, distinguished. *Anderson* v. *United Realty Co.*, 164.

REPEALS.

See ACTIONS, 1;
STATUTES, A 17.

REPORTS OF DECISIONS.

See INTERSTATE COMMERCE, 3.

RES JUDICATA.

See PRACTICE AND PROCEDURE, 9–12.

RIVERS.

See NAVIGABLE WATERS;
PUBLIC WORKS, 3, 4.

RULE IN SHELLEY'S CASE.

See ESTATES OF DECEDENTS, 1–6.

RULES OF COURT.

See APPENDIX AND SPECIAL INDEX, *post*.

SAFETY APPLIANCE ACTS.

1. *Constitutionality not open to question.*

The repugnancy of the Safety Appliance Law to the Constitution is not now open to controversy; it has been held constitutional. (*Southern Railway Co.* v. *United States*, *ante*, p. 20.) *Chicago Junction Ry. Co.* v. *King*, 222.

2. *Instrumentalities of commerce embraced within.*

The Safety Appliance Act of March 2, 1893, 27 Stat. 531, c. 196, as amended March 2, 1903, 32 Stat. 943, c. 976, embraces all locomotives, cars and similar vehicles used on any railway that is a

highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce. *Southern Ry. Co.* v. *United States*, 20.

3. *Instrumentalities of commerce embraced within.*

It is of common knowledge that interstate and intrastate commerce are commingled in transportation over highways of interstate commerce, that trains and cars on the same railroad, whether engaged in one form of traffic or the other, are interdependent and that absence of safety appliance from any part of a train is a menace not only to that train but to others. *Ib.*

SAFETY APPLIANCES.

See CONSTITUTIONAL LAW, 1.

SALES.

1. *Relation of parties to.*

The relation of vendor and vendee, and not that of principal and agent, exists where the manufacturer sells goods to another under exclusive contract and delivers goods only on payment of draft attached to bill of lading. *Banker Brothers Co.* v. *Pennsylvania*, 210.

2. *Duty of one claiming interest in property sold; acts constituting ratification.*

One claiming an interest in property and having knowledge of such claim is charged to consider at the time it is sold by trustees whether he will assert his title or retain a share of the proceeds; both vendor and vendee are entitled to timely disavowal in order to protect and indemnify themselves; acceptance of proceeds and failure to disavow may, as held in this case, amount to ratification. *Hussey* v. *United States*, 88.

3. *Same. Laches barring recovery.*

Even if the state court has decided that the widow of a deceased partner had a community interest in his share of real estate belonging to the partnership, if she does not promptly disavow a sale of the entire property made by surviving partners but accepts part of the proceeds, and makes no attempt for many years to assert title, she is guilty of laches and neither she nor her grantees can recover. *Ib.*

4. *Pendente lite; rights of vendee.*

Where a case has not passed to a final decree one buying *pendente lite*

from a party thereto stands no better than the vendor. (*Mellen* v. *Moline Iron Works*, 131 U. S. 352.) *Lewers & Cooke* v. *Atcherly*, 285.

See CONSTITUTIONAL LAW, 18, 20; INTERSTATE COMMERCE, 15, 16; CONTRACTS, 10, 15, 17–20; JUDICIAL NOTICE; PRINCIPAL AND AGENT.

SECRETARY OF THE INTERIOR.

See INDIANS, 1; MANDAMUS, 2, 3; PUBLIC LANDS, 7, 9.

SECRETARY OF THE NAVY.

See CONTRACTS, 2.

SELF-INCRIMINATION.

See BANKRUPTCY, 12, 13; CONSTITUTIONAL LAW, 23, 24, 25.

SHELLEY'S CASE.

See ESTATES OF DECEDENTS, 1–6.

SIMILITUDE CLAUSE IN TARIFF ACT.

See CUSTOMS LAW.

SITUS FOR TAXATION.

See TAXES AND TAXATION, 9–16.

SLANDER AND LIBEL.

See LIBEL.

SPECIAL ASSESSMENTS.

See CONSTITUTIONAL LAW, 27.

SPECIAL PRIVILEGES.

See TERRITORIES, 1, 2.

SPECIFIC PERFORMANCE.

See CONTRACTS, 17–20.

STARE DECISIS.

1. *Reference to point, without direct decision, not controlling.*
Even though a court below might hesitate to decide against language

of this court referring to a debated point, if there has been no direct decision, this court is not precluded by such references when the point is actually before it. *Grigsby* v. *Russell*, 149.

2. *Effect of assumption of jurisdiction, unchallenged, on subsequent case in which challenged.*

That this court has assumed jurisdiction in a case in which its jurisdiction passed unchallenged is not controlling in a subsequent case when the jurisdiction is challenged. *Armstrong* v. *Fernandez*, 208 U. S. 324, qualified and limited. *Tefft, Weller & Co.* v. *Munsuri*, 114.

STATES.

1. *Classification of objects for legislation; powers as to.*

The legislature of a State has a wide range of discretion in classifying objects of legislation; and even if the classification be not scientifically nor logically appropriate, if it is not palpably arbitrary and is uniform within the class, it does not deny equal protection. *Mutual Loan Co.* v. *Martell*, 225.

2. *Commerce; power over.*

There are three degrees to which the State exercises power over commerce. First exclusively; second, in the absence of legislation by Congress, until Congress does act; third, where Congress having legislated, the power of the State cannot operate at all. *Southern Ry. Co.* v. *Reid*, 424.

3. *Commerce; power over; cessation of.*

Although when Congress is silent, the State may legislate in aid of, or without burdening, interstate commerce, there may at any time be Federal exertion of authority which takes that power from the State. *Ib.*

4. *Concurrent power of Congress; when paramount.*

Although where Congress and the State have concurrent power, that of the State is superseded when the power of Congress is exercised, the action of Congress must be specific in order to be paramount. (*Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612.) *Ib.*

5. *Contract; power to restrict liberty of.*

There are many legal restrictions that may be placed by a State on the liberty of contract, and this court will not interfere except in a clear case of abuse of power. (*Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549.) *Mutual Loan Co.* v. *Martell*, 225.

6. *Controversies between; celerity required of parties.*
Even if the question in litigation is important and should be disposed of without undue delay, a State cannot be expected to move with the celerity of an individual; a motion made in this case by complainant that the court proceed to determine all questions left open by the decision in 220 U. S. 1, denied without prejudice. *Virginia* v. *West Virginia*, 17.

7. *Controversies between; scope of conference suggested in 220 U. S. 1, 36.*
The conference suggested by this court, 220 U. S. 36, is one in the cause to settle the decree and not to effect an independent compromise out of court. *Ib.*

8. *Execution and authentication of legal instruments; regulation by.*
A State has power to prescribe the form and manner of execution and authentication of legal instruments in regard to property, its devolution and transfer. (*Arnett* v. *Reade*, 220 U. S. 311.) *Mutual Loan Co.* v. *Martell*, 225.

9. *Federal authority paramount.*
As between the Federal Government and the States one authority must be paramount and when it speaks the other must be silent. *Southern Ry. Co.* v. *Reid*, 424.

10. *Federal power; effect of exercise on essential power of States.*
No essential power is taken from the States in preserving the balances of the Constitution and giving to Congress the power which belongs to it. *Ib.*

11. *Penalties imposed by; determination of amount; quære as to.*
Quære: Whether conceding that a State may impose a penalty does not concede the State to be competent to determine the amount. *Ib.*

12. *Police power; extent of.*
The power of the State extends to so dealing with conditions existing in the State as to bring out of them the greatest welfare of its people. (*Bacon* v. *Walker*, 204 U. S. 311.) *Mutual Loan Co.* v. *Martell*, 225.

13. *Police power; limitations upon.*
Police power is but another name for the power of government; it is subject only to constitutional limitations which allow a comprehensive range of judgment, and it is the province of the State to adopt by its legislature such policy as it deems best. *Ib.*

14. *Police power; assignment of future wages; regulation within.*
A State may, as a police regulation, make assignments of future wages invalid except under conditions that will properly restrict extravagance and improvidence of wage-earners. *Ib.*

15. *Police power; assignment of future wages by married men; regulation within.*
A State may, under conditions justifying it, prescribe that an assignment by a married man of wages to be earned by him in future shall be invalid unless consented to by his wife. *Ib.*

16. *Police power over Federal subjects; cessation of, during intermediate period between action by Congress and date at which act goes into force.*
Congress by enacting a statute in regard to a subject within its exclusive power manifests its purpose to call that power into effect, and at once removes that subject from the sphere of state action and even if Congress provides that the statute shall not go into effect until a subsequent date the States lose control of that subject during the intermediate period from the enactment to the active operation of the statute. *Northern Pacific Ry. Co.* v. *Washington*, 370.

17. *Same.*
The enactment by Congress of the Hours of Service Law, March 4, 1907, c. 2939, 34 Stat. 1415, was a manifestation by Congress of its intent to bring the subject of hours of labor of employés of interstate carriers under its control; and, although the act did not go into effect for a year after its passage, the various state laws on the subject became inoperative at once on the enactment. *Ib.*

18. *Police power; when right to exercise ceases with action by Congress.*
The right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive power. *Ib.*

19. *Police power; oil as subject of regulation.*
The fact that oil inspection laws have been passed in a majority of the States shows that oil is a proper subject for police regulation. *Red "C" Oil Co.* v. *North Carolina*, 380.

20. *Police power; powder as subject of.*
An article, such as powder, which is dangerous to handle in proportion

to the quantity handled, is properly subject to police regulation in regard to quantity from which harmless articles of commerce are exempt. *Williams* v. *Walsh*, 415.

See CONSTITUTIONAL LAW, 2, 3, 15, 17, 26–29;
FEDERAL QUESTION, 2;
INTERSTATE COMMERCE, 15–20;
MUNICIPAL CORPORATIONS, 1, 3;
NAVIGABLE WATERS;
REMEDIES, 1;
TAXES AND TAXATION, 9, 15–18.

STATUS QUO.

See APPEAL AND ERROR, 4.

STATUTE OF FRAUDS.

See CONTRACTS, 10.

STATUTE OF LIMITATIONS.

See CONSTITUTIONAL LAW, 4.

STATUTES.

A. CONSTRUCTION OF.

1. *Purpose of statute controlling.*

As between opposing views in regard to the construction of a statute the court in this case accepts the one in accord with the manifest purpose of Congress. *Southern Ry. Co.* v. *United States*, 20.

2. *Power manifested and not motive initiating it considered.*

In construing a statute the court must be controlled by the power manifested by the act and not by the motive which initiated it; the scope of the act may extend beyond the generating causes thereof. *Berryman* v. *Whitman College*, 334.

3. *Application of rule against imputing to Congress intention to depart from long enforced uniform policy.*

The rule of construction that an intention to depart from a long enforced uniform policy will not be imputed to Congress, applied in construing the act of April 28, 1904, 33 Stat. 552, c. 1772, relative to coal lands in Alaska. *United States* v. *Munday*, 175.

4. *Reference to reports of committees of Congress.*

In this case the court referred to the report of the committee of Congress having the legislation in charge as indicating the intent of Congress in enacting the statute. *Northern Pacific Ry. Co.* v. *Washington*, 370.

5. *Known policy of Congress considered.*
In construing an act of Congress, the known policy of Congress in regard to the subject-matter of the statute will be considered. *Richardson* v. *Harmon*, 96.

6. *Measure of meaning; when character of statute and when words used constitute.*
If there be ambiguity, the character of the statute determines for strict or liberal construction, but where there is no ambiguity the words of the statute are the measure of its meaning. *United States* v. *Baltimore & Ohio S. W. R. R. Co.*, 8.

7. *Meaning given to general words following words descriptive of particular actions.*
Where general words follow words descriptive of particular actions they should, unless clearly manifested to the contrary, be construed as applicable to cases or matters of like kind with those described by the particular words. *United States* v. *Stever*, 167.

8. *Legal expressions in; presumption as to.*
Congress will be presumed to use familiar legal expressions in their familiar legal sense. *United States* v. *Fidelity Trust Co.*, 158.

9. *Phrases used; presumption as to consciousness of meaning by Congress and intention in use.*
This court assumes that Congress uses a phrase in a statute with a consciousness of its meaning and with the intention of conveying such meaning. *United States* v. *Garbish*, 257.

10. *Exceptions in favor of offenders against criminal law, rule against.*
A statute will not be construed as grafting exceptions on the criminal law in favor of offenders against that particular statute in the absence of clear and unambiguous expressions. *United States* v. *Morgan*, 274.

11. *Silence as to prosecution not construed as permitting perjury.*
A statute in regard to giving testimony, which does not provide for prosecution of perjury, will not be construed as permitting perjury because in other statutes in that regard Congress has, from abundant caution, inserted provisions as to prosecution of perjury. *Glickstein* v. *United States*, 139.

12. *Codes; subsequent legislation; effect to supersede provisions of.*
In view of the custom of embodying National legislation in codes and

systematic collections of general rules, it is the settled rule of decision of this court that subsequent legislation upon a subject covered by a previous codification carries the implication that general rules are not superseded by such subsequent legislation except where it clearly appears. *United States* v. *Barnes*, 513.

13. *Same.*

Where there is a codification of revenue laws to prevent fraud, the inference is that subsequent legislation is auxiliary to the earlier, and only in case of manifest repugnancy will it be construed as an abrogation thereof. (*Wood* v. *United States*, 16 Pet. 342, 363.) *Ib.*

14. *Law imposing graduated tax; effect of partial unconstitutionality.*

A statute imposing a graduated tax would not necessarily be held unconstitutional as to the initial rate, even if the provisions as to the higher rates were unconstitutional. *Keeney* v. *New York*, 525.

15. *Penal; strict construction.*

Courts are not inclined to make constructive crimes, and in this case the general rule that penal statutes must be strictly construed applies. *United States* v. *Baltimore & Ohio S. W. R. R. Co.*, 8.

16. *Penal; confounding of willful and unwillful acts avoided.*

A penal statute should not be construed as confounding unwillful with willful acts by uniting in criminality and penalties parties to whom no notice need be given with those to whom notice must be given. *Ib.*

17. *Repeals by implication; presumption against inefficiency of statute.*

Repeals by implication are not favored; nor is there a presumption that a law passed in the interest of public health was intended to hamper prosecutions of offenses against the statute itself. *United States* v. *Morgan*, 274.

See ACTIONS, 1;
CRIMINAL LAW, 2, 3, 4;
FEDERAL QUESTION, 3;
JURISDICTION, A 12, 16, 17, 18;
MARITIME LAW, 1, 2;
MAXIMS;
OLEOMARGARINE ACT;
PRACTICE AND PROCEDURE, 9–14, 17;
PUBLIC LANDS, 5;
PUBLIC WORKS, 3;
RAILROADS, 1;
TAXES AND TAXATION, 2;
TERRITORIES, 3.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.
See LOCAL LAW.

SUBROGATION.
See BANKRUPTCY, 14;
CONTRACTS, 17.

SUPERSEDEAS.
See APPEAL AND ERROR, 6, 7.

SURETIES.
See CONTRACTS, 5;
PRINCIPAL AND SURETY.

TARIFF.
See CUSTOMS LAW.

TAXES AND TAXATION.

1. *Excise on transfers; character of tax.*
An excise on transfers does not become an *ad valorem* tax on the property conveyed because the amount is based on the value of such property. (*Magoun* v. *Illinois Trust Bank*, 170 U. S. 283.) *Keeney* v. *New York*, 525.

2. *Exemptions; strict construction; broadness of rule.*
The rule that exemptions from taxation must be strictly construed against the exemption is as broad as the subject to which it relates; the rule applies not only to the extent of the legislative grant itself but also to the power of the legislature to make it. *Berryman* v. *Whitman College*, 334.

3. *Inspection fees; character of statute imposing.*
In this case this court cannot conclude that the charge for inspecting oil, provided by the North Carolina oil inspection law of 1909, is so seriously in excess of what is necessary for the object designed to be effected as to justify the imputation of bad faith and the conclusion that the law is one for revenue and not merely for inspection. (*Patapsco Guano Co.* v. *South Carolina*, 171 U. S. 354.) *Red "C" Oil Co.* v. *North Carolina*, 380.

4. *Inspection fees; character of statute imposing.*
This court will not lightly attribute improper motives to the law-making power, and will not, on a mere charge, regard a statute

imposing inspection fees as an act to raise revenue. (*Ellis* v. *United States*, 206 U. S. 246.) *Ib.*

5. *Inspection fees; reasonableness of.*
Prima facie, the charge for inspection in an act otherwise constitutional is reasonable. (*Western Union Tel. Co.* v. *New Hope*, 187 U. S. 417.) *Ib.*

6. *Inspection fees; presumption as to action of State when fees excessive.*
If the inspection fees exacted under a state statute average largely more than enough to pay expenses, the presumption is that the State will reduce them to conform to the constitutional authority to impose fees solely to reimburse for expense of inspection. *Ib.*

7. *Interference with taxing power justified, when.*
The taxing power can only be interfered with on the grounds of unjustness where the abuse is flagrant and can be remedied by some affirmative principle of constitutional law. *Southern Pacific Co.* v. *Kentucky*, 63.

8. *Legality of tax not measured by benefits or protection afforded by taxing power.*
Although equality of burdens be the general standard sought to be obtained in taxation, the legality of the tax is not to be measured by the benefit received by the taxpayer, nor are protection and taxation necessarily correlative obligations. *Ib.*

9. *Situs for taxation; intangible property of corporation taxable, where.*
A corporation organized under the law of a State and having its general office and holding its corporate meetings therein, receives such protection from that State as affords a basis for taxing its intangible property which has not acquired a situs for taxation elsewhere. *Ib.*

10. *Situs for taxation; effect of enrollment of vessel at port or marking of name of port thereon.*
An artificial situs for purposes of taxation is not acquired by the enrollment of a vessel at a port or the marking of that port on the stern, under §§ 4141 and 4178, Rev. Stat., as amended by the act of June 23, 1874, 18 Stat. 252, c. 467. *Ib.*

11. *Situs of vessel for purposes thereof.*
The taxable situs of a vessel which has no permanent location within another jurisdiction is the domicile of the owner. *Ayer & Lord*

Tie Co. v. *Kentucky*, followed, 202 U. S. 409, and *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299, distinguished. *Ib.*

12. *Situs of vessel for purposes thereof.*
A vessel is built to navigate the seas and not to stay in port and it does not acquire a situs in one port rather than another by reason of frequently visiting the former. (*Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596.) *Ib.*

13. *Situs of vessel for purposes of. Power of State to tax not dependent upon existence of port therein.*
The taxable situs of a vessel not permanently located within another jurisdiction does not depend upon whether the State which is the domicile of the owner possesses a port which such vessel could reach. Such a test would introduce elements of uncertainty dependent upon draft of the vessel and depth of the water. *Ib.*

14. *Situs of vessel for purposes of; domicile of owner as situs.*
Vessels engaged in coastwise trade belonging to a Kentucky corporation held to be taxable in Kentucky although enrolled in the port of New York, having the name of New York painted on their sterns and never were at any port in Kentucky. *Ib.*

15. *State; power to impose transfer tax.*
A State may impose a transfer tax based on personal property passing under a trust deed to take effect at the grantor's death if the property had its situs in that State when the deed was made. *Keeney* v. *New York*, 525.

16. *State; power to tax property passing under trust deed effective on grantor's death.*
Where the power to tax exists, the State may fix the rate and say when and how the amount shall be ascertained and paid, and if the personal property has its situs in the State when the deed is made, it may tax a transfer of personal property under a trust deed to a resident of the State to take effect at the grantor's death, although the personal property at that time may be without the State. *Ib.*

17. *State; right to tax privilege of acquiring property by trust instrument.*
The privilege of acquiring property by trust instrument, taking effect on the death of the grantor, is as much dependent on the law as that of acquiring property by inheritance and is subject to taxation by the State. *Ib.*

18. *State tax law; law governing validity.*
Where a state tax on the transfer of property does not offend the Con-

stitution of the United States, its validity must be determined by the law of the State. *Ib.*

19. *War Revenue Act; legacy constituting vested life estate; recovery of taxes paid.*

A legacy to pay over net income to the legatee in periodical payments during the legatee's life on which the legatee has received several payments of income is not a contingent beneficial interest, but a vested life estate; and taxes paid on the value of such a legacy under the War Revenue Act of June 13, 1896, c. 448, 30 Stat. 448, 464, cannot be recovered under § 3 of the act of June 27, 1902, c. 1160, 32 Stat. 406. *Vanderbilt* v. *Eidman*, 196 U. S. 480, distinguished. *United States* v. *Fidelity Trust Co.*, 158.

See CONSTITUTIONAL LAW, 7, 15, 17, 28; INTERSTATE COMMERCE, 15, 16; JURISDICTION, A 5, 6, 7; OLEOMARGARINE ACT; PRACTICE AND PROCEDURE, 21; STATUTES, A 14; TERRITORIES, 1, 2.

TERRITORIES.

1. *Special privileges prohibited by act of March 2, 1867.*

The act of March 2, 1867, 14 Stat. 426, now Rev. Stat., § 1889, prohibiting the granting by territorial legislatures of especial privileges related to conferring new privileges on existing corporations as well as to granting privileges in original charters; and the prohibition included all especial privileges such as exemption from taxation. *Berryman* v. *Whitman College*, 334.

2. *Special privileges within prohibition of § 1889, Rev. Stat.; exemption from taxation as.*

A contract for exemption from taxation is an especial privilege, and is none the less within the prohibitions of § 1889, Rev. Stat., because granted to an educational institution; it cannot be regarded as beyond the prohibition because granted as an equivalent. *Ib.*

3. *Acts of; effect to validate, of failure of Congress to disapprove.*

The fact that Congress failed to disapprove an act of a territorial legislature does not validate it if the act was passed in direct violation of a prohibitive provision in the organic act. (*Clayton* v. *Utah*, 132 U. S. 632.) *Ib.*

TESTAMENTARY LAW.

See ESTATES OF DECEDENTS; WILLS.

TITLE.

See BANKRUPTCY, 9;
CONTRACTS, 17.

TORTS.

Detention of vessel; liability of collector of port for placing inspector on vessel held by marshal under irregularly issued process.

A collector of the port cannot be held responsible for detention of a vessel because he places an inspector thereon with orders to detain her if she attempts to sail, if at the time the vessel is validly in custody of the marshal and the inspector is withdrawn before the possession of the marshal terminates. *Bryan* v. *Ker*, 107.

See CONSTITUTIONAL LAW, 3; LEX LOCI;
COURTS, 3; MARITIME LAW, 2–6.

TRANSFER TAX.

See CONSTITUTIONAL LAW, 7, 15, 17;
TAXES AND TAXATION, 1, 15–19.

TRANSFERS OF TITLE.

See STATES, 8.

TRANSPORTATION.

See INTERSTATE COMMERCE, 7, 19.

TREATIES.

See WAR, 8.

TRIAL.

See PRACTICE AND PROCEDURE, 3.

TRUST DEEDS.

See TAXES AND TAXATION, 15–18.

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See SALES, 2.

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See BANKRUPTCY, 9.

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See JURISDICTION, E.

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See FRAUD;
PUBLIC LANDS, 1;
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See BANKRUPTCY, 14;
CONTRACTS, 17–20;
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See CONSTITUTIONAL LAW, 3; MARITIME LAW; TAXES AND TAXATION, 10–14; TORTS.

VIRGINIA *v.* WEST VIRGINIA.

See STATES, 6, 7.

VOUCHERS.

See FRAUD, 2.

WAGES.

See CONSTITUTIONAL LAW, 8;
STATES, 14, 15.

WAR.

1. *Civil and international war distinguished.*

There is a distinction between the capture of an enemy's port in a war with a foreign country, and the restoration of national authority over territory in a civil war and in the protection of property after capture. *The Venice*, 2 Wall. 258, distinguished. *Herrera* v. *United States*, 558.

2. *Enemies; who deemed.*

War makes of the citizens or subjects of one belligerent enemies of the government, citizens and subjects of the other. *Ib.*

3. *Enemy's country; who deemed enemies.*

During the war with Spain Cuba was enemy's country; and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, and their property enemy's property and subject to seizure, confiscation and destruction. *Ib.*

4. *Enemy property; what is.*

Property in the harbor after the capitulation of Santiago remained enemy property, and seizures thereof by the United States were acts of war. *Ib.*

5. *Enemy property; confiscation; effect of proclamation of July 13, 1898.*

Nothing in the President's proclamation of July 13, 1898, militated against the right of the United States to confiscate enemy's property for the use of the army of occupation. *Ib.*

6. *Laws of; effect of President's proclamation of July 13, 1898, to interfere with.*

The President's proclamation of July 13, 1898, was not intended to supersede the laws of war, to interfere with the seizure, confiscation, or destruction of property necessary for the operation of war, or to attach to the necessary appropriation of such property by military officers the obligations and remedies of contracts. *Diaz* v. *United States*, 574.

7. *Seizure of property; distinction in.*

There is a distinction between a seizure of private property of an enemy for immediate use of the army and the taking of such property as booty of war. (*Planters Bank* v. *Union Bank*, 16 Wall. 483.) *Herrera* v. *United States*, 558.

8. *Seizure of property; effect of treaty of peace on claims of Spanish subjects.*

Right of Spanish subjects against the United States for indemnity for illegal seizures and detention of property during the war of 1898 was taken away by the treaty of peace. (*Hijo* v. *United States*, 194 U. S. 315.) *Ib.*

9. *Seizure of property during war with Spain; liability for United States for.*

Herrera v. *United States*, *ante*, p. 558, followed as to the nature and effect of, and liability of the United States for, seizures and detention of vessels in Santiago harbor after the capitulation of 1898. *Diaz* v. *United States*, 574.

See JURISDICTION, E.

WAR REVENUE ACT.

See TAXES AND TAXATION, 19.

WATERS.

See NAVIGABLE WATERS.

WILLS.

1. *Equitable titles subject to devise.*

Equitable titles are subject to devise and if not specifically bequeathed, form part of the residuary estate. *Mayer* v. *American Security & Trust Co.*, 295.

2. *Residuary clause; objects of; inclusion of equitable estates.*

One of the objects of a residuary clause is to gather up unremembered, as well as uncertain, rights; and the words "all the rest and residue of my estate, real, personal and mixed, which I now possess or which may hereafter be acquired by me" are sufficient to carry an equitable estate. *Ib.*

See ESTATES OF DECEDENTS;
JUDGMENTS AND DECREES, 3.

WITNESSES.

See BANKRUPTCY, 12, 13;
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WORDS AND PHRASES.

"*At or near*" (see Railroads, 3). *Union Pacific R. R.* v. *Mason City &c. R. R.*, 237.

"*Controversy*" within meaning of § 24*a* of Bankruptcy Act (see Bankruptcy, 10). *Tefft, Weller & Co.* v. *Munsuri*, 114.

"*Original package*" *as used in state statutes.*

The term "original package" as used in a state statute does not necessarily have the same meaning as when used in some of the decisions of this court. *Williams* v. *Walsh*, 415.

See STATUTES, A, 7, 8, 9.

WRIT AND PROCESS.

1. *Execution; when marshal protected in case of process in rem.*

If process *in rem* is apparently valid and it does not appear on the face thereof that the libel on which it is issued discloses only a personal action for damages the marshal is protected in executing it. *Bryan* v. *Ker*, 107.

2. *Irregularity in issuance of writ; effect on duty of marshal to act.*

Although a writ which the court has power to issue in a proper case may have been irregularly issued, the marshal is authorized and bound to act thereunder if it comes into his hands as an apparently valid writ. *Ib.*

3. *Same; cure of irregularity; liability of marshal acting under irregularly issued writ.*

Although the attempted delegation of authority may have been ineffectual to clothe the person signing a writ with power to do so, the marshal is protected in executing it, if it is in the usual form and bears the seal of the court; such an irregularity can be cured by amendment substituting the signature of the person properly authorized. *Ib.*

See APPEAL AND ERROR, 6, 7; HABEAS CORPUS; JURISDICTION, D; MANDAMUS.

APPENDIX

Rules of the Supreme Court of the United States

Promulgated December 22, 1911



The following pages, 1–40, are identical with those of the publication containing the Rules as officially published by the Clerk of the Supreme Court of the United States and printed at the Government Printing Office.

Washington : 1912

APPENDIX

Rules of the Supreme Court of the United States

V

Promulgated December 22, 1911

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RULES OF THE SUPREME COURT OF THE UNITED STATES.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, except as provided by Rule 10.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the States to which they respectively belong, and that their private and professional characters shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz:

I, ——— ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

3.

PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4.

BILL OF EXCEPTIONS.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necesssary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Forty-five minutes on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and

control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule.

6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument.

7. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be

at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

8.

WRIT OF ERROR AND APPEAL, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

In order to enable the Clerk to perform such duty and for the purpose of reducing the size of transcripts of record in cases brought to this Court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this Court, he shall file with the clerk of the lower court his *praecipe* also, within ten days thereafter, (unless the time shall be enlarged by a judge of the lower court or by a Justice of this Court), indicating such additional portions of the record desired by him.

The clerk of the lower court shall transmit to this Court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

If this Court shall find that portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript by either party, the Court may order that the whole or any part of the Clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before

the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii and Porto Rico, when the time shall be extended to sixty days and from the Philippine Islands to one hundred and twenty days.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon

producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

10.

PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, the case shall be dismissed.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed

the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at

the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14.

CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on

which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three

successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or

appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16.

NO APPEARANCE OF PLAINTIFF IN ERROR OR APPELLANT.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17.

NO APPEARANCE OF DEFENDANT IN ERROR OR APPELLEE.

Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dis-

missed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21.

BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record

On April 1st, 1912, Rule 21 was amended by adding thereto the following section—see 223 U. S. p .

8. Every brief of more than 20 pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where cases are cited.

and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

22.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the Circuit Courts of Appeals, cases involving solely the jurisdiction of the court below, and cases under the act of March 2, 1907, 34 Stat., 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear

interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

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

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

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

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the

clerk to be printed. And it shall be the duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney-General.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29.

SUPERSEDEAS.

Supersedeas bonds in the district courts and Circuit Courts of Appeals must be taken, with good and

sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

32.

WRITS OF ERROR AND APPEALS IN CASES INVOLVING JURISDICTION OF LOWER COURT.

Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall

be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

35.

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court direct to this court, under section 238 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary,"

approved March 3, 1911, chapter 231, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9, of Rule 10.

36.[1]

APPEALS AND WRITS OF ERROR FROM DISTRICT COURTS.

1. An appeal or a writ of error from a district court direct to this court, in the cases provided for in sections 238 and 252 of the act entitled "An act to codify, revise and amend the laws relating to the

[1] Amended February 26, 1912. See page 41, *post*.

judiciary," approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under section 238, the district court, or any judge thereof,[1] shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

37.

CASES FROM CIRCUIT COURTS OF APPEALS.

1. Where, under section 239 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

[1] See amendment, page 41, *post*.

3. Where application is made to this court to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant, as part of the application.

38.

INTEREST, COSTS, AND FEES.

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 238, 239, 240, and 241 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231.

39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

40.

PRACTICE IN CASES FROM CIRCUIT COURTS OF APPEALS.

The provisions of these rules relating to the practice on direct writs of error to and appeals from the district courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the Circuit Courts of Appeals.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It is ordered by the Court that Rule 36 [1] of the rules of this Court be, and the same is hereby, amended so as to read as follows:

"36.

"1. An appeal or a writ of error from a district court direct to this court, in the cases provided for in §§ 238 and 252 of the act entitled, 'An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary,' approved March 3, 1911, chapter 231,[1] may be allowed, in term time or in vacation by any justice of this court, or by any circuit judge assigned to the district court, or by any district judge within this district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

"2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under section 238,[2] the district court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the district court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed."

(Promulgated February 26, 1912.)

[1] See pages 38, 39, *ante*.

[2] 36 Statutes at Large, 1087, pp. 1157, 1159.