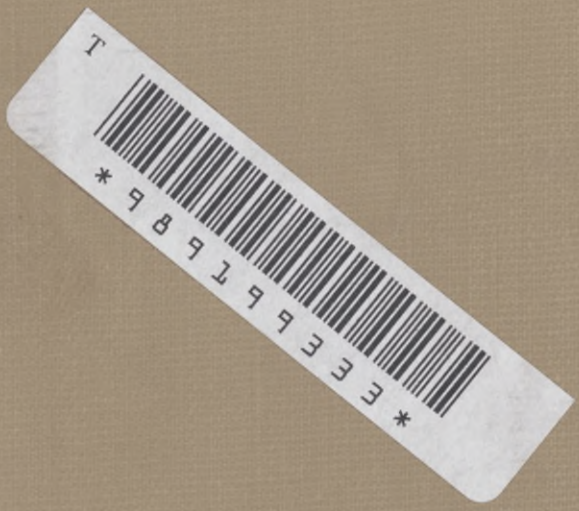

UNITED STATES REPORTS

VOLUME 223

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1911

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1912

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.
MAHLON PITNEY, Associate Justice.[4]

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 222 U. S., p. v). He took no part in the decisions of any cases submitted during October Term, 1911, and reported in this volume.

[3] Mr. Justice Day was necessarily absent during October Term, 1911, until January 18, 1912 (see 222 U. S., xxix), and took no part in any of the decisions reported in this volume which were argued or submitted during his absence.

[4] 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. He took no part in any of the decisions reported in this volume.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, MARCH 18, 1911.[1]

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

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

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

For the Third Circuit, Mahlon Pitney, Associate Justice.

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

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

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

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

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

For the Ninth Circuit, Joseph McKenna, Associate Justice.

[1] For previous allotment see 222 U. S., p. iv.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1911.

SECOND EMPLOYERS' LIABILITY CASES.

MONDOU *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

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

NORTHERN PACIFIC RAILWAY CO. *v.* BABCOCK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* WALSH.

WALSH *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 120, 170, 289, 290. Argued February 20, 21, 1911.—Decided January 15, 1912.

The Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, as amended April 5, 1910, 36 Stat. 291, c. 143, regulating the liability of common carriers by railroad to their employés, is constitutional.

Congress may, in the execution of its power over interstate commerce, regulate the relations of common carriers by railroad and their employés while both are engaged in such commerce.

Congress has not exceeded its power in that regard by prescribing the regulations embodied in the Employers' Liability Act.

Those regulations have superseded the laws of the several States in so far as the latter cover the same field.

Rights arising under the regulations prescribed by the act may be enforced, as of right, in the courts of the States, when their jurisdiction, as fixed by local laws, is adequate to the occasion.

Congress, in the exertion of its power over interstate commerce, and subject to the limitations prescribed in the Constitution, may regulate those relations of common carriers by railroad and their employés which have a substantial connection with interstate commerce and while both carrier and employé are engaged therein.

A person has no property—no vested interest—in any rule of the common law. While rights of property created by the common law cannot be taken without due process, the law as a rule of conduct may, subject to constitutional limitations, be changed at will by the legislature.

Under the power to regulate relations of employers and employés while engaged in interstate commerce, Congress may establish new rules of law in place of common-law rules including those in regard to fellow-servants, assumption of risk, contributory negligence, and right of action by personal representatives for death caused by wrongful neglect of another.

In regulating the relations of employers and employés engaged in interstate commerce, Congress may regulate the liability of employers to employés for injuries caused by other employés even though the latter be engaged in intrastate commerce.

The power of Congress to insure the efficiency of regulations ordained by it is equal to the power to impose the regulations; and prohibiting the making of agreements by those engaged in interstate commerce which in any way limit a liability imposed by Congress on interstate carriers does not deprive any person of property without due process of law, or abridge liberty of contract in violation of the Fifth Amendment.

Quære: Whether an element of the due process provisions of the Fifth Amendment is the equivalent of the equal protection provision of the Fourteenth Amendment.

A classification of railroad employés, even if including all employés, whether subjected to peculiar hazards incident to operation of trains or not, is not so arbitrary or unequal as to amount to denial of equal protection of the laws. Such a classification does not vio-

late the due process clause of the Fifth Amendment even if equal protection is an element of due process.

State legislation, even if in pursuance of a reserved power, must give way to an act of Congress over a subject within the exclusive control of Congress.

Until Congress acted on the subject, the laws of the several States determined the liability of interstate carriers for injuries to their employés while engaged in such commerce; but Congress having acted, its action supersedes that of the States, so far as it covers the same subject. That which is not supreme must yield to that which is.

The inaction of Congress on a subject within its power does not affect that power.

Rights arising under an act of Congress may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

When Congress, in the exertion of a power confided to it by the Constitution, adopts an act, it speaks for all the people and all the States, and thereby establishes a policy for all, and the courts of a State cannot refuse to enforce the act on ground that it is not in harmony with the policy of that State. *Claflin* v. *Houseman*, 93 U. S. 130.

A state court cannot refuse to enforce the remedy given by an act of Congress in regard to a subject within the domain of Congress on the ground of inconvenience or confusion.

The systems of jurisprudence of the State and of the United States together form one system which constitutes the law of the land for the State.

The United States is not a foreign sovereignty as regards the several States but is a concurrent and, within its jurisdiction, a paramount sovereign. *Claflin* v. *Houseman*, 93 U. S. 130.

Existence of jurisdiction in a court implies the duty to exercise it notwithstanding such duty may be onerous.

82 Connecticut, 373, reversed; 173 Fed. Rep. 494, affirmed.

No. 120 (*Mondou* v. *New York, New Haven & Hartford Railroad Co.*).

This was an action by a citizen of Connecticut against a railroad corporation of that State to recover for personal injuries suffered by the plaintiff while in the defendant's service. The injuries occurred in Connecticut August 5, 1908, the action was commenced in one of the Superior Courts of that State in October following, and the right

of action was based solely on the act of Congress of April 22, 1908 (35 Stat. 65, c. 149). According to the complaint, the injuries occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States and while the plaintiff, as a locomotive fireman, was employed by the defendant in such commerce, and the injuries proximately resulted from negligence of the plaintiff's fellow servants, who also were employed by the defendant in such commerce. A demurrer to the complaint was interposed upon the grounds, first, that the act of Congress was repugnant in designated aspects to the Constitution of the United States, and, second, that even if the act were valid a right of action thereunder could not be enforced in the courts of the State. The demurrer was sustained, judgment was rendered against the plaintiff, the judgment subsequently was affirmed by the Supreme Court of Errors of the State (82 Connecticut, 373) upon the authority of *Hoxie* v. *N. Y., N. H. & H. R. Co.*, 82 Connecticut, 352, and the plaintiff then sued out the present writ of error.

No. 170 (*Northern Pacific Railway Co.* v. *Babcock*).

This was an action by the personal representative of a deceased employé of a railroad corporation to recover, for the exclusive benefit of the surviving widow, for the death of the employé, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Montana, September 25, 1908, the action was commenced in the Circuit Court of the United States for the District of Minnesota, October 4, 1909, and the right of action was based solely on the act of Congress before mentioned. It appeared, from the complaint, that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States, and while the deceased, as a locomotive fireman, was employed by the defendant in

such commerce; that the injury proximately resulted from negligence of fellow servants of the deceased, who also were employed by the defendant in such commerce; that the deceased resided in Montana and died without issue or a surviving father or mother, but leaving a widow and also a sister, and that if the statutes of Montana were applicable the recovery should be for the equal benefit of the widow and sister, and not for the exclusive benefit of the widow, as prayed in the complaint and as provided in the act of Congress. The defendant challenged the validity of the act by a demurrer to the complaint, and in the subsequent proceedings insisted that the recovery, if any, should be for the benefit of the widow and sister jointly and not for the benefit of the widow alone, but the demurrer and the insistance were overruled and judgment was rendered for the plaintiff for the exclusive benefit of the widow, as prayed. By a direct writ of error the defendant seeks a reversal of that judgment.

Nos. 289, 290 (*Walsh* v. *New York, New Haven and Hartford R. R. Co.; New York, New Haven and Hartford R. R. Co.* v. *Walsh*).

These writs of error relate to the judgment in a single case. It was an action by the personal representative of a deceased employé of a railroad corporation to recover, for the benefit of the surviving widow and children, for the death of the employé, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Connecticut, February 11, 1909, the action was commenced in the Circuit Court of the United States for the District of Massachusetts in July following and the right of action asserted in the second count of the declaration was based on the act of Congress before mentioned. There were several other counts, but they may be passed without special notice. It was charged in the second count that the injury occurred while the de-

fendant, as a common carrier by railroad, was engaged in commerce between some of the States and while the deceased, in the course of his employment by the defendant in such commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce, and that the injury proximately resulted from negligence of fellow servants of the deceased in pushing other cars against the one on which he was working. A demurrer to that count challenged the validity of the act of Congress, but the demurrer was overruled. The defendant answered, putting in issue all that was stated in that count, and also alleging that the deceased, by his own negligence, contributed to the injury which resulted in his death and therefore that the damages should be diminished in proportion to the amount of negligence attributable to him. A trial to the court and a jury resulted in a verdict and judgment for the plaintiff upon the second count, and there was a judgment for the defendant upon the other counts. Each party has sued out a direct writ of error from this court. The defendant calls in question the ruling upon its demurrer and other rulings in the progress of the cause, notably such as related to the nature of the employment in which the deceased and the fellow servants whose conduct was in question were engaged at the time of the injury and to the admeasurement of the damages. The plaintiff makes no complaint of the judgment upon the second count and, if it shall be affirmed, wishes to waive her objections to the judgment upon the other counts.

The act whose validity is drawn in question, 35 Stat. 65, c. 149, and the amendment of April 5, 1910, 36 Stat. 291, c. 143, are as follows:

"An Act Relating to the liability of common carriers by railroad to their employés in certain cases.

"*Be it enacted by the Senate and House of Representatives*

of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SEC. 3. That in all actions hereafter brought against

any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé; *Provided*, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"SEC. 7. That the term 'common carrier' as used in

this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employés under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employés' approved June eleventh, nineteen hundred and six.

"Approved April 22, 1908."

"An Act to Amend an Act entitled 'An Act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That an Act entitled 'An Act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case

arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

"SEC. 2. That said Act be further amended by adding the following section as section nine of said Act:

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury.

"Approved, April 5, 1910."

Mr. Donald G. Perkins for plaintiff in error in No. 120:

The act of 1906 was held unconstitutional by this court because it could not by construction write into the act words to make it read, "Any employé *when engaged in interstate commerce*," which express words of limitation if contained in the act, it was conceded, would have rendered it constitutional. Congress in passing the act of 1908 adopted this suggestion and used express words of limitation to meet the views of the court.

So far as the substantive right goes the act of 1908 does not differ from the act of 1906 and was within the power of Congress under the decision of this court, and it is unnecessary to cite the cases and repeat the argument there considered. Thornton Employers' Liability Acts, §§ 7, 10, *et seq.; Employers' Liability Cases*, 207 U. S. 463; and see *Adair* v. *United States*, 208 U. S. 178.

The power to create the liability necessarily includes the power to change any and all rules in existence in relation to the liability of master to servant at common law or under state statutes.

Even the rules of the common law limited the power of the carrier to free itself entirely by contract from liability

for its negligence in the carriage of passengers and freight, and the legislative power of Congress, assuming the matter is within its sphere, includes the right to change these rules of the common law and create a new and different rule. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Railroad Co.* v. *Stevens*, 95 U. S. 655; *Liverpool S. S. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; *Employers' Liability Cases*, 207 U. S. 492; *United States* v. *D. H. R. R. Co.*, 213 U. S. 405.

There is no violation of constitutional privilege, because the act applies to railroad interstate carriers alone. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205.

The act of Congress did not create an original jurisdiction in the Superior Court but it did create a substantial right which accrued to a citizen of Connecticut, and the Superior Court as a court of general jurisdiction had jurisdiction to adjudicate the right. *Ex parte McNeil*, 13 Wall. 423; *Cook* v. *Whipple*, 55 N. Y. 164; *Claflin* v. *Houseman*, 13 Wall. 137.

Congress intended that the state courts should exercise a concurrent jurisdiction, and that the jurisdiction of the Circuit Court shall be concurrent with that of the state courts in actions under this act, which was merely declaratory of the law as it existed. See amendment of 1910, Public No. 117, H. R. 17,263.

It was evidently the intent of Congress that the state court should have a concurrent jurisdiction, for unless this is so a party having a claim of less than $2,000 would be without a remedy, for the Circuit Court of the United States has no jurisdiction where the damages claimed are less than $2,000. See act, March 3, 1875, c. 137, § 1, 18 Stat. 470; § 969, U. S. Stat; act of 1887–8; 24 Stat. 552 and 25 Stat. 443.

The power to regulate interstate commerce is one of the powers which the State surrendered to the United States, and assuming that the act in question is constitutional and within the power of Congress to regulate in-

terstate commerce, then the power of Congress is supreme and paramount to that of the State and supersedes the law and policy of the State of Connecticut on the same subject, so that the State has no law and no policy on this subject except the act of Congress. *Sinnott* v. *Davenport et al.*, 22 How. 242; *Gulf &c. R. R. Co.* v. *Helfley*, 158 U. S. 98, 103; *Atl. &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 162; *Miss. R. R. Comrs.* v. *Ill. Central R. R.*, 203 U. S. 335; *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

The oath of office of the judges of the Connecticut Supreme Court requires them to support the Constitution of the United States.

Even in enforcing transitory actions either in contract or tort arising under the laws of a foreign State, which is done as an act of comity between foreign States, the fact that the foreign law is different is not sufficient to prevent jurisdiction. *Walsh* v. *N. Y. & N. E. R. R. Co.*, 160 Massachusetts, 571; *Nor. Pac. Ry. Co.* v. *Babcock*, 154 U. S. 197; *Dennick* v. *R. R. Co.*, 103 U. S. 18.

Even if the plaintiff's right of action were to be treated as arising under the laws of a foreign State, the Connecticut court could not deny him a remedy from mere whim or because the judges did not like the law, but it could only be done on established principles of law governing all cases, that to grant him his remedy would be against the public policy or interests of the State, not simply against the interest of the defendant, and the following cases show that the conclusion of the court that it could not entertain jurisdiction was unsound and not in accord with established principles. *Dennick* v. *Railroad Co.*, 103 U. S. 18; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Huntington* v. *Attrill*, 146 U. S. 657; *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190; *Ward* v. *Jenkins*, 10 Metc. 588; *Higgins* v. *Railroad Co.*, 155 Massachusetts, 176; *Walsh* v. *Railroad Co.*, 160 Massachusetts, 571; *King* v. *Sarria*, 69 N. Y. 31; *Leonard* v. *Columbia & Co.*, 84 N. Y.

48; *Stoeckman* v. *T. H. & R. R. Co.*, 15 Mo. App. 503; *C. & O. R. R. Co.* v. *Am. Ex. Bank*, 92 Virginia, 154.

But the plaintiff's case is much stronger than if he were suing under a foreign law because the whole foundation of the comity rule as to transitory actions is the principle that the law of a State has no extraterritorial force and therefore can be enforced not of right but only as an act of comity, while this plaintiff is a citizen of Connecticut and sues in the courts of his own State on a cause of action arising in the State under the act of Congress, which is the supreme law of Connecticut, and governs the public policy of the State on that point. *Blythe* v. *Hinckley*, 173 U. S. 508; *Claflin* v. *Houseman*, 93 U. S. 136.

This is a right under United States law just as much as is a discharge in bankruptcy granted by a court of the United States under the United States bankrupt law and such a discharge is valid in the courts of all the States, *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181, and the denial of the right presents a Federal question. *Strader* v. *Baldwin*, 9 How. 261; *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87. *St. Louis &c. R. R. Co.* v. *Taylor*, 210 U. S. 285, distinguished.

The Connecticut Supreme Court had no power to legislate or establish the public policy of the State but its duty was to declare the law and it was bound by the Constitution and laws of the United States. That the plaintiff was entitled to maintain his action in the state court is established by *Ex parte McNeil*, 13 Wall. 243; *Teal* v. *Felton*, 12 How. 292; *Claflin* v. *Houseman*, 93 U. S. 136; *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141, 144; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184; *Raisler* v. *Oliver*, 97 Alabama, 710; *Ordway* v. *Central Nat. Bank*, 47 Maryland, 245; *Schuyler Nat. Bank* v. *Bollong*, 24 N. W. 827; *Singer* v. *Bedstead Co.*, 65 N. J. Eq. 293; *Cook* v. *Whipple et al.*, 55 N. Y. 164; *People* v. *Welch*, 141 N. Y. 273; *Bletz* v. *Columbia Nat. Bank*, 87 Pa. St. 87; *Hartley*

v. *United States*, 3 Hayw. (Tenn.) 45; *Kansas City &c.* v. *Flippo*, 138 Alabama, 487; *Mobile &c. Ry.* v. *Bramberg*, 141 Alabama, 258; *Wilson* v. *Southern Ry. Co.*, 172 Fed. Rep. 478.

Mr. Edward D. Robbins, with whom *Mr. Joseph F. Berry* was on the brief, for defendant in error in No. 120:

The power to regulate commerce among the several States is exclusive wherever the matter is national in its character or admits of one system or plan of regulation. *Cooley* v. *Board of Wardens*, 12 How. 319; *Welton* v. *Missouri*, 91 U. S. 280; *Kendall* v. *United States*, 12 Pet. 524, 618; *Valarnio* v. *Thompson*, 7 N. Y. 579.

There can be no question in this case that the act itself is national in its character and admits of only one system, which, to be effective, must be uniform in its application.

Where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself, but, if exclusive jurisdiction be neither expressed nor implied, the state courts have concurrent jurisdiction whenever by their own constitution they are competent to take it. *Claflin* v. *Houseman*, 93 U. S. 130. See also *Hoxie* v. *N. Y., N. H. & H. R. R. Co.*, 82 Connecticut, 356; *Chicago &c. R. Co.* v. *Whitton*, 13 Wall. 288; *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 521; *Teal* v. *Felton*, 12 How. 292; *Dallemagne* v. *Moisan*, 197 U. S. 174; *Robertson* v. *Baldwin*, 165 U. S. 278.

Congress cannot confer jurisdiction upon the state courts, *Martin* v. *Hunter*, 10 Wheat. 334; *Houston* v. *Moore*, 5 Wheat. 27; and state courts will not or cannot have jurisdiction of cases involving a penalty under United States laws. *Dudley* v. *Mayhew*, 3 N. Y. 9, 15; *Davidson* v. *Champlin*, 7 Connecticut, 224; *State* v. *Curtiss*, 35 Connecticut, 374; *United States* v. *Lathrop*, 17 Johnson (N. Y.)

4, 8; *Ex parte Knowles*, 5 California, 301; Kent's Commentaries,* 399; *Rushworth* v. *Judges*, 58 N. J. L. 97.

As Congress cannot vest any of the judicial power of the United States in the state courts, it is bound to create inferior courts in which to vest jurisdiction in cases arising under its acts. These courts have been created and cases arising under the act should be tried in courts ordained and established by the Congress, which are adapted better to enforce the act in a uniform manner than courts established by the State.

While conceding that Congress may have intended the state courts to assume jurisdiction, Congress cannot compel the state court to entertain it against its wish.

The reservation to the States respectively by the Tenth Amendment means the reservation of the right of sovereignty which they respectively possessed before the adoption of the Constitution and which they had not parted from by that instrument; and any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the States or the people and would not be the supreme law of the land but null and void. *United States* v. *Williams*, 194 U. S. 295; *Ex Parte Merryman*, 17 Fed. Cases, 9, 487; *Collector* v. *Day*, 11 Wall. 124; *Calder* v. *Bull*, 3 Dallas (U. S.), 388.

Art. V, § 1, of the Connecticut constitution prescribes how the judicial power of the State shall be vested and exercised, and it cannot be within the power of Congress to prescribe that a court of Connecticut must assume jurisdiction of a cause of action based upon an act the terms of which are entirely incompatible with its system of jurisprudence. Kent's Commentaries, 12th ed.* 403.

The power of the state courts to determine what cases they will accept jurisdiction of is absolute, for the power to maintain a judicial department is one incident to the inherent sovereignty of each State, in respect to which the State is as independent of the General Government as

that Government is independent of the States. As to that power the two governments are on an equality. *Collector* v. *Day*, 11 Wall. 113, 126; *Stearns* v. *United States*, 2 Paine, 300; *Sherman* v. *Bingham*, Fed. Cases, No. 12,762; *Beavin's Petition*, 33 N. H. 89; *Stephens, Petitioner*, 4 Gray, 559; *In re Woodbury*, 98 Fed. Rep. 833.

The exercise of jurisdiction in this case in the state courts is entirely incompatible with the laws of the State and the act has been deemed to be both impolitic and unjust.

There are vital reasons why the state courts are not obliged to assume jurisdiction of this action and one of the principal reasons is that the act, to be enforced in the state courts, can be enforced only at the expense of disregarding many of the requirements of the law in Connecticut both in respect to pleadings and in respect to evidence.

Congress cannot provide rules of evidence which the state courts are bound to follow. *People* v. *Gates*, 43 N. Y. 40; *Caldwell* v. *N. J. Steamboat Co.*, 47 N. Y. 282; *Moore* v. *Moore*, 47 N. Y. 467; *Bowlin* v. *Commonwealth*, 2 Bush (Ky.), 5; *S. C.*, 92 Am. Dec. 468; *Carpenter* v. *Snelling*, 97 Massachusetts, 452.

Mr. J. C. McReynolds, special assistant to the Attorney General, by leave of the court, filed a brief for the United States as *amicus curiæ* in No. 120.

The principles of law necessary for solving the questions in issue have been definitely determined by this court.

Congress has power to legislate concerning the mutual rights and liabilities of master and servant when both are actually engaged in interstate commerce. *Howard* v. *Illinois Central R. R. Co.*, 207 U. S. 463; *Adair* v. *United States*, 208 U. S. 161.

The Employers' Liability Act of 1906 was, in *El Paso & N. E. Ry. Co.* v. *Gutierrez*, 215 U. S. 87, 96, declared valid so far as it relates to commerce within the Territories

where the inhibitions of the Fifth Amendment apply with full force. *Rassmussen* v. *United States*, 197 U. S. 516. Objections predicated upon the Fifth Amendment, which are now urged against the act of 1908, apply with equal force to the earlier act, and therefore must be considered as overruled.

In *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, this court upheld the Carmack amendment as a proper regulation of interstate commerce and not in violation of the Fifth Amendment; and see *Mobile &c. Railroad Co.* v. *Turnipseed*, 219 U. S. 35; *L. & N. Railroad* v. *Melton*, 218 U. S. 36; *Griffith* v. *Connecticut*, 218 U. S. 572; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, as to general classification of railway employés being a proper exercise of the police power.

The relationship—the reciprocal rights and liabilities—between a railroad carrier and its employés arises out of agreement; and when both parties are actually engaged in interstate commerce this agreement is an essential part thereof over which Congress has plenary power of regulation subject only to the restrictions of the Constitution. Beven on Employers' Liability, 3; Rueggs on Employers' Liability, 7th ed.; Mechem on Agency, § 1; Cooley on Torts, 531; *Farwell* v. *Boston & Worcester R. R. Co.*, 4 Met. 49, 56; *Priestley* v. *Fowler*, 3 Mees. & W. 1; *Murray* v. *So. Car. R. R. Co.*, 1 McMullan, 385; *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; *Chicago, &c. Ry. Co.* v. *Ross*, 112 U. S. 377, 382; *Nor. Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642, 647; *Nor. Pac. R. R. Co.* v. *Hambly*, 154 U. S. 349; Article by Prof. Mechem in The Illinois Law Review, November, 1909.

What constitutes interstate commerce and what is a regulation of it are practical questions to be decided in view of the rights involved in each case. *Dozier* v. *Alabama*, 218 U. S. 124. The operation of a railroad carrier in interstate commerce is impossible without servants—the human instrumentalities who must perform the neces-

sary acts. The lack of power to control agreements with such servants by prescribing their terms or otherwise would result in inability completely and effectually to regulate the course and current of commerce as ordinarily conducted through the instrumentality of railroads. Congress has plenary power to regulate whatever is interstate commerce, subject only to the restrictions of the Constitution. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

In the absence of action by Congress, the States may legislate concerning the relationship—the rights and liabilities—between master and servant operating in interstate commerce. But the general subject is within the control of Congress whenever it may choose to exercise its power. *Martin* v. *Pittsburg &c. R. R.*, 203 U. S. 284, 294; *Sherlock* v. *Alling*, 93 U. S. 99, 103, 107; *Old Dominion S. S. Co.* v. *Gilmore*, 207 U. S. 398; *West. Un. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406.

State statutes have been upheld only where Congress left the matter untouched and open to state regulation. When the public good requires such legislation it must come from Congress and not from the States. *Hall* v. *De Cuir*, 95 U. S. 485; *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 218 U. S. 71; *Louisville, N. O. & T. Ry. Co.* v. *Mississippi*, 133 U. S. 587; *Plessy* v. *Ferguson*, 163 U. S. 537, 540; *N. J. S. Co.* v. *Brockett*, 121 U. S. 637; Hutchinson on Carriers (3d ed.), §§ 997, 1077.

A contract for the transportation of goods between different States by vessel or railroad is a part of interstate commerce whose terms may be prescribed or regulated by act of Congress; *The Delaware*, 161 U. S. 459, 471; and as to the Harter Act, passed in 1893, see *Martin* v. *The Southwark*, 191 U. S. 1; *Patton* v. *T. & P. Ry. Co.*, 179 U. S. 658, 663.

As to the Carmack amendment, see *Atlantic Coast Line R. R.* v. *Riverside Mills*, 219 U. S. 186.

The contract for service between a sailor and a vessel engaged in foreign commerce is part thereof and its terms may be directly prescribed by Congress. *Patterson* v. *The Eudora*, 190 U. S. 169, 176; *Robertson* v. *Baldwin*, 165 U. S. 275.

Congress may prescribe the character of instruments to be used in interstate commerce and declare the result of a failure so to do upon the agreement of employment between master and servant. *Johnson* v. *So. Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U. S. 1; *St. Louis &c. Ry. Co.* v. *Taylor*, 210 U. S. 281, 294, 295.

Mr. Charles W. Bunn for plaintiff in error in No. 170:

Probably the interests of the railway company, plaintiff in error, would be promoted by having the act of Congress sustained, thus securing to it at least one uniform law of liability throughout the States in lieu of the differing laws of many States. But the fact cannot be ignored that for over a century it has been supposed that laws such as this fell within the exclusive power of the States, and that this view is held still by a large proportion of the bar and people. In fact, while defendant in error as administratrix is maintaining this action under this law, a sister of deceased, not a party to this action, asserts the liability of the railway company to her under the Montana statute.

The act of Congress rests wholly upon the power of Congress to regulate commerce among the States, which is the power to prescribe the rules by which commerce is to be governed. *Adair* v. *United States*, 208 U. S. 161, 177. See article by Mr. Hackett in Harvard Law Review for November, 1908. From the adoption of the Constitution until recently it has been understood universally that the exclusive power is in the States to say for what negligence a master shall be liable to a servant, what shall

be the effect of the servant's contributory negligence, what shall be the master's liability for the acts of fellow servants, whether any pecuniary liability shall arise out of death caused by negligence, what shall be the measure of damage in death and other negligence cases, and who shall receive the fruits of recovery.

While the power of Congress is supreme in its sphere, it does not extend beyond those subjects which pertain immediately and directly to commerce. The utmost ingenuity has failed to prove how commerce will directly be promoted or affected, or the movement of goods or passengers by rail directly influenced, by any rule governing the master's liability to his servant for defects in appliances, or for the acts of fellow servants, or establish the effect of the servant's own negligence, or determining when a liability arises for negligent death, or the extent of the damages, or the persons to whom the damages shall go.

The act is plainly distinguishable from safety appliance laws and from laws prescribing tests for qualification of trainmen. Such laws have an obvious and direct relation to commerce. They make transportation both of passengers and freight safer and more reliable.

Congress may have authority to regulate in some respects the relation of master and servant, but it has no such authority except to make rules really and substantially affecting commerce, and the rules laid down in the act in question do not so affect commerce.

Regulation of liability for injury to an employé merely because the master is engaged in interstate commerce, or because the employé is so engaged, is inadmissible, the particular regulation not being a rule of commerce or having any relation to commerce; or at most such a shadowy and indirect relation as not to be a regulation of commerce within the power of Congress. *County of Mobile* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v.

Pennsylvania, 114 U. S. 196; *In re Rahrer*, 140 U. S. 545; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *United States* v. *Knight Co.*, 156 U. S. 1; *Hooper* v. *California*, 155 U. S. 648.

The act of Congress probably conflicts with the law of every State, with some in one particular, with others in another. It would be impossible to enumerate such conflicts; but some of them are: in respect of the liability for the acts of fellow servants; in creating an action for death practically with unlimited damages; in distribution of proceeds in cases of recovery for death; in respect of the effect of contributory negligence and assumption of risk; in providing that no contract may be made between the parties contrary to the terms of the act; and in giving two years to bring action and in not requiring, as the laws of some States do, any preliminary notice to the defendant.

Congress has assumed to enter the field of the administration of deceased persons. In some States damages for death are not subject to the claims of creditors; in others it is believed that they are; but if this act is valid it seems to remove that question from state control. Some States give the damages to the heirs, some to the next of kin, and some to the widow. The rules in the States vary widely in determining who is an heir or next of kin entitled to share in the recovery.

In this particular case the law of Montana would give the damages half to the widow and half to the sister; but the act of Congress assumes to overrule these state statutes, in the case at bar giving the whole damage to the widow to the exclusion of the sister, instead of dividing it between them.

Conflicts between the act of Congress and laws of the States result in annulling the acts of the States, providing that of Congress is valid, because if this is a regulation of commerce it is so well settled as now to be elementary, that Congress once having acted, state power over the

whole subject (if indeed the States ever had any power) is ended; and any legislation by a State creating a liability of railway companies to their employés engaged in interstate commerce would be an unlawful interference with and burden upon such commerce. On this clear principle the plaintiff in error will not be liable to the sister of deceased, or to an administrator appointed for her benefit under the laws of Montana, provided this judgment is affirmed.

Plaintiff in error agrees with the Attorney General that railway companies have no employés who are not engaged in interstate commerce, unless indeed they carry on mining or some business apart from transportation. The whole line of a railroad extending through several States constitutes a single property and of necessity must be operated as such.

If the act in question is valid all employés of railways, at least all employed in or about the transportation carried on by railways, are taken out of the jurisdiction of the States of which they are citizens, to the extent of all the matters regulated by the act. The same will follow, if Congress chooses to act as to employés of manufacturers and merchants engaged in interstate commerce.

Mr. Samuel A. Anderson for defendant in error in No. 170:

Congress has power, under the commerce clause, to regulate the relation of master and servant as between an interstate carrier and an interstate servant. *Employers' Liability Cases*, 207 U. S. 463; *Adair* v. *United States*, 208 U. S. 161; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87; *Peirce* v. *Van Dusen*, 78 Fed. Rep. 693; *The Daniel Ball*, 10 Wall. 557; *Gilman* v. *Philadelphia*, 3 Wall. 713, 724, 725; *United States* v. *Combs*, 12 Pet. 72, 78; *Cooley* v. *Board of Wardens &c.*, 12 How. 299; *Patterson* v. *Bark Eudora*, 190 U. S. 169.

Congress has the power to regulate the relation of master and servant as between an interstate carrier and an intrastate employé. See *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minn. & St. Louis Ry. Co.* v. *Herrick*, 127 U. S. 210; *Chicago, Kansas & Western R. R. Co.* v. *Pontius*, 157 U. S. 209; *Tullis* v. *Lake Erie &c. R. R. Co.*, 175 U. S. 348; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368; *Minnesota Iron Company* v. *Kline*, 199 U. S. 593.

The power of Congress to regulate commerce between the States is as great as to regulate commerce with foreign nations, the power in both instances originating solely from the commerce clause. See *Brown* v. *Houston*, 114 U. S. 622; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577.

The fact that the act declares that such common carriers shall be liable for injuries to interstate servants caused through the negligence of any employé does not tend to impair its validity. *Watson* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942, 950.

Under the decisions on the Safety Appliance Acts, if any car in a train is being used in interstate commerce, all cars in that train must be equipped according to the provisions of the acts, whether such cars are being used or were ever used in carrying interstate merchandise. See *Johnson* v. *Southern Pacific Ry. Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1; *Wabash Railway Company* v. *United States*, and *Elgin J. & E. Ry. Co.* v. *United States*, 168 Fed. Rep. 1.

Congress has power to impose liability upon an interstate carrier by railroad in favor of an interstate servant injured through the negligence of other employés working at and about and in connection with such interstate railroad, irrespective of the employment of the servant chargeable with careless acts resulting in such injury. *Gilman* v. *Philadelphia*, 3 Wall. 713; *In re Debs*, 158 U. S. 564.

The act in question is not invalid because confined to common carriers by railroad engaged in interstate commerce, nor because it embraces all interstate employés on interstate roads, when injured while engaged in such service, without regard to the character of such service. *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Kiley* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 138 Wisconsin, 215.

Sections 3 and 4 of the act, the first establishing the doctrine of comparative negligence, the second abrogating the doctrine of assumption or risk in certain cases, are valid enactments. *Johnson* v. *Southern Pacific Ry. Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1.

It was the aim of Congress to do exact justice. As to wisdom of such a rule as applied to marine torts, see *The Max Morris*, 137 U. S. 1; *The Mystic*, 44 Fed. Rep. 399. Whether or not these provisions are equitable or unjust is a matter concerning Congress and not the courts. *St. Louis & Iron Mountain Ry. Co.* v. *Taylor*, 210 U. S. 281, 295.

Section 5, limiting the right of contract and providing that no rule, etc., shall be permitted to exempt such common carriers from any liability created by said act, is a valid enactment. *Kiley* v. *Chicago, M. & St. P. Ry. Co.*, 138 Wisconsin, 215.

Sections 3, 4 and 5 are clearly separable from the main body of the statute and, even if one or all should be held invalid, nevertheless, the main statute could and should be sustained, notwithstanding such invalidity.

The statute is in keeping with modern thought and is a wise and humane enactment. Many States have legislated along similar lines and probably in no State does the common law still exist in its full force and effect. All men, including all persons engaged in the business of transportation, now concede that the general object sought by the enactment of the statute is one that should meet with universal approval.

The Attorney General, by leave of the court, filed a brief for the United States, as *amicus curiæ*, in No. 170: [1]

So far as it relates to the liability of an interstate employer to an interstate employé for injury received through the negligence of another interstate employé, the act is a regulation of interstate commerce, and within the constitutional power of Congress.

In the *Employers' Liability Cases*, 207 U. S. 463, the enactment there considered was held unconstitutional, for the reason that it imposed a liability to an intrastate employé as well as to an interstate employé; while what was then said in the opinion of the court concerning the authority of Congress to regulate the liability to an interstate employé was not logically vital to the decision, nevertheless the utterance was made after full discussion of the very question at the bar, after solemn consideration of the question by the court, and in a deliberate purpose of preventing misconception by Congress of the actual and limited scope of the exact decision, with the result that Congress should not mistakenly believe itself incapable of enacting a new statute affecting interstate employés alone.

Whether the court's declaration was, in a technical view, dictum or decision, the declaration certainly was not casual or unconsidered, but was solemnly made after argument, upon consideration, and with serious, just and beneficent purpose, and see dissenting opinions of Justices Harlan, McKenna, Holmes and Moody.

In the later case of *Adair* v. *United States*, 208 U. S. 161, this court treated the power of Congress as settled.

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[1] The brief contained the following statement:

The foregoing brief was prepared by the late Solicitor General (Lloyd W. Bowers who died in September, 1910) with his accustomed care and ability. In order that it may properly be before the court, I adopt it and ask its consideration. Geo. W. Wickersham, Attorney General. December, 1910.

Congress passed the act of 1908 in the purpose of exercising a power which this court, in *The Employers' Liability Cases* and in the *Adair Case*, solemnly accorded to Congress; and the lower Federal courts have regarded those cases as settling the matter. *Watson* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Zikos* v. *Oregon R. R. & Nav. Co.*, 179 Fed. Rep. 893.

Whatever may be the power of Congress to legislate about or for agents of interstate commerce, when such legislation can have no substantial influence upon the act which is interstate commerce, there can be no doubt of the congressional authority to legislate concerning the agents of interstate commerce in ways that do substantially influence the act of interstate commerce about which such agents are engaged, or affect the reliability, security, promptness or economy of the Interstate Commerce Act. Interstate commerce—if not always at any rate when the commerce is transportation—is an act.

If Congress regards the rule of employer's responsibility established by this new statute as more conducive than the old rule to the security of the men performing the act of interstate commerce, whether it is right in its conclusion is unimportant, for, if that view can be fairly entertained, it is not for the courts to substitute their opinion concerning the better policy. *Employers' Liability Cases, supra; St. Louis & I. M. Ry. Co.* v. *Taylor*, 210 U. S. 281.

Testing the rule therefore by the theory on which it may and does rest, it is an enactment to promote not only the actual, but also the prompter, cheaper, safer and more efficient, performance of the act of interstate commerce itself. Illustrations of the power of Congress to regulate the act of interstate commerce by legislation concerning the agents who do it or the instruments with which it is done exist both in the Federal statutes and in the decisions of this court.

Congress may create an agent for doing interstate

commerce, *Pacific Railroad Removal Cases*, 115 U. S. 1; *California* v. *Pacific Railroad*, 127 U. S. 1; may authorize the erection of bridges as instrumentalities of interstate commerce, *The Clinton Bridge*, 10 Wall. 454; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; may prescribe the character or qualifications of the agents of interstate commerce—so as to pilots. See *Spraigue* v. *Thompson*, 118 U. S. 90, 95.

Such power as the States possess to license and to require the use of pilots exists only because Congress leaves them that power until action by itself. *Cooley* v. *Philadelphia Wardens*, 12 How. 299; *Huus* v. *N. Y. & Porto Rico S. S. Co.*, 182 U. S. 392; *Olsen* v. *Smith*, 195 U. S. 332, 344.

Congress may prescribe the kind and condition of the material instruments with which commerce shall be done. See Safety Appliance Acts, March 2, 1893, 27 Stat. 531; of April 1, 1896, 29 Stat. 85; March 2, 1903, 32 Stat. 943; and numerous acts concerning such things as steam boilers, life preservers, lifeboats and fire apparatus on vessels.

The validity of the Safety Appliance Acts seems never to have been questioned either by the bar or by this court. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *B., R. & P. Ry. Co.*, 205 U. S. 1; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281.

The system of licensing steam vessels engaged in interstate commerce was upheld in *The Daniel Ball*, 10 Wall. 557.

The supply and distribution of cars as instruments of interstate commerce may be regulated under the authority of Congress. *Int. Com. Comm.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452, 474–474. For other instances see Hours of Service Act, March 4, 1907, 34 Stat. 1415; Explosive Act of July 3, 1866, 14 Stat. 81; Rev. Stat. §§ 5353–5355, Commodities Clause; *United States* v. *Del. & Hudson Co.*, 213 U. S. 366.

Congress may legislate in reasonable ways to preserve the existence and conserve the efficiency of interstate employés against other persons who are in the same interstate business. The Federal power is to protect and advance the act of interstate commerce, and so to protect and further the work of any particular agent of interstate commerce, against all the world. *In re Debs*, 158 U. S. 564. Even a State of the Union cannot sanction an interruption. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; *Union Bridge Co.* v. *United States*, 204 U. S. 364.

Congress would probably be within its power if it were legislating solely for the benefit of the interstate employé who is injured in interstate work, and without reference to the effect of its legislation upon the security and efficiency of the interstate act itself.

In *Patterson* v. *Bark Eudora*, 190 U. S. 169, the commerce clause was held to empower Congress to forbid the advance payments of wages to seamen engaged in interstate or foreign commerce. This rule was enacted for the sole benefit of the seamen as the agents of commerce. The case did not rest upon the admiralty powers of the United States.

Congress may so legislate as to preserve the utility or the beneficence of commerce to those for whom it is done or to the public at large, and may prevent the conduct of pernicious commerce. *Lottery Case*, 188 U. S. 321; *United States* v. *Del. & Hudson Co.*, 213 U. S. 366.

The statute is a regulation of interstate commerce although it creates a liability of the interstate employer to his interstate employé for injury of the latter through the negligence of an intrastate employé. *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 11.

Abolition of the fellow-servant rule is only an extinction in the particular case of the doctrine of assumed risk.

The constitutional function of Congress is to save and

promote interstate commerce; and it may save and promote it through suppression of any kind of injurious influence. *In re Debs*, 158 U. S. 564; *Loewe* v. *Lawlor*, 208 U. S. 274.

Congress has forbidden local bridges which interfere with interstate navigation; local carriage of explosives on interstate trains; state or municipal interference with the business of interstate soliciting agents, and state and municipal taxation of interstate business. An act for punishment of outsiders for stealing goods of a wrecked vessel was upheld, under the commerce clause, in *United States* v. *Coombs*, 12 Pet. 72, 77.

An interstate employer can be required to be careful about the apparatus that he uses, for the protection of his employé who is engaged in interstate work, without reference to the interstate or intrastate character of the use to which the apparatus is being put at the particular time.

If constitutional difficulty be found about extending the interstate employer's responsibility to an interstate employé for negligence of an intrastate employé, the statute then should be construed as limited to the case of an interstate employé's negligence.

The proper construction of the statute, unless that construction will destroy it, includes the case of an intrastate employé's negligence.

The congressional selection of a civil liability of the interstate employer as the best sanction for his new duty of preventing injury of an interstate employé through negligence of his co-employés is clearly allowable; and, as Congress had authority to adopt that sanction, it necessarily prescribed to whom the new civil right should belong. See Taft, Cir. J., in *Narramore* v. *Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed., Rep. 298, 300.

A new civil duty necessarily involves a new civil right. It was allowable, because unavoidable, for Congress to say who should have the right of civil recovery. Other-

wise, even if it would be competent for the States to designate the possessor or beneficiary of the right, the state legislatures might make no such designation. In any event, the effectiveness of the new congressional rule of duty would be left to the choice of the States.

The statutory provisions that the injured man may sue and that, if he dies, his personal representative may sue for the benefit of designated relatives, are requisite to the existence of any effective right, and therefore of any effective duty.

The designation of the beneficiaries of the new right, in case the injured employé dies, does not interfere with the ordinary control of the States over *post mortem* succession. State laws of descent have nothing to do with the question who may continue settlement and finally take title under the homestead law of the United States, after death of the original entryman. *Bernier* v. *Bernier*, 147 U. S. 242; *McCune* v. *Essig*, 199 U. S. 382.

Congress can enact that the responsibility of an interstate employer to an interstate employé for negligence of co-employés or negligence about appliances shall not be entirely displaced by contributing negligence of the interstate employé.

Nobody has a vested right in the continuance of the rules of the common law. Rights already created under those rules and property already derived from them have sanctity; but the common law may be changed as to future transactions, just as statutes may be. *Munn* v. *Illinois*, 94 U. S. 113, 134.

How the interstate employé's negligence shall be allowed to affect the interstate employer's liability for his own negligence or for negligence with which he is chargeable is purely one of policy, within the legislative discretion, and the common-law view may rationally be rejected. The alternative conclusion which Congress has reached is to be found in the long-established rules of certain

jurisdictions not holding to the common law and in the recent trend of English and American legislation. See, for instance the admiralty practice, which divides the loss between persons concurrently negligent. *The Sapphire*, 18 Wall. 51, 56; *The Max Morris*, 137 U. S. 1. And contribution lies between joint tort feasors in admiralty. *Erie R. R. Co.* v. *Erie Transp. Co.*, 204 U. S. 220, 225, 227.

The rule of comparative negligence, variant in its details but always contradictory of the common-law rule, was established by the courts in Illinois, Kansas and Tennessee. *Galena* v. *Jacobs*, 20 Illinois, 478, 496; *Chicago* v. *Stearns*, 105 Illinois, 554; *Union Pacific R. R. Co.* v. *Rollins*, 5 Kansas, 167, 180; *Kansas &c. R. R. Co.* v. *Peavey*, 29 Kansas, 169, 180; *Nashville &c. R. R. Co.* v. *Smith*, 6 Heisk. 174; *Nashville &c. R. R. Co.* v. *Carroll*, 6 Heisk. 347, 366.

For statutory instances, see Georgia Code, § 2972; Florida Laws of 1887, c. 3744, § 1; Mississippi Code of 1892, § 3548; English Employers' Liability Acts, Aug. 6, 1897; 60 and 61 Vict., c. 37, § 1; Act of July 30, 1900, 63 and 64 Vict., c. 22; *McNicholas* v. *Dawson*, 68 L. J. (Q. B.) 470.

It seems never to have been held anywhere that the Federal or any state constitution requires that contributory negligence be either total or a partial defense.

As to statutes adopting the rule of comparative negligence and abolishing contributory negligence, see *Nor. Pac. Ry. Co.* v. *Castle*, 172 Fed. Rep. 841, 843; *Alabama G. S. Ry. Co.* v. *Coggings*, 88 Fed. Rep. 455; *Christian* v. *Macon Ry. & Light Co.*, 120 Georgia, 314; *Railroad Co.* v. *Foxworth*, 41 Florida, 1, 63; *Phila., B. & W. R. R. Co.* v. *Tucker*, 35 App. D. C. 123, 38 Washington Law Reporter, 230; *Pulliam* v. *Illinois Central R. R. Co.*, 75 Mississippi, 627; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1.

Congress likewise can modify, as it did in § 4, as to interstate employés the assumption of risk rule in cases where the common carrier has violated any statute en-

acted for the safety of employés and so contributed to the injury or death of such employé.

Recent statutory abrogation of the doctrine of assumption of risk will be found in North Carolina Act of February 23, 1897, Private Laws of 1897, c. 56; Massachusetts Laws of 1895, c. 362, § 7; New York act of April 15, 1902, Laws of 1902, Vol. 2, c. 600, § 3, pp. 1748–50; English Employers' Liability Act of 1880, as interpreted in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, and *Smith* v. *Baker*, App. Cas. 1891, 325; English Employers' Liability Act of July 30, 1900, 63 and 64 Vict., c. 22; Federal Safety Appliance Act of March 2, 1893, as amended April 1, 1896, § 8 (27 Stat. 531, and 29 Stat. 85).

For judicial authorities upholding general statutory changes of that nature, see *Coley* v. *Railroad Co.*, 128 Nor. Car. 534; *S. C.*, 129 Nor. Car. 407; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Miss. & St. Louis Ry. Co.* v. *Herrick*, 127 U. S. 210; *Chicago K. & Western R. R. Co.* v. *Pontius*, 157 U. S. 209; *Tullis* v. *Lake Erie & West. R. R. Co.*, 175 U. S. 348; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Narramore* v. *Cleveland &c. R. R. Co.*, 96 Fed. Rep. 298, 302; *Kilpatrick* v. *Grand Trunk Ry. Co.*, 74 Vermont, 288; *Schlemmer* v. *Buff., Roch. & Pitts. Ry. Co.*, 205 U. S. 1, 11–14; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1.

Sections 3 and 4, concerning contributory negligence and assumption of risk, are each clearly separable from the rest of the statute; and even if they are unconstitutional that would not affect the operation of the rest of the act. *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

Congress did not attempt, either in the act of 1908 or that of April 5, 1910, to confer a new jurisdiction upon state courts over actions in enforcement of the new Federal right; and, even if the act of April 5, 1910, should be construed as embracing such an attempt, its invalidity in that respect would not affect the substantive rules of law established by the act of 1908. Nor can Congress be

considered to have made the operation of the substantive rules of law established by the act of 1908 dependent upon the willingness of all or any state courts to take cognizance of actions founded upon those rules. *Hoxie* v. *N. Y., N. H. & H. R. R. Co.*, 73 Atl. Rep. 754, 762, is clearly wrong.

The act of 1908 did not try to give a new jurisdiction of its own creation to the state courts. The act deals entirely with rights and duties—not with remedies. It creates rules of substantive law.

The state courts, inasmuch as Congress did not give exclusive jurisdiction to the Federal courts, could and should use their general jurisdiction, given to them by their state legislatures, in enforcement of the Federal right. The privilege of the state courts so to use their jurisdiction is undeniable, when neither Congress nor the state legislature has withdrawn that privilege in a particular case. The general grant of jurisdiction by state law is sufficient to cover any right, whether created by the law of that State or of other States or of the United States or of foreign countries. Congress has left the state courts free to use that general jurisdiction, by not prohibiting its use; and the terms of the State's grant of jurisdiction cover the case. *Claflin* v. *Houseman*, 93 U. S. 130.

It is the duty, as well as the right, of the state courts to take jurisdiction of actions under the Federal Employers' Liability Act. Report of the Senate Committee on the Judiciary, March 22, 1910, 61st Congress, 2d Session.

The statute makes no reference to remedies, and establishes the law independently of remedies. The clause of 1910 about concurrent jurisdiction of the state courts was obviously intended to prevent a mistaken and important reduction of remedies—not to make new conditions upon the operation of the original statute.

Further, the attitude of the state courts can make no real difference in the operation of the statute. In the

first place, any claimant of the new Federal right can go into a Federal court by simply laying his damages at more than $2,000. In the second place, as already suggested, this court can doubtless compel the state courts to exercise in aid of the new Federal right such jurisdiction as those courts have under state laws.

The act does not deprive a railroad of its property without due process of law, in violation of the Fifth Amendment.

Assuming that the due process requirement of the Fifth Amendment is equivalent to the equal protection of the laws required by the Fourteenth Amendment, the authorities show that this court has already repeatedly disposed of these objections to the act.

The following cases sustain state statutes abolishing the fellow-servant rule upon railroads alone, against express attack under the Fourteenth Amendment: *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minn. & St. Louis R. R. Co.* v. *Herrick*, 127 U. S. 210; *Chicago &c. R. R. Co.* v. *Pontius*, 157 U. S. 209; *Tullis* v. *Lake Erie & Northern R. R. Co.*, 175 U. S. 348; *St. Louis Bridge R. R. Co.* v. *Callahan*, 194 U. S. 628; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *P. C. C. & St. L. R. R. Co.* v. *Lightheiser*, 212 U. S. 560; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36.

Pertinent support of other legislation making special rules for railroads is found in *Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284; *St. Louis, I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 404; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417.

Extension of the new rules to interstate employés generally was permissible. Their restriction to employés injured in consequence of special railroad hazard was not required by the Constitution.

Of the cases above cited, concerning statutes abolishing the fellow-servant rule upon railroads, the following

related to injuries which did not result from any peculiar hazard: *Chicago &c. R. R. Co.* v. *Pontius*, 157 U. S. 209; *St. Louis &c. Terminal R. R. Co.* v. *Callahan*, 194 U. S. 628 (see the full facts in *S. C.*, 170 Missouri, 473); *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36.

El Paso & Northeastern Ry. Co. v. *Gutierrez*, 215 U. S. 87, while not explicitly treating it, really covers the exact point as presented under this legislation.

The cases at bar involve no question under § 5 concerning the validity of a contract exempting the carrier from responsibility under the rules of the statute. That section is manifestly separable from the rest of the act. Strong principle and much authority support its validity; but its palpable separableness makes discussion of the section now unnecessary. *McNamara* v. *Washington Terminal Co.*, 38 Wash. Law Rep. 343, in which § 5 of the present act was construed and upheld. The separableness of § 5 is too plain for discussion.

Mr. John L. Hall for plaintiff in error in No. 289 and defendant in error in No. 290:

The act is not in itself a regulation of commerce. *Gibbons* v. *Ogden*, 9 Wheat. 196.

The Constitution which enumerates the powers of the National Government is in itself a limitation upon the power of Congress to legislate. *United States* v. *Knight*, 156 U. S. 1, 11.

The Constitution guarantees the existence of the powers of the state governments no less than it guarantees the powers of the Federal Government. Cooley on Const. Lim. 592; *Ward* v. *Maryland*, 12 Wall. 418. This act is not one which plainly, logically, and directly tends to promote commerce between the States. *Hopkins* v. *United States*, 171 U. S. 592.

In cases in which this court has described the power

of the States to legislate upon interstate commerce, the legislation which has been under consideration has always directly and logically affected the intercourse between the States, see *Hall* v. *DeCuir*, 95 U. S. 485; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Brown* v. *Maryland*, 4 Wash. C. C. 378; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Crandall* v. *Nevada*, 6 Wall. 35; *Wabash R. R.* v. *Illinois*, 118 U. S. 557; *Nashville &c. R. R.* v. *Alabama*, 128 U. S. 96; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Gladson* v. *Minnesota*, 166 U. S. 427; *Illinois Central R. R.* v. *Illinois*, 163 U. S. 142.

The cases of *Coe* v. *Errol*, 116 U. S. 517; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 628; *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587; *Hennington* v. *Georgia*, 163 U. S. 299; *Telegraph Co.* v. *James*, 162 U. S. 650; *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 96, involve the consideration of statutes which bear directly and naturally upon the commerce itself.

Any regulation to come within the meaning of the interstate commerce clause must be direct and logical and not indirect, remote and merely incidental. *Addyston P. & S. Co.* v. *United States*, 175 U. S. 211; *Hooper* v. *California*, 155 U. S. 648; *Munn* v. *Illinois*, 94 U. S. 113; *L. & N. Ry.* v. *Kentucky*, 161 U. S. 677; *Lake Shore Ry.* v. *Smith*, 173 U. S. 684.

The act does not declare that it regulates interstate commerce. It prescribes no rule by which commerce is to be governed; it determines no conditions upon which it shall be conducted. It does not seek to secure equality and freedom against discrimination. It does not determine when it shall be free or when it shall be subject to any duties or other burdens. See Minority Report on the redraft of this bill known as H. R. No. 2310 of the 60th Congress, 1st Session; and Report No. 1386, H. R., 60th Congress, 1st Session.

Cases arising under maritime law in which acts of Congress upon the relations of owners of ships to the owners of goods, upon the relations with passengers and employés, have been sustained, rest not on the commerce clause but on the admiralty jurisdiction. *Craig* v. *Insurance Company*, 141 U. S. 638; *Butler* v. *Boston S. S. Co.*, 130 U. S. 548; and see *B. & O. R. R.* v. *Maryland*, 21 Wall. 456; *In re Garnett et al.*, 141 U. S. 1; *The Daniel Ball*, 10 Wall. 557; *The Roanoke*, 189 U. S. 185; *The Lottawanna*, 21 Wall. 558.

Acts which are held constitutional when applied to maritime regulation are not necessarily constitutional when applied to commerce by land.

The Safety Appliance Acts are justified because it was essential that States should not legislate as to the instrumentalities which should be used by railroads. Such legislation by States would interfere with interstate commerce and place a burden upon free and rapid transportation. The legislation was national in its character and required uniformity of regulation. *United States* v. *Southern Ry. Co.*, 164 Fed. Rep. 351.

This act invades the sovereignty of the States. *Trade-Mark Cases*, 100 U. S. 96; *Barbier* v. *Connolly*, 113 U. S. 27; *Hooper* v. *California*, 155 U. S. 648.

If Congress has the power to determine the liability of a railroad company to its employés simply because both are engaged in interstate commerce, then it has the same right to regulate the liability of a shipper to its employé when engaged in interstate commerce. In fact, there is scarcely any relation upon which it cannot legislate. The States would be shorn of their power to regulate their domestic affairs. *Houston* v. *Moore*, 5 Wheat. 1, 48; *Keller* v. *United States*, 213 U. S. 138; *Leisy* v. *Hardin*, 135 U. S. 100; *Pa. R. R.* v. *Knight*, 192 U. S. 21; *Chicago &c. R. R.* v. *Solan*, 169 U. S. 133; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Northern Securities Co.* v. *United States*,

193 U. S. 197; *L. & N. R. R.* v. *Kentucky*, 161 U. S. 677.

The act regulates the relation of master and servant as to things which are not exclusively interstate commerce.

It substantially reënacts in this particular the words of the previous Employers' Liability Act, and must be presumed to have been drafted with knowledge of the judicial construction which those words had received. *Employers' Liability Cases*, 207 U. S. 463.

An interstate carrier is also an intrastate carrier and employés upon the same train may be engaged at the same time in interstate and intrastate commerce; the statute therefore confers a right of recovery upon employés engaged in intrastate commerce, and thus touches the relation of master and servant as to matters concerned with intrastate commerce.

The right of the State to regulate its commerce within its own borders is paramount to the power of Congress to regulate such commerce. *The License Cases*, 5 How. 504.

The act touches directly and seeks to regulate the relation of master and servant as to intrastate business. *Hoxie* v. *N. Y., N. H. & H. R. R. Co.*, 82 Connecticut, 352, 368.

When Congress seeks to impose some new rule of liability upon employers engaged in interstate commerce, it is imposing a rule of liability to the same extent in effect upon those who are engaged in intrastate commerce. It denies the authority of the State to regulate its domestic commerce, which is in no respect inferior to the power of Congress to regulate interstate commerce. *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. Rep. 893.

The act is unconstitutional in that it violates the Fifth Amendment to the Constitution, which is a limitation upon the power of Congress, while the Fourteenth is a limitation upon the power of the States. The purpose of both amendments is to secure the existence of fundamental

justice and to prevent capricious and arbitrary legislation whereby unfair burdens are placed upon one class of persons.

The construction placed upon one Amendment is applicable to the other. *San Mateo County* v. *So. Pac. Ry.*, 13 Fed. Rep. 151; *Dent* v. *West Virginia*, 129 U. S. 114; *Sinking Fund Cases*, 99 U. S. 718; *French* v. *Barber Asphalt Co.*, 181 U. S. 324; *Munn* v. *Illinois*, 94 U. S. 123; *Giozza* v. *Tiernan*, 148 U. S. 657; *Hurtado* v. *California*, 110 U. S. 516; *Gulf, Colorado &c. R. R.* v. *Ellis*, 165 U. S. 150.

The act violates the Fifth Amendment because: It imposes upon common carriers by rail engaged in interstate commerce liabilities which are not imposed upon others engaged in interstate commerce; it deprives common carriers by rail engaged in interstate commerce of defenses which are available to others engaged in interstate commerce; it limits the powers of contract of common carriers by rail engaged in interstate commerce in their relations with their employés, and does not limit such powers of others engaged in interstate commerce.

Congress sought no reasonable or proper basis for the classification, although its attention was directed to the necessity for such a distinction. See Cong. Rec. 1908, 4433. Congress is not seeking to regulate interstate commerce by regulating the hazardous business of operating a railroad, but is attempting to regulate carriers by rail in all of their departments, and liability is imposed in favor of all employés while engaged in interstate commerce.

The Fifth Amendment insures equal protection of the laws. It prevents distinctions and classifications, unless the classifications are made upon some basis which is natural and not arbitrary. *Gulf, Colorado &c. R. R.* v. *Ellis*, 165 U. S. 150; *Missouri Pacific Ry.* v. *Mackey*, 127 U. S. 205; *Minneapolis &c. Ry.* v. *Herrick*, 127 U. S. 210; *Chicago &c. R. R.* v. *Pontius*, 157 U. S. 209.

As a basis for classification by special legislation of Congress, this court has no right to assume that the majority of the members of the class who are favored by this legislation are exposing their lives to extraordinary risks when the facts are to the contrary. This court will determine for itself the propriety of the classification. *Lochner* v. *New York*, 198 U. S. 45.

It is for this court to assume that those actually engaged in the movement and operation of trains form a greater part or even one-half of the total number of employés engaged in the business of interstate commerce of any carrier by rail so engaged.

A classification is not justified by general considerations when the reason for the classification applies to less than one-fifth of the class selected. Accident Insurance Manual, 365–371; 21st Report Interstate Com. Comm. 153; and see *Louisville & Nashville Ry.* v. *Melton*, 218 U. S. 36; *Tullis* v. *Lake Erie & W. R. R.*, 175 U. S. 348; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 294; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Martin* v. *Pittsburg &c. R. R.*, 203 U. S. 284; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Johnson* v. *Ry. Co.*, 43 Minnesota, 222, as to classifications, holding that one rule of liability cannot be established for railway companies merely as such and another rule for other employers under like circumstances, and that special legislation to be not class legislation must not only treat alike under the same conditions all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions.

The act has not included within its provisions the interstate employés of all other persons engaged in interstate commerce.

It includes within its terms only one class of employers who are engaged in interstate commerce; namely, railroads. It discriminates against railroad companies en-

gaged in interstate commerce who operate and maintain boats, wharves, docks and incidental equipment, and other employers engaged in interstate commerce operating and maintaining boats, wharves, and incidental equipment under precisely the same conditions.

The provisions of § 5 violate the Fifth Amendment in that they interfere with freedom of contract. *Adair* v. *United States, supra.*

The right to contract is as well recognized as the right to property. *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Railroad Co.* v. *Richmond,* 19 Wall. 584; *Hoxie* v. *N. Y., N. H. & H. R. R. Co.,* 82 Connecticut, 352, 369.

If the act is constitutional, plaintiff in this case cannot recover as the employé must be engaged in interstate commerce at the time of his injury in order to maintain his action under the statute, and the burden is necessarily upon the plaintiff to show that at the time of the injury he was not engaged in intrastate commerce.

The work performed by some employés may be properly described as dangerous, while the work performed by other employés is subject to no more risks than the ordinary occupations of life. There are employés engaged in the direct movement and operation of trains; employés engaged in the repair and maintenance of tracks; those engaged in the construction and repair of locomotives and cars; those whose duties are purely commercial and clerical. See on this point *Foley* v. *Railroad,* 64 Iowa, 644; *Stroble* v. *Railroad,* 70 Iowa, 555; *Malone* v. *Railroad,* 65 Iowa, 417; *Johnson* v. *Railroad,* 43 Minnesota, 222; *Jemming* v. *Railroad,* 96 Minnesota, 302; *Missouri, K. & T. R. R.* v. *Medaris,* 60 Kansas, 151; *Indianapolis & G. R. R.* v. *Foreman,* 162 Indiana, 85; *Taylor* v. *Southern Railway,* 178 Fed. Rep. 380; *St. Louis & St. F. R. R.* v. *Delk,* 158 Fed. Rep. 931.

The car involved in this case bore the same relation to interstate commerce that it would have borne had it

been in the repair shop awaiting repairs, and under those circumstances the men engaged in repairing the car would not have been engaged in interstate commerce or any other commerce.

The carrier is not liable for the negligence of an intrastate employé. *Zikos* v. *Oregon Railroad & Navigation Co.*, 179 Fed. Rep. 893.

The act seeks to regulate the relations of the employer to the members of the family of a deceased employé, which Congress cannot do under its power to regulate commerce.

In this respect the act invades the settled limits of the sovereignty of the States, *Williams* v. *Fears*, 179 U. S. 270, and also seeks to determine the administration of the estates of deceased persons. Congress has not the power to create the duties of an administrator. The power of the administrator is limited by the authority granted him by the State which created his office.

A strict construction of this statute, which alters the common law, is required, and no sufficient provision has been made for the assessment of damages. *Sewall* v. *Jones*, 26 Massachusetts, 9 Pick. 412; *United States* v. *Fisher*, 2 Cranch, 358; *Shaw* v. *Railroad Co.*, 101 U. S. 557.

Mr. Endicott P. Saltonstall, with whom *Mr. George D. Burrage* was on the brief, for plaintiff in error in No. 290, and defendant in error in No. 289:

The Employers' Liability Act of 1906 was declared unconstitutional because it was addressed to all common carriers engaged in interstate commerce, and imposed a liability upon them in favor of any of their employés, without qualification or restriction as to the business in which the carriers or their employés might be engaged at the time of the injury. *Employers' Liability Cases*, 207 U. S. 498.

Immediately thereafter Congress enacted the act of April 22, 1908, and met the objections to the former act. See report of House Committee on the Judiciary on House Bill 20310; Thornton's Employers' Liability, 247–260. The act has been passed on and upheld in *Watson* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Colasurdo* v. *Central R. R. of N. J.*, 180 Fed. Rep. 832; *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. Rep. 893; *Fulgham* v. *Midland Valley R. Co.*, 167 Fed. Rep. 660; *Winfree* v. *Northern Pac. Ry. Co.*, 173 Fed. Rep. 65; *Dewberry* v. *Southern Ry. Co.* 175 Fed. Rep. 307; *Bottoms* v. *Louis & S. F. R. Co.*, 179 Fed. Rep. 318, and held unconstitutional only in *Hoxie* v. *N. Y., N. H. & H. R. R. Co.*, 82 Connecticut, 354, and *Mondou* v. *Same*, 82 Connecticut, 373.

Congress has power to regulate the relations of master and servant as between an interstate carrier and an interstate employé. *State* v. *Chicago, M. & St. Paul R. Co.*, 136 Wisconsin, 407, at 410.

Congress has power, in regulating the relations of master and servant, as aforesaid, to make an interstate carrier liable to an interstate employé for the negligence of an intrastate employé. *Watson* v. *St. Louis &c. Ry. Co., supra*; *United States* v. *Col. & N. W. R. R. Co.*, 157 Fed. Rep. 321; *The Daniel Ball*, 10 Wall. 557, 566; *In re Debs*, 158 U. S. 564, 599; *United States* v. *Burlington &c. Ferry Co.*, 21 Fed. Rep. 331, 340; *The Hazel Kirke*, 25 Fed. Rep. 601, 607.

If the act is constitutional, but applies only where the negligent fellow-servant is engaged in interstate commerce, the road is liable, as there was evidence that the negligence which caused the accident was that of interstate employés.

The provisions of the act in this respect are separable, and liability may be upheld where the injury is caused by an interstate employé, although denied where caused by an intrastate employé. *Zikos* v. *Oregon R. & N. Co. supra.*

The act does not violate either the Fifth or the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis &c. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Chicago &c. R. R.* v. *Pontius*, 157 U. S. 209; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Tullis* v. *Lake Erie & W. R. R. Co.*, 175 U. S. 348; *Pittsburg &c. Ry. Co.* v. *Ross*, 212 U. S. 560.

Congress has power to provide a remedy to an injured employé of an interstate carrier as provided in § 3 of the act; *The Max Morris*, 137 U. S. 1, 14; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1.

The common-law rule that contributory negligence is a bar to recovery may be altered or abolished by the legislature whenever, in its discretion, it sees fit to do so. *Munn* v. *Illinois*, 94 U. S. 113, 134; *Hurtado* v. *People of California*, 110 U. S. 516; see also *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60, 74; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 524.

A legislature may by statute extend the common-law liability of a railroad, *Chicago &c. Ry. Co.* v. *Zernecke*, 183 U. S. 582; *St. Louis &c. Ry. Co.* v. *Taylor*, 210 U. S. 281; or limit it, *Martin* v. *Pittsburg &c. R. R.*, 203 U. S. 284.

The act is not invalid as violating the constitution and statutes of Connecticut, because it has been held unconstitutional in that State. *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96, 99.

It is not necessary that an act of this nature should make any provision for the assessment of damages. If it makes none, the jury will be instructed as to the manner of assessing damages, and these instructions will be based upon the principles of the common law governing actions of tort for personal injury.

The Safety Appliance Act is a penal statute, and there are no words specifically giving an injured employé a right

of action for damages, much less providing how those damages shall be assessed. *Johnson* v. *Southern Pac. Co., supra; Schlemmer* v. *Buffalo &c. Ry. Co., supra.*

Congress can create such a right of action in favor of personal representatives of an inhabitant of a State.

Congress may, within constitutional limits, alter or modify the common law. A state statute as to distribution of estates can stand on no higher ground. *Sherlock* v. *Alling*, 93 U. S. 99, 104.

Congress has power to abolish the doctrine of assumption of risk, as provided in § 4 of the act. *Johnson* v. *Southern Pac. Co.; Schlemmer* v. *Buffalo &c. R. Co., supra.*

Congress has power to declare void a contract which enables a common carrier to exempt itself from liability under the act, as provided in § 5.

The company and the deceased were engaged in interstate commerce at the time of the accident.

The car which was backed or "kicked" down upon the car under which Walsh was working was a car belonging to the company, coupled to an Erie flat car.

The single fact that the car which deceased undertook to repair contained perishable freight brought from outside the State where the accident happened is sufficient to show that the company was engaged in interstate commerce at the time. *The Daniel Ball, supra; Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557; *Norfolk &c. Ry. Co.* v. *Pennsylvania*, 136 U. S. 114; *United States* v. *Col. & Northwestern Ry. Co., supra;* and see also *United States* v. *Chicago &c. Ry. Co.*, 149 Fed. Rep. 486, 490; *United States* v. *St. Louis &c. R. Co.*, 154 Fed. Rep. 516; *United States* v. *Illinois Cent. R. R.*, 156 Fed. Rep. 182, 193; *United States* v. *Wheeling &c. R. R. Co.*, 167 Fed. Rep. 198; *Wabash R. Co.* v. *United States*, 168 Fed. Rep. 1; *Belt Ry. Co.* v. *United States*, 168 Fed. Rep. 542; *Chicago Junc. Ry. Co.* v. *King*, 169 Fed. Rep. 372; *United States* v. *Southern Ry. Co.*, 170 Fed. Rep. 1014; *Johnson* v. *Great*

Northern Ry. Co., 178 Fed. Rep. 643, 646; *Felt* v. *Denver &c. R. Co.*, 110 Pac. Rep. 215.

MR. JUSTICE VAN DEVANTER, after stating the cases as above, delivered the opinion of the court.

The principal questions presented in these cases as discussed at the bar and in the briefs are: 1. May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employés while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do those regulations supersede the laws of the States in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion?

The clauses in the Constitution (Art. I, § 8, clauses 3 and 18) which confer upon Congress the power "to regulate commerce . . . among the several States" and "to make all laws which shall be necessary and proper" for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does

not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

3. "To regulate," in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employés.

6. The duties of common carriers in respect of the safety of their employés, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. *Cooley* v. *Board of Wardens*, 12 How. 299, 315–317; *The Lottawanna*, 21 Wall. 558, 577; *Sherlock* v. *Alling*, 93 U. S. 99, 103–105; *Smith* v. *Alabama*, 124 U. S. 465, 479; *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96, 99; *Peirce* v. *Van Dusen*, 78 Fed. Rep. 693, 698–700; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 378; *Patterson* v. *Bark Eudora*, 190 U. S. 169, 176; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1; *Em-*

ployers' Liability Cases, 207 U. S. 463, 495; *Adair* v. *United States*, 208 U. S. 161, 176–178; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20.

As is well said in the brief prepared by the late Solicitor-General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations

of common carriers by railroad and their employés, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employés are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk have no tendency to promote the safety of the employés or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employé through the negligence of another, although confined to instances where the injured employé is engaged in interstate commerce, is not confined to instances where both employés are so engaged; and (3) because the act offends against the Fifth Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class and all their employés engaged in such commerce in a favored class.

Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employé resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employé; (b) the rule exonerating an employer from liability for injury sustained by an employé through the concurring negligence of the em-

ployer and the employé is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employés contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employé; (c) the rule that an employé was deemed to assume the risk of injury, even if due to the employer's negligence, where the employé voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employés contributed to the injury; and (d) the rule denying a right of action for the death of one person caused by the wrongful act or neglect of another is displaced by a rule vesting such a right of action in the personal representatives of the deceased for the benefit of designated relatives.

Of the objection to these changes it is enough to observe:

First. "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn* v. *Illinois*, 94 U. S. 113, 134; *Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *The Lottawanna*, 21 Wall. 558, 577; *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406, 417.

Second. The natural tendency of the changes described

is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employés and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. *Lottery Case*, 188 U. S. 321, 353, 355; *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 203.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna*, 21 Wall. 558, 581–582; *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, 378–379.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employé through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employé is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co.* v. *United States*, 222 U. S. 20, 27, that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases*, 207 U. S. 463, deals only with the liability of a carrier engaged in interstate commerce for injuries sus-

tained by its employés while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employé engaged in intrastate commerce; for such negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein.

Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the Fifth Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire*, 219 U. S. 549; *Atlantic Coast Line Railroad Co.* v. *Riverside Mills*, 219 U. S. 186, and *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it.

Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employés of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employés in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the "due process of law" clause of the Fifth Amendment. Even if it be assumed that that clause is equivalent to the "equal protection of the laws" clause of the Four-

teenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley* v. *Carbonic Gas Co.*, 220 U. S. 61, 78. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employés for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri Pacific Railway Co.* v. *Mackey*, 127 U. S. 205; *Louisville & Nashville Railroad Co.* v. *Melton*, 218 U. S. 36; *Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed*, 219 U. S. 35.

It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act.

The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316:

(p. 405) "If any one proposition could command the universal assent of mankind, we might expect it would be this:—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its com-

ponent parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof, . . . shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any State, to the contrary notwithstanding.'

(p. 426) "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."

And particularly apposite is the repetition of that principle in *Smith* v. *Alabama*, 124 U. S. 465, 473:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employés while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police

power of the States in the absence of action by Congress. *Sherlock* v. *Alling*, 93 U. S. 99; *Smith* v. *Alabama*, 124 U. S. 465, 473, 480, 482; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96, 99; *Reid* v. *Colorado*, 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. 558, 581; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado and Santa Fe Railway Co.* v. *Hefley*, 158 U. S. 98, 104; *Southern Railway Co.* v. *Reid*, 222 U. S. 424; *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370.

We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the Superior Courts of the State of Connecticut, and, in that case, the Supreme Court of Errors of the State answered the question in the negative. That, however, was not because the ordinary jurisdiction of the Superior Courts, as defined by the constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case, but because the Supreme Court of Errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the Superior Courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the State respecting the liability of employers to employés for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the

same general class, to apply in some the standards of right established by the congressional act and in others the different standards recognized by the laws of the State.

We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, "That the circuit courts of the United States shall have original cognizance, *concurrent with the courts of the several States*, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and arising under the Constitution or laws of the United States.*" August 13, 1888, 25 Stat. 433, c. 866, § 1. *Robb* v. *Connolly*, 111 U. S. 624, 637; *United States* v. *Barnes*, 222 U. S. 513. This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that "The jurisdiction of the courts of the United States under this Act shall be *concurrent with that of the courts of the several States*, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it.

Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary ju-

risdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion," because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow-servant.

The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. As was said by this court in *Claflin* v. *Houseman*, 93 U. S. 130, 136, 137:

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. . . . If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without

specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman* v. *Booth*, 21 How. 506; and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person

was a passenger, an employé or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

In No. 289 several rulings in the progress of the cause, not covered by what already has been said, are called in question, but it suffices to say of them that they have been carefully considered, and that we find no reversible error in them.

In Nos. 170, 289 and 290 the judgments are affirmed, and in No. 120 the judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

QUONG WING *v.* KIRKENDALL, TREASURER OF LEWIS AND CLARK COUNTY, MONTANA.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 119. Argued December 18, 1911.—Decided January 22, 1912.

A State does not deny equal protection of the laws by adjusting its revenue laws to favor certain industries.

A State, like the United States, although with more restrictions and to a less degree, may carry out a policy even if the courts may disagree as to the wisdom thereof.

In carrying out its policy, a State may make discriminations so long as they are not unreasonable or purely arbitrary.

On the record as presented in this case, and without prejudice to determining the question, if raised in a different way, the statute of

Montana imposing a license fee on hand laundries does not appear to be an unconstitutional denial of equal protection of the laws because it does not apply to steam laundries and because it exempts from its operation laundries not employing more than two women.

The Fourteenth Amendment does not interfere with state legislation by creating a fictitious equality where there is a real difference.

Quære: Whether this statute is aimed directly at the Chinese, in which case it might be a discrimination denying equal protection.

When counsel do not bring the facts before it, the court is not bound to make inquiries.

Courts sometimes enforce laws which would be declared invalid if attacked in a different manner.

39 Montana, 64, affirmed.

THE facts, which involve the constitutionality of a laundry license act of Montana, are stated in the opinion.

Mr. Charles E. Pew, with whom *Mr. M. S. Gunn* and *Mr. Ira T. Wight* were on the brief, for plaintiff in error:

The sole question presented is whether § 2776 of the Revised Codes of Montana provides a proper classification for taxing purposes.

Section 2776 is a revenue measure simply, and is not an exercise of the police power. This is alleged in the complaint, and was conceded by the Montana Supreme Court. There is therefore no question of the reasonableness of a police regulation, but the only question to be decided is whether the taxation of hand laundries operated by males and the exemption of other laundries is a just, reasonable and proper classification for taxation purposes.

Classification for any purpose must be based upon some real and reasonable difference in the property or business placed in one class from the property or business which is exempted from burdens imposed upon such class; otherwise such classification is repugnant to the equal protection clause of the Federal Constitution. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Gulf Ry. Co.* v. *Ellis,* 165 U. S. 155.

If such arbitrary selection as that attempted by this statute can be justified, there is no limit to which such selection might go. The same principle might be extended to the point where the entire burden of taxation might be placed upon one portion of a class. A license fee for police regulation is limited to the necessities of the regulation; but if a revenue measure of this kind can be justified as to a tax of $10.00, it can be justified to the point of confiscation.

Federal District Judge Knowles in the District of Montana held void the statute of Montana which at that time required hand laundries to pay $25.00 per quarter while steam laundries were required to pay only $10.00 per quarter. *In re Yot Sang*, 75 Fed. Rep. 983.

If it is the business which is being taxed, the instrumentalities used in that business make no difference, except that the tax might be graded according to the amount of business done, while if the tax is upon the instrumentalities, that would be another matter. In this case it is the laundry business which is the basis of the tax.

Nor is there any reason for exempting women in the manner in which it is attempted under this statute. A woman in business is, from a taxation standpoint, subject to the same burdens as a man in the same business.

Muller v. *Oregon*, 208 U. S. 412, is not an authority for the decision of the Montana court, the law under consideration here being a revenue measure, not a police measure. The statute involved in the *Muller Case* limited the hours of labor of females in laundries and similar places, and was purely a health regulation; and this court upheld it upon the ground that it was a reasonable exercise of the power of the State to protect the health of its citizens.

Mr. W. H. Poorman, with whom *Mr. Albert J. Galen*, Attorney General of Montana, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover ten dollars paid under duress and protest for a license to do hand laundry work. The plaintiff got judgment in the court of first instance, but this judgment was reversed by the Supreme Court of the State. 39 Montana, 64. The law under which the fee was exacted imposed the payment upon all persons engaged in laundry business other than the steam laundry business, with a proviso that it should not apply to women so engaged where not more than two women were employed. 1 Rev. Codes, § 2776. The only question is whether this is an unconstitutional discrimination depriving the plaintiff of the equal protection of the laws. U. S. Const., Am. XIV.

The case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women. One like the former was held bad in *In re Yot Sang*, 75 Fed. Rep. 983, and while the latter was spoken of by the Supreme Court of the State as an exemption of one or two women, it is to be observed that in 1900 the census showed more women than men engaged in hand laundry work in that State. Nevertheless we agree with the Supreme Court of the State so far as these grounds are concerned. A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a State may carry out a policy, even a policy with which we might disagree. *McLean* v. *Arkansas*, 211 U. S. 539, 547. *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Re-*

fining Co. v. *Louisiana*, 179 U. S. 89, 92, 95; *Williams* v. *Fears*, 179 U. S. 270, 276; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 469. It may favor or discourage the liquor traffic, or trusts. The criminal law is a whole body of policy on which States may and do differ. If the State sees fit to encourage steam laundries and discourage hand laundries that is its own affair. And if again it finds a ground of distinction in sex, that is not without precedent. It has been recognized with regard to hours of work. *Muller* v. *Oregon*, 208 U. S. 412. It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the State.

Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese; which would be a discrimination that the Constitution does not allow. *Yick Wo* v. *Hopkins*, 118 U. S. 356. It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country while on the other hand it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. But this ground of objection was not urged and rather was disclaimed when it was mentioned from the Bench at the argument. It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even if when called to our attention the facts should be taken notice of judicially,

whether because they are only the premise for a general proposition of law, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227, *South Ottawa* v. *Perkins*, 94 U. S. 260, *Telfair* v. *Stead*, 2 Cranch, 407, 418, or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed.

Judgment affirmed.

MR. JUSTICE HUGHES concurs in the result.

MR. JUSTICE LAMAR dissenting.

I dissent from the conclusions reached in the first branch of the opinion, because, in my judgment, the statute which is not a police but a revenue measure makes an arbitrary discrimination. It taxes some and exempts others engaged in identically the same business. It does not graduate the license so that those doing a large volume of business pay more than those doing less. On the contrary, it exempts the large business and taxes the small. It exempts the business that is so large as to require the use of steam, and taxes that which is so small that it can be run by hand. Among these small operators there is a further discrimination, based on sex. It would be just as competent to tax the property of men and exempt that of women. The individual characteristics of the owner do not furnish a basis on which to make a classification for

purposes of taxation. It is the property or the business which is to be taxed, regardless of the qualities of the owner. A discrimination founded on the personal attributes of those engaged in the same occupation and not on the value or the amount of the business is arbitrary. "A classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560.

NOBLE *v.* GALLARDO y SEARY.

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

No. 147. Submitted December 22, 1911.—Decided January 22, 1912.

A court of equity being a novelty in Porto Rico, it would be unjust to apply its doctrines to the conduct of parties during the period that was not governed by any rules peculiar to chancery courts.

The right to foreclose liens on crops under a mortgage executed in 1865, which is contested on the ground of laches, should be determined according to Spanish law as it prevailed during the time when laches is claimed to have taken place, and not according to the doctrines of our equity courts.

5 Porto Rico Fed. Rep. 10, reversed.

THE facts, which involve the construction of the law of liens on crops in Porto Rico, are stated in the opinion..

Mr. N. B. K. Pettingill for appellants.

There was no brief filed for the appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to foreclose a mortgage or lien executed in

December, 1865, by which one Ramon Ruiz Gandia bound himself to pay a certain sum to William Noble with the proceeds of the first crops that might be ground from the next January at a certain plantation. The defendants pleaded laches apparent on the face of the bill and different statutes of limitation. The notarial document by which the lien was created is presented only in a translation which suggests doubts whether a further lien upon succeeding crops applied to this debt or only to another that is referred to and that was due to another man. There was also a petition for leave to intervene on the part of the representative of the other creditor, referring to documents not set out, but this was not acted upon except as affected by the disposition of the principal case. The court below expressed doubts whether any of the instruments bound the land, but held that in any event the plaintiffs were barred by laches and dismissed the bill.

As was observed by the court below, a court of equity is a novelty in Porto Rico. But, this being so, it would be unjust to apply its doctrines to the conduct of the parties during the many years that were not governed by any rule peculiar to chancery courts. The plaintiffs are not relying upon a merely equitable right; they are asserting a lien which they say the Spanish law gave them until it was barred by the statute of limitations. Whether the Spanish law had any doctrines of laches that in any aspect would be applicable to this case was not argued and we have not inquired. But it is to be observed that no change of position on the faith of, or seemingly influenced by, the quiescence of the plaintiffs and their predecessors is disclosed. It would be open to argument whether laches was made out, even under our law, sufficient to defeat the remedy usually given by equity to enforce a purely legal right; in other words whether mere lapse of time short of the statute of limitations, with nothing more, should defeat the foreclosure of a lien supposed still to

exist at law. But we express no opinion on that point because the matter must be decided by Spanish law, which prevailed during the time when the laches is supposed to have been shown.

The case is a hard one, no doubt, if the plaintiffs ultimately should prevail on the strength of the old law of prescription for mortgages and subsequent recognitions. It should be scrutinized with care, not only with reference to the property covered by the lien, but the nature of the recognitions during the time when the bond could not be denied, and the law. As we have intimated, the record leaves some doubt as to material facts, no argument was presented to us on behalf of the appellees, and upon the whole we think it will be more conducive to justice if the case be remitted to the District Court for further consideration. To that end the decree will be reversed.

Decree reversed without prejudice.

UNITED STATES *v.* WONG YOU.

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

No. 597. Argued January 12, 1912.—Decided January 22, 1912.

The Alien Immigration Act of February 20, 1907, c. 1134, § 36, 34 Stat. 898, 908, applies to Chinese laborers illegally coming to this country notwithstanding the special acts relating to the exclusion of Chinese.

To allow a subsequent general act its literal effect does not repeal, alter, or amend an earlier special law when the later law expressly provides that it shall not have that effect.

The omission from a later act of a clause contained in an earlier act on the same subject, excluding certain classes from its operation,

and inserting a provision applicable to such classes, signifies that Congress intended to include that class in the operation of the later act, notwithstanding the existence of other special legislation in regard thereto.

181 Fed. Rep. 313; 104 C. C. A. 535, reversed.

THE facts, which involve the construction of § 36 of the Alien Immigration Act of 1907 are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States:

The application of the immigration laws to Chinese aliens is well settled. The immigration act of March 3, 1893, 27 Stat. 569, 571, provided: "That this act *shall not apply* to Chinese persons." But in the immigration act of March 3, 1903, 32 Stat. 1213, 1221, § 36, and in the act of February 20, 1907, 34 Stat. 898, 911, this clause was changed so as to read: "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent." This change indicates the intent of Congress that the immigration act should apply to Chinese aliens, although not affecting the operation of the exclusion laws, and such has been the practical and judicial construction of this legislation.

In the opinion rendered June 24, 1903, Attorney General Knox held that the Alien Immigration Act of March 3, 1903, authorized the exclusion of a Chinese alien afflicted with a dangerous and contagious disease. 24 Op. Atty. Gen. 706, 708.

This view has been uniformly followed by the executive department and the courts. *Ex parte Lee Shee Wing*, 164 Fed. Rep. 506; *Looe Shee* v. *North*, 170 Fed. Rep. 566; *Ex parte Li Dick*, 174 Fed. Rep; 674; *S. C.*, 176 Fed. Rep. 998; *Haw Moy* v. *North*, 183 Fed. Rep. 89.

No appearance for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of habeas corpus. It was dismissed by the District Court, 176 Fed. Rep. 933, but was sustained by the Circuit Court of Appeals, which ordered the parties concerned to be discharged from custody. 181 Fed. Rep. 313. 104 C. C. A. 535. The parties are Chinamen who entered the United States surreptitiously, in a manner prohibited by the immigration act of February 20, 1907, c. 1134, § 36, 34 Stat. 898, 908, and the rules made in pursuance of the same, if applicable to Chinese. They were arrested *in transitu* and ordered by the Secretary of Commerce and Labor to be deported. §§ 20, 21. But as it transpired in the evidence that they were laborers, the Circuit Court of Appeals held that they could be dealt with only under the Chinese exclusion acts of earlier date. Those acts make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing them. Hence it was concluded that such persons were tacitly excepted from the general provisions of the immigration act, although broad enough to include them and although of later date.

We are of opinion that the Circuit Court of Appeals made a mistaken use of its principles of interpretation. By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the Government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the Government a better remedy against them alone of all the world, now that one has been created in general terms.

To allow the immigration act its literal effect does not repeal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not, in § 43. The present act does not contain the clause found in the previous immigration act of March 3, 1893, 27 Stat. 569, c. 206, that it shall not apply to Chinese persons, and, on the other hand, as it requires deportation to the trans-Pacific ports from which such aliens embarked for the United States, § 35, it is rather hard to say that it has not the Chinese specially in mind.

Judgment reversed.

LOUISVILLE & NASHVILLE RAILROAD CO. *v.* F. W. COOK BREWING CO.

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

No. 64. Submitted November 13, 1911.—Decided January 22, 1912.

This court has jurisdiction of an appeal from the Circuit Court of Appeals in this case, as the jurisdiction of the Circuit Court did not depend only on diversity of citizenship, but the constitutionality of a state law and the construction of a Federal statute were also involved.

Where relief in equity may be admissible under any circumstances at all, the objection of adequate remedy at law comes too late when made for the first time in this court.

Where a common carrier threatens to abjure its functions and duties as such in regard to a commodity, equity can grant relief to a dealer in such commodity whose business would be ruined by such continual action by the common carrier.

Beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.

A State cannot forbid a common carrier to transport intoxicating liquors from a consignor in one State to a consignee in another State.

Until transportation of intoxicating liquor from one State to another is concluded by delivery to the consignee, the article transported does not become subject to state regulation.

The Wilson Act of August 8, 1890, c. 728, 26 Stat. 313, does not apply to interstate shipments of liquor until delivery to the consignee.

The Kentucky statute of 1906, prohibiting common carriers from transporting intoxicating liquors to "dry" points in Kentucky, while a valid enactment as to intrastate shipments, was not effective as to interstate shipments; in that respect it was an unconstitutional interference with interstate commerce.

A state statute regulating shipments of common carriers, although legal as to intrastate shipments, if illegal as to interstate shipments imposes no obligation upon the carrier in regard thereto, nor affords any excuse for refusal to perform its duties as a carrier.

Where the action of the common carrier is not discriminatory and the question is not an administrative one within the scope of the Interstate Commerce Commission, a question of general law as to the duties of the carrier arises which is one for a judicial tribunal, and not competent for the Commission; and the fact that the carrier may have filed notice with the Commission does not give it jurisdiction of the subject.

Where reasonableness of, or discrimination in, rates, is not an element, but the common carrier bases a refusal to perform its duty as such on legislative enactments, a shipper can resort to the courts to compel him to do so without first obtaining a finding from the Interstate Commerce Commission. *Texas & Racific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 246, distinguished.

172 Fed. Rep. 117, affirmed.

THIS suit started in a court of the State of Indiana and was removed by the defendant, now the appellant, to the Circuit Court of the United States.

The Brewing Company is an Indiana corporation, engaged in brewing beer at Evansville, Indiana, and sells its product in state and interstate trade. The Railroad Company is a Kentucky corporation, owning and operating a line of railway extending into many States, including Indiana and Kentucky.

The complaint averred, that although prepayment of freight had been tendered and every shipping regulation complied with, the railroad company had refused to accept for carriage from Evansville, Indiana, to stations on the line of its railway in the State of Kentucky, beer in kegs and cases, consigned to points which were "local option" or "dry" localities under the law of Kentucky, and had notified complainant and the public that it would discontinue receiving consignments of beer or other liquors for points in the State of Kentucky where the local option law of that State was in operation. The prayer of the bill was that the railroad company be enjoined from so refusing to accept the product of the brewing company for transportation from Evansville to such local option points in Kentucky.

A preliminary injunction was issued as prayed. Thereupon the defendant removed the case to the Circuit Court of the United States, upon the ground that there was diversity of citizenship, and also because the case involved questions arising under the Constitution and laws of the United States, namely, the validity of the law of Kentucky prohibiting the transportation and delivery of liquors to points in that State where the sale was prohibited, and also as a case arising under the act of Congress regulating interstate commerce of February 4, 1887, 24 Stat. 379, c. 104, as amended June 29, 1906, 34 Stat. 584, c. 3591. An answer was then filed and the cause heard upon bill and answer, with the result that the preliminary injunction allowed by the state court was made permanent and the railroad company enjoined from refusing to receive and carry beer from Evansville to any point upon its line of road in the State of Kentucky, wet or dry. An appeal by the railroad company to the Circuit Court of Appeals resulted in an affirmance of the order of the Circuit Court. For the opinion, see 172 Fed. Rep. 117.

Mr. Henry L. Stone and *Mr. Philip W. Frey*, with whom *Mr. George R. DeBruler* was on the brief, for appellant:

Shipments of beer or intoxicating liquor are interstate shipments, and as such constitute interstate commerce, and are regulated and to be governed by the provisions of the Act to Regulate Commerce and the amendments thereto. See § 1, as amended June 29, 1906; § 3, commonly known as the discrimination section, and §§ 13, 15 and 16, which prescribe the methods of civil procedure for the enforcement of the orders of the Commission where the carrier fails or neglects to obey the same.

This machinery was provided by Congress for the regulation of interstate commerce and the redress of all grievances and was intended to be exclusive of all other remedies for all unlawful acts of the carriers. *Central Stock Yards* v. *L. & N. R. R. Co.*, 112 Fed. Rep. 823; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Howard Supply Co.* v. *Ches. & Ohio Ry. Co.*, 162 Fed. Rep. 188; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Danciger* v. *Wells, Fargo & Co.*, 154 Fed. Rep. 379.

The order granting the preliminary injunction is void, because the state court of Indiana in which the suit started thereby undertook to affect property and rights of the parties beyond its territorial jurisdiction, or that of the Circuit Court into which the case was removed. The state court had no power to grant a mandatory injunction requiring appellant to perform acts in Kentucky affecting property in that State. 11 Cyc. 684; *Western Union Teleg. Co.* v. *West. & Atl. R. R. Co.*, 8 Baxter (Tenn.), 54.

After removal, it was the duty of the court below to dissolve the temporary restraining order and dismiss the action. *Auracher* v. *Omaha & St. L. Ry. Co.*, 102 Fed. Rep. 1; *Swift* v. *Phila. & Reading R. R. Co.*, 58 Fed. Rep. 858; *Sheldon* v. *Wabash R. R. Co.*, 105 Fed. Rep. 785.

A party on whose petition a cause is removed into the

Federal court is estopped to deny the jurisdiction of such court to render judgment against him therein *unless* on the ground that the state court was without jurisdiction. *Cowley* v. *Northern Pac. Ry. Co.*, 159 U. S. 569; *Mastin* v. *Chicago, R. I. & P. Ry. Co.*, 123 Fed. Rep. 827.

Even if the state court had jurisdiction, there was no equity in the bill. It is not averred that appellee was without adequate remedy at law. In fact, appellee had a complete remedy at law for the recovery of the damages, if any, it had sustained by appellant's refusal to ship and deliver shipments of beer offered by it for shipment, consigned to persons at the local option points in Kentucky, whose licenses to sell intoxicating liquors had expired. It is not alleged by appellee that it had any other kind of customers in Kentucky besides those who were engaged in the sale of such liquors under licenses so to do.

The rule of the appellant not to accept, transport, or deliver intoxicating liquors consigned to points in Kentucky, where the sale of such liquor is prohibited by law, is reasonable and valid.

At common law a common carrier was not required to transport all commodities; he was only bound to carry the things which he was in the habit of carrying and which were within his profession as a common carrier. *Dickson* v. *Great Northern Ry. Co.*, 5 Eng. Ruling Cas. 358.

Assuming the Kentucky act of 1906, prohibiting the shipment of liquor into local option districts, to be invalid as to interstate shipments, a common carrier which has adopted a rule or regulation to conform to the law as written cannot be required by mandatory injunction to accept liquor offered for shipment from a point outside of Kentucky for local option points within that State. 5 A. & E. Ency. of Law, 2d ed., 162; 4 Elliott on Railroads, §§ 1465, 1466; Moore on Carriers, § 5, p. 98; Hutchinson on Carriers, §§ 144–147.

Where it treats all of a class alike, a railroad company

can make reasonable rules, and can refuse to accept goods for carriage; *Harp* v. *Choctaw &c. Ry. Co.*, 118 Fed. Rep. 169; *S. C.*, aff'd, 125 Fed. Rep. 445; *Int. Com. Comm.* v. *Cincinnati &c. Ry. Co.*, 167 U. S. 479; *Int. Com. Comm.* v. *Baltimore & Ohio Ry. Co.*, 43 Fed. Rep. 37; *S. C.*, aff'd, 145 U. S. 263; *Kansas Pacific R. R. Co.* v. *Nichols*, 9 Kansas, 243; *Johnson* v. *Midland Ry.*, 4 Exch. 367.

The question is whether the rule or regulation restricting the business is a reasonable one. The carrier cannot arbitrarily refuse to carry a certain kind of goods which it has every facility to carry, and the carriage of which will not endanger its property, or the lives, property, health or morals of others. It cannot be said that it is unreasonable for a carrier to adopt a rule that it will not ship liquor into districts in which the sale of liquor is prohibited by state law, and into which the legislature has declared that it shall be unlawful to ship liquor, although the statute prohibiting the shipment is invalid as to interstate shipments.

Carriers have some discretion, upon giving due notice, as to what they will carry, provided all persons are treated alike, without discrimination. The legislature cannot require the carrier to separate interstate passengers from intrastate passengers, but the carrier may make the separation if it elects to do so. *Hall* v. *DeCuir*, 95 U. S. 485. The carrier ought not to be required to take the risk of litigation and penalties. Under the statutes we are considering the carrier must, in order to be sure that it will escape the penalty, know that the goods have been ordered by some person in the State to which they are to be shipped, and if what purports to be an order is presented to the carrier, it takes some risk, unless it knows that the order is genuine. *American Express Co.* v. *Commonwealth*, 30 Ky. Law Rep. 207; *Crigler &c.* v. *Commonwealth*, 27 Ky. Law Rep. 921.

The risks are so great as to justify the carrier in making

a regulation, upon due notice, that it will not carry intoxicating liquors at all into any local option district, and that it will treat all shippers, both resident and non-resident, alike.

The legislature of Kentucky has legally determined, while dealing with a matter within its jurisdiction, that the shipment of liquor into the local option districts from any point is dangerous to the health, safety and good morals of the people of that district, and the carrier has a right to aid the people in avoiding that danger. It may refuse to carry high explosives because of the danger to life and property, although such explosives are essential to the conduct of useful business enterprises, but the theory upon which the statute in this case is based is that liquor is not only dangerous to life and property, but to the health and good morals of the people. See *Adams Express Co.* v. *Commonwealth*, 5 L. R. A. (N. S.) 630; *S. C.*, 92 S. W. Rep. 932, where the court said that an express company could not legitimately thrust the shadow of its greed between the people and their uplift.

See *Champion* v. *Ames*, 188 U. S. 321, upholding an act of Congress prohibiting the carriage of lottery tickets by express companies engaged in interstate commerce. See also *Austin* v. *Tennessee*, 179 U. S. 343.

One who sells goods to be delivered in another State may have the constitutional right to deliver them, but he has no constitutional right to have them delivered by a carrier who does not profess to carry that class of goods, but refuses to do so for anyone, after giving due notice to all. *Cook* v. *Marshall County*, 196 U. S. 261; *Mugler* v. *Kansas*, 123 U. S. 662; *State* v. *Goss*, 59 Vermont, 266.

A carrier may lawfully refuse to carry goods where such service will be exposed to peculiar and unusual danger, for instance, to the fury of a mob. *Pearson* v. *Duane*, 4 Wall. 605, 615.

Already Congress had made considerable progress in

providing restrictions upon the interstate transportation of intoxicating liquors by common carriers. See act of March 4, 1909, §§ 238–240; U. S. Comp. Stat., Supp. 1909.

The people of prohibition States and of localities in other States who have voted out or prohibited the sale of intoxicating liquors have long waited for an act of Congress positively prohibiting the transportation of such liquors from points without to points within such States and localities; and, in the absence of Federal legislation to that end, it is within the lawful powers of interstate carriers to establish reasonable regulations, such as this record shows appellant unselfishly adopted, foregoing the revenue to be derived from such traffic, after due notice to the public, whereby they will not transport or deliver such liquors to points in prohibition territory, no matter whether the same be interstate or intrastate traffic.

In Kentucky to-day there are ninety-six "dry" counties, and only twenty-three "wet" counties. See *Adams Express Co.* v. *Kentucky*, 206 U. S. 129; *Milwaukee Malt Extract Co.* v. *Chicago &c. Ry. Co.*, 73 Iowa, 98.

There is manifest and well-recognized difference between intoxicating liquors and all other kinds of merchandise. By the common consent of mankind the trade in intoxicants is regarded as dangerous and a menace to the public. Such liquor is an article which is in a class by itself, and it is made by the Wilson Act of 1890 subject to the will of the State, and so it is competent for the legislature to prohibit the sale of liquor in original packages by the consignee within the limits of the State, although it may have been shipped from a point without the State and thus have been the subject of interstate commerce. *Platt* v. *LeCocq*, 158 Fed. Rep. 723.

Mr. George A. Cunningham for appellee:

This suit does not arise under the Interstate Commerce

Act, nor does it arise under the Constitution and laws of the United States, and the appeal should be dismissed. *Empire State-Idaho M. & D. Co.* v. *Hanley*, 198 U. S. 292; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526; *Bonin* v. *Gulf Co.*, 198 U. S. 115; *Bankers' Mutual Casualty Co.* v. *Railway Co.*, 192 U. S. 371; *Cochran* v. *Montgomery County*, 199 U. S. 182, 260; *Chapman* v. *Brown*, 207 U. S. 88, 116; *Empire State-Idaho M. & D. Co.* v. *Hanley*, 205 U. S. 225; *Weir* v. *Rountree*, 216 U. S. 603; *St. L., K. C. & C. R. Co.* v. *Wabash Co.*, 217 U. S. 247; *Bagley* v. *General Fire Ex. Co.*, 212 U. S. 477.

This is not a case in which the remedies provided by the Interstate Commerce Act are exclusive. Those remedies are exclusive only when it is sought to enforce some provision of the act itself, and not when it is sought to enforce a right theretofore existing either at common law or by statute, unless the enforcement of such right is by the act committed to some other tribunal. *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 112 Fed. Rep. 823, and *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, do not apply, and see *Danciger* v. *Wells-Fargo & Co.*, 154 Fed. Rep. 379.

The state court had jurisdiction of the subject-matter and of the parties, so that it was authorized to issue a temporary restraining order.

Where a court has jurisdiction of the parties, especially in cases of injunction and specific performance, it will grant relief, even though the property to be affected is in another State. Even proceedings in the courts of one State may be enjoined by courts of another State where the latter have jurisdiction of the parties. 1 High on Injunctions, 4th ed., § 103; 6 Pomeroy's Eq. Jur., § 670; *Eingarter* v. *Illinois Steel Co.*, 59 Am. St. Rep. 859, note; *Hawkins* v. *Ireland*, 58 Am. St. Rep. 534, note; *Hayden* v. *Yale*, 40 Am. St. Rep. 232; and see *C., B. & Q. Ry. Co.*

v. *B. C. R. & N. Ry. Co. et al.*, 34 Fed. Rep. 481; Hutchinson on Carriers, 3d ed., § 149; *Bluthenthal* v. *Southern Ry. Co.*, 84 Fed. Rep. 920.

As to the right to mandatory injunction in cases of this kind, see Elliott on Railroads, 2d ed., § 1564, and authorities there cited. Mandatory injunction is the proper remedy to compel a carrier to accept shipments of intoxicating liquors which it refuses because of void state legislation. *Danciger* v. *Wells-Fargo & Co., supra; Crescent Liquor Co.* v. *Platt*, 148 Fed. Rep. 897.

The appellant has the right to make any rule that it will not accept, transport, or deliver intoxicating liquors consigned to points in Kentucky where the sale of such liquor is prohibited by law.

As to the act of March 21, 1906, making it unlawful to bring or deliver any intoxicating liquor into any local option county or district of the State of Kentucky, and imposing penalties, the Court of Appeals of the State of Kentucky, in October, 1907, about six months after this answer was filed, held that act unconstitutional and void as to interstate shipments. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Kentucky*, 104 S. W. Rep. 394; citing *Heyman* v. *Southern Ry. Co.*, 203 U. S. 270; *Rhodes* v. *Iowa*, 170 U. S. 412; *Lord* v. *Goodall*, 102 U. S. 541, holding that the transportation of intoxicating liquor from one State to another is interstate commerce and entirely beyond the control of the States.

Appellant admits in effect that it accepts and delivers beer to all places along its line other than local option districts. It is not the rule that it will not carry intoxicating liquors at all, and therefore does not bring itself within the reasoning of those decisions that concede to the carrier the right to determine within reasonable limitations what class of merchandise it will carry. Should the appellant adopt a general rule not to carry intoxicating liquors at all, a somewhat different question may be presented;

but even in such a case the courts would say that the rule was unreasonable.

The Court of Appeals of Kentucky has, since this litigation was instituted, decided the main question involved adversely to the appellant, holding that shipments of the kind involved in this suit constitute interstate commerce and are entirely beyond the control of the State. *Commonwealth* v. *McKinney*, 131 S. W. Rep. 497; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218; *Kentucky* v. *Scott*, 133 S. W. Rep. 766.

The control of all interstate shipments is vested in Congress, and no State may make any law limiting the right of a citizen of one State to purchase any article of commerce in any other State and to have the same shipped to him wherever he may be without regard to the laws of any State. *State* v. *Wignall*, 128 N. W. Rep. 935.

Notwithstanding any effects of intoxicating liquors, beer is recognized as an article of interstate commerce and is entitled to the protection of the law to the same extent and under the same conditions as other commodities. *Danciger* v. *Stone*, 187 Fed. Rep. 823; *S. C.*, 188 Fed. Rep. 510; *Barrett* v. *City of New York*, 183 Fed. Rep. 793.

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

1. The jurisdiction of this court to entertain an appeal in this case cannot be seriously controverted. The jurisdiction of the Circuit Court was not dependent alone upon diversity of citizenship. There was involved not only the validity of the law of Kentucky as a regulation of interstate commerce, but a question as to whether the sole remedy in any such case was not by an application to the Interstate Commerce Commission.

2. The objection that there was an adequate remedy at law, assuming that the subject is one for any tribunal other

than the Interstate Commerce Commission, comes too late, if ever available, the objection being now made for the first time, so far as is discoverable from the record. The announced purpose of the railroad company to abjure its function and duty as a common carrier in respect of interstate shipments of all intoxicating liquors to localities in the State of Kentucky, where the Kentucky local option prohibition laws prevailed, threatened the ruin of complainant's business, and relief by injunction against such a continued course of conduct was certainly one which in such circumstances might be granted. Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say that there was an adequate remedy at law only upon review proceedings. *Kilbourn* v. *Sunderland*, 130 U. S. 505.

3. The case was heard upon bill and answer. The defense is based solely upon the terms of the Kentucky act of March 21, 1906, now § 2569–a, Carroll's Kentucky Statutes of 1909, entitled an act "to regulate the carrying, moving, delivering, transferring or distribution of intoxicating liquors in local option districts." By that act it is made unlawful for any common carrier to transport beer or any intoxicating liquor to any consignee in any locality within the State where the sale of such liquors has been prohibited by vote of the people under the local option law of the State. A violation of the law subjects the offender to a fine of not less than fifty nor more than one hundred dollars for each offense.

Upon the assumption that this legislation effectively prohibited both state and interstate transportation of such commodities within the State, the railroad company notified all of its agents, in and out of the State, to refuse to receive such liquors when consigned to any local option point. This notification was by a printed circular letter, which set out the full text of the act, and gave a full list of all such local option points. In express terms this

notification applied to both inter- and intrastate shipments; and, it is averred, this circular was filed with the Interstate Commerce Commission. It is not, however, averred that the Commission either took any action thereon, or that it was asked to take any action.

The legality of the attitude of the railroad company toward interstate shipments of intoxicating liquors to local option points in Kentucky must turn upon the validity of that legislation as applied to interstate shipments.

By a long line of decisions, beginning even prior to *Leisy* v. *Hardin*, 135 U. S. 100, it has been indisputably determined:

a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

b. That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another;

c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition.

The Wilson act, which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson act construed are: *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *Vandercook Co.*, 170 U. S. 438; *Heyman* v. *Southern Railway*, 203 U. S. 270; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218.

Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky Court of Appeals, upon the authority of the line of cases

above cited, reached the same conclusion. *Cincinnati, N. O. & T. P. R. Co.* v. *Commonwealth*, 126 Kentucky, 563.

The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other States any commodity which is an ordinary subject of interstate commerce, and such transportation, could not be prohibited by any law of the State of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce not authorized by the police power of the State. It is obvious, therefore, that in so far as the Kentucky statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey, nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight.

The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis for an argument that neither the state court nor the Circuit Court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce.

Why should the brewing company have made complaint to the Commission. What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities. Evans-

ville was not discriminated against in favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

The decision in the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate-making necessarily required a resort to that body as a basis for a common law recovery of an excessive charge.

The result is that the decree of the court below must be

Affirmed.

WASKEY *v.* HAMMER.

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

No. 84. Argued December 7, 1911.—Decided January 22, 1912.

A discovery of mineral within the limits of a mining claim is essential to its validity; proximity will not suffice.

An original location is invalidated by readjusting the lines so as to exclude the point or place of the only prior discovery.

A readjusted location becomes effective as of the date of the readjustment as though it were a new one, and if the locator is disqualified at the time of the readjustment, the location is invalid.

A prohibition against purchase of public lands by officers of the Land Department and employés is to prevent abuse and inspire confidence in administration of the land laws, and should be construed broadly to include officials and employés of subordinate offices and all methods of securing title to public lands under the general laws.

A United States mineral surveyor is disqualified under § 452, Rev. Stat., from making a mining location.

Although the opinion may possibly go beyond the necessities of the case concerning the statute, if it states the natural effect to be given to a statute, and that view is accepted and acted upon for many years by the Department enforcing it, the construction should not be disturbed.

The general rule of law that an act done in violation of statutory prohibition is void and confers no right upon the wrongdoer, held applicable in this case and not subject to the qualification that it was the legislative intent that under the circumstances of the case the statute should not apply.

The fact that a statute prescribes a penalty for the doing of a prohibited act does not confine the scope of the statute to the prohibition, or make the prohibited act valid as against parties other than the Government, and so held as to § 452, Rev. Stat.

170 Fed. Rep. 31, affirmed.

THE facts, which involve the construction of the mining laws of the United States and conflicting claims thereunder, are stated in the opinion.

Mr. Albert Fink, with whom *Mr. W. H. Metson, Mr. Ira D. Orton* and *Mr. E. H. Ryan* were on the brief, for petitioners:

This case is a purely possessory action between two individuals and not a patent proceeding.

Notwithstanding § 2319, Rev. Stat., *Manuel* v. *Wulff,* 152 U. S. 505; *McKinley Mining Co.* v. *Alaska Mining Co.,* 183 U. S. 563, hold that no one other than the Government can question the validity of the location on ground of non-citizenship.

Location by an alien is voidable and not void and free from attack by any one except the Government. *Shea* v. *Nilima,* 133 Fed. Rep. 209, 215; *Tornanses* v. *Melsing,* 109 Fed. Rep. 711; *Lone Jack M. Co.* v. *Megginson,* 82 Fed. Rep. 89; *Billings* v. *Aspen M. & S. Co.,* 52. Fed. Rep. 250; *Holdt* v. *Hazard,* 102 Pac. Rep. 540. See also Shamel on Mining Law, 108; Morrison's Mining Rights, 13th ed. 308; Lindley on Mines, § 233; Martin's Mining Law, § 98; Costigan on Mines, § 263; Ricketts on Mines, § 163.

The cases arising under the National Banking Acts are analogous, and this court has uniformly held that securities taken in violation of law are enforceable by the banks, when their validity has been questioned by private persons, the same being voidable only at the instance of the Government on office found. *National Bank* v. *Matthews,* 98 U. S. 621, 627; *Oates* v. *National Bank,* 100 U. S. 239, 249; *National Bank* v. *Whitney,* 103 U. S. 102, 103; *Reynolds* v. *Bank,* 112 U. S. 405; *Schuyler National Bank* v. *Gadzen,* 191 U. S. 451.

In the case of contracts of foreign corporations made in violation of state statutes, no one can question their validity except the sovereign on direct proceedings instituted for that purpose. *Fritts* v. *Palmer,* 132 U. S. 282; *Seymour* v. *Slide,* 153 U. S. 523.

So as to cases arising under *ultra vires* acts of corporations. *Cowell* v. *Springs Co.,* 100 U. S. 55, 60; *Jones* v.

Habersham, 107 U. S. 174; *Blair* v. *City of Chicago*, 201 U. S. 450.

In cases arising under Indian Reservation Acts, where entry of one disqualified is valid on its face, no one but the Government through its land department can question the entry. *McMichael* v. *Murphy*, 197 U. S. 304; *Hodges* v. *Colcord*, 193 U. S. 192.

For analogous cases, see also *Webber* v. *Spokane &c.*, 64 Fed. Rep. 208; *Sanders* v. *Thornton*, 97 Fed. Rep. 863; *Brown* v. *Schlerer*, 118 Fed. Rep. 987; *Blodgett* v. *Lanyon Zinc Co.*, 120 Fed. Rep. 893; *Waterbury* v. *McKinnon*, 146 Fed. Rep. 737–739; *Dunlap* v. *Mercer*, 156 Fed. Rep. 545; *Newchatel* v. *New York*, 49 N. E. Rep. 1043; *Ledebuhr* v. *Wisconsin Trust Co.*, 88 N. W. Rep. 607, 609; *Meyers* v. *Campbell*, 44 Atl. (N. J.) 863; *Camp* v. *Land*, 122 California, 167.

There are only two decisions reported on the question whether a deputy surveyor can make a mineral location, one adverse to such right, *Lavignino* v. *Uhlig*, 71 Pac. Rep. (Utah) 1047, and one favorable in Nevada, *Hand* v. *Cook*, 92 Pac. Rep. (Nevada), 3. There have, however, been other cases decided by the Land Department on this subject; as to these see 2 Lindley on Mines, 2d ed., § 661; *Seymour* v. *Bradford*, 37 Land Dec. 61; *Leffingwell Case*, 30 Land Dec. 139; *In re Lock Lode*, 6 Land Dec. 105; *Dennison* v. *Willits*, 11 Land Dec. 261; 26 Land Dec. 122, 136.

While the construction so given by a Department of the Government to any law affecting its arrangements is certainly entitled to great respect, still, however, if it is not in conformity to the true intendment, and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. *United States* v. *Dickson*, 15 Pet. 161, and see also *United States* v. *Moore*, 95 U. S. 760, 763; *Quinby* v. *Colon*, 104 U. S. 420, 426; *Hastings & Dak. R. R. Co.* v. *Whitney*, 132 U. S. 357, 366.

A deputy mineral surveyor is not either an "officer, clerk or employé" in the General Land Office. See § 10, act of April 25, 1812, establishing a General Land Office, 2 Stats. 716; act of July 4, 1836, reorganizing the General Land Office, 5 Stats. 107; §§ 2207, 2319, 2334, Rev. Stat.; act of May 16, 1872, c. 152, § 1, 17 Stat. 91; act of May 17, 1884; General Mining Circular of December 18, 1903, 31 Land Dec. 453, 489; 32 Land Dec. 367.

A deputy mineral surveyor has no duties whatever to perform outside of the surveying of the mining claims owned by private parties by whom he is employed.

A deputy mineral surveyor is not an officer within the provisions of § 452. *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 303, 307; *United States* v. *Smith*, 124 U. S. 525, 532.

A deputy mineral surveyor is not a clerk in the General Land Office. As to definition of clerk, see Bouvier's Law Dictionary; *People* v. *Fire Commissioners*, 73 N. Y. 437, 442; *Satterlea* v. *Police Board*, 75 N. Y. 38; *People* v. *Fire Commissioners*, 73 N. Y. 437, 442.

A deputy mineral surveyor is not an employé in the General Land Office. As to definition of employé see Century Dictionary; Standard Dictionary; *McCluskey* v. *Cromwell*, 11 N. Y. 593.

A United States mineral surveyor receives no compensation from the United States of any kind or character. He is therefore not an employé of the Government. *United States* v. *Meiggs*, 95 U. S. 748; *Ex parte Burdell*, 32 Fed. Rep. 681; *Powell* v. *United States*, 60 Fed. Rep. 689, 690; *People* v. *Ahearn*, 110 N. Y. Supp. 306; *United States* v. *McDonald*, 72 Fed. Rep. 898; *Louisville, E. & St. L. R. Co.* v. *Wilson*, 138 U. S. 501, 505; *Auffmordt* v. *Hodden*, 137 U. S. 310; see also *Vance* v. *Newcomb*, 124 U. S. 311; *Pack* v. *The Mayor &c. of New York*, 8 N. Y. 222; *Campfield* v. *Lane*, 25 Fed. Rep. 128; *Kelly* v. *The Mayor of*

New York, 11 N. Y. 432; *Peter Morris* v. *Randall*, 73 N. Y. 416; *Blake* v. *Ferris*, 5 N. Y. 58.

By any fair interpretation of its terms, § 432 does not include United States deputy mineral surveyors. Where a statute plainly points out the persons subject to its provisions no others can by construction be brought within the purview thereof. 26 Am. & Eng. Ency. Law (2d ed.), 597; *Hamilton* v. *Rathbone*, 175 U. S. 4217.

Mr. Albert H. Elliot, with whom *Mr. George W. Rea* was on the brief, for respondents.

Mr. Justice Van Devanter delivered the opinion of the court.

This was an action of ejectment, the subject-matter of which was the overlapping portions of two placer mining claims in Alaska, one known as the Golden Bull and the other as the Bon Voyage. The plaintiffs claimed the area in conflict as part of the Golden Bull, and the defendants claimed it as part of the Bon Voyage. The facts, as they must be accepted for present purposes, are these:

In 1902 the Bon Voyage was located by J. Potter Whittren, he having previously made a discovery of placer gold within the ground which he included in the claim. Although not intended to be excessive, the claim embraced a trifle more than twenty acres, the maximum area permitted in a location by one person. In 1903 Whittren, upon ascertaining that fact, drew in two of the boundary lines sufficiently to exclude the excess, and in doing so left the point or place of his only prior mineral discovery outside the readjusted lines. Later in 1903, he made a discovery of placer gold within the lines as readjusted. At the time of drawing in the lines and making the subsequent discovery he was an United States mineral surveyor, but was not such at the time of the original location. In 1904 the Golden

Bull was located by B. Schwartz, and included a part of the ground embraced in the Bon Voyage. Neither claim was carried to patent or entry, and when the action was begun the defendants were in possession. The plaintiffs other than Schwartz claimed under him, and the defendants other than Whittren claimed under conveyances from him made after 1904.

Upon the trial the court, at the instance of the plaintiffs, directed a verdict in their favor, substantially upon the following grounds, taken collectively: 1. A discovery of mineral within the limits of a mining claim is essential to its validity; 2. The original location of the Bon Voyage was invalidated by the readjustment of its lines whereby the point or place of the only prior discovery of mineral was left without those lines; 3. The readjusted location was invalid because at the time of the discovery of mineral therein Whittren, being an United States mineral surveyor, was disqualified to make a location under the mining laws. The jury returned a verdict as directed, judgment was entered thereon, the judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, 170 Fed. Rep. 31, and the case is here upon certiorari. 216 U. S. 622.

Conceding that the unintentional inclusion of a trifle more than twenty acres in the Bon Voyage as originally located was an irregularity which did not vitiate the location, but merely made it necessary that the excess be excluded when it became known (*Richmond Mining Co.* v. *Rose*, 114 U. S. 576, 580; *McIntosh* v. *Price*, 121 Fed. Rep. 716; *Zimmerman* v. *Funchion*, 161 Fed. Rep. 859), we come to consider whether the location was invalidated when, by the readjustment of its lines, it was left without a mineral discovery therein. The mining laws, Rev. Stat. §§ 2320, 2329, make the discovery of mineral "within the limits of the claim" a prerequisite to the location of a claim, whether lode or placer, the purpose being to reward the

discoverer and to prevent the location of land not found to be mineral. A discovery without the limits of the claim, no matter what its proximity, does not suffice. In giving effect to this restriction, this court said, in *Gwillim* v. *Donnellan*, 115 U. S. 45, that the loss of that part of a location which embraces the place of the only discovery therein is "a loss of the location." Possibly what was said went beyond the necessities of that case, critically considered, but it illustrates what naturally would be taken to be the effect of the statute; and as that view of it has been accepted and acted upon for twenty-five years by the Land Department and by the courts in the mining regions, it should not be disturbed now. It follows that when, in 1903, Whittren excluded from the Bon Voyage the only place at which mineral had been discovered therein, he lost the location. That his purpose was not to give up the location, but only to eliminate the excess in area, is immaterial, because, although free to exclude any other part of the claim and to retain that embracing the discovery, he excluded the latter and thereby caused the location to be without a discovery within its limits. Possibly, as was suggested in argument, the discovery was excluded because it was not deemed sufficiently promising to make its retention advisable, but, however that may have been, its exclusion defeated the location and left the lands therein "open to exploration and subject to claim for new discoveries." *Gwillim* v. *Donnellan, supra.*

As no adverse right had intervened at the time of Whittren's subsequent discovery of mineral within the limits of the readjusted location, it must be conceded that that location became effective as of that time, just as if he had then marked those limits anew (2 Lindley on Mines, §§ 328, 330), unless he was then disqualified to make a location by reason of his having become an United States mineral surveyor; and so it is necessary to consider whether such a surveyor is within the prohibition of Rev. Stat.,

§ 452, and, if so, whether that prohibition made the readjusted location void, or only voidable at the instance of the Government. That section reads:

"The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

Mineral surveyors are appointed by the surveyor general under Rev. Stat., § 2334, and their field of action is confined to the surveying of mining claims and to matters incident thereto. They act only at the solicitation of owners of such claims, and are paid by the owners, not by the Government; but their charges must be within the maximum fixed by the Commissioner of the General Land Office, and their work must be done in conformity to regulations prescribed by that officer. They are required to take an oath, and to execute a bond to the United States, as are many public officers. Within the limits of their authority they act in the stead of the surveyor general and under his direction, and in that sense are his deputies. The work which they do is the work of the Government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims and to the Government. Of the representatives of the Government who have to do with the proceedings incident to applications for patents to mining claims, they alone come in contact with the land itself, and have an opportunity to observe its situation and character, and the extent and nature of the work done and improvements made thereon; and it is upon their reports that the surveyor general makes the certificate required by Rev. Stat., § 2325, which is a prerequisite to the issuance of a patent. See Mining Regulations of July 26, 1901, para-

graphs 90, 115–169, 31 Land Dec. 474, 489, 493; *Gowdy* v. *Kismet Gold Mining Co.*, 24 Land Dec. 191, 193. This résumé of their authority and duties, and of their relation to the surveyor general and the General Land Office, satisfies us that they are within the prohibition of § 452. That prohibition is addressed not merely to the officers of the General Land Office, or to its officers and clerks, but to its "officers, clerks and employés." These words, taken collectively, are very comprehensive and easily embrace all persons holding positions under that office and participating in the work assigned to it, as is the case with mineral surveyors. The purpose of the prohibition is to guard against the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to prevent abuse and inspire confidence in the administration of the public-land laws. So understanding the letter and purpose of the prohibition, we think it embraces the location of a mining claim by a mineral surveyor. True, it is addressed to officers, clerks and employés "*in* the General Land Office" and is directed against "the *purchase* of any of the public land" by them, but in view of the terminology common to public-land legislation, we think the reference to the General Land Office is inclusive of the subordinate offices or branches maintained under its supervision, such as the offices of the surveyors-general and the local land offices, and that the term "purchase" is inclusive of the various modes of securing title to or rights in public lands under the general laws regulating their disposal.

That the construction which we here place upon § 452 is the one prevailing in the Land Department is shown in its circular of September 15, 1890, 11 Land Dec. 348, wherein it is said: "All officers, clerks and employés in the offices of the surveyors general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Com-

missioner of the General Land Office, are, during such employment, prohibited from entering or becoming interested, directly or indirectly, in any of the public lands of the United States." The published decisions of the Secretary of the Interior, although disclosing instances in which that construction has been departed from or doubted, *Dennison and Willits*, 11 Copp's Land-Owner, 261; *Lock Lode*, 6 Land Dec. 105; *W. H. Leffingwell*, 30 Land Dec. 139, show that in the main it has been closely followed. *Herbert McMicken*, 10 Land Dec. 97, and 11 Land Dec. 96; *Muller* v. *Coleman*, 18 Land Dec. 394; *John S. M. Neill*, 24 Land Dec. 393; *Floyd* v. *Montgomery*, 26 Land Dec. 122, 136; *Frank A. Maxwell*, 29 Land Dec. 76; *Alfred Baltzell*, 29 Land Dec. 333; *Seymour K. Bradford*, 36 Land Dec. 61.

In principle, the recent case of *Prosser* v. *Finn*, 208 U. S. 67, goes far to sustain the view here expressed. There a special agent of the General Land Office, whose field of duty was in the State of Washington, made an entry of public land under the timber-culture law, and thereafter in all respects complied with that law. But it was held by this court that he was, in every substantial sense, an employé in the General Land Office, and therefore was within the prohibition of § 452.

The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer, but this rule is subject to the qualification that when, upon a survey of the statute, its subject-matter and the mischief sought to be prevented, it appears that the legislature intended otherwise, effect must be given to that intention. *Miller* v. *Ammon*, 145 U. S. 421, 426; *Burck* v. *Taylor*, 152 U. S. 634, 649; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 548. Here we think the general rule applies. The acts described in § 452 are expressly prohibited under penalty of dismissal. There is in its language nothing indicating that its scope is to be con-

fined to the exaction of that penalty, *Prosser* v. *Finn, supra,* or that acts done in violation of it are to be valid against all but the Government. Nor is there anything in its subject-matter or in the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable, from the language of the section and the situation with which it deals, that it is intended that violations of it shall be attended by the ordinary consequences of unlawful acts. We therefore are of opinion that the readjusted location was void.

Affirmed.

UNITED STATES EX REL. LOWE *v.* FISHER, SECRETARY OF THE INTERIOR.

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

No. 445. Argued November 14, 1911.—Decided January 29, 1912.

Where the Court of Claims has kept control of a case referred to it by act of Congress giving it jurisdiction as to all questions, its reply made to the request of the officer of the Government charged with execution of its judgment for further opinion is to be regarded as part of the decision.

The limitations on the right to return to the tribe in Art. IX of the Cherokee Treaty of August 11, 1866, refer to both freedmen and free colored persons; and freedmen and descendants of freedmen who did not return within six months are excluded from the benefit of the treaty.

Notwithstanding a decree of the Court of Claims determining the rights of Indians in a case over which Congress gave the court jurisdiction, it is competent for Congress to deal further with the subject. *Stephens* v. *Cherokee Nation,* 174 U. S. 445; *Wallace* v. *Adams,* 204 U. S. 415.

Quære: Whether a roll of citizenship of an Indian tribe, made under

direction of the Court of Claims, has the conclusive effect of a judicial decree.

Under the acts of Congress of 1902 and 1906 in regard thereto, the enrollment of freedmen of the Cherokee tribe was to be made in strict conformity with the decree of the Court of Claims, and should include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal *bona fide* residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence within six months thereafter.

While the Secretary of the Interior did not have power to strike names from the roll of Cherokee citizens without notice and opportunity to be heard, he did have power, after such notice and opportunity had been given, to strike from the roll names which had been placed thereon through fraud or mistake. *Garfield* v. *Goldsby*, 211 U. S. 249.

35 App. D. C. 524, affirmed.

THE facts, which involve the construction of the various treaties, acts of Congress and decisions of the Court of Claims in regard to the rights of Cherokee freedmen and their descendants to share in the distribution of tribal property, are stated in this opinion.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler*, *Mr. J. K. Jones* and *Mr. Frank E. Duncan* were on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Harr for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case involves the question whether the Secretary of the Interior, after due hearing and after having made up a roll of citizens of the Five Civilized Tribes of Indians and after having issued certificates of allotment to the enrolled Indians, may strike their names from the roll after

giving due notice of his intended action and an opportunity to be heard.

The case arose upon the exercise of such power by the Secretary and an action of mandamus to require him to cancel his action. To the answer of the Secretary the Supreme Court of the District of Columbia sustained a demurrer and entered a judgment in accordance with the prayer of the petition. The Court of Appeals reversed the judgment. On return of the case to the Supreme Court the relators elected to stand on their demurrer and the court dismissed their petition. This action was affirmed by the Court of Appeals and the case was then brought here.

It was decided in *Garfield* v. *Goldsby*, 211 U. S. 249, that the Secretary had no such power without notice to the parties concerned and an opportunity to be heard. These conditions were performed in the present case, and, so far, the case is distinguished from the *Goldsby Case*. The power of the Secretary upon the rehearing under the applicable statutes is now to be considered.

The relators base their right of enrollment on Article IX of the Cherokee treaty of August 11, 1866 (14 Stat. 799), the material part of which is as follows: "They [Cherokee Nation] further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now resident therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees." It was found by the Secretary of the Interior that relators were descendants of liberated slaves, but he also found that their ancestors had not returned to the Cherokee Nation within six months of the date of the treaty, August 11, 1866. This must be assumed to be the fact, for it is alleged in the answer and admitted by the demurrer. Two propositions of law are, however, urged

by relators: (1) that the requirement of a return within the time designated applies only to free colored persons; and (2) that the Secretary having, on November 16, 1904, approved a list of Cherokee freedmen, containing the names of relators, on the ground that their ancestors had complied with the provision for return to the Nation, had no power to cancel their names.

(1) Article IX of the treaty is undoubtedly ambiguous, and to support their construction of it relators trace its genesis to the compulsion exercised on the Cherokee Nation by the United States for its espousal of the cause of the Confederacy during the Civil War. The Indians, it is said, were regarded as having forfeited their treaty rights, but the United States were willing to renew relations with them, stipulating, among other things, that "the institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for."

The Indians resisted the conditions, and replied that it would not be for the benefit of the emancipated negro, nor for the Indians, to incorporate the former into the several tribes on an equal footing with the original members. They conceded, however, that the emancipated negro must be suitably provided for, and subsequently the Choctaws suggested that white persons should be excluded from their Territory, and that "no person of African descent, except our former slaves, or free persons of color who are now, or have been, residents of the Territory, will be permitted to reside in the Territory, unless formerly incorporated with some tribe, according to the usage of the band."

The Seminoles answered to the same effect, and asked that Article III be changed to admit only colored persons

lately held in bondage by them and free persons of color residing in the Nation previous to the rebellion, to a residence among them, and adoption in the Seminole tribe upon some plan to be agreed upon by them and approved by the Government. "We are willing," they said, "to provide for the colored people of our own Nation, but do not desire our lands to become colonization grounds for the negroes of other States and Territories." The Creeks expressed this in the same way, and the relators further adduce, as supporting their construction of Article IX, that the commission which negotiated the treaty, reporting on it officially, said: "Slavery is abolished and the full rights of the freedmen are acknowledged."

The history of Article IX, therefore, it is insisted, shows that the article consummated the purpose. In other words, when the Indians realized that they must provide for negroes, they limited their concession "to former slaves and then to any other negroes who had been in the Indian country at the outbreak of the war and might return within a short time after peace to make their home in the Indian Territory, thereby preventing a general influx of negroes who might seek free land." And the right to land, it is pointed out, was the consequence to be apprehended, as "lawful residence in the Indian Territory meant the right to occupy land."

It is further contended that the Cherokees acted upon the treaty practically in accordance with this construction of it, and that it was not until many years after that they "sought to refine it away and abrogate it in effect." They accepted it reluctantly, it is said, and subsequently contended that it conferred civil, not property, rights and passed what was known as the "Blood Bill," by which they sought to exclude all but native Cherokees by blood from participation in a large payment of funds which was about to be made. This gave rise to controversy, and Congress passed an act conferring jurisdiction on the

Court of Claims to settle the matter. The act is entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes." It was approved October 1, 1890 (26 Stat. 636, c. 1249). The Cherokee freedmen whose rights were to be determined under the act were those who "settled and located in the Cherokee Nation under the provisions and stipulations of article nine" of the treaty.

The court decided that under the Cherokee constitution of 1866 the freedmen became citizens equally with the Cherokees and equally interested in the common property and equally entitled to share in its proceeds *per capita*. But the court did not attempt an analysis of § 5 of the constitution nor of Article IX of the treaty (they are alike) but defined the rights of the freedmen and the free negroes in the language of the constitution and the article. 31 Court of Claims, 140. The opinion in the case, therefore, as delivered, had the same ambiguity as the constitution and treaty and was not understood by the Commissioner of Indian Affairs, who was charged by the Secretary of the Interior with the duty of determining who were the resident freedmen entitled to share in the disposition of the fund as decreed and who desired the further opinion of the court. In reply, the court said (31 Ct. Cl. 148):

"The court is of the opinion that the clauses in that article in these words, '*And are now residents therein, or who may return within six months, and their descendants,*' were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree."

Subsequently the court was called upon to add to its opinion, which it did, as follows: "The court is of the opinion that the *Act 2d March, 1895* (28 Stat. L., p. 910, § 11), prescribes the manner in which payments per capita shall be made and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior. The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs February 18, 1896.

"The within motion for instructions is overruled." 31 Court of Claims, 140, 148.

The relators contend that the reply of the court to the Commissioner was not part of its decision. This, however, is a mistake. The court had kept control of the case, and at the time of its reply to the Commissioner the case was pending upon certain motions made by the parties. And, as we have seen, the court had been given special jurisdiction of the question and all others which were involved in the controversy. But it is contended that the only issue submitted to the court was whether "the Cherokee freedmen, as a class, were entitled to share in the proceeds of the Cherokee outlet or strip lands west of the 90th meridian." It is, hence, further contended that the jurisdictional act did not extend to the determination of what particular persons composed such class or who were freedmen, and that, therefore, "the point now involved has not had judicial determination."

The object of the contention, no doubt, is to clear the way for the ultimate contention upon which their case must rest, the want of power of the Secretary of the Interior over rolls which he had once approved and after having issued certificates of allotment to the enrolled Indians. In other words, relators would push aside the adjudication of their disqualification to be enrolled, they not having returned to the Cherokee Nation within the time designated by the treaty. They, however, make

an alternative contention and urge that they were adjudged to be within the provisions of the treaty by their enrollment upon the Kern-Clifton roll, which they insist was adjudged to be legal evidence of the rights of the freedmen; in other words, that the enrollment identified the individual freedmen who were entitled to participate in the tribal property.

It is admitted in the answer that relators are on the Kern-Clifton roll, and it does not seem to be contested that the roll was made under instructions from the Court of Claims. A plausible argument, therefore, is presented that it partakes of the conclusive effect to be attributed to a judicial decree. And it is further urged by relators that the Kern-Clifton roll was confirmed by the act of June 10, 1896 (29 Stat. 321, 329, c. 398), which declared "that the rolls of citizenship of the several tribes as now existing are hereby confirmed."

What effect we should have to give to the decree, assuming it to go as far as contended, we are not called upon to say. It was certainly competent for Congress further to deal with the subject. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Wallace* v. *Adams*, 204 U. S. 415.

We pass, therefore, to a consideration of the act of June 10, 1896, upon which relators rely. It was one of a number of acts which exhibit a connected scheme for the enrollment of the members of the Five Civilized Tribes and the division of their tribal property, although their provisions are somewhat varying.

By the act of March 3, 1893 (§ 16, 27 Stat. 645), the Dawes Commission was created, with powers to negotiate with the tribes. In 1896, by the act of June 10th of that year (29 Stat. 321, c. 398), the Commission was directed to make up a roll of the citizens of the tribes, which included the Cherokees, who should apply within three months from the passage of the act, and to decide all such applications within ninety days after the same should be

made. Due force and effect was directed to be given to tribal rolls, usages, customs and laws, if not inconsistent with Federal laws. The act contained the provision which we have already quoted, that is, "that the rolls of citizenship of the several tribes as now existing are hereby confirmed." There were powers of review given to those aggrieved by the decision either of the Commission or the tribal authorities. The relators, however, say that "the Dawes Commission, as is matter of official history, did not adopt the tribal rolls as confirmed, but proceeded to try the rights of persons to be on the tribal rolls, and the controversy which ensued continued, and the rolls were not closed until March 4, 1907, Congress refusing to heed administrative appeals for more time."

But before that final date arrived Congress passed several acts, the provisions of which are relied on by relators as establishing their right. The acts would seem to demonstrate the contrary, and that the conditions which arose demanded changes in legislation. It is true that it is provided that the rolls of the tribes which were directed to be made, when approved by the Secretary of the Interior, should be final and should constitute the several tribes which they represented; and it is therefore contended that those provisions became legislative confirmations which the Secretary was without power to disregard, and that every partial list forwarded to him which he approved he could not afterwards change, whatever the proof of mistake, imposition or fraud. A few citations will prove the unsoundness of the contention.

The act of June 10, 1896, *supra*, which is so much relied on, was largely superseded by § 21 of the act of June 28, 1898, commonly known as the Curtis Act. 30 Stat. 495, 502, c. 517. The section gave the Commission the power to investigate the right of persons whose names were on the rolls and to "omit all such as may have been placed there by fraud or without authority of law, enrolling only such

as may have lawful right thereto," etc. And it was provided that the Commission "shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six." It was further provided that the Commission should "take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress. . . ."

It is manifest from this act that the contention of relators that the tribal rolls were to be treated or accepted as absolutely confirmed is unsound. One roll only was confirmed. The other rolls were to be corrected, not confirmed; and a roll of the Cherokee freedmen was to be made in conformity with the decree of the Court of Claims—a roll not confirmed, but to be made, so as to exclude the relators because they were excluded by the decree; that is, because they were not residents of the Cherokee Nation at the time of the promulgation of the treaty.

It does not appear that relators were on any roll prior to the passage of the act of June 10, 1896, upon which they so much rely, and therefore within its confirmatory provision, giving it all the force contended for. They were on the Kern-Clifton roll, it is said, but when that roll was made does not appear. The allegation of the petition is that prior to November 16, 1904, the Secretary of the Interior affirmed a decision by the Commissioner of the Five Civilized Tribes which held that relators were entitled to enrollment as citizens, and that prior to that date they were regularly ordered to be placed upon the final roll of freedmen citizens, and that such roll was duly and regularly approved by the Secretary of the Interior on the sixteenth of November, 1906.

But the act of July 1, 1902 (32 Stat. 716, 720, § 27), emphasized the requirement that the enrollment of freedmen

must be made in strict conformity with the decree of the Court of Claims. Congress was even more particular in the act of April 26, 1906 (34 Stat. 137). Section 3 of the act explicitly provided that "The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal *bona fide* residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven."

Relators nevertheless insist that notwithstanding they were not entitled to be placed upon the rolls, yet, having been placed there, they cannot be taken off by the Secretary of the Interior; citing in support of the contention certain provisions of the acts of Congress and the congressional policy expressed in them. The policy of the Government, it is said, was to expedite enrollment, with the view to the distribution of the tribal property and the preparation of the Indian Territory for statehood. To these ends the acts of May 31, 1900, 31 Stat. 221, c. 598, and March 3, 1901 (31 Stat. 1073, c. 832), endeavored to speed enrollment matters by directing the Secretary of the Interior to fix a time for closing the rolls, after which no name should be added thereto. Then came the act of July 1, 1902 (32 Stat. 716, c. 1375), which, it is insisted, practically repealed prior acts so far as they concerned enrollments. Such prior acts, it is said, "made approval of enrollments depend upon the completion of the rolls of an entire tribe, and the Secretary's approval under it would await the finishing of enrollments of an entire tribe." And until such time "there would be no allotment to any tribal member." The Secretary's control, hence, continued "until the last," and the congressional policy was likewise postponed. But, it is argued, contrasting the

new measures with the old, under the act of 1902 "enrollment and allotment went hand in hand." This contention is rested on § 29 of the act, which directs lists to be prepared of those found by the Commission to be entitled to enrollment; and, it is provided, that "the lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of their property shall be made;" and, further, that "when there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete."

A roll made complete, it is argued, by legislation excludes the idea of correction by an executive officer; and, besides, it is urged that the certificates of allotment carry with them the sanction of the law's declaration that they shall be "conclusive evidence" of the rights of the allottee. Physical possession of the lands described in them is to be given, it is pointed out, and, describing the conditions which were created and which would be disturbed by an exercise of power to recall them, it is said that "from the date of selection of their allotments under the law, allottees did lease their allotments for grazing, oil and gas, mineral, and other purposes." And, further, that "allottees also, from the same date, created town sites where practicable, and sold town lots, with their title resting in their allotment selections or certificates," and that such transactions have been declared valid by the Supreme Court of Oklahoma, citing *McWilliams Investment Co.* v. *Livingston*, 98 Pac. Rep. 914; *Godfrey* v. *Iowa L. & T. Co.*, 95 Pac. Rep. 792.

We recognize the strength of the considerations urged, but it certainly did not militate against the congressional policy of the allotment of lands to retain in the Secretary of the Interior the power of revision and correction until

the final moment when jurisdiction was expressly taken from him, as provided in § 2 of the act of April 26, 1906 (34 Stat. 137, c. 1876), that is, the fourth day of March, 1907. That Congress could give such power to the Secretary of the Interior is settled. *Stephens* v. *Cherokee Nation* and *Wallace* v. *Adams, supra.* In all the legislation providing for the making of the rolls care is observed to prevent or correct mistakes and to defeat attempts at fraud. We have seen what power the Dawes Commission was given to investigate the rights of persons whose names were on the rolls, and, as to freedmen, strict compliance with the decree of the Court of Claims was enjoined. By the act of March 3, 1905, 33 Stat. 1048, 1060, c. 1479, the work of completing the unfinished business of the Commission was devolved upon the Secretary of the Interior and all of the powers theretofore granted to the Commission were conferred upon the Secretary. It was subsequent to this act that action was taken as to relators and their names stricken from the rolls. This revisory and corrective power of the Secretary over the allotment of land is similar to that exercised by the Land Department respecting the entries upon public lands, which this court has stated to be correct and annul entries of land which were made upon false testimony and without authority of law. *Cornelius* v. *Kessel,* 128 U. S. 456, 461; *Hawley* v. *Diller,* 178 U. S. 476, 490.

Judgment affirmed.

CHEROKEE NATION AND UNITED STATES *v.* WHITMIRE, TRUSTEE FOR FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

No. 735. Argued January 9, 10, 1912.—Decided January 29, 1912.

As after a decree of the Court of Claims in favor of the petitioner an act of Congress was passed, and the court made another decree granting the same relief, the second decree was a decision upon the effect of the subsequent legislation, and an appeal lies therefrom if taken within the time prescribed by law.

Held, that under the circumstances of this case, and the proceedings taken thereon, appellants' appeal was taken in time.

Lowe v. *Fisher*, *ante*, p. 95, followed as to the construction of the Cherokee Treaty of August 11, 1866, and as to the freedmen of the Cherokees and their descendants entitled to be enrolled as citizens and the power of Congress thereover, and that the Secretary of the Interior had the power, after notice and opportunity to be heard, to strike from the rolls names which had been improperly placed thereon through mistake or fraud.

44 Ct. Cl. 453, reversed.

THE facts, which involve the construction of the various treaties, acts of Congress and decisions of the Court of Claims in regard to the rights of Cherokee freedmen and their descendants to share in the distribution of tribal property, are stated in the opinion.

Mr. William W. Hastings for appellant, the Cherokee Nation.

Mr. Assistant Attorney General John Q. Thompson and *Mr. George M. Anderson*, filed a brief for appellant, the United States.

Mr. Samuel A. Putman and *Mr. Charles Poe*, with whom *Mr. Robert H. Kern* was on the brief, for appellee.

Mr. Charles M. Rice, Mr. George S. Ramsey and *Mr. C. C. Calhoun, Mr. Frank J. Boudinot, Mr. John J. Hemphill* and *Mr. Daniel B. Henderson,* filed briefs as *amici curiæ.*

MR. JUSTICE MCKENNA delivered the opinion of the court.

This appeal is prosecuted to review a supplemental decree of the Court of Claims enjoining and directing the Secretary of the Interior to enroll upon the final roll of the citizens of the Cherokee Nation for allotment of lands the names of certain persons and their descendants claiming rights as Cherokee freedmen, whose names were found upon the roll called the Kern-Clifton roll, which the decree adjudged was directed to be made by a former decree of the court. The names of those persons, who are appellees in this case, after investigation by the Secretary of the Interior, were found by him not entitled to be enrolled, and not entitled to participate in the distribution of tribal property.

The decision in *United States ex rel. Lowe* v. *Fisher, ante,* p. 95, has simplified the decision in this case. Indeed, the ultimate question in both is the same, the power of Congress over the allotment of Indian lands and the manner of ascertaining what persons shall be entitled to them. There were, however, contentions made in that case which are not made here. There are propositions of law conceded in this case which were contested in that. Therefore a brief summary of the elements necessary to a decision is appropriate.

Preceding the merits, however, motion to dismiss the appeal must be disposed of. The motion is made on the following grounds: (1) The decree of February 3, 1896, was a final decree from which no appeal was prosecuted to this court; (2) that the decree of February 20, 1911, hereafter referred to, was merely in the nature of an execution

of that of February 3, 1896, and defined no new rights, but enforced merely rights established and consented to; and (3) because, although the decree of February 20, 1911, was regularly entered on that day, the appeal now pending was not allowed or prosecuted until the seventeenth of June, 1911, more than ninety days after the entry of the decree.

The first and second grounds are untenable. The decree under review has broader application than that of February 3, 1896. It determined rights to allotments which had not then been provided for, and, assuming that it declared the principle by which such rights could be determined, there was, as we shall presently see, intervening legislation by Congress. This legislation gave rise to serious controversy. It confirmed, it was contended by petitioners (appellees here), and is yet contended by them, as we shall presently see, the decree of the court both as to the principle of the decree and also as to the means of identification of the individuals who would be entitled to rights under the principle. By the defendants (appellants here) it was contended that the legislation superseded the decree and made new provision for the identification of persons. The court decided in favor of the petitioners, and we think the decision is more than the execution of the decree of February 3, 1896. It is a decision upon the effect of subsequent legislation by Congress enacted in the exercise of its power over Indian affairs, a power which is not questioned.

The third ground urged for the dismissal of the appeal is also without merit. The contention is that the decree of the court became final the instant it was entered, February 20, 1911, and that an appeal was not taken from it until June 17, 1911, which was not within the time allowed by § 1069 of the Revised Statutes. There were, however, intervening proceedings. The record shows that "on March 30, 1911, the defendants [appellants] filed an application for appeal. On May 15, 1911, the defendants

filed a motion to withdraw the application for appeal filed March 30, 1911, which was allowed by the court May 15, 1911." On May 15, 1911, the defendants filed a motion for new trial, which motion was overruled June 5, 1911, "with privilege to the defendants to renew their application for appeal heretofore filed." The record further shows that the defendants, "from the decree rendered on the twentieth day of February, 1911, in favor of claimants, . . . make application for, and give notice of, an appeal to the Supreme Court of the United States." The application was allowed as prayed.

This court has decided that if a motion for new trial or petition for rehearing is made in season and entertained by the court, the time for taking an appeal or writ of error does not begin to run until the motion or petition is disposed of. *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675. It is, however, urged that the court lost jurisdiction of the case by the application for appeal filed March 30, 1911. *United States* v. *Adams*, 6 Wall. 101, is cited to support this contention. In that case the paper filed was as follows: "The United States, by E. P. Norton, its solicitor, makes application to the Honorable Court of Claims for an appeal of the case of *Theodore Adams* v. *The United States* to the Supreme Court of the United States." This application was filed within the ninety days allowed by the statute. The order allowing it, however, was not made until after the expiration of the ninety days. It was contended that both application and allowance should have been made within that time, but this court held otherwise, saying (p. 109) "that the filing of this paper was taking the appeal, and that the delay in the subsequent proceeding to render it effectual does not touch its validity."

It was not, however, decided that the Court of Claims lost control of the case. It was only decided that the party had secured a right under the statute. The rules of the

Court of Claims, made under regulations prescribed by this court, provided for further action to perfect the right acquired by the party which was made necessary by certain statutes under which only questions of law could be brought here for review. And the action was more than formal. It consisted in the finding of the ultimate facts in the nature of a special verdict and the questions of law therefrom to be certified to this court.

The practice in the Court of Claims is adverse to appellees' contention. The court followed the practice in entering the decree of February 3, 1896, the decree upon which appellees based all of their rights. It was substituted for a decree passed May 8, 1895. On the twentieth of July, following entry of the latter decree, the defendants filed a motion for rehearing and an application for appeal from the decree. A few days afterward the claimants also filed an application for an appeal. Later the defendants filed a motion for new trial. On January 30, 1896, the applications for appeal were withdrawn by leave of the court, and, on February 3, the decree of May 6, 1895, was vacated and the decree of the former date was entered.

It will be observed, therefore, that if the contention of appellees is correct that the Court of Claims lost jurisdiction of the decree under review by the application of appellants for an appeal March 30, 1911, the court lost jurisdiction of the case by the applications for appeal from the decree of May 8, 1895, and therefore had no jurisdiction to enter the decree of February 3, 1896, which is the foundation of the rights of appellees. Counsel would hardly like us to push their contention that far, and that far it might have to be pushed if it were tenable. The motion to dismiss is denied.

The Court of Claims obtained its jurisdiction of the questions involved by an act of Congress approved October 1, 1890, 26 Stat. 636, c. 1249, entitled "An Act to

refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes." The rights referred to the Court of Claims for adjudication were those "in law or in equity . . . of the Cherokee freedmen" who were "settled and located in the Cherokee Nation under the provisions and stipulations of article nine" of the treaty of 1866 "in respect to the subject matter" in the act provided for. The subject-matter was described to be "to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the . . . freedmen, which the Cherokee Nation" had "before paid out, or" might thereafter "pay per capita, in the Cherokee Nation, and which was or may be" refused or neglected "to be paid to the said . . . freedmen by the Cherokee Nation, out of any money or funds" which had been, or might be, "paid into the treasury of," or in any way had come or might come "into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude," and which had been or might be, "appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands and rights which" should "appear to be due to the said . . . freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement." 26 Stat. 636.

Article IX of the treaty of August 11, 1866, 14 Stat. 799, 801, the meaning of which was to be determined, provided as follows: "They [Cherokee Nation] further agree that all freedmen who have been liberated by the voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees."

Under the jurisdictional act, and in accordance with its provisions, suit was brought by the freedmen by their trustee, Moses Whitmire, against the Cherokee Nation and the United States to determine the rights of the freedmen under the treaty, which resulted in a decree of the court passed May 8, 1895. The course of the litigation will be found in 30 Ct. Cls. Reps. 138, 180, respectively.

The court decided that under the Cherokee constitution of 1866 the freedmen became citizens of the nation equally with the Cherokees and equally interested in the common property and equally entitled to share in its proceeds, but also decided that the freedmen to whom the treaty referred were those who had returned to the nation within six months after the promulgation of the treaty, and their descendants, and that the freedmen and the descendants of freedmen who did not return within six months were excluded from the benefits of the treaty. *United States ex rel. Lowe* v. *Fisher*, *ante*, p. 95.

The court decreed that the Cherokee Nation and the United States be prohibited from making any discrimination between such freedmen citizens and their descendants and native Cherokees in the distribution of a fund of $8,595,736 paid by the United States to the Cherokee Nation for that portion of its territory known as the "Cherokee Outlet."

The court conceived it necessary to ascertain the individual Indians who were entitled under its decree to share in the fund, and adjudged that the roll called the "Wallace Roll," which showed 3,524 persons, should be approved by the court.

Appeals were prayed by claimant and defendant, but were withdrawn afterward by stipulation, and a decree was entered February 3, 1896, as of May 8, 1895. The decree adjudged the rights of freedmen to be as we have hereinabove set out.

The decree also authorized the Secretary of the Interior

to appoint commissioners to make up a roll of the freedmen entitled to share in the fund to be distributed, which that officer did. They completed the roll which was thereafter known, and to which we have referred, as the Kern-Clifton roll. It was approved by the Secretary on the eighteenth of January, 1897, and in the succeeding month the moneys available for distribution were paid to the persons whose names were on the roll.

The legislation in regard to the allotment of lands and the making of rolls of persons entitled to allotments is detailed in *United States ex rel. Lowe* v. *Fisher*, and need not be repeated except in a very brief way. By virtue of that legislation the Dawes Commission, which had been created before the decree of February 3, 1896, proceeded to make up rolls, which were finally approved by the Secretary on March 4, 1907, from which were excluded a large number of freedmen whose names were on the Kern-Clifton roll, with the consequence that such persons so excluded will receive no allotments of lands or share in the moneys which stand to the credit of the Cherokee Nation in the Treasury of the United States.

On May 6, 1908, Jacob B. Wilson, by permission of the Court of Claims, and having been substituted trustee of the freedmen, filed a supplemental petition in the court in behalf of such excluded persons, which recited the decrees of the court and acts of Congress subsequent to them, asserted a right under the decrees and acts of Congress to be upon the rolls, to be allotted lands and to share in the distribution of funds, and prayed that the action of the Dawes Commission and of the Secretary of the Interior be declared unlawful, and that the Cherokee Nation and the United States be enjoined from discriminating between such freedmen and other citizens of the Cherokee Nation in the allotment of lands and the distribution of property and assets of the nation, and that it and the United States be further enjoined from further

disturbing such freedmen in the possession and occupation of their homes and improvements, and to reinstate such of them as have been ousted from such possession.

The court took jurisdiction of the petition, as we have seen, and decreed as it prayed. 44 Ct. Cls. 453. The court, in an elaborate and ably reasoned opinion, decided that its decree had larger scope than a description of the class of freedmen and the declaration of a principle, and that it undertook to identify "the individuals who were entitled to share in everything that was to be allotted or distributed." To this, the court said, the "defendants made no objections and acquiesced in the terms of the decree for the distribution of that part of the property then ready to be distributed." The court further said that "there was nothing in the terms of the decree or in the conduct of the parties affected by it to raise the inference that its language did not apply to all future distributions of the property, which the plaintiffs in that suit were entitled to have and enjoy whenever such property was ready for distribution."

The court, therefore, considered that the Kern-Clifton roll was made in compliance with the decree, and that the provisions of the Curtis Act, June 28, 1898, 30 Stat. 495, c. 517, requiring a roll to be made in "strict compliance with the decree of the Court of Claims rendered the third of February, eighteen hundred and ninety-six," necessarily confirmed the Kern-Clifton roll, and that the Dawes Commission, in disregarding it, disobeyed the command of the statute. "If," said the court, "the payment by the Secretary of the Interior was a 'compliance' with the provision of the decree for the payment of money, the refusal of the Dawes Commission to allow those same persons to participate in the common property, as further provided in the decree, is not a 'strict' compliance, nor, for that matter, a compliance of any kind."

The case is simplified by the concession of appellees that

the Congress had power to alter the decree and to adopt other means or ways for the disposition of the property than there provided. Indeed, the decree of the court recognizes this power and the case is brought to an interpretation of the acts of Congress subsequent to the decree. As we have already said, we have reviewed those acts in *United States ex rel. Lowe* v. *Fisher*, and, after a further consideration of them invoked in the case at bar and supported by the very able opinion of the Court of Claims, we adhere to the views there expressed. Congress accepted the decree as a correct interpretation of Art. IX of the treaty as to the rights of freedmen. It did not accept the Kern-Clifton roll as an authentic identification of the individual freedmen. It had been challenged. It had been made up with haste and under circumstances which caused question of its correctness. It had not received judicial approval. From the first to the last it was the act of administrative officers. Had it been reported to the court and its integrity established by the judgment of the court, Congress might, indeed, have hesitated to ignore it. As an act of merely administrative officers it had no such sanction. It must be borne in mind that important rights were involved and no good reason could be urged against, or serious consequences apprehended from another investigation. Those who were entitled to be enrolled could again establish their right. Those who were not so entitled and who had got on the rolls either by mistake or fraud had no legal ground of complaint. However, we are not required to consider the reasons which induced Congress to direct that a roll be made by the Dawes Commission. Congress had the power, and, as we have decided, exercised it.

Decree reversed and case remanded with directions to dismiss the supplemental petition.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY *v.* OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 36. Argued November 3, 1911.—Decided February 19, 1912.

The enforcement of the provision in § 4 of Art. IV of the Constitution that the United States shall guarantee to every State a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts.

The provisions of § 4 of Art. IV of the Constitution do not authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to Congress.

Under § 4 of Art. IV of the Constitution, it rests with Congress to decide what government is the established one in a State, and its decision is binding on every other department of the Government, and cannot be questioned by the judiciary. *Luther* v. *Borden*, 7 How. 1.

A statute otherwise constitutional cannot be attacked in the courts on the ground that it was adopted in pursuance of provisions in the constitution of the State which render the form of government of the State unrepublican in form within the meaning of § 4 of Art. IV of the Constitution. The courts have no jurisdiction of the question; it is for Congress to determine.

Where the claim that one taxed under a state statute is deprived of property without due process of law is not based on any inherent defect in the law, or infirmity of power of State to levy it, but on the ground that the government of the State is not republican in form, the question is not within the jurisdiction of the courts.

The judicial power of the United States will not be extended so as to interfere with the authority of Congress or of the Executive so as to make the guarantee contained in § 4 of Art. IV of the Constitution one of anarchy instead of order. *Luther* v. *Borden*, 7 How. 1.

Whether the adoption of provisions for the initiative and referendum in the constitution of a State, such as those adopted in Oregon in 1902, so alter the form of government of the State as to make it no longer republican within the meaning of § 4 of Art. IV of the Con-

stitution, is a purely political question over which this court has no jurisdiction.

Writ of error to review 53 Oregon 162, dismissed.

THE facts, which involve the constitutionality under § 4 of Art. IV of the Federal Constitution of the initiative and referendum provisions of the constitution of the State of Oregon, are stated in the opinion.

Mr. E. S. Pillsbury, with whom *Mr. Oscar Sutro* was on the brief, for plaintiff in error:

The initiative and the tax measure in question are repugnant to the equal protection provision of the Fourteenth Amendment.

That Amendment controls the action of all branches of the Government, legislative, executive and judicial. *Ex parte Virginia*, 100 U. S. 339–347; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Scott* v. *McNeal*, 154 U. S. 34; *Blake* v. *McClung*, 172 U. S. 232.

The initiative act under which the license tax is claimed in this suit was "enacted" by a vote of 69,635 in favor of the same and 6,441 against. The total vote for Governor at this election was 96,751 so that 20,675 of the electors did not vote on this measure.

To compel plaintiff in error to pay this tax would not accord to it the equal protection of the laws, nor the protection of equal laws, because this exaction is peculiar to plaintiff in error, and the few others included in these two acts, and is based upon alleged legislation which, for said period, is entirely different in character and in the manner of enactment, from that which pertains to the taxation of all other residents of the State who have only been subject to tax laws passed by the Legislative Assembly.

The power of taxation belongs exclusively to the legislative branch of the Government; it is lodged nowhere else. *United States* v. *New Orleans*, 98 U. S. 392.

Representation and taxation must go together. *Harvard* v. *St. Clair Drainage Co.*, 51 Illinois, 135.

The test of the constitutionality of a statute is not what has been done but what by its authority may be done. *Ames* v. *People*, 26 Colorado, 83.

There can be but one source of legislation, but one law-making power in a State; that power must be a legislature chosen and acting as contemplated by the Federal Constitution.

The right of the taxpayer to a hearing as to the amount of his tax, extends to the legislature when the same is determined by that body. Cooley, Const. Lim., 7th ed., 497; 2 Story on Const., § 1894.

The powers of taxation which might be exercised through initiative legislation would be violative of the implied rights to the protection of property which pertain to every person under the Federal Constitution. *Loan Association* v. *Topeka*, 20 Wall. 662.

By the initiative and referendum amendment no measure passed by the legislature, affecting taxation, can become a law until approved by the people at a regular general election, and none of the restrictions of the Constitution apply to measures of taxation so approved or initiated by the people.

The vote on this amendment was 44,171 for and 42,127 against. The total vote for Governor at the same election was 117,690, being 31,392 greater than the entire vote on this amendment. Under the Oregon plan it is a majority of those voting on a proposition, not a majority of all the voters, which determines the result; so that, under this rule, the amendment in question was adopted by a fraction over 37½ per cent of those voting at the same election for Governor.

The initiative amendment and the tax in question levied pursuant to a measure passed by authority of the initiative amendment violate the right to a republican form of

government which is guaranteed by § 4 of Art. IV of the Federal Constitution. That guaranty is to the people of the States, and to each citizen, as well as to the States as political entities, and amounts to a prohibition against the majority in any State adopting an unrepublican constitution. *Appeal of Allyn*, 81 Connecticut, 534; Cooley, Const. Lim., 7th ed., p. 62.

The power of the people of a State to amend or revise their constitution is so limited by the Constitution of the United States that it cannot abolish the republican form of government. *Koehler* v. *Hill*, 60 Iowa, 543; Von Holst, Const. Law of U. S., 236, 237.

As to the effect of the Constitution as a fundamental restriction upon the people of the States in the formation of their governments, see Patrick Henry's speech, Elliott's Debates, vol. III, p. 55; Black's Const. Law, 2d ed., 262; *Rice* v. *Foster*, 4 Harr. (Del.) 479; *Minor* v. *Happersett*, 21 Wall. 162; *Martin's Exrs.* v. *Martin*, 20 N. J. Eq. 421.

The power of the majority of the people to impose upon a State a democratic form of government, or to adopt institutions violating the republican form, is one of the powers which was not intended to be exercised by anyone but to be wholly annihilated.

Taxation by the initiative method violates fundamental rights and is not in accordance with the law of the land (U. S. Const., Art. VI). *State* v. *Allmond*, 2 Houst. 612, 639. See also *Martin's Exrs.* v. *Martin*, 20 N. J. Eq. 421; Cooley, Const. Lim., 7th ed., p. 62; Fiske, Critical Period American History, 250.

The sovereign power of the States over their citizens is subordinate to the power of the National Government over its citizens. *Koehler* v. *Hill*, *supra*; *Crandall* v. *Nevada*, 6 Wall. 35; *Lane County* v. *Oregon*, 7 Wall. 76; Story on the Const., § 318, vol. I, 227; Elliott's Debates, vol. V, 239.

The citizens of the United States receive from the Federal Government the protection of the rights which are conferred upon them by their national citizenship. The majority of the people of a State cannot, even by amendment of the State's organic law, encroach upon these privileges. *United States* v. *Cruikshank*, 92 U. S. 542, 549.

Legislation by representatives elected for that purpose is the distinguishing feature of a republican form of government.

The duty to provide a republican form of government was originally assumed by the States; and it still remains there. And the maintenance of the right is guaranteed to the people of the States by the National Government. Const., U. S., Art. IV, § 4; *Texas* v. *White*, 7 Wall. 730.

Every citizen of the United States is entitled to the protection of the Federal Government in his right to be governed by laws enacted only by representatives elected for that purpose, and in accordance with a republican form of government. Such is the "law of the land." Const., U. S., art. IV, § 6.

As to meaning of the phrase "the law of the land," see *University of Maryland* v. *Williams*, 9 Gill & J. 365, 412; *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Ah Fook*, 49 California, 402; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

The edicts of a multitude could not be the basis of due process, however fair the steps prescribed. Laws must emanate from the law-making power, and in a constitutional republic that power can only be a representative legislature created in accordance with the organic law.

The acts of a state legislature will not be declared unconstitutional unless in violation of some constitutional provision. The same principle must be applied to the acts of the States exercising their residuary sovereignty through any other of the departments of government, or through the people directly. *Holden* v. *Hardy*, 169 U. S.

389; *Loan Association* v. *Topeka*, 20 Wall. 655; *C. W. & Z. R. R. Co.* v. *Clinton County*, 1 Oh. St. 77, 87; *Parker* v. *Commonwealth*, 6 Barr. 507; and see *Maynard* v. *Commissioners*, 84 Michigan, 228, 239; *Commissioners* v. *Moir*, 199 Pa. St. 534; *People* v. *Hurlbut*, 24 Michigan, 44.

An oligarchy or a democracy is equally unrepublican; each was equally hateful to the founders of our government, and each is equally subversive of the structure which they erected. *Lexington* v. *Thompson* (Ky.), 68 S. W. Rep. 477; *Downes* v. *Bidwell*, 182 U. S. 244. And see *Wilkinson* v. *Leland*, 2 Pet. 657; *Terrett* v. *Taylor*, 9 Cranch, 43; *Bradshaw* v. *Rogers*, 20 Johns. 102; *Camp* v. *Rogers*, 44 Connecticut, 291; *State* v. *Williams College*, 9 Gill & J. 365; *People* v. *Humphrey*, 23 Michigan, 471.

Apart from the guaranty clause, all citizens of the United States may demand government in conformity with republican principles; No. 84 of the Federalist Hamilton; XII Hamilton's Works, 327; Madison, "Federalist" No. 44; XI Hamilton's Works, 370; 3 Elliott's Debates, 451; *Minor* v. *Happersett*, 21 Wall. 161; *United States* v. *Cruikshank*, *supra*.

The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a State to the Union, and which the State is bound to maintain.

For difference between a republic and democracy, see Webster's Dictionary; *Downes* v. *Bidwell*, 182 U. S. 279; Cooley's Const. Lims. 194; *Minor* v. *Happersett*, 21 Wall. 162; *In re Duncan*, 139 U. S. 461; 15 Jefferson's Writings, 452; Burgess, Pol. Science and Compar. Const. Law, Vol. I; Black's Const. Law, 28; Bartlett, Digest Election Cases, 446; *Ex parte Farnsworth*, 135 S. W. Rep. 537;

1 Story, Const. 388; *Ex parte Anderson*, 134 California, 74; Yeaman's, "Study of Government."

The direct exercise of the powers of government by the people at large would remove from a republic the feature which distinguishes it from a democracy. That government cannot be said to be representative in which the people at large are the legislators. *People* v. *Collins*, 3 Michigan, 343, 399; *State* v. *Swisher*, 17 Texas, 441; *Rice* v. *Foster*, 4 Harr. 479; *Ex parte Wall*, 48 California, 279; *State* v. *Harris*, 2 Bailey, 598; Federalist, No. 51.

In ascertaining the meaning of the phrase "republican form of government" the debates of the constitutional conventions and the Federalist papers are of great importance, if not conclusive. *McCullough* v. *Maryland*, 4 Wheat. 419; *Cohens* v. *Virginia*, 6 Wheat. 418; *Pollock* v. *Farmers' Tr. Co.*, 158 U. S. 601; *McPherson* v. *Blacker*, 146 U. S. 1; *Rhode Island* v. *Massachusetts*, 12 Pet. 657.

The framers of the Constitution recognized the distinction between the republican and democratic form of government, and carefully avoided the latter. "Federalist," No. 48; XII Hamilton's Works, 28; 2 Elliott's Debates, 253; 5 Elliott's Debates, 136 *et seq.;* and see 3 Elliott's Debates, 225, 233, for views of John Marshall, afterwards Chief Justice.

The extent of territory of the States alone sufficed, in the judgment of the framers of the Constitution, to condemn the establishment of a democratic form of government. Federalist, No. XIV; Hamilton's Works, Vol. XI, 101, 103; Madison in Federalist, No. X; Hamilton's Works, Vol. XI, 75.

The form of state government perpetuated by the Constitution was the republican form with the three departments of government, in force in all the States at the time of the adoption of the Constitution. 5 Elliott's Debates, 239.

Initiative legislation is invalid because government by

the people directly is inconsistent with our form of government.

The vital element in a republican form of government, as that phrase is used in American political science, is representation. Legislation by the people directly is the very opposite, the negative of this principle. It can, therefore, have no place in our form of government. Indeed, it has been repeatedly said to be contrary to and subversive of the structure of our republic. *In re Duncan, supra; State* v. *Swisher*, 17 Texas, 448; *Rice* v. *Foster*, 4 Harr. (Del.) 479; *Clarke* v. *Rochester*, 28 N. Y. 606, 633.

The well-known practices of adopting state constitutions by popular vote, and of local legislation in "town meetings" furnish no precedent for the lodgment of legislative power in the ballot-box.

The Federal Constitution presupposes in each State the maintenance of a republican form of government and the existence of state legislatures, to wit: representative assemblies having the power to make the laws; and that in each State the powers of government will be divided into three departments: a legislature, an executive and a judiciary, one of these, the legislature, is destroyed by the initiative.

State legislatures are a vital feature of our government; the Federal Constitution presupposes their existence and imposes on each State the obligation to maintain them.

The division of powers of the three departments in each of the States is a prerequisite to the National Government.

Under the Constitution the state legislatures are the agency to carry on the relations between the Nation and the States.

The word "legislature" in the Constitution means a representative assembly consisting of two houses, empowered to make the law. Such was its meaning at the time of the adoption of the Constitution.

Words and terms are to be taken in the sense in which

they were used when the Constitution was adopted. *Veazie Bank* v. *Fenno*, 8 Wall. 542; *Locke* v. *New Orleans*, 4 Wall. 172; *United States* v. *Harris*, Abb., U. S. 110; *United States* v. *Block*, 4 Sawy. 211; *Fox* v. *McDonald*, 101 Alabama, 51; Bancroft, Hist. of U. S. IX, 260 *et seq.*; *Evansville* v. *The State*, 118 Indiana, 426, 441.

Contemporaneous legislation by Congress sheds some light on the meaning of the term "legislature" as used in the Constitution. The initiative destroys the legislative assemblies or legislatures which it is the implied obligation of each State to maintain, for a legislature must be the law-making power.

Unless supreme within its jurisdiction a legislative assembly is not a legislature. Blackstone, Comm., Vol. I, 46; Law of the Const. 66; Federalist, Nos. 33, 75.

Two coördinate legislative authorities, each with equal power of making, repealing and amending laws, would be political anarchy and chaos.

The initiative overthrows one of the greatest safeguards against the abuse of the power of legislation, to wit: the system of a dual legislative assembly.

The provision in the Oregon constitution for direct legislation violates the provisions of the Act of Congress admitting Oregon to the Union. Act of Congress, February 14, 1859, 11 Stat. 383; *Romine* v. *State*, 34 Pac. Rep. 925; *People* v. *Adams*, 73 Pac. Rep. 866.

The State of Oregon was admitted because its proposed government was republican. The implied contract was that the State would continue that form. Every person within the State is entitled to that form of government. The State cannot secede from the Union. A change in its fundamental law, repugnant to republican institutions, is contrary to the act of Congress admitting the State, and is an impairment of the obligation of the State to preserve a republican form of government. Tiedeman, Unwritten Const. of the U. S. 164.

It is the power of this court to maintain and preserve this government against the attack of direct legislation and the absolutism of numbers.

The questions whether the "measure" in issue constitutes due process of law and affords plaintiff in error the equal protection of the law, and whether this "measure" in the method of its enactment violates the various provisions of the Federal Constitution designated in the opening brief, are contentions which this court must decide in the exercise of its jurisdiction and are not political.

Luther v. *Borden*, 7 How. 1; *Texas* v. *White*, 7 Wall. 730; *Taylor* v. *Beckham*, 178 U. S. 548; *In re Duncan*, 139 U. S. 449; *Hopkins* v. *Duluth*, 81 Minnesota, 189, cited by defendant in error, do not sustain the contention that the questions are political and not within the jurisdiction of this court.

The courts have never held that a cause was not justiciable because it involved an interpretation of Art. IV, § 4, but have in proper cases construed the language of that clause. *Chisholm* v. *Georgia*, 2 Dall. 419; *In re Duncan*, 139 U. S. 449; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *In re Pfahler*, 150 California, 71; *People* v. *Sours*, 31 Colorado, 369; *Kadderly Case*, 44 Oregon, 118; *People* v. *Johnson*, 38 Colorado, 76; *Elder* v. *Colorado*, 86 Pac. Rep. 250; aff'd, 204 U. S. 85; *Forsyth* v. *Hammond*, 166 U. S. 519; *South Carolina* v. *United States*, 199 U. S. 437, 454.

The right to a republican form of government is a substantial right. Like the franchise to vote, it is a political right. This has always been held to be within the protection of the courts. *Capen* v. *Foster*, 12 Pick. 485, 489; *Yick Wo* v. *Hopkins*, 118 U. S. 369; *Florida* v. *Georgia*, 17 How. 478, 494; *Virginia* v. *West Virginia*, 11 Wall. 54; *Boyd* v. *Thayer*, 143 U. S. 135; *Cohens* v. *Virginia*, 6 Wheat. 378.

If from the questions it appears that some title, right,

privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or law of the United States or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, otherwise not. *Starin* v. *New York City*, 115 U. S. 257; *Osborn* v. *Bank of United States*, 9 Wheat. 824; *Mayor* v. *Cooper*, 6 Wall. 252; *Tennessee* v. *Davis*, 100 U. S. 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 140; *Kansas Pac. R. R.* v. *Atchison R. R. Co.*, 112 U. S. 416; *Cooke* v. *Avery*, 147 U. S. 384, 385; *Consolidated Gas Co.* v. *Willcox*, 212 U. S. 19, 40.

The action of Congress in receiving Senators and Representatives from Oregon and its approval of a constitution containing the initiative as providing a republican form of government does not control this court in the construction of the language of the Oregon constitution, or in passing upon the validity of any provision or amendment to that constitution. *Gunn* v. *Barry*, 12 Wall. 610; *Homestead Cases*, 22 Gratt. 266; *Coyle* v. *Smith*, 221 U. S. 559; *McPherson* v. *Blacker*, 146 U. S. 1; *Texas* v. *White*, 7 Wall. 725.

The court has jurisdiction because the Oregon amendment providing for the initiative and the "measure" in question deny due process of law and the equal protection of the law. *Davidson* v. *New Orleans*, 96 U. S. 97; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Southwestern Tel. & Tel. Co.* v. *City of Dallas*, 134 S. W. Rep. 321; *Telephone Co.* v. *Los Angeles*, 211 U. S. 280.

The power to impose taxes has in our Government always been vested exclusively in the legislative department. It is a political axiom that the taxing power must be exercised by the legislative arm of the Government or by its authority: *Meriwether* v. *Garrett*, 102 U. S. 472, 501; *Heine* v. *The Levee Commissioners*, 19 Wall. 655; *Munday* v. *Rahway*, 43 N. J. L. 346; Cooley, Taxation, 32, 34; *Spencer* v. *Merchant*, 125 U. S. 345, 355.

The guarantee of equal protection of the law is a guarantee of the protection of equal laws. *Southern Railway Co.* v. *Greene*, 216 U. S. 412; *Yick Wo* v. *Hopkins*, 118 U. S. 369.

The unconstitutionality of the acts of a State are equally within the jurisdiction of the courts, whether they be the acts of the legislative or executive department or of the people themselves, adopting their constitutions or amending them. *Cohens* v. *Virginia*, 6 Wheat. 415; *Dodge* v. *Woolsey*, 18 How. 332; *Cummings* v. *Missouri*, 4 Wall. 277; Cooley, Const. Lim., 7th ed. 62; *Koehler* v. *Hill*, *supra*.

Mr. John J. Dye and *Mr. Addison C. Harris*, submitted a brief as *amici curiæ*, by leave of the court, in support of the contentions of the plaintiff in error.

Mr. A. M. Crawford, *Mr. George Fred Williams* and *Mr. Jackson H. Ralston*, with whom *Mr. S. H. Van Winkle*, *Mr. W. S. U'Ren* and *Mr. C. E. S. Wood* were on the brief, for defendant in error:

The power to determine whether a State has a republican form of government is vested in Congress. Hence it is a political rather than a judicial question. *Luther* v. *Borden*, 7 How. 1, 42; *Texas* v. *White*, 7 Wall. 700, 730; *Taylor* v. *Beckham*, 178 U. S. 548, 578; *Hopkins* v. *Duluth*, 81 Minnesota, 189; Article by W. A. Coutts, Vol. VI, No. 4, 304, Michigan Law Review; *In re Duncan*, 139 U. S. 449.

If the question is a judicial one, courts of the United States will follow the decision of the state courts, where the state court has passed upon the question. *Luther* v. *Borden*, 7 How. 1, 40; *Leeper* v. *State of Texas*, 139 U. S. 462–467.

The Federal authorities, including the Supreme Court, have treated this as a political question. 7 How. 1, 42; Cooley on Const. Lim., 7th ed., p. 59, 6th ed., p. 42.

This question does not lose its political complexion because it has arisen since the admission of Oregon into the Union of States. If the courts take jurisdiction of these questions, then we have a decision upon a political question, decided by the political power, reëxamined by the judicial and perhaps overthrown. One branch of the Government becomes arrayed against another, and revolution or rebellion is imminent.

It is not a decision upon one clause of the Constitution, but the whole instrument is examined and considered, and the plan or scheme of government there outlined adjudged to be republican, or anti-republican, in character.

The State of Oklahoma was recently admitted into the Union with the initiative and referendum principles reserved to the people. See §§ 2, 3, 5, Oklahoma Constitution.

While a court may decide whether an amendment of a constitution has been adopted in the prescribed manner, and whether it denies any constitutional right, either as to property or person, it would be an invasion of the prerogatives of Congress should the court below undertake to decide whether the constitution of a new State seeking admission is republican in form, and to decide whether it should become a member of the Union.

If the court decides to retain jurisdiction: A state constitution should not be held to contravene the Federal Constitution unless the general scope and plan of government provided in the former is opposed to the general scope and plan of government required by the latter, to be maintained by the State. The initiative and referendum amendment is essentially republican in form as guaranteed in the Federal Constitution, construed in the light of the following authorities: Cooley, Const. Lim., 7th ed., 59; *Id.*, 6th ed., 42, 45; Federalist, Hamilton ed., No. 39, p. 301; No. 43, p. 342; Oberholtzer on the Referen-

dum in America, Chap. 45, pp. 368 and 369; 2 Story, Const. 5th ed., §§ 1815 to 1819, both inclusive; 1 Elliott's Debates, 406; 5 *Id.* 160; 15 Writings of Thomas Jefferson, p. 17 (see Vol. XI, Federal Ed., p. 529); *Chisholm* v. *Georgia*, 2 Dallas, 419, 457; *In re Duncan*, 139 U. S. 449, 461; *Luther* v. *Borden*, 7 How. 42; *Minor* v. *Happersett*, 21 Wall. 162, 175; *Taylor* v. *Beckham*, 178 U. S. 548, 578; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *People* v. *Sours*, 31 Colorado, 369, 383; *In re Andrew Pfahler*, 150 California, 71, 77, 78; *Ex parte Wagner*, 21 Oklahoma, 33, 36; *Kadderly* v. *Portland*, 44 Oregon, 118, 144; *Oregon* v. *Pac. States Tel. Co.*, 53 Oregon, 162; *Straw* v. *Harris*, 54 Oregon, 424, 431; *Kring* v. *Missouri*, 107 U. S. 221.

The members of the Federal convention considered a "republican form of government" to be a government which derived all its powers from the great body of the people.

Both the Federal and state courts have uniformly held that the initiative method of enacting laws was not repugnant to the provisions of § 4, Art. IV, of the Federal Constitution, either directly or by necessary inference. *Chisholm* v. *Georgia*, 2 Dall. 419, 457; *In re Duncan*, 139 U. S. 449, 461; *Minor* v. *Happersett*, 21 Wall. 162, 175; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *People* v. *Sours*, 31 Colorado, 369, 383; *In re Andrew Pfahler*, 150 California, 71, 77, 78; *Kadderly* v. *Portland*, 44 Oregon, 118; 74 Pac. Rep. 710; *Oregon* v. *Pac. States T. & T. Co.*, 53 Oregon, 162; 99 Pac. Rep. 427; *Straw* v. *Harris*, 54 Oregon, 424, 431.

The executive and legislative branches of the Federal Government have held, in substance, that the reservation of the initiative and referendum powers by the people of a State is not violative of the Federal Constitution nor hostile to a republican form of government. Senators and representatives from States reserving those powers are seated in the Senate and House of Representatives without protest. When new States are admitted, the President and

Congress pass upon the form of government presented by the proposed State, and decide whether the same is in harmony with the Constitution of the United States, and they have in several cases approved state constitutions reserving the identical powers attacked in the case at bar, notably, Oklahoma and Arizona, and other States have changed their constitutions to include those powers, to-wit: South Dakota, Utah, Colorado, Arkansas, Maine and Oregon, without objection from any Federal authority, and no question has ever been raised as to their representation in Congress.

Also the right of the people to instruct their representatives in Congress and in the state legislatures, if it exists, is an admission or acknowledgment that the supreme power rests in the people, and we contend that such right does exist.

Inexpediency should not be considered. That is for the law-making power of the State.

The act does not violate any of the provisions of § 1 of the Fourteenth Amendment.

Assuming that the act under consideration was lawfully enacted the taxes levied thereby must be considered a valid exercise of the taxing power of the State in the light of the following authorities: *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562; *Kentucky R. Tax Case*, 115 U. S. 321, 337; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283, 294; *Am. Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89; *Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468; *Cook* v. *Marshall County*, 196 U. S. 261, 268, 273, 274; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Delaware Railroad Tax Case*, 18 Wall. 206, 231; 2 Cooley on Taxation, 3d ed., 1095; *City of St. Joe* v. *Ernst*, 8 S. W. Rep. (Mo.) 558; *Producers Oil Co.* v. *Texas*, 99 S. W. Rep. (Tex.) 157; *State Tax on R. R. Gross Receipts*, 15 Wall. 284, 293.

It cannot be claimed in this case that a tax on gross earnings is even incidentally a tax on interstate commerce.

Mr. George H. Shibley, Director of the American Bureau of Political Research of People's Rule League of America; *Mr. Robert L. Owen*, United States Senator from Oklahoma, Chairman of the National Committee, People's Rule League of America, and *Mr. J. Henry Carnes* as counsel, for the State of Oregon, filed a brief for the defendant in error.

Mr. George Fred Williams, as counsel for the States of California, Arkansas, Colorado, South Dakota and Nebraska, filed a separate brief for defendant in error.

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

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form and to enforce the guarantee of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practise of the Government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.

The case is this: In 1902 Oregon amended its constitution (Art. IV, § 1). This amendment while retaining an existing clause vesting the exclusive legislative power in a General Assembly consisting of a senate and house of representatives added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the constitution and to enact or

reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted when approved by popular vote should become the law of the State. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself or of a petition filed for that purpose by a specified number of voters. The full text of the amendment is in the margin.[1]

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[1] Section 1 of Article IV of the constitution of the State of Oregon shall be and hereby is amended to read as follows:

SECTION 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety)

In 1903 (Feby. 24, 1903, Gen. Laws 1903, p. 244) detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906 a law taxing certain classes of corporations was submitted, voted on and promulgated by the Governor in 1906 (June 25, 1906, Gen. Laws 1907, p. 7) as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, two per centum upon their gross revenue derived from business done within the State. Penalties were provided for non-payment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone and Telegraph Company, an Oregon corporation engaged in business in that State, made a return of its gross receipts as required by the

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either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the state of Oregon." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor. (1 Lord's Oregon Laws, p. 89.)

statute and was accordingly assessed two per cent. upon the amount of such return. The suit which is now before us was commenced by the State to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay and the failure to make such payment.

The answer of the corporation contained twenty-nine paragraphs. Four of these challenged the validity of the tax because of defects inhering in the nature or operation of the tax. The defenses stated in these four paragraphs, however, may be put out of view, as the defendant corporation, on its own motion, was allowed by the court to strike these propositions from its answer. We may also put out of view the defenses raised by the remaining paragraphs based upon the operation and effect of the state constitution as they are concluded by the judgment of the state court. Coming to consider these paragraphs of the answer thus disembarrassed, it is true to say that they all, in so far as they relied upon the Constitution of the United States, rested exclusively upon an alleged infirmity of the powers of government of the State begotten by the incorporation into the state constitution of the amendment concerning the initiative and the referendum.

The answer was demurred to as stating no defense. The demurrer was sustained, and the defendant electing not to plead further, judgment went against it and that judgment was affirmed by the Supreme Court of Oregon. (53 Oregon, 162.) The court sustained the conclusion by it reached, not only for the reasons expressed in its opinion, but by reference to the opinion in a prior case (*Kadderly* v. *Portland*, 44 Oregon, 118, 146), where a like controversy had been determined.

The assignments of error filed on the allowance of the writ of error are numerous. The entire matters covered

by each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of Art. IV of the Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character. Because of their absolute unity we consider all the propositions together, and therefore at once copy them. We observe, however, that in the argument the second, fourth and fifth paragraphs, for the purposes of discussion, were subordinately classified, and these subordinate classifications we omit from our text, reproducing them, however, by a marginal reference.

I.

"The initiative and the tax measure in question are repugnant to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States which forbids a State to deny to any person within its jurisdiction the equal protection of the law.

II.

"The initiative amendment and the tax in question, levied pursuant to a measure, passed by authority of the initiative amendment, violates the right to a republican

form of government which is guaranteed by section 4, article IV, of the Federal Constitution.[1]

III.

"Taxation by the initiative method violates fundamental rights and is not in accordance with 'the law of the land.' (U. S. Const., Art. VI).

IV.

"The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a State to the Union and which the State is bound to maintain.[2]

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[1] 1. The guaranty of article IV, section 4, of the Federal Constitution is to the people of the States, and to each citizen, as well as to the States as political entities.

2. Section 4 of article IV therefore prohibits the majority in any State from adopting an unrepublican constitution.

[2] 1. Difference between a republic and democracy.

2. In ascertaining the meaning of the phrase "republican form of government" the debates of the constitutional conventions and the federalist papers are of great importance, if not conclusive.

3. The framers of the Constitution recognized the distinction between the republican and democratic form of government, and carefully avoided the latter.

4. The extent of territory of the States alone sufficed, in the judgment of the framers of the Constitution, to condemn the establishment of a democratic form of government.

5. The form of state government perpetuated by the Constitution was the republican form with the three departments of government, in force in all the States at the time of the adoption of the Constitution.

6. The history of other nations does not furnish the definition of the phrase "republican form of government" as those words were used by the framers of the Constitution. They distinguish the American from all other republics by the introduction of the principle of representation.

V.

"The Federal Constitution presupposes in each State the maintenance of a republican form of government and the existence of state legislatures, to wit: Representative assemblies having the power to make the laws; and that in each State the powers of government will be divided into three departments: a legislature, an executive and a judiciary. One of these, the legislature, is destroyed by the initiative.[1]

VI.

"The provision in the Oregon constitution for direct legislation violates the provisions of the act of Congress admitting Oregon to the Union."

On the surface, the impression might be produced that the first and third propositions,—the one in words relating

7. Initiative legislation is invalid because government by the people directly is inconsistent with our form of government.

8. The well-known practices of (a) adopting state constitutions by popular vote, and of (b) local legislation in "town meetings," furnish no precedent for the lodgment of legislative power in the ballot-box.

[1] 1. State legislatures are a vital feature of our Government; the Federal Constitution presupposes their existence and imposes on each State the obligation to maintain them.

2. The division of powers of the three departments in each of the States is a prerequisite to the national Government.

3. It is evident under the Constitution the State Legislatures are the agency to carry on the relations between the Nation and the States.

4. The word "legislature" in the Constitution means a representative assembly consisting of two houses, empowered to make the law. Such was its meaning at the time of the adoption of the Constitution.

5. Contemporaneous legislation by Congress sheds some light on the meaning of the term "legislature" as used in the constitution.

6. The initiative destroys the legislative assemblies or legislatures which it is the implied obligation of each State to maintain, for a legislature must be the law-making power.

7. The initiative overthrows one of the greatest safeguards against the abuse of the power of legislation, to wit: the system of a dual legislative assembly.

to the equal protection clause of the Fourteenth Amendment, and the other in terms asserting "taxation by the initiative method violates fundamental rights, and is not in accordance with the law of the land," are addressed to some inherent defect in the tax or infirmity of power to levy it without regard to the guarantee of a republican form of Government. But this is merely superficial, and is at once dispelled by observing that every reason urged to support the two propositions is solely based on § 4 of Art. IV and the consequent inability of the State to impose any tax of any kind which would not violate the Fourteenth Amendment or be repugnant to the law of the land if in such State the initiative or referendum method is permitted. Thus dispelling any mere confusion resulting from forms of expression and considering the substance of things, it is apparent that the second proposition, which rests upon the affirmative assertion that by the adoption of the initiative and referendum the State "violates the right to a republican form of government which is guaranteed by section 4 of Article IV of the Federal Constitution," and the two subdivisions made of that proposition, the first that "the guarantee in question is to the people of the States and to each citizen, as well as to the States as political entities," and the second asserting "section 4 of Article IV therefore prohibits the majority in any State from adopting an unrepublican constitution," are the basic propositions upon which all the others rest. That is to say, all the others and their subdivisions are but inducements tending to show the correctness of the second and fundamental one. This conclusion is certain, as they all but point out the various modes by which the adoption of the initiative and referendum incapacitated the State from performing the duties incumbent upon it as a member of the Union or its obligations towards its citizens, thus causing the State to cease to be a government republican in form within the intendment of the

constitutional provision relied upon. In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character.

Before immediately considering the text of § 4 of Art. IV, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national Government, and however all the departments of that Government may recognize such state government, nevertheless every citizen of such State or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful exist-

ence of the State. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a State and if such contention be thought well founded to disregard the existence in fact of the State, of its recognition by all of the departments of the Federal Government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the power to control the legislative department of the Government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.

Do the provisions of § 4, Art. IV, bring about these strange, far-reaching and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those con-

tentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case—*Luther* v. *Borden*, 7 How. 1.

The case came from a Circuit Court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island and the conflict which was brought about by the effort of the adherents of that alleged government sometimes described as "the government established by a voluntary convention" to overthrow the established charter government. The defendants justified on the ground that the acts done by them charged as a trespass were done under the authority of the charter government during the prevalence of martial law and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government and denied the legality of the charter government. In the course of the trial the plaintiffs to support the contention of the illegality of the charter government and the legality of the voluntary government "although that government never was able to exercise any authority in the State nor to command obedience to its laws or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority of the male people of the State of the age of 21 years and upwards and also by a large

majority of those who were entitled to vote for general officers cast in favor of a constitution" which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The Circuit Court rejected this evidence and instructed the jury that as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out "the novelty and serious nature" of the question which it was called upon to decide. Attention also was at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of and for the purpose of sustaining such established government. On this subject it was said (p. 38):

"For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time, were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation, answerable as trespassers, if not in some cases as criminals."

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy in fact of the charter government, and had refused to investigate the legality of the

voluntary government for the purpose of decreeing the established government to be illegal, on the ground (p. 39) "that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses, etc." It was further remarked:

"This doctrine is clearly and forcibly stated in the opinion of the supreme court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority."

Reviewing the grounds upon which these doctrines proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, and from a point of view of the state law the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts, in the light of § 4 of Art. IV, of the Constitution of the United States. The contention of the plaintiff in error concerning that Article was, in substantial effect, thus pressed in argument: The ultimate power of sovereignty is in the people, and they in the nature of things, if the government is a free one, must have a right to change their constitution. Where in the ordinary course no other means exists of doing so, that right of necessity embraces the power to resort to revolution. As, however, no such right it was urged could exist under the Constitution, because of the provision of § 4 of Art. IV, protecting each State on application of the legislature or of the executive, when the legislature cannot be convened, against domestic violence, it followed that the guarantee of a government republican in form

was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular State hopeless in case of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of the charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of § 4 of Art. IV, and the resultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a State could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that owing to the inherent political character of such a question its decision was not by the Constitution vested in the judicial department of the Government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

"Moreover, the constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the constitution it rests with congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Pointing out that Congress, by the act of February 28, 1795 (1 Stat. 424, c. 36), had recognized the obligation resting upon it to protect from domestic violence by conferring authority upon the President of the United States,

on the application of the legislature of a State or of the Governor, to call out the militia of any other State or States to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of § 4 of Art. IV was a judicial one, the duty to afford protection from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the delegation of authority made to the President by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the President as to the manner of discharging this great responsibility, to interfere and set at naught his action; and the pertinent statement was made (p. 43): "If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order."

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. We do not stop to cite other cases which indirectly or incidentally refer to the subject, but conclude by directing attention to the statement by the court, speaking through Mr. Chief Justice Fuller, in *Taylor* v. *Beckham, No. 1*, 178 U. S. 548, where, after disposing of a contention made concerning the Fourteenth Amendment and coming to consider a proposition which was necessary to be decided concerning the nature and effect of the guarantee of § 4 of Art. IV, it was said (p. 578):

"But it is said that the Fourteenth Amendment must be

read with section 4 of article IV of the Constitution, providing that: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' It is argued that when the State of Kentucky entered the Union, the people 'surrendered their right of forcible revolution in state affairs,' and received in lieu thereof a distinct pledge to the people of the State of the guarantee of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the General Assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guarantee, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under § 709 of the Revised Statutes to revise the judgment of the state court on the ground that a constitutional right was decided against by that court.

"It was long ago settled that the enforcement of this guarantee belonged to the political department. *Luther* v. *Borden*, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it. . . ."

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just

stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different, that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously

affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.

KIERNAN *v.* PORTLAND, OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 503. Argued November 3, 1911.—Decided February 19, 1912.

Pacific States Telephone Co. v. *Oregon*, *ante*, p. 118, followed to the effect that the determination of whether the government of a State is republican in form within the meaning of § 4 of Art. IV of the Constitution is a political question within the jurisdiction of Congress and over which the courts have no jurisdiction.

Where the record does not contain the petition for rehearing but the opinion of the state court denying it discusses at length the Federal question relied on here, this court will infer that the subject was included in the petition.

Quære: Whether the plaintiff in a taxpayer's suit against a city to enjoin the issuing of bonds to build a bridge over navigable waters on the ground of unconstitutionality of the ordinance, can raise the question of lack of consent of the Government of the United States.

THE facts, which involve the constitutionality under § 4 of Art. IV of the Federal Constitution of the initiative and referendum provision of the constitution of the State of Oregon, are stated in the opinion.

Mr. Ralph R. Duniway, with whom *Mr. T. J. Geisler* was on the brief, for plaintiff in error:

The initiative and referendum amendment, Art. IV, § 1, of the Oregon constitution, adopted June 2, 1902, is invalid, as it changes the former republican form of government of the State of Oregon into a pure democracy, in violation of § 4, Art. IV, of the Constitution of the United States, which guarantees to every State in this Union a republican form of government. *Crampton* v. *Zabriskie*, 101 U. S. 601, 609; 21 Ency. of Law (2d ed.), 45, 76.

The powers of municipal corporations are limited to the powers granted in their charters. *Pac. University* v. *Johnson*, 47 Oregon, 448; *McDonald* v. *Lane*, 49 Oregon, 530, 532; *Naylor* v. *McCulloch*, 54 Oregon, 305, 308.

Municipalities cannot issue bonds unless the power to do so is conferred by legislative authority, express or implied, and any doubt as to the existence of such power is to be resolved against its existence. 25 Cyc. 1575; 21 Ency. Law (2d ed.), 45, 70; *Bonham* v. *Bank*, 144 U. S. 173; *Klamath Falls* v. *Sachs*, 35 Oregon, 325.

The validity of the constitutional amendment must be determined by what can be done under its authority as written. *Hood River Light Co.* v. *Wasco County*, 35 Oregon, 498, 510, 512; *Ames* v. *People*, 26 Colorado, 83, 109; *S. C.*, 56 Pac. Rep. 656, 663; *People* v. *Johnson*, 34 Colorado, 143; *S. C.*, 86 Pac. Rep. 233 on 237; *Collins* v. *New Hampshire*, 171 U. S. 33; *Henderson* v. *New York*, 92 U. S. 268; *Minnesota* v. *Barber*, 136 U. S. 313; *Stuart* v. *Palmer*, 74 N. Y. 188; *Colin* v. *Lisk*, 153 N. Y. 188; *Gilman* v. *Tucker*, 128 N. Y. 190; *Dexter* v. *Boston*, 176 Massachusetts, 247; *Howard* v. *R. R. Co.*, 207 U. S. 463.

Whether the constitutional amendment to a state constitution violates the Federal Constitution is a judicial question to be considered and decided by the courts. *Kadderly* v. *Portland*, 44 Oregon, 118, 130, 135; *Gunn* v. *Barry*, 15 Wall. 610, 629.

The fact that a constitution (Oklahoma) containing similar provisions to Art. IV, § 1, but not similar to Art. IV, § 1a and Art. XI, § 2, was submitted to Congress, and the State admitted to full rights in the Union under it, cannot make such provisions valid. *Gunn* v. *Barry*, 15 Wall. 610, 629; *In re Rahrer*, 140 U. S. 560; *Calhoun* v. *Calhoun*, 2 So. Car. 301; Cooley's Const. Lim., 6th Ed., 44–45.

The framers of the Constitution of the United States established a republican form of government by means of electing representatives of the people to carry on the government, as distinguished from a democracy. *Minor* v. *Happersett*, 21 Wall. 162, 175.

The power left to the legislature by the Oregon amendment is merely permissive. The legislative power may be taken away entirely by the electors under the initiative and referendum amendment.

By later constitutional amendments the power of the legislature has already been materially curtailed, if it can be done.

See Art. IX, § 1a as to poll or head taxes; and the amendment and Art. XI, § 2, attempting to take away power to legislate as to liquor and give it to the people; amendment, now Art. XI, § 10, attempting to delegate to the electors of counties unlimited power to go into debt to build permanent roads within the county; all passed November 8, 1910.

If these initiative and referendum amendments are valid, the legislature can be abolished and all the legislative functions of the State performed by the electors under the initiative and referendum amendments.

Under this "Oregon system" the electors can call a measure a constitutional amendment, and it is beyond the reach of legislature or courts.

The electors can enact constitutional amendments as easy as they can enact statutes. The only difference in the enactment is naming the act a constitutional amendment instead of a statute.

The veto power of the Governor has been curtailed by the initiative and referendum amendment, Art. IV, § 1. *State* v. *Kline*, 50 Oregon, 431; *Kadderly* v. *Portland*, 44 Oregon, 118; *Oregon* v. *Pacific States Telephone Co.*, 53 Oregon, 164.

It would be but a short step further for the electors to abolish the state courts and try lawsuits by secret ballot under the initiative and referendum amendment. The same statutory proceeding of filing statements for complaint and answer and having a ballot title to be voted for and a hearing by buying space in the state pamphlet could be used. Laws of Oregon, 1907, p. 398.

The power of the electors to encroach upon the departments of the state government by means of the initiative has been upheld by the Supreme Court of Oregon in *Acme Dairy Co.* v. *Astoria*, 49 Oregon, 520, 523; *McKenna* v. *Portland*, 52 Oregon, 582, 587; *Farrell* v. *Portland*, 52 Oregon, 582, 587; *City of Eugene* v. *W. V. Co.*, 52 Oregon, 490, 494; *Lang* v. *Portland*, 53 Oregon, 92, 96; *Portland* v. *Nottingham*, 113 Pac. Rep. 28; *State* v. *Swigert*, 116 Pac. Rep. 440.

That Oregon is now a pure democracy is clear.

Life, liberty and property are protected in Oregon by the good sense of the electors as expressed directly at an election, and in no other way.

The checks and balances of the republican form of government for the protection of the individual and minority are abolished in Oregon.

The framers of the United States Constitution provided

for an indestructible union of indestructible republican States. *Texas* v. *White*, 7 Wall. 730. The "Oregon system" is an attempt of an individual State to change its republican form of government into a pure democracy without the amendment of the United States Constitution permitting that to be done.

The South Dakota initiative and referendum, for instance, is only the right to petition the legislature, and is not revolutionary at all. It does not conflict with the United States Constitution. The revolutionary initiative and referendum of Oregon does.

Oregon under the initiative and referendum and recall has a system in which it is hard to get the courts to decide a case against the vote of the plurality of the people supported by clamor among politicians and newspapers for a given decision. Such a method of enacting law is not due process of law. *Loan Association* v. *Topeka*, 20 Wall. 655; *Holden* v. *Hardy*, 169 U. S. 389.

The Constitution is to be construed as it was construed at the time it was adopted. Its terms mean now what the terms meant at the time of its adoption. *Minor* v. *Happersett*, 21 Wall. 162, 175, 176; *Dred Scott* v. *Sanford*, 19 How. 392, 426; *Acme Dairy Co.* v. *Astoria*, 49 Oregon, 523; *Gibbons* v. *Ogden*, 9 Wheat. 1, 188; *State* v. *Wrighton* (N. J.), 22 L. R. A. 548, 559; 2 Watson on the Constitution, 1289.

The framers of the Constitution drew a distinction between the republican form of government and the democracy. See Goldwin Smith's introduction to the "Federalist"; "Federalist," No. 38; 44 Am. Law Rev. for May and June, 1910, No. 3, pp. 341, 373; Horatio Seymour in Nor. Am. Rev., 1878, on Government of the United States; Vol. 72, Cen. Law Jour., pp. 169 and 368, Mar. 10, 1911.

Even if the State of Oregon can adopt the initiative and referendum amendment, as attempted June 2, 1902,

the electors of the State of Oregon cannot, under the initiative, adopt the further initiative and referendum amendments to the Oregon Constitution, Art. IV, § 1a and Art. XI, § 2, attempted to be adopted June 4, 1906, by which the electors undertook to take away the power of the legislature and people of the State over municipalities and delegate it to the electors of each municipality.

The power of the State to create and control municipalities as its governmental subordinate agents is destroyed by these amendments; in fact, by these amendments the State of Oregon would commit state suicide. *People* v. *Johnson*, 34 Colorado, 143, 151; *People* v. *Sours*, 31 Colorado, 369; *Williams* v. *People*, 38 Colorado, 497, 502.

To turn the sovereign power of the State of Oregon over to the electors of a municipality is to destroy absolutely the principles of representation and of a republican form of government, and to allow the affairs of the State to be run by an oligarchy consisting of the citizens of a municipality which are a mere handful of the people of the entire State; this is clearly unrepublican. *Martin's Exrs.* v. *Martin*, 20 N. J. Eq. 421, 423; *Ex parte Anderson*, 134 California, 73; *S. C.*, 66 Pac. Rep. 194, 195, 196; *Ex parte Farnsworth*, 135 S. W. Rep. 537; *People* v. *Humphrey*, 23 Michigan, 471, 481; *Rice* v. *Foster*, 4 Harr. (Del.) 479.

Laws must emanate from the law-making power, and in a constitutional republic that power can only be a representative legislature. See Tiedeman's Unwritten Const. of U. S., 43; *Holden* v. *Hardy*, 169 U. S. 389.

What now exists in Oregon was utterly unknown in the United States prior to its adoption in Oregon, and attempted adoption in Colorado. 1 Dillon's Munic. Corp., 5th ed., §§ 15 to 63, inclusive.

This power of the legislature over municipalities before the adoption of these constitutional amendments

has been conclusively established in the State of Oregon. *Winters* v. *George*, 21 Oregon, 251, 257; *Simon* v. *Northrup*, 27 Oregon, 487, 495; *Brand* v. *Multnomah County*, 38 Oregon, 79, 91. This power cannot be taken away. 28 Cyc. 132, 235–243; *States* v. *Scales*, 97 Pac. Rep. 587; *Elliott* v. *State*, 121 Michigan, 611; *State* v. *Haines*, 35 Oregon, 379, 381.

The power of the State cannot be invaded by an amendment to the charter of cities by electors of cities. *Cook* v. *Dendginger*, 38 La. Ann. 261, 263; *Nelson* v. *Homer*, 48 La. Ann. 258; *State* v. *M. T. Co.*, 189 Missouri, 83 to 107; *Fragley* v. *Phelan*, 126 California, 383; *Straw* v. *Harris*, 103 Pac. Rep. 777; *McMinnville* v. *Howenstine*, 109 Pac. Rep. 81; *Kansas City* v. *Marsh Oil Co.*, 141 Missouri, 458; *Ewing* v. *Hoblitzelle*, 85 Missouri, 64, 76. See also: *Fawcett* v. *Fitzgerald*, 14 Washington, 604, for limitations on the power of the voters in amending their charter. Also *In re Cloherty*, 2 Washington, 137; *City* v. *State*, 4 Washington, 64; *Tacoma* v. *City*, 14 Washington, 288; *Haset* v. *Seattle*, 51 Washington, 174, 178, 179.

Mr. Frank S. Grant and *Mr. William C. Benbow* for defendants in error:

The people have the power of local self-government. Art. I, § 1, Const. Oregon; Amendment X Const. of United States; Cooley on Const. Lim. (7th ed.), pp. 68–69.

The Federal Government is the only party who can question the construction of a bridge over navigable water on account of a lack of Federal authority. None can question the lack of legislative authority to construct a bridge across navigable waters, except the State. *Cudinger* v. *Saginaw*, 132 Michigan, 395, 405; *Portland* v. *Montgomery*, 38 Oregon, 215, 222; *S. C.*, 190 U. S. 89; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 689; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 44; *Rowe* v. *Strong*, 107 N. Y. 350, 360; *Doolittle* v. *Broome Co.*, 18 N. Y. 155.

Art. IV, § 1, and § 1a do not violate the Federal Constitution. *Kiernan* v. *Portland*, 111 Pac. Rep. (Ore.), 379; *S. C.*, rehearing, 112 Pac. Rep. 402; *Straw* v. *Harris*, 54 Oregon, 424, 430–431; *Bonner* v. *Belsterling*, 137 S. W. Rep. 1155; *Walker* v. *Spokane*, 113 Pac. Rep. (Wash.) 775; *Kadderly* v. *Portland*, 44 Oregon, 118, 144–145; *Hartig* v. *Seattle*, 102 Pac. Rep. (Wash.) 408, 409; *In re Pfahler* (Cal.), 88 Pac. Rep. 270, 272.

Whether or not a state government is republican in form is a political question. *Luther* v. *Borden*, 7 How. 1, 42; *Texas* v. *White*, 7 Wall. 700, 730; *Taylor* v. *Beckham*, 178 U. S. 548; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *In re Duncan*, 139 U. S. 449; *Leeper* v. *Texas*, 139 U. S. 462, 467; *McConaughey* v. *State*, 106 Minnesota, 392; *Brickbome* v. *Brooks*, 165 Fed. Rep. 534.

The Oregon initiative and referendum amendments as to municipalities are valid. Const. Oregon, Art. IV, § 1a; Art. XI, § 2; *Kiernan* v. *Portland, supra; Straw* v. *Harris*, 54 Oregon, 424, 430–431; *Walker* v. *Spokane*, 113 Pac. Rep. (Wash.) 775; *McMinnville* v. *Howenstine*, 109 Pac. Rep. 81; *In re Pfahler* (Cal.), 88 Pac. Rep. 270, 272; *St. Louis* v. *N. W. T. Co.*, 149 U. S. 465.

For definitions of the word republic, see The Century Dictionary; Rapalje & Lawrence's Law Dictionary; 2 Bouvier's Law Dictionary, 577; 20th Century Ency. & Dict.; Encyclopedia Americana (ed. 1903–04); 34 Cyc., pp. 16–22; 24 Amer. & Eng. Ency. of Law, 598; *Chisholm* v. *Georgia*, 2 Dall. 419.

For the meaning of the word republic as defined in the Federal debates at the time of adoption of the Constitution, see Federalist papers Nos. 39 and 43; 5 Elliot's Debates, 160; 3 Elliot's Debates, 34, 322; Madison in The Federalist.

As to what constitutes the principles and meaning of a republican form of government, see: Cooley on Const. Lim. (7th ed.), pp. 3, 6, 9, 45, 65–69; *Chisholm* v. *Georgia*, 2

Dall. 419; *Saratoga Springs* v. *Saratoga Gas Co.*, 191 N. Y. 123; *S. C.*, 18 L. R. A. (N. S.) 718; *Kadderly* v. *Portland*, 44 Oregon, 118, 144–145; *Walker* v. *Spokane*, 113 Pac. Rep. (Wash.) 775; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *Oregon* v. *Pac. States Tel. & Tel. Co.*, 53 Oregon, 162, 166; *Straw* v. *Harris*, 54 Oregon, 424, 430–431; *Ex parte Wagner*, 95 Pac. Rep. (Okl.) 435; *Hartig* v. *Seattle*, 102 Pac. Rep. (Wash.) 408, 409; *In re Pfahler* (Cal.), 88 Pac. Rep. 270, 272.

Mr. Chief Justice White delivered the opinion of the court:

Following the incorporation into the constitution of the State of Oregon in 1902 of the initiative and referendum amendment referred to in the case of *Pacific States Telephone & Telegraph Co.* v. *Oregon*, just decided, two other amendments to the constitution were adopted by that method, designated, the first as Article IV, § 1a, and the second as Article XI, § 2. The pertinent provisions of Article IV, § 1a, and of Article XI, § 2, are in the margin.[1]

[1] Article IV, section 1a. The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town.

Article XI, section 2. Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to

The legislature (Feb. 25, 1907, Laws of 1907, chap. 226, p. 398), authorized municipalities to provide by ordinance for carrying into effect the initiative and referendum powers reserved by the amendment to the Constitution just quoted. The city of Portland adopted ordinance No. 16311, providing the methods by which the initiative and referendum powers of the city should be exerted. We quote in the margin [1] from the opinion of the

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enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon. (1 Lord's Oregon Laws, pp. 91, 118.)

[1] On April 7, 1908, an initiative petition, containing the required number of signatures, was filed with the council, requesting the city to build a bridge across the Willamette river, from Broadway street in East Portland to the west side of the river, whereupon the City of Portland took steps to obtain plans and specifications for building said bridge. On May 8, 1908, the auditor notified the mayor of the filing of said petition, and requested him to comply with his duties under the charter in regard thereto. On October 20, 1908, the petition, containing a sufficient number of signatures, was presented to the council at a legally called meeting, and at said date the council requested the opinion of the city attorney as to the validity thereof. On October 27, 1908, the attorney filed his opinion, affirming its validity, and thereafter, on November 11, 1908, the council passed an ordinance (No. 18,531) submitting to a vote of the people an amendment to the city charter, providing for the construction of said bridge and for issuing bonds in the sum of not to exceed $2,000,000 to pay for the same, designating said proposed amendment as § 118½ of Art. VI of Chap. 3, and on November 25, 1908, the council passed a resolution, submitting the proposed amendment to a vote of the people at a special election on April 23, 1909. Thereafter, on February 17, 1909, the council passed an ordinance (No. 18,976), amending ordinance No. 18,531, so as to fix the date of the election on May 8, 1909, instead of April 23, as originally specified. On March 31, 1909, the council passed an ordinance (No. 19,174) expressly repealing ordinance No. 18,531 as amended, and no special election was held under any ordinance or resolution. On March 31, 1909, the same date as that of the repealing ordinance, a resolution was passed, authorizing the submission of the charter amendment to a vote of the people at the general election to be held June 7, 1909. More than twenty days

Supreme Court of Oregon in this case the facts concerning the action taken by the municipality leading up to the adoption of an ordinance which forms the subject-matter of this controversy.

The ordinance in question was entitled "To amend Article VI of chapter 3 of the Charter of the City of Portland . . . by inserting a section in said Article VI of chapter 3 after section 118 and before section 119 thereof, which shall be designated in the Charter as section one hundred and eighteen and a half (118½) of Article VI of chapter 3." Omitting details, the amendment conferred upon the council of the city authority to issue and dispose of bonds of the city not exceeding two millions of dollars, to be sold, as occasion might require, to enable the Executive Board of the city of Portland to construct in the name of the city of Portland a bridge with proper approaches and terminals "across the Willamette river in said city from Broadway street at or near its intersection with Larrabee street on the east side of said river. . . ." The amendment gave power to the Executive Board in building the authorized bridge, to "erect and construct . . . subject to such regulations as may be imposed by the United States, piers, abutments and other necessary supports in the bed of the Willamette river for the foundation of such bridge." Again, as stated by the Supreme Court of Oregon, pursuant to the submission to voters as above stated, "on June 7th the election was held, at which there were cast for the amendment 10,087 votes, and against it 6,061, and on June 21st the mayor proclaimed that the amendment had been adopted." Following the adoption of the ordinance, on October 27, 1909, the council passed an ordinance

prior to the election the auditor of the city published the proposed charter amendment, with the ballot in full, in the city's official newspaper, as required by law, and also sent out and distributed copies of said amendment to the voters of the city. . . .

(No. 20208), authorizing the issue and sale of two hundred and fifty thousand dollars of the bonds provided for in the amendment to the charter for the purpose of obtaining funds to commence the construction of the bridge. On the promulgation of this ordinance the present suit was begun by the plaintiff in error in a state court with the object of enjoining the sale of the bonds and preventing the carrying out of the amendment of the city charter which had been adopted in pursuance of the vote as above stated. The right to stand in judgment for this purpose was based upon the interest of the complainant as a citizen and taxpayer. The complaint stated a multitude of grounds, assailing in every conceivable form the power to authorize the voters of the municipality to resort to the initiative for the purpose of amending the charter; and the repugnancy of the delegation of that power and of the charter amendment adopted in pursuance of it to many provisions of the state constitution and the Constitution of the United States. The regularity of the proceedings taken to adopt the amendment was also elaborately assailed. The city answered. The case was submitted to the trial court on bill and answer, and resulted in the dismissal of the bill. The case was taken to the Supreme Court of the State, where that judgment was affirmed. The court delivered two opinions, one on the first hearing and the other on a rehearing. The first carefully disposed of the many objections made to the power under the state constitution to confer on the voters of the municipality the authority to amend the charter and to the regularity of the proceedings leading up to the adoption of the amendment, and to the proceedings culminating in the adoption of the assailed ordinance. The various contentions concerning these subjects, based upon the Constitution of the United States, were also disposed of in the course of the opinion. We have not examined the petition for the rehearing, as it was omitted in printing the record, but it is

inferable, from the elaborate opinion which was delivered on the rehearing, that the main grounds urged for a rehearing were based on the absence of power in a State to adopt the methods of initiative and referendum, and the effect of doing so on the continued existence of a government republican in form. We think this is the reasonable inference, as those subjects were elaborately reviewed by the court on the rehearing.

The errors assigned are numerous and involve assumed state and Federal questions so interwoven as to cause it to be difficult to separate them or state with precision the questions of a Federal nature which they embrace. We need not, however, undertake to do so, as all the questions which it is deemed arise for consideration are in the argument reduced to eight propositions, which are in the margin.[1] Coming to test these propositions, we think on their face it is apparent they are disposed of by either or

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[1] 1. Can the State of Oregon legally adopt the initiative and referendum amendment to its constitution, Article IV, section 1, attempted to be adopted June 2, 1902?

2. Can the electors of the State of Oregon legally adopt the further initiative and referendum amendments to its constitution, Article IV, section 1–A, and Article XI, Section 2, attempted to be adopted June 4, 1906, by virtue of said Article IV, Section 1?

3. Can the electors of the City of Portland legally adopt the pretended section 118½ of the charter of the City of Portland, which is printed above in this brief, by virtue of the above-mentioned initiative and referendum amendments to the Oregon constitution?

4. Can the City of Portland legally issue bonds, tax plaintiff in error, and build said Broadway Bridge across the navigable Willamette River owned by the State of Oregon, by virtue of the said section 118½ of charter, attempted to be adopted at said city election under said system of government?

5. The Supreme Court of Oregon committed error in deciding that the pretended section 118½ is invalid in so far as it attempts to impose the care and maintenance of the Broadway Bridge upon Multnomah County and then holding that said clause is severable from the rest of the section, and the remainder of the section is valid, as thereby the

both of one or two considerations—(*a*) the necessary operation and effect of the opinion in *Pacific States Telephone & Telegraph Co.* v. *Oregon*, just announced, or (*b*) the conclusive effect on questions of a local and state character resulting from the action of the court below, and hence that none of them have a foundation sufficiently substantial to support the exertion of jurisdiction.

In saying this we are not unmindful that one of the assignments is based upon the contention that as the Willamette River was navigable, there was no power to build a bridge over it without the consent of the Government of the United States. But in the first place, we are unable to perceive upon what theory the complainant possessed the right to raise such a question, and in the second place, the ordinance which empowered the bridge expressly ex-

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Supreme Court of Oregon attempted to legislate and authorize the taxation of plaintiff in error and deprived him of the law of the land.

6. The Supreme Court of Oregon committed error in deciding that the granting of a franchise and building a bridge across the Willamette river, owned by the State of Oregon and controlled jointly by the United States of America and the State of Oregon, is a municipal purpose instead of a state purpose and can be granted by the electors of the City of Portland in amending the charter of the City of Portland under the said "Oregon system," as said decision denied to plaintiff in error the law of the land.

7. The Supreme Court of Oregon committed error in deciding that the Council and electors of the City of Portland can enact a charter amendment to the charter of the City of Portland, under said "Oregon system," by which the city could issue bonds in a large amount and tax the property of plaintiff in error for the payment of the bonds as a municipal purpose, when it is a state purpose, and it is not within the constitutional power of the people of the State of Oregon to delegate the power to tax without limitation and exercise state powers to the electors of a municipality, and the attempt to do so is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States; also in violation of sections 3 and 4 of Article IV of the Constitution of the United States of America, as such grant of power would be for the State of Oregon to commit state suicide and dissolve the State of Oregon into as many smaller States as there are munici-

acted that it should be built in conformity to the requirements of the authorities of the United States. It is to be observed that both sides refer to and insert in their printed arguments an act of the legislature of Oregon passed since this writ of error was sued out (Jany. 18, 1911, Gen. Laws, 1911, c. 6, p. 23). Nothing could be more complete and comprehensive in the manifestation of a purpose, so far as there was power to do so, to cure any and every possible defect. Its title is an indication of its purpose and scope:

"An act to authorize the construction of a bridge known as the Broadway bridge, to be built across the Willamette River in the city of Portland in the State of Oregon and to cure any errors or irregularities in the passage of the amendment to the charter of the city of Portland author-

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palities within the State and to change the republican government of the State of Oregon into a confederacy of cities within the State of Oregon, and tends to destroy our system of government created and guaranteed by the Constitution of the United States of America.

8. The Supreme Court of Oregon erred in holding and deciding that plaintiff, a citizen of the United States, must conform his conduct and hold his property in state matters and tax matters, to a rule of conduct or law enacted by mere numbers of people and assemblages of people within the borders of a municipality because it is not in accordance with due process of law and is in violation of the law of the land to require any citizen of the United States to conform his conduct, and hold his property in state matters and in tax matters, to a rule of conduct or law, enacted directly by mere numbers of people or assemblages of people within a municipal corporation, and is contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States of America, sections 3 and 4 of article IV of the Constitution of the United States of America; and also is contrary to the implied provisions of the Constitution of the United States that government of the several States shall be representative in form and that the several States shall create and maintain representative legislative assemblies, and that the citizens of the United States shall be protected in their rights of enjoyment of life, liberty and property by the law of the land which is an inherent attribute of citizenship of the United States, which no State or its people may impair.

izing such bridge and to validate and confirm the bonds issued or to be issued for the construction therefor."

We have not deemed it necessary to take into consideration the act of Congress—36 Stat., c. 253, p. 1348—expressly approving the authority granted to build the bridge so far as the United States was concerned, and ratifying any infirmity which might otherwise have arisen in that regard.

It follows that the writ of error must be, and it is,

Dismissed for want of jurisdiction.

THE ABBY DODGE.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 41. Argued November 6, 7, 1911.—Decided February 19, 1912.

Each State owns the beds of all tide waters within its jurisdiction unless they have been granted away; also the tide waters themselves and the fish in them so far as they are capable of ownership while running. *McCready* v. *Virginia*, 94 U. S. 391.

Congress has no control over sponges growing on the land beneath tide water within the jurisdiction of a State.

Where two interpretations of a statute are admissible, one of which makes the statute constitutional and the other unconstitutional, the former must be adopted. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

The act of June 20, 1906, 34 Stat. 313, c. 3442, regulating the landing of sponges at ports of the United States, relates only to sponges taken outside of the territory of any State.

The power of Congress over foreign commerce is complete; no one has a vested right to carry on foreign commerce with the United States. *Buttfield* v. *Stranahan*, 192 U. S. 470.

Congress can, by exertion of its power to regulate foreign commerce,

[1] The docket title of this case is The vessel "Abby Dodge," A. Kalimeris, Claimant, Appellant, *v.* The United States.

forbid the importation of sponges gathered under conditions expressed in the act of June 20, 1906.

Where the act of Congress, under which forfeiture is sought, does not apply to territorial waters, the libel must aver that the acts were done outside of the territorial limits of any State.

When Congress, under its power to regulate foreign commerce, prohibits the importation of certain merchandise, it may cast on the one seeking to bring merchandise in the burden of establishing that it is exempt from the operation of the statute.

Under the circumstances of this case it is proper to allow the Government to amend the libel to present a case within the statute as construed in this opinion. *The Mary Ann*, 8 Wheat. 389.

THE facts, which involve the constitutionality and construction of the act of Congress of June 20, 1906, relating to landing of sponges in ports of the United States, are stated in the opinion.

Mr. Edward R. Gunby, for appellant:

Congress had no power under the Federal Constitution to pass the act of June 20, 1906. *Marbury* v. *Madison*, 1 Cranch, 137.

Under the wording of the act, sponges are prohibited from being landed at any port of the United States, even if taken within the waters of a State, and no element whatever of interstate or foreign commerce is required to enter into the act in order to make it a violation of law.

If the landing of an ordinary article of commerce is commerce within the meaning of the law when commerce is confined within the limits of a single State, Congress has no power to regulate or control it. *The Daniel Ball*, 10 Wall. 557; *The Bright Star*, Fed. Cases, No. 1880; *King* v. *The Am. Trans. Co.*, Fed. Cases, No. 7787; *United States* v. *New Bedford Bridge*, Fed. Cases, No. 15,867; *United States* v. *Morrison*, Fed. Cases, No. 15,465; *Sinnot* v. *Davenport*, 22 How. 227.

Even if the acts controlled and regulated by the act of Congress are matters of interstate commerce, if the same

are so blended with intrastate commerce that the two are inseparable, the act of Congress would be unconstitutional. *Howard* v. *Ill. Cent. R. R. Co.*, 207 U. S. 463; *Sears* v. *Warren*, 36 Indiana, 267.

The people of the United States, as distinguished from the people of the several States, have no common property in wild animals, oysters, fish, etc., within the boundaries of the several States, which will give them as citizens of the United States the right to legislate for the preservation of such property within the limits of the several States. The right to legislate on this subject being based upon the common ownership of the property, the several States have this authority when they are erected; but neither the States nor the United States have this authority over the waters of the high seas outside the limits of the several States.

While there are no decisions in relation to the control of the sponge industry and the catching of sponges, decisions upon the right of the States to legislate in regard to oysters are so nearly parallel as to practically control the same rights in regard to sponges. The right of the State to absolutely regulate the oyster industry has been clearly recognized. *Lee* v. *State of New Jersey*, 207 U. S. 67; *McReady* v. *Virginia*, 94 U. S. 391; *Louisiana* v. *Mississippi*, 202 U. S. 1; *Smith* v. *Maryland*, 18 How. 71.

As to the ownership, sovereignty and control of the tide water and the right to control the fishing therein, see *Manchester* v. *Massachusetts*, 139 U. S. 240; *Lawton* v. *Steele*, 152 U. S. 133; *Martin* v. *Waddell*, 16 Pet. 367; *Pollard* v. *Hagan*, 3 How. 212; *Illinois* v. *Ill. Cent. R. R. Co.*, 146 U. S. 387; *Wharton* v. *Wise*, 153 U. S. 155; *Mann* v. *De Coma Land Co.*, 153 U. S. 273; *McCready* v. *Virginia*, 94 U. S. 391; *Hardin* v. *Jordan*, 140 U. S. 371; *Shively* v. *Bowlby*, 152 U. S. 1.

By the act of March 3, 1845, Florida was admitted into the Union on equal footing with the original States in all

respects whatsoever. *Florida* v. *Black River Phosphate Co.*, 32 Florida, 83, 94.

Under Art I, Florida Const. the boundaries of the State are defined as being three leagues from shore, in the Gulf of Mexico. So the State has control over the sponge bars and beds in the Gulf of Mexico and Straits of Florida from the shore out to, and coextensive with, the state limits so defined. *United States* v. *Bevans*, 3 Wheat. 336.

As to the right of the several States to control the taking of fish and game within the limits of their territory, the following decisions among the state cases are to the same effect: *Alabama* v. *Harred* (Ala.), 15 L. R. A. 761; *Waverly* v. *White* (Va.), 45 L. R. A. 227; *People* v. *Truckee Lumber Co.* (Cal.), 39 L. R. A. 581 and note; *Commonwealth* v. *Hilton* (Mass.), 45 L. R. A. 475; *State* v. *Lewis* (Ind.), 20 L. R. A. 52; *Geer* v. *Connecticut*, 161 U. S. 519; *New York* v. *Hesterberg*, 211 U. S. 31.

On the question of the power to control the taking of sponges, fish, and oysters outside of the territorial limits of the State or United States there are no decisions, but see those in relation to the seal industry in Behring Sea, *In re Cooper*, 143 U. S. 474; *Nor. Am. Commercial Co.* v. *United States*, 171 U. S. 110; *La Ninfa* v. *United States*, 75 Fed. Rep. 513, under which it appears that Congress has neither the power to prohibit the landing or sale of an ordinary article of commerce within the limits of a State, nor has it the power to control the taking of sponges, either within the waters of a State or upon the high seas.

The Solicitor General, with whom *Mr. Charles E. McNabb, Assistant Attorney*, was on the brief, for the United States:

Whether the act of Congress in question is unconstitutional as an invasion of the reserved power of the State is a question not presented by this record, inasmuch

as it is not shown that any of the sponges landed from the *Abby Dodge* were taken within the boundaries of the State. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107–177.

The United States has undoubted right alike in virtue of its power to regulate foreign commerce and as an exercise of its inherent powers of national sovereignty to regulate the use of fisheries near its shores and outside the boundaries of the States, so far as concerns operations by its own people or to or from its own shores. *Lord* v. *Steamship Co.*, 102 U. S. 541; *Chinese Exclusion Case*, 130 U. S. 581; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Nor. Am. Commercial Co.* v. *United States*, 171 U. S. 110; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Oceanic Steam Co.* v. *Stranahan*, 214 U. S. 320.

Conservation of these fisheries concerns the users of sponges throughout the United States. Florida certainly cannot protect them, and unless the United States does so they may be utterly destroyed.

American fisheries have been regulated by law for more than a century. See act of February 18, 1793, 1 Stat. 305, 307, ch. 8. The laws in force in 1873, when the statutes were revised, appear under Titles 50 and 51; see §§ 4321, 4393, for regulations as to whale, mackerel, and cod. Those statutes have been construed by the courts without question as to the power of Congress to enact such laws. *The Nymph*, 1 Ware, 257; 18 Fed. Cas. 509; *United States* v. *The Davis*, 1 Cliff. 523; 27 Fed. Cas. 454; *United States* v. *The Reindeer*, 14 Law Rep. 235; 27 Fed. Cas. 758; and see act of February 28, 1887, 24 Stat. 434, ch. 288; April 6, 1894, 28 Stat. 52, ch. 57; June 5, 1894, 28 Stat. 85, ch. 91; December 29, 1897, 30 Stat. 226, ch. 3. See also *Nor. Am. Commercial Co.* v. *United States*, 171 U. S. 110, 134; Act of June 30, 1906, 34 Stat. 768, ch. 3915.

If the foregoing laws are constitutional, the one in question is. The power to regulate commerce in sponges

gathered outside the territorial waters of States must be lodged somewhere. It cannot be nonexistent. Obviously, it is not in the States; therefore it must be in the Federal Government.

"Commerce," in the grant of power to Congress, comprehends external relations of every nature. 2 Madison Papers, 859; *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Henderson* v. *Mayor*, 92 U. S. 259, 272.

For other cases presenting, as in this case, conditions beyond state control or regulation and involving consideration and application of both constitutional and international law, see *Chinese Exclusion Case*, 130 U. S. 581, 603, 609; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 543; *Turner* v. *Williams*, 194 U. S. 279, 290; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492, 493; *Oceanic Steam Co.* v. *Stranahan*, 214 U. S. 320, 334, 335; *Lord* v. *Steamship Co.*, 102 U. S. 541.

The conventional limitation of national authority over the high seas to within three miles of the shore is applicable only as between nations. The people of the United States have an interest in sea fisheries, and an especial interest in those near their own shores. The United States is asserting nothing here against the sovereignty of any other nation. It simply closes the ports of the United States against everybody engaged in operations which it holds to be needlessly wasteful and destructive in their methods.

There is nothing new in this. It is not new in the legislation of the United States. It is not new in the legislation of other nations. Examples, indeed, are numerous. Russia, Great Britain, New Zealand, Sweden, Norway, Germany, and Holland have all adopted legislative regulations, applicable to their own subjects, for the protection of seals of various species. Other instances are the British "Sea Fisheries Act" of 1868 (31 and 32 Vict., ch. 45, § 47);

the Scotch "Herring Fishery Act" of 1889 (52 and 53 Vict., ch. 23); ordinances of Ceylon and statutes of Australasia regulating pearl fisheries; laws of Italy as to coral fishing, and those of Norway establishing a close season for whales. See the treaty recently concluded between Russia, Great Britain, Japan and the United States.

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

By libel of the vessel *Abby Dodge*, either her forfeiture or the enforcement of a money penalty was sought because of an alleged violation of the act of June 20, 1906, 34 Stat. 313, ch. 3442, entitled, "An Act To regulate the landing, delivery, cure, and sale of sponges." The specific violation alleged was "That there was at the port of Tarpon Springs, within the Southern District of Florida, on the 28th day of September, A. D. 1908, landed from the said vessel, *Abby Dodge*, 1,229 bunches of sponges, taken by means of diving and apparatus from the waters of the Gulf of Mexico and the Straits of Florida; . . . at a time other than between October 1st and May 1st of any year, and at a time subsequent to May 1st, A. D. 1907."

The owner of the vessel appeared and filed exceptions which, although urged in various forms, were all, as stated by counsel, "directed to and based upon the alleged unconstitutionality of the said act of June 20, 1906." The exceptions were overruled, and, the claimant declining further to plead, a decree was entered assessing a fine of $100 against the vessel. This appeal was then taken.

For the purposes of the questions upon which this case turns we need only consider the first section of the act of June 20, 1906, which is as follows:

"That from and after May first, anno Domini nineteen hundred and seven, it shall be unlawful to land, deliver, cure, or offer for sale at any port or place in the United States any sponges taken by means of diving or diving

apparatus from the waters of the Gulf of Mexico or Straits of Florida: *Provided*, That sponges taken or gathered by such process between October first and May first of each year in a greater depth of water than fifty feet shall not be subject to the provisions of this Act: *And provided further*, That no sponges taken from said waters shall be landed, delivered, cured, or offered for sale at any port or place in the United States of a smaller size than four inches in diameter."

Broadly the act, it is insisted, is repugnant to the Constitution because, in one aspect, it deals with a matter exclusively within the authority of the States, and in another because, irrespective of the question of state authority, the statute regulates a subject not within the national grasp and hence not embraced within the legislative power of Congress. The first proceeds upon the assumption that the act regulates the taking or gathering of sponges attached to the land under water within the territorial limits of the State of Florida and it may be of other States bordering on the Gulf of Mexico, prohibits internal commerce in sponges so taken or gathered, and is therefore plainly an unauthorized exercise of power by Congress. The second is based on the theory that even if the act be construed as concerned only with sponges taken or gathered from land under water outside of the jurisdiction of any State, then its provisions are in excess of the power of Congress, because, under such hypothesis, the act can only apply to sponges taken from the bed of the ocean, which the National Government has no power to deal with.

We briefly consider the two propositions. If the premise upon which the first rests be correct, that is to say, the assumption that the act when rightly construed applies to sponges taken or gathered from land under water within the territorial limits of the State of Florida or other States, the repugnancy of the act to the Constitution would plainly be established by the decisions of this court. In

McCready v. *Virginia*, 94 U. S. 391, the question for decision was whether the State of Virginia had such exclusive authority over the planting and gathering of oysters upon the soil in tide waters within the territorial limits of the State as not only to give the State the power to control that subject, but to confer the right to exclude the citizens of other States from participating. In upholding a statute exerting such powers the doctrine was declared (p. 394) to be as follows: "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Smith* v. *Maryland*, 18 How. 74; *Munford* v. *Wardwell*, 6 Wall. 486; *Weber* v. *Harbor Commissioners*, 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddell*, 16 Pet. 410. . . . The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship." True it is that the rights which were thus held to exist in the States were declared to be "subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce has been granted to the United States," but with that dominant right we are not here concerned.

Again, in *Manchester* v. *Massachusetts*, 139 U. S. 240, in upholding a statute of the State of Massachusetts regulating the taking of Menhaden in Buzzard's Bay, the doctrine of the case just cited was expressly reiterated. True, further in that case, probably having in mind the declaration made in the opinion in the *McCready case*, that fish running within the tide waters of the several

States were subject to state ownership "so far as they are capable of ownership while so running," the question was reserved as to whether or not Congress would have the right to control the Menhaden fisheries. But here also for the reason that the question arising relates only to sponges growing on the soil covered by water we are not concerned with the subject of running fish and the extent of state and national power over such subject.

The obvious correctness of the deduction which the proposition embodies that the statute is repugnant to the Constitution when applied to sponges taken or gathered within state territorial limits, however, establishes the want of merit in the contention as a whole. In other words, the premise that the statute is to be construed as applying to sponges taken within the territorial jurisdiction of a State is demonstrated to be unfounded by the deduction of unconstitutionality to which such premise inevitably and plainly leads. This follows because of the elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366 407, and cases cited.

While it is true that it would be possible to interpret the statute as applying to sponges taken in local waters, it is equally certain that it is susceptible of being confined to sponges taken outside of such waters. In view of the clear distinction between state and national power on the subject, long settled at the time the act was passed and the rule of construction just stated, we are of opinion that its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate, and, therefore, be held not to embrace that which was not within such power.

In substance the argument is that this case does not come within the rule, since it is insisted to confine the statute to sponges taken or gathered outside of state territorial limits would also, although for a different reason, cause it to be plainly unconstitutional. This but assumes that the second proposition, denying all power in Congress to exert authority in respect to the landing of sponges taken outside of the territorial jurisdiction of a State is well founded, and we come therefore to the consideration of that proposition. For the sake of brevity we do not stop to review the general considerations which the proposition involves for the purpose of demonstrating its inherent inaccuracy, or to point out its conflict with the law of nations, and its inconsistency with the practices of the Government from the beginning. We thus refrain since there is a simpler and yet more comprehensive point of view disposing of the whole subject.

Undoubtedly, (*Lord* v. *Steamship Company*, 102 U. S. 541), whether the *Abby Dodge* was a vessel of the United States or of a foreign nation, even although it be conceded that she was solely engaged in taking or gathering sponges in the waters which by the law of nations would be regarded as the common property of all and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This being not open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress by an exertion of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States. *Buttfield* v. *Stranahan*, 192 U. S. 470, 492–493, and authorities there collected. Indeed, as pointed out in the *Buttfield Case*, so complete is the authority of Congress over the subject that no one can be said to have a vested

right to carry on foreign commerce with the United States.

Although, for the reason stated, we think the statute, limited by the construction which we have given it, is not repugnant to the Constitution, we are nevertheless of opinion that as thus construed the averments of the libel were not sufficient to authorize the imposition of the penalty which the court below decreed against the vessel. As by the interpretation which we have given the statute its operation is confined to the landing of sponges taken outside of the territorial limits of a State, and the libel does not so charge—that is, its averments do not negative the fact that the sponges may have been taken from waters within the territorial limits of a State—it follows that the libel failed to charge an element essential to be alleged and proved, in order to establish a violation of the statute. *United States* v. *Britton*, 107 U. S. 655, 661–662, and cases cited.

As we deem that it has no relevancy to the power of Congress to deal with a subject not within its constitutional authority, that is, the taking of sponges within the exclusive jurisdiction of a State, we have not considered it necessary to refer to a statement made by the district judge concerning legislation of the State of Florida making it unlawful to gather or catch sponges "in and upon any of the grounds known as sponging grounds along the coast of Florida from Pensacola to Cape Florida by diving either with or without a diving suit and armor." Equally, also, have we refrained from attempting to reconcile the enactment of this state law with some reference made by the Government in argument to certain statements in testimony given before a committee of the House when the act which is before us was in process of adoption, to the effect that there were no sponge beds within the jurisdiction of Florida, because "the sponge beds were from fifteen to sixty and sixty-five miles out."

In view of the paramount authority of Congress over foreign commerce, through abundance of precaution we say that nothing in this opinion implies a want of power in Congress, when exerting its absolute authority to prohibit the bringing of merchandise, the subject of such commerce, into the United States, to cast upon one seeking to bring in the merchandise, the burden, if an exemption from the operation of the statute is claimed, of establishing a right to the exemption.

While it necessarily follows from what we have said that the decree must be reversed, we are of opinion that under the circumstances of the case it should be accompanied with directions to permit the Government, if desired, to amend the libel so as to present a case within the statute as construed. *The Mary Ann*, 8 Wheat. 380.

Reversed.

HENDRICKS *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 164. Argued January 25, 1912.—Decided February 19, 1912.

The specification of the identity of a defendant and precise nature of his offense is the end, and not the beginning, of a grand jury proceeding. *Hale* v. *Henkel*, 201 U. S. 43.

An indictment for subornation of perjury committed before a grand jury inquiry into certain criminal violations of the law of the United States relating to the public lands, disposal of the same, and the unlawful fencing thereof, is not insufficient, as failing to set forth the nature and cause of the accusation, because it does not state the particular matter brought under inquiry. *Markham* v. *United States*, 160 U. S. 319.

THE facts, which involve the sufficiency of an indictment for perjury and the rights of the accused under the

Sixth Amendment to the Constitution of the United States, are stated in the opinion.

Mr. Alfred S. Bennett for plaintiff in error:

The provisions of the Sixth Amendment give to defendants in criminal cases important constitutional rights of which the courts will not permit them to be deprived. A substantial and serious failure to comply with its terms raises a constitutional question which the defendant may invoke as such, and which cannot be taken away by any act of legislature. *United States* v. *Cruikshank*, 92 U. S. 542; *State* v. *Weber*, 62 Atl. Rep. 1018; *Hogue* v. *United States*, 184 Fed. Rep. 248; *State* v. *Pettye*, 84 Fed. Rep. 891; *State* v. *Silverberg*, 78 Mississippi, 858; *Moline* v. *State*, 93 N. W. Rep. 228; *State* v. *Mace*, 76 Maine, 66; *McLaughlin* v. *State*, 45 Indiana, 343; *McNair* v. *People*, 89 Illinois, 444; *Reyes* v. *State*, 15 So. Rep. 876; Bishop's New Crim. Proc., §§ 104, 108, 110; *Rosen* v. *United States*, 161 U. S. 31, 40; *Turnbull* v. *United States*, 46 Fed. Rep. 755; *United States* v. *Potter*, 56 Fed. Rep. 83.

The particular proceeding in which the alleged false testimony is claimed to have been given and to which the alleged false testimony is claimed to be material must be set forth in the indictment, whether the alleged perjury was committed before a grand jury or before any other tribunal. Cases *supra* and *Commonwealth* v. *Taylor*, 96 Kentucky, 394; 29 S. W. Rep. 138; *State* v. *McCormick*, 52 Indiana, 169; *Banks* v. *State*, 78 Alabama, 14; *State* v. *Wiggin* (Miss.), 30 So. Rep. 712; *Buller* v. *State*, 33 Tex. Crim. Rep. 551; *Commonwealth* v. *Pickering*, 8 Grattan, 628; *State* v. *Koslowski*, 228 Missouri, 351; *State* v. *Ayer*, 40 Kansas, 43; 19 Pac. Rep. 403; *State* v. *McCone*, 59 Vermont, 117; *State* v. *See*, 4 Washington, 344; *Wilson* v. *State*, 115 Georgia, 206; *State* v. *Ela*, 91 Maine, 309; *Davis* v. *State*, 79 Alabama, 20; *United States* v. *Wilcox*, 4 Blatchford, 391; *Hope* v. *United States*, 184 Fed. Rep. 245; *State* v.

Smith, 40 Kansas, 631; *United States* v. *Robinson* (Dak.), 23 N. W. Rep. 90; *Brooks* v. *State*, 29 Tex. Appeals, 582; *Weaver* v. *State*, 34 Tex. Crim. Rep. 554; *United States* v. *Mann*, 95 U. S. 580.

It is not enough that alleged false testimony may have been material. Its materiality must be proven and established the same as any other fact in the case. *McClelland* v. *People* (Colo.), 113 Pac. Rep. 640; *State* v. *Aikins*, 32 Iowa, 413; *State* v. *Deneen*, 203 Missouri, 628; *Koslowski* v. *State* (Mo.), 128 S. W. Rep. 740; *State* v. *Smith*, 40 Kansas, 631; *Banks* v. *State*, 78 Alabama, 14; *Commonwealth* v. *Pollard*, 12 Metc. (Mass.) 229.

Mr. Assistant Attorney General Denison, with whom *Mr. William W. Lemmond* was on the brief, for the United States.

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

The plaintiff in error, upon a conviction and sentence for subornation of perjury, in violation of § 5393, Revised Statutes, prosecutes this writ of error upon the theory that a question of constitutional right was involved, arising upon a claim made in the court below that the indictment was repugnant to the Sixth Amendment to the Constitution. On the assumption that there was jurisdiction to entertain the writ, counsel also in argument assailed as erroneous certain rulings of the trial court "admitting evidence and instructions given and refused in the course of the trial."

The indictment consisted of two counts—the first charging the subornation of one George W. Hawk, and the second the subornation of one Clyde Brown, to commit perjury in giving the testimony before a Federal grand jury.

As, however, on the trial the Government elected to rely upon the charge of the subornation of Hawk, we are concerned alone with the first count. The sufficiency of this count was assailed by demurrer, it being alleged "That the said count of said indictment and the matters and facts therein contained, in manner and form as the same are stated, are not sufficient in law and are not sufficient to constitute a crime and are not direct and certain." The protection of the Constitution was not, however, invoked until after conviction, when a motion to arrest judgment was made, "based upon the ground that the indictment in this case does not charge a crime, and is insufficient and does not sufficiently describe the offense, 'And does not inform the defendant of the nature and cause of the accusation,' against him and is in violation of and insufficient under the Sixth Amendment to the Constitution of the United States."

The portions of the indictment which relate to the particular matter which was under investigation before the grand jury, or which refer to the materiality of the alleged testimony, and which it is claimed exhibits the repugnancy of the indictment to the Sixth Amendment, is contained in the excerpt, which is in the margin,[1] the italics being

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[1] That Hamilton H. Hendricks, late of the County of Wheeler, in the said district, on the fifteenth day of January, in the year of our Lord nineteen hundred and five, at and within the said County of Wheeler, in the said district, unlawfully did wilfully and corruptly suborn, instigate and procure one George W. Hawk to appear in person before them the said grand jurors, then and from thence hitherto sitting at the city of Portland, in the said district, as a grand jury of the Circuit Court of the said United States for the said district, *and, amongst other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district,* and to take his oath before the said grand jury, and upon his oath so taken to testify, depose and swear before the said grand jury in substance and to the effect *that when he the said George*

those of counsel, who assert that the italicized portion "is the portion bearing upon the question."

It is urged that the indictment did not sufficiently set

W. Hawk made his application dated October 19, 1898, and filed in the land office of the said United States at The Dalles, Oregon, on October 21, 1898, to enter certain public lands known and described as the southeast quarter of the southeast quarter of section two, the east half of the northeast quarter of section eleven, and the southwest quarter of the northwest quarter of section twelve, in township seven south and range twenty-two east, reference being had to the Willamette meridian and base line, as a homestead, under the laws of the said United States concerning homesteads, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporations; that he the said George W. Hawk was not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon; that he was not applying to enter the said lands for the purpose of speculation, but in good faith and to obtain a home for himself; that he had not made, and would not make, any agreement or contract with any person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of any person except himself, and that he himself paid the fees required by law to be paid upon the filing of such application;—that when he the said George W. Hawk, *on the second day of March, in the year nineteen hundred*, subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the said lands, he had there-fore, to wit, in the month of April, 1899, commenced his residence on the said lands, and had not sold, conveyed or mortgaged any portion of the said lands: And thereupon the said George W. Hawk, in consequence and by means of the said willful and corrupt subornation, instigation and procurement of the said Hamilton H. Hendricks, afterwards, to wit, *on the twenty-third day of January, in the year nineteen hundred and five*, in the said district, did appear in person before the said grand jury, at Portland aforesaid, and then and there was in due manner sworn by the foreman thereof, and then and there took his the said George W. Hawk's oath before the said grand jury that he would testify truly, and true answers make . . . and whether he himself paid the fees required by law to be paid upon the making of such final proof."

forth "the nature and cause of the accusation" within the meaning of the Sixth Amendment, because it did not "set forth in some definite way the matter or thing which was under investigation at the particular time, so that the defendant may know as to what particular controversy the alleged false testimony is claimed to be material, and how to meet the allegation of materiality." It is claimed "that the indictment, in order to be sufficient, should have stated *the particular matter* which was being investigated by the grand jury at the time, and to which it was claimed the alleged false testimony was material;" and that if the alleged false testimony concerning Hawk's final proof upon his land "became material collaterally in some other later matter, of which the grand jury did have jurisdiction . . . the collateral matter should have been set forth, and the indictment should have alleged that it was material in relation to that matter, so that the defendant could have an opportunity to intelligently defend as to the materiality of the alleged evidence as well as to other elements of the offense."

Reduced to their final analysis the contentions but assert that the indictment did not apprise the accused of the crime charged with such reasonable certainty that he could make his defense and be protected after judgment against another prosecution for the same offense. We are of opinion, however, that the principles settled by many prior adjudications of this court are so controlling as to foreclose discussion of the matter.

The description, in the indictment, of the proceeding in which the perjury was committed is as follows:

". . . Sitting as a grand jury . . . and, amongst other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district."

That this description adequately advised the defendant as to the identity of the proceeding in which the perjury was committed is settled by the following authorities: *Markham* v. *United States*, 160 U. S. 319, 320; *Williamson* v. *United States*, 207 U. S. 425; *Rosen* v. *United States*, 161 U. S. 29, 34, 40; *Dunbar* v. *United States*, 156 U. S. 185, 192; *Bannon* v. *United States*, 156 U. S. 464, 468; *Coffin* v. *United States*, 156 U. S. 432, 452, and *Kirby* v. *United States*, 174 U. S. 47, 64. A less definite description was held sufficient in the *Markham Case*, where the indictment specified "an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States, at Washington, in the District of Columbia." As the specification of the identity of a defendant and the precise nature of his offense is normally the end, and not the beginning of grand jury proceedings (*Hale* v. *Henkel*, 201 U. S. 43, 61, 65), and the very object of the proceeding may have been to determine the identity of the criminal, it was not essential that the proceedings should state the name of a specified defendant under investigation.

That the indictment was not wanting in definiteness, because therein it was in effect simply alleged that before the grand jury, after Hawk had been sworn, the truth of the recited matters concerning which it was subsequently alleged Hawk testified falsely, "became and was a material question," and it was not specified in just what evidentiary way the perjured testimony became material, is settled by the *Markham Case* (160 U. S. 324, 325), where a similar point was directly held to be without merit.

As, in view of prior decisions, the contention based upon the Sixth Amendment was manifestly frivolous, it results that the writ of error must be dismissed.

Writ of error dismissed.

ÆTNA LIFE INSURANCE COMPANY *v.* TREMBLAY.

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

No. 166. Argued January 26, 1912.—Decided February 19, 1912.

The full faith and credit clause of the Constitution does not extend to judgments of foreign states or nations, and unless there is a treaty relative thereto this court has no jurisdiction under § 709, Rev. Stat., to review a judgment of a state court on the ground that it failed to give full faith and credit to a judgment of a court of a foreign country.

The facts are stated in the opinion.

Mr. Ralph W. Crockett for plaintiff in error:

Where a life insurance policy is issued by a company of one State to one domiciled in another State, and the insured assigns the policy in the latter State, the law of the place where the assignment was executed shall govern. *Coburn's Appeal*, 74 Connecticut, 463; *Lee* v. *Abdy*, 17 Q. B. D. 309; *Union Cent. Life Ins. Co.* v. *Woods*, 11 Ind. App. 335; *Mut. Life Ins. Co.* v. *Allen*, 138 Massachusetts, 24; *Miller* v. *Campbell*, 140 N. Y. 457; *Spencer* v. *Myers*, 150 N. Y. 269; *Mut. Ben. Life Ins. Co.* v. *Bank*, 68 Michigan, 116; 19 Am. & Eng. Ency. of Law (2d ed.), 90.

This judgment is a valid and binding judgment in the Province of Quebec and by the decisions of this court is valid and binding upon our courts. See *Hilton* v. *Guyot*, 159 U. S. 113; *Ritchie* v. *McMullen*, 159 U. S. 235.

The judgment set up by the Ætna Life Insurance

Company in answer to the suit of Patrick F. Tremblay is a judgment rendered by a court of competent jurisdiction in the Province of Quebec. No question is raised as to the identity of the subject-matter in the Quebec and Maine suits nor as to the identity of the parties. It was rendered in accordance with the laws and practice of Quebec. All parties were duly notified and cited to appear. There is no flaw in the record.

The Federal question was raised in the original suit of *Tremblay* v. *Ætna Life Insurance Co.*, 97 Maine, 547, in which the credit to be given to the Canadian judgment is also discussed.

The defendant company introduced evidence of the Canadian judgment. The plea was the general issue, with the agreement that all of the defendant's evidence, if admissible at all, might for the purpose of that case, be deemed admissible under the general issue; and see *Ætna Life Insurance Co.* v. *Tremblay*, 101 Maine, 585.

The Federal right was denied by the Supreme Judicial Court of Maine. The Federal question was erroneously decided, and the judgment of the state court was not founded upon any other matter broad enough to sustain the judgment. Taylor, Juris. & Pro. U. S. Sup. Ct. 434; *Hilton* v. *Guyot*, 159 U. S. 163.

The effect to be given to foreign judgments is altogether a matter of comity in cases where it is not regulated by treaty. 2 Kent's Comm. (6th ed.) 120; *Hilton* v. *Guyot*, 159 U. S. 166; *McEwan* v. *Zimmer*, 38 Michigan, 765, 769; *Bradstreet* v. *Insurance Co.*, 3 Sumn. 600, 608.

The Canadian judgment in this case is pleaded in bar, and there is a marked distinction between judgments as a cause of action and as a plea in bar. A foreign judgment when brought forward as a cause of action may be only *prima facie*, but conclusive when called into question incidentally or by a plea in bar. *Walker* v. *Witter*, 1 Doug. 1; *Buttrick* v. *Allen*, 8 Massachusetts, 237; *Galbraith* v.

Neville, 5 East, 75; *Wood* v. *Gamble*, 11 Cush. 8; *Williams* v. *Preston*, 3 J. J. Mar. (Ky.) 600; Bigelow on Estoppel, 192; Freeman on Judgments (2d ed.), § 592.

The Canadian judgment is in the nature of a judgment *in rem*. Such judgments are conclusive under conditions where it might be held otherwise with regard to judgments *in personam*. See *Hilton* v. *Guyot*, *supra*.

There was no fraud on the part of the insurance company in any of the proceedings connected with the Quebec judgment.

Mr. Henry W. Oakes, with whom *Mr. William Frye White* was on the brief, for defendant in error:

This court has no jurisdiction.

No authority to review the judgment of a state court exists because it refuses to give effect to valid contracts, or because in its effect it impairs the obligation of a contract.

It must be the constitution or the statute of the State which impairs the obligation of a contract, or the case does not come within the jurisdiction of this court. *Sayward* v. *Denny*, 158 U. S. 180; *Railroad Company* v. *Rock*, 4 Wall. 481; *Knox* v. *Exchange Bank*, 12 Wall. 379; *Railroad Company* v. *McClure*, 10 Wall. 511; *Railroad Company* v. *Lovering*, 12 Wall. 384; *Chouteau* v. *Moffitt*, 111 U. S. 200; *Lehigh* v. *Borough of Easton*, 121 U. S. 388; *Parmalee* v. *Lawrence*, 11 Wallace, 36; *McManus* v. *O'Sullivan*, 91 U. S. 578.

Even had this court jurisdiction, it seems to us manifest that the decision of the court of Maine could not be successfully attacked on its merits. It was clearly within the power of the state court to decide as to the validity of the foreign judgment. Judgments of a foreign state are *prima facie* correct only. *Hilton* v. *Guyot*, 159 U. S. 113, 180.

Having power to inquire into the validity of the foreign

judgment, the court did so, and decided against it on several grounds as stated in its opinion.

A foreign judgment, even *in rem*, is open to inquiry with respect to its original validity, both as to the question whether the subject of the judgment, the property or right upon which it undertook to act, was within the jurisdiction of the court, and also whether the judgment was obtained by fraud on the part of the plaintiff, or by fraud or collusion on the part of the party undertaking to set up the judgment as a defense. *Wilkinson* v. *Hall*, 6 Gray (Mass.), 568; *Eddy* v. *O'Hare*, 132 Massachusetts, 56; *Whipple* v. *Robinson*, 97 Massachusetts, 107; *Wardle* v. *Briggs*, 131 Massachusetts, 518.

The court of Maine properly inquired into these questions, and after full hearing decided them adversely to the plaintiff in error.

The questions were fully within the province of the court to decide, and the decision cannot be revised by this process.

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

The facts are these: At Quebec, Canada, in 1885, the plaintiff in error issued its policy of insurance for two thousand dollars upon the life of Jean O. Tremblay, a resident of Canada, his wife being named as the beneficiary. In 1891, Tremblay assigned the policy as collateral security to J. B. Cloutier, of Quebec. Ten years later Mr. and Mrs. Tremblay assigned the policy to their son, Patrick F. Tremblay, subject to the claim of Cloutier. Soon after this last assignment Jean O. Tremblay died, and both assignees made claim upon the insurance company. The contending claimants not being able to agree as to the amount of the claim of Cloutier, the insurance company, as authorized by the statutes of Canada, paid

the amount of the policy to the Provincial Treasurer of Quebec. Cloutier then brought suit upon the policy, making the heirs, widow and son of the insured parties defendant. None of the defendants appeared; judgment by default was entered in favor of Cloutier, and the money was paid over to him by the Provincial Treasurer. During the pendency of Cloutier's suit, however, and before the latter obtained his judgment, Patrick F. Tremblay sued the insurance company in a court of the State of Maine, and recovered judgment for the full amount due upon the policy. 97 Maine, 547. The insurance company then unsuccessfully attempted, by a suit in equity, to stay the collection of the judgment in the action at law. 101 Maine, 585. Presumably in consequence of an intimation of the court when dismissing the equity cause, the insurance company began this proceeding for a review of the action at law, and the same culminated in a judgment in favor of the insurance company against Tremblay for $818.33 and interest, the sum found to be due to Cloutier, as equitable assignee of the policy for his advances to the original holder of the policy, thereby operating a set-off of the amount against Tremblay's judgment upon the policy. This writ of error was then allowed by the Chief Justice of the Supreme Judicial Court of Maine.

The assignments of error are three in number, but they merely allege in various forms the commission of error by the state court, sitting as a court of law, in not holding as requested that the judgment obtained upon the policy by Cloutier which had been pleaded in bar by the insurance company, was a bar to the action upon the policy brought by Patrick F. Tremblay, thereby denying "full and proper faith and credit" to the Cloutier judgment.

Plainly the writ of error was improvidently allowed. The authority conferred by Rev. Stat., § 709, to review a final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had,

is limited to cases "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity, specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority." The first section of Art. IV of the Constitution confers the right to have full faith and credit "given in each State to the public acts, records, and judicial proceedings in every other State." No such right, privilege or immunity, however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and we are referred to no treaty relative to such a right.

Neither expressly nor by necessary intendment was there asserted in the state court during the course of the litigation in question any claim on behalf of the insurance company of the possession of a right, etc., protected by the Constitution of the United States. Since, therefore, entirely aside from all question as to the correctness of the judgment below rendered, we are without authority to review the decision made by the state court, it results that the writ of error must be and it is dismissed for want of jurisdiction.

Writ of error dismissed.

UNITED STATES *v.* BARUCH.

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

No. 190. Argued November 13, 14, 1911.—Decided February 19, 1912.

Cotton featherstitch braids are properly assessed at sixty per centum as braids under the trimming schedule, par. 339, and not at forty-five per centum as tapes or bindings under notions schedule, par. 320 of the Tariff Act of July 24, 1897.

Where a conflict which had existed under prior tariff acts as to the classification of articles had been settled, Congress will not be presumed in enacting a new tariff to renew the conflict by not adhering to the commercial and tariff meaning of the terms as it had been settled.

The soundness of the judicial construction of a statute is reinforced by the fact that it had been the construction given by the Executive Department charged with its enforcement ever since its adoption.

172 Fed. Rep. 342, reversed; 159 Fed. Rep. 294, affirmed.

THE facts, which involve the classification of cotton-featherstitch braids under the tariff act of 1897, are stated in the opinion.

Mr. Assistant Attorney General Wemple, with whom *Mr. Charles E. McNabb, Assistant Attorney* was on the brief, for the United States.

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

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

This case concerns the proper classification of merchandise imported in 1899, and subsequent years, by the

respondent at the port of New York, invoiced as "cotton-featherstitch braids." The goods consisted of articles ranging variously from about one-fourth to one-half of an inch in width, loom woven, of white or colored threads throughout, or of mixed white and variously colored threads of cotton or other vegetable fiber, and ornamented with raised figures in various designs, some of which had plain and others scalloped or looped edges. They were officially appraised as "cotton braids—sixty percentum;" and were accordingly classified by the collector as "braids" under paragraph 339 of the tariff act of July 24, 1897 (30 Stat. 151, 181, c. 11), generally referred to as the "trimmings" schedule, the pertinent provision of which is as follows: "Embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings and bands, . . . composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this Act."

Asserting that the articles should not have been assessed at 60 per cent. but were dutiable at the rate of 45 per cent. ad valorem under paragraph 320 of said act, usually styled the "notions" schedule, as "bindings" or as "tapes . . . made of cotton or other vegetable fiber," the importers duly protested, and the question of the proper classification was considered by the Board of General Appraisers. That body, on July 24, 1906, sustained the decision of the collector, upon the authority of a ruling made in the case of Straus Bros. & Co., wherein the Board but acted upon the evidence taken in and applied the ruling made in what is known as the *Vom Baur Case*. The importers carried the case to the Circuit Court, and in that court additional evidence was introduced by both parties. Upon such additional evidence and the evidence taken before the board, the decision of the board was affirmed on November 23, 1907. 159 Fed. Rep. 294. On appeal, however, the Circuit Court of Ap-

peals held the merchandise dutiable at 45 per cent. ad valorem as "binding," under § 320, and the decision of the Circuit Court was reversed. 172 Fed. Rep. 342. This writ of certiorari was then allowed.

Under the tariff acts of 1890 (May 9, 1890, 26 Stat. 105, c. 200) and 1894 (August 27, 1894, 28 Stat. 509, c. 349) braids were enumerated in the "notions" schedule, which carried a lower rate of duty than articles in the "trimmings" schedule.

In re Dieckerhoff, 54 Fed. Rep. 161, involved a review of the decision of the Board of General Appraisers (G. A. 1301) in the matter of an importation, in 1891, of articles similar to those here in question, dutiable under the tariff act of 1890. The controversy was whether the goods should have been assessed at the rate of 60 per cent. ad valorem as cotton trimmings under the "trimmings" schedule, paragraph 373 of the tariff act of 1890, or assessed as cotton braids at 35 cents per pound under the "notions" schedule of the same act. The Government insisting on the higher duty, contended that the articles should be classified as cotton trimmings, and were not braids, because to be such they must be braided. The importers, however, contending for the lower duty, urged that the goods were commonly known as featherstitch braids, and should be classified as braids, and thus be brought under the notion schedule bearing the lower duty. The court overruled the contention of the Government, accepted the commercial designation, and sustained the ruling of the Board of General Appraisers that the goods were braids, and dutiable as such. The Government acquiesced in this decision. The administrative rule, therefore, under the tariff act of 1890, was to classify the articles in question as braids embraced within the notions schedule, and thereby cause them to carry a lower duty than they would have carried had they been embraced in the trimmings schedule; and under the act of 1894 the

same practice was pursued. When, by the act of 1897, upon which this case depends, braids were taken out of the notions schedule carrying a lower duty and put in the trimmings schedule which carried the higher, the articles continued to be classed as braids, and consequently, because of the change in the law, were assessed for a higher duty. And this administrative construction was applied under the act of 1897 for a considerable number of years. See G. A. 4326 (T. D. 20,515), decided January 3, 1899, and G. A. 4929 (T. D. 23,073), decided May 27, 1901.

When the latter decision was rendered (May 27, 1901), however, the importer appealed from the ruling, and the Circuit Court for the Southern District of New York, in *Steinhardt* v. *United States*, 121 Fed. Rep. 442, reversed the decision of the Board of General Appraisers and held that the articles were dutiable as bindings under the notions schedule and not as braids under the trimmings schedule. The reasoning was this—the court said (p. 443): "The articles in question appear to be narrow woven tapes of cotton used largely for covering the seams of underwear and waists. The Standard Dictionary gives one definition of a 'braid' as 'a narrow, flat tape or woven strip for binding the edges of fabrics, or for ornamenting them.' If these articles are braids within this or a like definition, they are also bindings or tapes within paragraph 320 . . ." Thus finding the articles to be within the dictionary definition of both braids and bindings, as the trimmings schedule in which braids were embraced, paragraph 339, contained a general qualification that articles therein named should be liable to the duty therein specified when "not elsewhere specially provided for in this act," the court held that as the braids in question were within the dictionary definition of bindings they were therefore otherwise provided for and should be classed within the notion schedule, paragraph 320, and carry the lower duty. The Government did not appeal from this decision, under the

instructions of the Attorney General. Such instructions, however, expressly directed that in all future importations the decision should not be applied, but that duty should be assessed according to the prior practice so that a test case might be made. (T. D. 24,269.) It is persuasively indicated by what we shall hereafter state, that this course was followed, because the record in the *Steinhardt Case* did not contain what was deemed to be adequate proof as to the accepted commercial designation of the articles to afford a proper basis for testing the matter in that case, a deficiency which it may well be surmised arose from the belief on the part of the Government in making up that case that the settled administrative practice based upon the previous judicial construction would not be departed from.

The classification again came under consideration in what is known as the *Vom Baur Case*, and much testimony was taken before the board "for the purpose of showing that the articles were commercially known as braids, and were so commercially known at and prior to the passage of the tariff act of 1897, and therefore dutiable under paragraph 339." In an exhaustive review of the evidence in that case the board held that the testimony established that there had been no change in the commercial designation of the articles since 1892, at which time, as heretofore stated, the goods were commercially known as "feather-stitch braids," and such had been judicially determined to be the case by the Circuit Court in the *Dieckerhoff Case*, *supra*. The board pointed out that in the case before it the importers had taken a position the opposite to that which had been assumed by the importers in the *Dieckerhoff Case*, since in that case, for the purpose of obtaining the lower duty under the act of 1890, they had insisted that the articles were commercially known as braids, and were dutiable as such; and in the case under consideration the contention was that there was no general and definite

trade designation of the articles as braids, since they were known as bindings and tapes, as well as by the name of featherstitch braids, and that they were in fact tapes, having been produced by weaving instead of by braiding.

The following questions were considered by the board in connection with an extended review of the testimony:

"First. Were these goods known in the trade and commerce of this country at and immediately prior to July 24, 1897, as 'braids'?

"Second. If the goods were commercially known as 'braids' at and immediately prior to July 24, 1897, are they dutiable under paragraph 339?"

On the record before it it was found "as matter of fact":

1. That the goods in question were generally known in the wholesale trade of the United States at and prior to July 24, 1897, as "featherstitch braids."

2. That the term "featherstitch braids" was the only general commercial name under which the goods were known in the trade and commerce of this country at and immediately prior to July 24, 1897, and that the terms "seam bindings," "finishing tapes," and others are subordinate names which have not been generally employed to designate these goods.

The board concluded its opinion as follows:

"In view of these findings, we think the case is distinguished from the *Steinhardt Case* (*supra*). That case only decided that if the articles were braids within the lexicographical definitions they were also bindings or tapes, and were therefore, more specifically provided for in paragraph 320. There was no satisfactory testimony in the case as to the commercial designation of the articles, whereas it has now been shown by competent testimony that they are generally known in the commerce of this country as 'braids,' and not as 'tapes' or 'bindings.' The Circuit Court of Appeals in *Hiller* v. *United States* (106 Fed. Rep. 73), decided that cotton braids of all

classes are included within the scope of paragraph 339. The decision of the court is in part as follows: 'A comparison of the provisions of the cotton schedules in the acts of 1894 and 1897 in regard to the classification of braids is, however, quite significant of the intent of Congress. Paragraph 263 of the act of 1894, which corresponds to paragraph 320 of the act of 1897, imposed a duty of 45 per cent. upon cords, braids, etc., made of cotton, but braids are omitted in paragraph 320 of the new act, which imposes the same duty. Paragraph 276 of the act of 1894, which corresponded to paragraph 329 of the new act, omitted braids, which was inserted in paragraph 339—the one under consideration. A comparison of the two acts indicates that Congress intentionally took braids out of the 45 per cent. paragraph, where it had been in 1894, and put the article into a paragraph imposing the higher rate of duty, and that it intended to impose the rate upon the articles, irrespective of the use to which they might be applied.'

"Under this decision, featherstitch braids, which were held in the *Dieckerhoff Case* to be dutiable as 'braids' under the act of 1890, and which we have found were commercially known as 'braids' at the time of the passage of the act of July 24, 1897, are, in our opinion, dutiable as assessed under the provisions of paragraph 339 of the act of July 24, 1897."

On the appeal of the importers, the decision was affirmed, "on the opinion of the Board," which is set out *verbatim* in the report of the case. *Vom Baur* v. *United States*, 141 Fed. Rep. 439. An appeal was taken from the decision, but it was subsequently dismissed without prejudice.

As already stated, the Board of General Appraisers, in the case at bar, rested their decision upon the evidence taken and its ruling in the *Vom Baur Case*. As also stated, that evidence was supplemented in the Circuit

Court by evidence taken on behalf of both parties to the controversy. Such further testimony, it was observed by the Circuit Court, did not tend to weaken the conclusion reached by the board, "that these goods were known generally in the trade as featherstitch braids prior to 1897," but "in truth it serves to strengthen it."

In the opinion of the Circuit Court of Appeals, reversing the decision of the Circuit Court, the court referred to the "merchandise in question" as consisting "of narrow woven strips bearing 'featherstitch' or 'herringbone' ornamentation," and substantially conceded that the Circuit Court and Board of Appraisers correctly decided "that prior to 1897 it was generally commercially designated as 'featherstitch braid.'" Accepting this commercial designation, however, and evidently relying upon the reasoning of the opinion in the *Steinhardt Case*, it was in effect held that the braids in question were not used "for ornamental purposes solely," but "being used for the purpose of binding seams are, in our opinion, the kind of braids properly called bindings." Referring to § 320 of the act of 1897 as the "notions" paragraph, and § 339 as the "trimmings" paragraph, the court then said:

"And we think that it may fairly be assumed that when Congress inserted the word 'bindings' in the 'notions' paragraph and transferred the word 'braid' to the 'trimmings' paragraph with words of qualification, it intended to embrace in the latter paragraph only such braids as were not bindings.

"If the articles are bindings as well as braids, the provision in the 'notions' paragraph is the more specific. Bindings are embraced without words of restriction or qualification. These articles as bindings are necessarily included and they are specially provided for elsewhere in paragraph 339."

There is no substantial dispute as to the correctness of the findings of the Board of General Appraisers that

the goods in question were generally known in the wholesale trade of the United States at and prior to July 24, 1897, as "featherstitch braids," and at such period that designation "was the only general commercial name under which the goods were known in the trade and commerce of this country." That the tariff act of 1897 was drafted and was adopted by Congress in the light of the then fixed practice of the Government to assess such articles as "braids," irrespective of the subsidiary names which may have been applied by some who used the articles or without regard to some of the special uses of which they were susceptible of being put is not open to reasonable contention. This being the case, we are unable to conclude that Congress, knowing the commercial as well as the tariff designation of the articles, reëmployed the term braids in the act of 1897, and yet intended that some of the articles embraced within the commercial designation should be taken out of that designation and treated for the purpose of assessment of duty as being that which they were not, because they possessed features of utility as well as ornamentation.

When the contentions which had arisen concerning the dutiable character of the articles under the act of 1890 are taken into view and the claims there made by the importers as to their nature and character for the purpose of subjecting them to a lower duty are borne in mind, we think the shifting of braids from the lower duty of the notions schedule to the higher duty of the trimmings schedule, without any change of phraseology to indicate that it was the purpose to depart from the settled commercial meaning of the word braids, plainly manifested the purpose of Congress to accept that designation and make it applicable, and hence to subject the articles, under their accepted designation, to the higher duty placed upon the articles embraced in the schedule to which braids were transferred. Any other view would render

necessary the conclusion that it was the intention of Congress in using the word braids not to adhere to the then well-settled commercial and tariff meaning of the term, but to use the word in a sense different from that which was accepted for the purpose of renewing a conflict as to the proper meaning of the word, which had been flagrant under the prior act. While these conclusions need no reinforcement, their soundness is additionally and cogently sustained by the construction given to the act upon its adoption and the consequent administrative enforcement of the same which prevailed without question for so considerable a time.

The decree of the Circuit Court of Appeals is reversed, and that of the Circuit Court is affirmed; and the case is remanded to the District Court of the United States for the Southern District of New York.

JACOBS *v.* PRICHARD, TRUSTEE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 93. Submitted December 8, 1911.—Decided February 19, 1912.

In allotting Indian lands, Congress can determine the conditions under which they shall be alienated by the allottees, and titles resting on deeds of Commissioners and consents of the allottees required by the statute under which the lands were allotted are to be determined by the Federal statute, and not by the laws of the States.

Under the act of March 3, 1893, 27 Stat. 612, c. 209, and the amendatory act of June 7, 1897, 30 Stat. 62, c. 3, carrying out the treaty with the Omaha Indians of 1854, the consent required to be given to the Commissioner for sale of land of allottee Indians in the Puyallup Reservation in Washington was not a mere power to sell

which terminated with the death of the giver, but an agreement which continued in force after death.

The rule that where ambiguity exists courts will follow the construction placed on a statute by the Department charged with its execution is strengthened where the statute itself directs such Department to make the necessary regulations to carry it into effect.

Habits of Indian life will be considered in construing a statute providing methods for a sale of Indian lands, and it will not be presumed that Congress would insert therein a condition which defeats an approved sale by the death of a roving Indian before the delivery of the deed.

46 Washington, 562, affirmed.

THE facts, which involve the title to lands in the Puyallup Indian Reservation allotted under the treaty with the Omaha Indians and the acts of March 3, 1893, and June 7, 1897, are stated in the opinion.

Mr. W. H. Doolittle, with whom *Mr. E. D. Wilcox* and *Mr. Jesse Thomas* were on the brief, for plaintiffs in error:

It is immaterial in this case whether or not the Department has construed the so-called consent to be something more than a naked power to sell, as this is a question of law, and not of fact, and while the findings of the Department of the Interior, especially the Land Department and its various branches, are held to be binding on questions of fact, no such rule can be found as to questions of law on rulings made by officers of the departments of the Government. *Moore* v. *Robbins,* 96 U. S. 530; *Marquez* v. *Frisbie,* 101 U. S. 473; *Shepley* v. *Cowen,* 91 U. S. 330; *Johnson* v. *Towsley,* 13 Wall. 72; *Quimby* v. *Conlan,* 104 U. S. 420.

The regulation of a department of the Government is not to control the construction of an act of Congress when its meaning is plain. *Robertson* v. *Downing,* 127 U. S. 402.

Even if there was trust created in the commission to sell this land, it is not a trust coupled with an interest, and it would not survive.

The Indians gave up their claims to other land and took this in payment, and after the issuance of the patent to an individual, it was his absolutely and for value given. *Lykins* v. *McGrath*, 184 U. S. 169.

The consent was a naked power to sell, and, where, as in the case at bar, no sale was made during the period of ownership by the giver of the consent, the power terminated. The title to the land had passed from the United States by its patent and the commissioners were only agents of the Indian to sell the land. No sale having been made there was nothing to continue in force after death, as the land, after the death of the allottee, was the property of another. Under the act of Congress of 1887, 24 Stats. 388, the laws of the State of Washington govern the descent of this land. See Session Laws of 1895, § 1, p. 197.

As to the construction of the acts of 1893 and of 1897 in their application to the Puyallup Indians and their lands, see *United States* v. *Kopp*, 110 Fed. Rep. 160; *Goudy* v. *Meath*, 38 Wisconsin, 129, aff'd in *Goudy* v. *Meath*, 203 U. S. 146; *Wa-la-note-tke-tying* v. *Carter*, 53 Pac. Rep. 106; *Re Huff*, 197 U. S. 488.

After the death of the parents in order to divest these heirs of their title to the land one of two things must appear: First, that the plaintiffs in error, having power to do so, have conveyed the land; which it is nowhere claimed they have done; or second, that the paper executed gave some right or authority to the commissioner that survived the giver. The instrument of March 7, 1898, is of no greater power or authority than an ordinary power of attorney, and is subject to the same rules and restrictions. *Hunt* v. *Rousmanier's Admstrs.*, 8 Wheat. 174.

The power of an agent ceases on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to

the agent, the act is void. *Glat* v. *Galloway*, 4 Peters, 332; *McCasky* v. *Barr*, 50 Fed. Rep. 712; *Frink* v. *Roe*, 70 California, 296; *Staples* v. *Broadbury*, 8 Maine, 181; Story on Agency, § 489; *Norton* v. *Sjolseth*, 43 Washington, 327.

Even if there had been a trust imposed upon the commissioner by consent, it was revoked by the death of Charley Jacobs prior to its execution. *Harmon* v. *Smith*, 38 Fed. Rep. 482; 4 Kent's Comm. 310 and note; *Gartland* v. *Nunn*, 11 Arkansas, 720; *Bradstreet* v. *Kinsella*, 76 Missouri, 63; 28 Am. & Eng. Enc. of Law (2d ed.), 1000.

The Secretary of the Interior has no judicial power to adjudge a forfeiture, to decide questions of inheritance or to divest the owner of his title without his knowledge or consent. *Richardville* v. *Thorp*, 28 Fed. Rep. 52; *Jones* v. *Meehan*, 175 U. S. 1.

To allow the construction contended for by respondent, means that the property of plaintiffs in error will be taken from them without due process of law, and contrary to the Fourteenth Amendment.

Plaintiffs in error have been vested with the title by descent from their ancestors and cannot be divested of the title without being made personally parties to the proceeding.

The record does not show a long continued construction of this consent or that it has become a rule of property, or that there is any title involved, except that in this case. This is the first time the matter has ever been before any court.

Defendant in error made no inquiry or investigation before his purchase, but relied wholly upon the regularity of the proceedings.

The act of March 3, 1893, is in derogation of the usual and ordinary rights of citizens, and it will not be enlarged, but will rather be limited and strictly construed by the court.

Mr. Stanton Warburton, with whom *Mr. Overton G. Ellis* and *Mr. John D. Fletcher* were on the brief, for defendant in error:

The allottees named in the patent from the United States took a base or qualified fee simple title subject to temporary restrictions on the right of alienation as held by the Supreme Court of the State of Washington in passing upon a similar patent. *Guyatt* v. *Kautz*, 41 Washington, 115.

The question here presented for determination is not what title Charley Jacobs took as head of a family under the patent, but what was the nature and effect of the written agreement of consent executed by the allottees on March 7, 1898, to the commissioner, appointing him trustee to sell the land in question under the provisions of the acts of March 3, 1893, and June 7, 1897. The act of June 7, 1897, is in all respects similar to the act of March 3, 1893, except that it reduces the number of commissioners to one instead of three. The act of March 3, 1893, does not contemplate the execution of successive agreements of consent; its terms were complied with by the execution of the one agreement of consent provided for in said act, by the original allottees.

The United States was not under any obligations to patent these lands to the Indians. Its determination so to do was voluntary and was an act of gratuity. It therefore had the power to place any condition it might see fit in the grant. *Eells* v. *Ross*, 64 Fed. Rep. 417, 421.

The restriction of alienation was a valid restriction, in no wise inconsistent either with the estate granted or with the citizenship of the Indian. It was so held in *Smythe* v. *Henry*, 41 Fed. Rep. 705; *Libby* v. *Clark*, 118 U. S. 250.

The patent issued on January 30, 1886, prohibited, absolutely, alienation for a longer period than two years.

Congress, in pursuance of the power reserved in the

patent itself, did, by the act of March 3, 1893, confer the power of alienation and prescribe the manner of its exercise. The Government had reserved this power in the patent itself, and the courts have no authority to invoke any technical rules of conveyancing to change or modify the manner in said act provided. *Smythe* v. *Henry*, 41 Fed. Rep. 705.

The Department of the Interior has universally, in all its dealings with the Puyallup Indians and these Indian lands, construed the act in this manner. See letter of July 2, 1897, to Clinton A. Snowden, which contains a clear statement of the construction of the Department as to the meaning of this act, and the court should be slow to adopt a different construction when the terms of the statute warrant the construction given it by the Department.

Where a statute entrusted the carrying out of its own provisions to one of the Executive Departments of the Government, the interpretation of the statute by such department will be followed by the courts unless there are most cogent reasons to the contrary. *Prichard* v. *Jacobs*, 46 Washington, 562, 570; *United States* v. *Moore*, 95 U. S. 760, 764; *Edwards* v. *Darby*, 12 Wheat. 206; *Brown* v. *United States*, 113 U. S. 568, 574; *Louisiana* v. *Garfield*, 211 U. S. 70, 78; *Robertson* v. *Downing*, 127 U. S. 607, 614; *United States* v. *State Bank*, 6 Peters, 29, 40.

In all cases of ambiguity the contemporaneous construction not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling. *Schell* v. *Fauche*, 138 U. S. 562, 573; *United States* v. *Cerecedo*, 209 U. S. 337; *Hastings & Dakota R. Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Burlington R. R. Co.*, 96 U. S. 334; *United States* v. *Pugh*, 99 U. S. 265, 272; *Hahn* v. *United States*, 107 U. S. 402, 406; *Smythe* v. *Fiske*, 23 Wall. 374, 383; *United States* v. *Johnson*, 124 U. S. 236, 255;

United States v. *Finnell*, 185 U. S. 236, 254; *United States* v. *Alabama R. R. Co.*, 142 U. S. 615, 622; *United States* v. *Philbrick*, 120 U. S. 52, 59; *Stuart* v. *Laird*, 1 Cranch, 299, 309.

State courts have likewise followed this same rule in construing statutes. *McSorley* v. *Hill*, 2 Washington, 638, 651; *Keane* v. *Brygger*, 3 Washington, 338, 350; Sutherland, Stat. Const. (2d ed.), § 474; *Smith* v. *Ross*, 42 Washington, 439, 445; *Blair* v. *Brown*, 17 Washington, 570, 573.

The Supreme Court of Wisconsin holds that a uniform construction by the department to which an act is referred for the carrying out of its provisions will be followed by the courts even when the courts would not have so construed the act in the first instance. *Herrington* v. *Smith*, 28 Wisconsin, 68; *Bloxham* v. *Electric Light* (Fla.), 18 So. Rep. 444; *Copper Queen Mining Co.* v. *Arizona*, 84 Pac. Rep. 511, 516; *Van Veen* v. *Graham County*, 108 Pac. Rep. (Ariz.) 252.

The land was sold for its fair value. The purchaser has paid the price. The Department has examined and approved all steps leading up to the deed, and the purchaser took his deed relying upon the Department, to which the act itself entrusted the execution of its provisions, as having done its duty in the premises. The purposes of the act have been fully met; viz.: the protection of the Indians from improvident sales.

It makes no difference that Charley Jacobs was a citizen of the United States. There is no authority for the contention that a citizen cannot hold a base or qualified title. There is ample authority for the converse. *Beck* v. *Flourney Co.*, 65 Fed. Rep. 30, 35; *Eells* v. *Ross*, 64 Fed. Rep. 417, 421; *Smythe* v. *Henry*, 41 Fed. Rep. 705; *United States* v. *Flourney Co.*, 71 Fed. Rep. 576, 579.

The authorities relied upon by the plaintiffs in error are not applicable. *Guyatt* v. *Kautz*, 41 Washington, 115;

Pickering v. *Lomax*, 145 U. S. 310, 316; *Lykins* v. *McGrath*, 184 U. S. 169.

The fact that this land has advanced in value since the sale, is no reason whatever for now seeking to so construe the statute as to invalidate the title of the defendant in error.

Since the decision in the case at bar, the Supreme Court of the State of Washington has passed upon the same question, and followed this decision in the case of *Little Bill* v. *Swanson*, 117 Pac. Rep. 481; *Little Bill* v. *Dyslin*, 117 Pac. Rep. 487.

See also on question of Indian lands and the government supervision over the same, *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Starr* v. *Campbell*, 208 U. S. 527; *Marquez* v. *Frisbie*, 101 U. S. 473.

Mr. Justice McKenna delivered the opinion of the court.

Error to the Supreme Court of Washington to review a decree of that court which affirmed a decree of the Superior Court of the County of Pierce adjudging defendant in error, who was plaintiff in the trial court, to be the owner of the east half and the east half of the east half of the west half of the northeast quarter of the northwest quarter of section 35, township 21 N., R. 3 east of the Willamette Meridian, Pierce County, Washington, formerly in King County, Washington.

The land lies in the Puyallup Indian Reservation and was allotted or patented by the United States on January 30, 1886, to Charley Jacobs, the head of a family consisting of himself, Julia, Annie, Frank and Oscar, all Puyallup Indians, the allotment or patent being subject to the stipulations and conditions contained in Art. 6 of the treaty of the United States with the Omaha Indians. Plaintiffs in error were not named in the patent, they not then being born.

Defendant in error claims title under a deed dated February 27, 1901, from C. A. Snowden, trustee and commissioner of Puyallup lands, appointed by the United States Government under an act of Congress dated March 3, 1893 (27 Stat. 612, c. 209), and an amendatory act passed June 7, 1897 (30 Stat. 62, c. 3).

Plaintiffs in error claim title to an undivided one-third part of the lands as heirs of Charley and Julia Jacobs, deceased, and contend that the deed from Snowden is void as to them or as to the interest they would take as such heirs for the reason that the Snowden sale and deed were after the death of Charley and Julia Jacobs.

Article 6 of the treaty of the United States with the Omaha Indians (March 16, 1854, 10 Stat. 1043), to the conditions of which the patent to Charley Jacobs was made subject, empowered the President to cause allotments to be made from reservation lands to such Indians as were willing to avail themselves of the privilege and who would locate on the same as permanent homes. The patent was to be issued upon the further condition that the assigned land should not "be aliened or leased for a longer term than two years" and "should be exempt from levy, sale or forfeiture." Upon the formation of a State these restrictions could be removed by the legislature, but it was provided that they could not be removed without the consent of Congress. It was also provided that lands not necessary for assignment might be sold for the benefit of the Indians under such rules and regulations as might thereafter be prescribed by Congress or the President of the United States.

Under the act of March 3, 1893, the President was empowered to appoint a commission of three persons to select and appraise such portion of the allotted lands not required for homes of the Indian allottees. It was provided that if the Secretary of the Interior approved the selections and the appraisement the lands selected should

be sold for the benefit of the allottees, after due notice, at public auction, at no less than the appraised value.

It was the duty of the commission to superintend the sale of the lands, ascertain the true owners thereof, and have guardians appointed for minor heirs of deceased allottees and make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior. The deeds, it was provided, should operate as a complete conveyance of the lands upon a full payment of the purchase money. The disposition of the money was provided for, and it was provided further that no part of the lands should be offered for sale until the Indian or Indians entitled to the same should sign a written agreement consenting to the sale thereof, and appointing the commissioners, or a majority of them, trustees to sell the land and make deeds to the purchasers. The approval of the Secretary was made necessary to the validity of the deeds, and he was directed to make all necessary regulations to carry out the provisions of the act.

On November 6, 1893, the Secretary instructed the commissioners, in accordance with the terms of the act as to the appraisement of the lands, and to ascertain who were allottees or the heirs of allottees or heads of families under the laws of Washington, to have guardians appointed for the minor heirs of deceased allottees and to obtain the consent of the heirs of twenty-one years and of such guardians. The commissioners were directed to report to the Secretary their action for approval, and, if approved, further instructions were to be given.

By an act subsequent to that of March 3, 1893, to-wit, an act of June 7, 1897, the number of commissioners was reduced to one and Clinton A. Snowden was appointed commissioner. Instructions were given to him and he was informed as follows: "That the title under these patents vests in the family whose names are recited in the patent, and not in the head of the family. It is

necessary to obtain the written consent of all the members of the family named in the patent. That it is necessary to have legal guardians appointed for minors who are themselves allottees, but not minor heirs of deceased allottees. It is necessary to obtain the written consent of sale of allotments of all members of the family named in the patent, and natural guardians and parents of minors are incompetent for this purpose, as in the case of minor heirs of deceased allottees."

On January 18, 1901, in answer to an inquiry of Snowden, the Secretary instructed him that where the allottees and true owners of the lands had executed consents of sale which had been approved by the Secretary it was the practice of the Department to continue the sale of the lands covered thereby, though the allottee or owner died, and to distribute the funds arising therefrom to his or her heirs, the Department regarding the "consents as remaining in full force and effect upon the decease of the Indian executing the same," they being "in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease." The Secretary added: "These lands are sold under the provision of the Act of Congress, March 3, 1893, and not under the laws of the State of Washington. . . . It is for the Department to pass upon the sufficiency of consents and not the courts of the State of Washington."

Charley Jacobs was, as we have seen, the grantee in the patent as the head of a family consisting of himself, Julia, Annie, Frank and Oscar. Julia was his wife, Annie his sister, Frank his son by a former wife, and Oscar his son by his wife, Julia.

Lillie Jacobs and Ruther Jacobs, plaintiffs in error, are respectively, a daughter and son of Charley and Julia and were born, respectively, in the years 1888 and 1891—that is, after the patent was issued—and necessarily were not named therein.

Annie, who was named in the patent, died in November, 1888, never having been married, and leaving Charley Jacobs her sole heir. He, on the seventh of March, 1898, Julia Jacobs and Frank Jacobs, all of age and named in the patent, executed a written consent required by the statute directing Commissioner Snowden to sell the lands.

Charley Jacobs, as guardian of Oscar Jacobs, named in the patent, having been previously appointed by the Superior Court of Pierce County, executed a similar consent and also a similar consent as the sole heir of Annie, named in the patent.

These consents and other papers were duly transmitted to the Secretary of the Interior and approved by him, and Snowden, on the twenty-seventh of February, 1901, duly offered the lands for sale at public auction. They were purchased by A. G. Prichard, trustee, in accordance with the statute, he making the payment required. Snowden executed a deed to him, which was duly approved by the Secretary of the Interior, and duly recorded in the Office of Indian Affairs.

Prior to the commencement of this action Prichard made the payments required, which were received and accepted by the Interior Department for distribution to those entitled to the same, including Ruther Jacobs and Lillie Jacobs, plaintiffs in error. Their guardian, E. D. Wilcox, has not received the same and refused to accept the sum, except a cash payment of $420.

Charley Jacobs died January 2, 1900, leaving surviving him, among others, the plaintiffs in error, who, as we have said, were not named in the patent. His death was reported to the Commissioner of Indian Affairs by Snowden May 1, 1900.

Wilcox is the duly appointed guardian of plaintiffs in error, and reported to the court the receipt by him of the payment of $420 made by Prichard. He did not know, however, that the sale by Snowden was after the death of

Charley Jacobs, father of plaintiffs in error, until after the commencement of this suit, and, as soon as he discovered that fact, refused to receive any further payment. The money received by plaintiffs in error as their share of the purchase price of the land was tendered to defendant in error prior to the trial of the action.

At the time Prichard, defendant in error, purchased the land he did not know of the death of Charley Jacobs, and was at no time advised of it or of the existence of plaintiffs in error until shortly before bringing this action. He purchased the property in good faith, relying upon the representations of Snowden, and in the full belief of the regularity of the proceedings.

We have stated the facts thus fully, although they are not disputed, as they exhibit clearly upon what right the Secretary of the Interior proceeded in his instructions to Commissioner Snowden and the strict compliance of the latter with those instructions. It will be observed that where the allottees and true owners executed consents which had been approved by the Secretary, it was the practice of the Department to continue the sale of the lands covered thereby, though the allottee or owner died, and to distribute the funds arising therefrom to his or her heirs, the Department regarding the "consents as remaining in full force upon the decease of the Indian executing the same," they being "in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease." The Secretary expressed the view that the "lands are sold under the provisions of the act of Congress, March 3, 1893, and not under the laws of Washington. . . . It is for the department to pass upon the sufficiency of consents and not the courts of Washington."

Defendant in error takes the view that the consents remained good after the decease of the Indian who gave them, in this case Charley Jacobs, and was "in the nature

of a permanent power or trusteeship." On the other hand, plaintiffs in error contend that the consent was a "naked power to sell," and terminated with the death of the giver.

There can be no doubt of the power of Congress to give character to the consents. *United States ex rel. Lowe* v. *Fisher, ante,* p. 95; *The Cherokee Nation et al.* v. *Whitmire, Trustee, ante,* p. 108. The questions in the case, therefore, turn upon the statute, and both sides invoke it to sustain their respective contentions.

The patent to Charley Jacobs was made subject to the conditions and restrictions of the sixth article of the treaty. In other words, there was a limitation upon the right of alienation of the patented lands, and the ultimate power to remove this restriction and grant a right of full alienation was reserved to Congress. The act of 1893 was an exercise of this power. It provided for the sale of such part of the allotted lands as was not required for the homes of the Indians, and prescribed the conditions of the sale to be "a written agreement consenting to the sale," signed by the Indian or Indians entitled to the allotted land offered for sale. And it was provided further that the agreement should constitute the commissioners, or a majority of them (subsequently one commissioner), trustees to sell the lands and "make deeds to the purchasers for the same," subject to the approval of the Secretary of the Interior, which deeds should "operate as a complete conveyance of the land upon the full payment of the purchase money." It is manifest that the "consent" required created something more than a mere revocable agency. It was a written agreement giving the commissioner (we drop the plural) full power to execute the provision and policy of the act of Congress, a power which could be confidently counted on as continuing against contingencies, and to terminate in a "complete conveyance of the land."

That the "consent" was to have this character was the

immediate and continued construction of the act of Congress by the Interior Department, and such construction would determine against ambiguity in the act even if we should admit ambiguity existed. The rule which gives strength to the construction of the officers who are directed to execute the law and who, it has been said, may have written or suggested it, is given an added force from one of the provisions of the act of Congress. It directs the Secretary of the Interior "to make the necessary regulations to carry out the purposes" of its enactment.

But we find no ambiguity in the act when we consider its purpose and the habits of Indian life. It could not have been intended that when proceedings had been instituted under it they should be embarrassed always by the possibility of defeat, and, it may be, progressing up to the moment of the delivery of the deed to a purchaser, should be made useless and nugatory by the death of some roving Indian. It is to be noted that all the proceedings are under the control of the Secretary of the Interior and that any irregularity in them or improvidence in the consents can be corrected by him.

We do not answer in detail the argument of plaintiffs in error based on the law of agency because we do not think its analogies are applicable to the situation.

The Supreme Court of Washington has repeated its ruling in this case in two others, *Little Bill* v. *Swanson*, 117 Pac. Rep. 481; *Same* v. *Dyslin*, Id. 487.

Judgment affirmed.

FAIRBANKS *v.* UNITED STATES.
WARREN *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 112, 113. Argued January 18, 19, 1912.—Decided February 19, 1912.

The Nelson Act of January 14, 1889, 25 Stat. 642, c. 24, providing for allotment of lands of Chippewa Indians in the White Earth Reservation was still effective as to those Indians who had not received allotments thereunder when the Steenerson Act of April 24, 1904, 33 Stat. 589, c. 1786, was enacted and such Indians were not required to await proceedings under the Steenerson Act to obtain their original allotments under the Nelson Act.

The Steenerson Act is part of a plan of legislation in regard to Indian allotments and modified and changed the prior general allotment acts of February 8, 1887, and February 28, 1891, by superseding certain of their provisions and enlarging the quantity of land to be allotted, and the scheme of legislation of which it is a part is to have existence and continuity of action until its purpose shall have been fulfilled. *Oakes* v. *United States*, 172 Fed. Rep. 304.

Under the Nelson Act and the other acts relating to Indian allotments in the White Earth Reservation, in force August 8, 1904, children born on the reservation subsequent to the final order and who had not had allotments were entitled to allotments of eighty acres.

Indians who had already received allotments under the Nelson Act were not entitled prior to August 8, 1904, to make selections of additional land under the Steenerson Act to the exclusion of one who had not received any allotment under the Nelson Act.

In a continuous proceeding in the Land Department under the Indian Allotment Acts all parties are chargeable with notice of the different steps taken.

Quære: Whether a decree can be made in a suit against the United States by a party claiming a selection under Indian allotment acts which would affect the rights of other claimants to the same land who are not parties to the suit.

THE facts, which involve the title to lands in the White Earth Indian Reservation, allotted under the Chippewa Indian treaty of 1867, and various acts of Congress relating thereto, are stated in the opinion.

Mr. F. W. Houghton, with whom *Mr. George B. Edgerton* was on the brief, for appellants.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellants were plaintiffs in the court below, and we shall so designate them.

The plaintiffs, one a minor (No. 112) and the other an adult (No. 113), residing on the White Earth Indian Reservation, brought these actions to determine their rights, respectively, to allotments of land under the provisions of a treaty with the Chippewa Indians proclaimed April 18, 1867, and certain acts of Congress relating to such Indians.

The Government claims that two minor children of Samuel Mooers, also Chippewa Indians, residing on the reservation with their father, have been justly allotted the lands on account of a superior right under the treaty and acts of Congress. The cases were tried together and a decree was entered in each case in accordance with the prayer of the plaintiffs, respectively. The decrees were reversed by the Circuit Court of Appeals and the bills directed to be dismissed. 171 Fed. Rep. 337.

The treaty of March 19, 1867, and certain acts of Congress are elements in the controversy. The treaty provided that as soon as the location of the reservation should have been approximately ascertained it should be surveyed in conformity with the system of Government surveys, and that any Indian of bands parties to the treaty, either male or female, who should have 10 acres of land under cultivation should be entitled to a certificate showing him to be entitled to 40 acres and a like number of

acres for every additional 10 acres cultivated until the full amount of 160 acres should be certified. 16 Stat. 719, 721. This was denominated the "cultivation clause" and many allotments of 160 acres were made under it.

On February 8, 1887 (24 Stat. 388, c. 119), Congress passed an act "to provide for the allotment of lands in severalty to Indians on the various reservations." The first section of the act provided that where any tribe or band of Indians had been or should be located upon any reservation created for their use by treaty, act of Congress or executive order, the President was authorized, if the reservation or any part thereof was advantageous for agricultural and grazing purposes, to cause the reservation to be surveyed or resurveyed, and to allot the lands in severalty as follows: To each head of a family $\frac{1}{4}$ of a section, to each single person over 18 years of age, $\frac{1}{8}$ of a section, a like fraction to an orphan child under 18 years, to each single person under 18 then living or who might be born prior to the date of the President's order directing allotment, $\frac{1}{16}$ of a section. In case of deficiency the allotments were to be made *pro rata*. It was provided further that where the treaty or act of Congress setting apart the reservation provided for allotments in excess of those designated the allotments should be made in the quantities specified in such treaty or act.

This act was amended February 28, 1891 (26 Stat. 794, c. 383). The allotment to which each Indian was to be entitled was made $\frac{1}{8}$ of a section of land. In case of an insufficiency a *pro rata* allotment as near as might be according to legal subdivision was provided. On January 14, 1889 (25 Stat. 642, c. 24), an act was passed entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota." It is known as the Nelson Act and provided for the appointment by the President of three commissioners to negotiate with the different bands of Chippewas for the cession of all their

lands except so much of the White Earth and Red Lake Reservations as the Commissioner should deem necessary for allotments to be made to the Indians. It also provided for the removal to the White Earth Reservation of all but Red Lake Indians and for allotments to such Indians on White Earth Reservation under the direction of such commissioners.

Section 4 of the act provided for the survey of the lands after the cession and relinquishment of the Indian title and that upon the report of the survey the Secretary of the Interior should appoint a sufficient number of competent examiners to go upon the lands thus surveyed and personally make a careful, complete and thorough examination of the same by 40-acre lots for the purpose of ascertaining upon which lots there was growing or standing pine timber, and the tract upon which such timber was standing or growing should be termed pine lands. The minutes of examination were directed to be entered in books showing with particularity the quantity of timber to be estimated by feet and the quality of timber, which estimates and reports should be filed with the Commissioner of the General Land Office as a part of its permanent records, and that officer should thereupon make up a list of such lands, describing each 40-acre tract separately, and opposite each description place the actual cash value of the same according to his best judgment and information, but such valuation should not be less than $3 per thousand feet, board measure. The list should thereupon be transmitted to the Secretary of the Interior for his approval, modification or rejection, as he may deem proper. It is further provided that "all other lands acquired from the said Indians on said reservation other than pine lands are for the purposes of this act termed agricultural lands." There are provisions for the sale of the pine lands in 40-acre parcels, for the disposal to actual settlers only of the agricultural lands, and that the money

received from both shall be deposited in the Treasury of the United States for the benefit of the Indians.

There are amending acts which need not be noticed. Then came the act of April 28, 1904 (33 Stat. 539, c. 1786), entitled "An Act to provide allotments to Indians on White Earth Reservation in Minnesota." It is called the Steenerson act. It authorized the President to allot to each Chippewa Indian legally residing on the White Earth Reservation, under the treaty or laws of the United States, 160 acres of land. The act recited that it was enacted in accordance with the express promise made to the Indians by previous acts and the treaty, and that the allotments should be made and the patents issued therefor should be in the manner and have the same effect as provided in the acts of February 8, 1887, and February 28, 1891. And it was provided "that where any allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed one hundred and sixty acres." There is a provision, in case of insufficiency, for *pro rata* allotment, as follows: "That if there is not sufficient land in said White Earth (diminished) Reservation subject to allotment each Indian entitled to allotments under the provisions of this Act shall receive a pro rata allotment."

These acts constitute the statutory law of the case.

The facts are as follows: On June 29, 1904, and June 30, 1904, respectively, the plaintiffs, Annie Fairbanks, through her father, Warren, for himself, applied at the White Earth Agency for an additional allotment of 80 acres each, respectively, being the W. $\frac{1}{2}$ and E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, T. 142, R. 39. The applications were under the Steenerson Act, the plaintiffs having received their full quota under the Nelson Act. The applications were refused, on the ground that they could not then be received.

On August 8, 1904, Lewis and Alice Mooers, aged, re-

spectively, four and six years, made application through their father, Samuel Mooers, for an original allotment of 80 acres of land each under the Nelson act, the act of Congress approved January 14, 1889. The selection for Lewis was the same 80 acres applied for by Annie Fairbanks; the selection for Alice the same 80 acres applied for by Warren. In the Mooers' application the land was described as not pine land. At the time of the applications the Indian Agent was away, but his clerk received the applications, marking the land on the agency plats as allotted to them, and made the usual entries on the allotment roll. He made the allotment, therefore, as far as he could.

Subsequently the agent required the clerk to cancel the allotment on the ground that the lands were pine lands and notified Mooers of such cancellation, which was done by mail, and he was directed to select other lands for his children.

On April 24, 1905, the allotments were commenced on the reservation under the Steenerson Act, and on that date the plaintiffs, respectively, made application and were allotted the lands in controversy, they being the same as applied for by them on June 29th and 30th, 1904.

Against the action of the agent cancelling the allotments to Lewis and Alice on August 8, 1904, Mooers appealed to the Indian Office. The commissioner ruled in favor of his contention and directed the agent to re-allot the lands to Mooers' children. The agent, however, suspended action pending an investigation, which resulted in the commissioner, under the directions of the Secretary of the Interior, revoking his ruling and sustaining the allotments to plaintiffs. Other lands were directed to be allotted to the Mooers. Upon Mooers' appeal the last decision of the commissioner was reversed and the land directed to be allotted to his children.

The commissioner in his letter directing the restoration

of the allotment to the Mooers children, discussing the right of selection of pine lands, said: "It is true that in the early work of the Chippewa Commission in making allotments on the White Earth Reservation the Office did direct that only agricultural lands should be allotted, reserving the pine lands for the common benefit of all of the Indians of the reservation; but after the passage of the Steenerson Act which contemplated the allotment of all the lands of the reservation, such instructions necessarily could have no application."

The order of the commissioner allotting the land to the Mooers children, as we have seen, was reversed by the then Secretary of the Interior, but not on the ground that pine lands could not be selected. The ruling of the Secretary was on the ground that the selection by the Mooers was premature. The Secretary said: "The testimony shows that Mr. Mooers was at the Agency, arrived on Sunday, the day before the allotting began, but he did not take his place in line until quite late, if at all, but seems to have relied upon the fact that he had designated to a clerk at the Agency the particular lands which he desired, even after he had been told that the selections would not be recognized as against other claimants."

Secretary Garfield, in reversing the decision of his predecessor, took the view that "the applications of the Mooers children were for original allotments, were actually allowed, and that there were no valid reasons against such action." The Secretary also said that it was "plain that there was no reason for laying upon Mooers the rule governing additional allotments under the Steenerson act;" that is, that Mooers should appear in line and take his chances with other Indians. Concluding his opinion, the Secretary said: "It appears that allotments have been made to the Mooers children, for which Samuel A. Mooers says he did not apply. Our office will also adjust this matter accordingly."

From these repeated changes in views and decisions in the Interior Department we gain little light upon the controversy between the parties so far as it depends upon the interpretation of the statutes, and even the Government in this case is somewhat uncertain as to what position it will ultimately take. "It might," it says, "find occasion to reverse its former attitude by conceding the plaintiffs' claim or denying that any of the contestants is entitled." But it concedes "that lands classified as pine lands *outside* of the reservation which had been ceded by the Indians to be sold for their benefit, were not allotable."

We may gather, notwithstanding the confusion, that the department and all of the claimants regarded the Nelson Act as still effective as to Indians who had not received its benefits and the Steenerson Act as applying to additional allotments, leaving only the question whether allotments could be made of pine lands. If so, the allotments to the Mooers children were good, because selections under the Nelson Act were not required to wait for proceedings under the Steenerson Act. But notwithstanding the uncertainty and seeming confusion, the question in the case is simple when certain elements are kept in mind—that is, the distinction between the lands ceded and those not ceded but reserved for allotments.

Section 1 of the Nelson Act provides for the negotiation with the Chippewas "for the cession and relinquishment" of their title to their reservations, "except White Earth and Red Lake, and to all of those two *which may not be* required to *fill the allotments required by this* and *existing acts*." (Italics ours.) The land reserved for allotments is the diminished reservation, to which we shall presently refer, and § 3 provides for its allotment. Section 4 applies to the lands ceded, not those reserved for allotments, and provides for the examination of the pine lands and for their sale in 40 acre pieces. It provides also (§ 6) for the disposal of agricultural lands to settlers under the

homestead laws at $1.25 per acre, the proceeds of which and of the sale of pine lands to be put into the Treasury of the United States for the benefit of the Indians. § 7.

The department at first, as we have seen, regarded only agricultural lands as allotable, making no distinction between ceded and the reserved part of the reservation. In the reserved part (diminished reservation)—that is, the part that was to be allotted, there was no distinction made between pine land and agricultural lands. In the ceded part there was a distinction, but only in the manner of their disposition. Neither was allotable, not because of their character, but because of their situation. The Indian Department, as we have seen, took back its ruling and even if it was not done under the compulsion of the Steenerson Act, plaintiffs might have no ground of complaint. Certainly not if the first ruling was made under a misapprehension of the Nelson Act, as the Court of Appeals strongly intimates. However, the department justifies its last ruling under the Steenerson Act, and upon the decision of the Court of Appeals sustaining that ruling plaintiffs assign error.

It becomes necessary, therefore, to consider the Steenerson Act, and it may be well to repeat somewhat. The Steenerson Act authorized the President to allot 160 acres of land "to each Chippewa Indian now legally residing upon the White Earth Reservation under treaty or laws of the United States." And it was provided that where an allotment had theretofore been made of less than 160 acres an additional allotment should be made, which, together with the land already allotted, should not exceed that amount. The act is very direct as to quantity and there is no qualification as to the character of the land to be allotted, and no classification of the lands to cause misunderstanding. The general allotment act and the act of February 28, 1891, are referred to, but only to adopt the manner of the allotment and the effect of the patent.

The provision is: "The allotment shall be, and the patent issued therefor, in the manner and having the same effect as provided in the general allotment act." The manner of allotment is one thing and the kind of land to be allotted is another and cannot well be confounded, and we cannot hold that Congress did not observe or intend to make the distinction.

It is contended further that the Mooers' children being, respectively, 4 and 6 years of age, were not entitled to an original allotment under the Nelson Act.

The lower courts disagreed as to this contention, the Circuit Court supporting it and the Circuit Court of Appeals deciding that it was untenable. Plaintiffs in error urge that the Circuit Court of Appeals fell into error by assuming that § 1 of the act of February 8, 1887, was part of the Nelson Act, and hence decided that the power of the President to make allotments which was given by the former was a continuing power, and could be exercised from time to time in favor of those born upon the reservation subsequent to the first order. It is, however, insisted that under the Nelson Act the power to make allotments was taken from the President and vested in commissioners, and that the provision relied on by the Circuit Court of Appeals was omitted from the act, and it is insisted further that if it be considered part of the act the whole of the provision must be considered, and that it limits an allotment to $\frac{1}{16}$ of a section to any single person then living or who should be born prior to the date of the order directing an allotment of lands. Undoubtedly, if that part of the provision had remained the law an allotment of 80 acres could not have been made, but plaintiffs in error concede that it did not remain the law. It was superseded by the act of February 28, 1891, and they admit that "the Land Department has treated the act of February 28, 1891, as amending section 1 of the act of 1887. By such amendment the classification

found in the act of February 8, 1887, is entirely omitted, and the language is: 'To each Indian located thereon one-eighth of a section of land.'" The conclusion that plaintiffs in error draw from that provision is that being on the reservation at the instant of time the act was passed is a necessary condition. But such conclusion misses the meaning of the word "located." Of itself it has no reference to time. It has reference entirely to place and is used to designate upon what Indians the powers given by the act, when exercised, should operate—that is, "to each Indian located" on the reservation. The act was a part of a scheme of legislation to have existence and continuity of action until its purpose should be completely fulfilled. See *Oakes* v. *United States*, 172 Fed. Rep. 305.

This being so, the Steenerson Act is easily seen to be a part of the plan of legislation, and, contrary to the contention of plaintiffs in error, did modify and change the prior acts of Congress by superseding certain of their provisions and enlarging the quantity of land to be allotted.

It is finally contended that Secretary Garfield had no power to set aside the allotments to plaintiffs in error on an *ex parte* appeal. In other words they were entitled to notice and opportunity to be heard. *Garfield* v. *Goldsby*, 211 U. S. 249. The only evidence offered to sustain the contention is that of the attorney who testified that he appeared "before the department for Warren and Fairbanks in this case," and that he "did not learn until after the decision had been rendered on the rehearing or appeal" that an appeal had been taken from the letter or order of the Commissioner of Indian Affairs of July 13, 1906, in which the Commissioner directed the agent to cancel the allotments to Warren and Fairbanks and to restore the allotments to them. It may well be, as urged by the Government, that such testimony does not preclude the inference that other attorneys or Warren or the father of the Fairbanks had notice. We, however, do not con-

sider the inference material. It is manifest that the proceedings were single and continuous—at one time the Mooers prevailing, at others the plaintiffs in error, and finally the Mooers; and all were chargeable with notice of what was happening in regard to their rights. We have seen that an allotment to the Mooers children and that to plaintiffs in error were made without notice. The Mooers had a subsequent hearing, it is true, and the cancellation of the allotments to them ordered to be set aside. The latter order was suspended and an investigation instituted, upon which one Secretary decided in favor of plaintiffs in error and another Secretary decided in favor of the Mooers. The latter was considered as the final decision, and plaintiffs in error have sought its review in this proceeding.

It is objected by the Government that the Mooers children are necessary parties. The point was suggested by the Court of Appeals, but passed by, as the court said, because counsel had not raised it. A doubt was expressed, however, if a decree could be rendered seriously affecting the rights of the Mooers children without their being made parties. A query to the same effect was made in *Oakes* v. *United States, supra.*

The jurisdictional act has this provision as to a suit brought under it: "In said suit the parties thereto shall be the claimant, as plaintiff, and the United States as party defendant." It may well be contended, therefore, that the United States stands in judgment for all opposing claimants, not, it may be, excluding the power of the court to permit them to come in, or, in its discretion, to order them to be brought in. However, we are not called upon to decide the question. Upon the suit brought and case made by plaintiffs we decide that they have no grounds for the relief they pray.

The decree of the Circuit Court of Appeals is

Affirmed.

UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 125. Submitted December 18, 1911.—Decided February 19, 1912.

Payment by a surety company of the amount of a supersedeas bond after affirmance of the judgment by the Supreme Court of the Territory and notice by the Governor of the State of non-payment by the principals and that unless the judgment were paid forthwith, or excuse for non-payment shown, the company would forfeit its right to transact business in the Territory, is not a voluntary payment even if the Governor had no power to revoke the license, no ruling to such effect having been made prior to the payment.

The fact that an appeal was subsequently taken by the judgment debtors to this court from the judgment, and that on payment thereof the surety company took security for repayment from the judgment creditor in the case of reversal, does not diminish the right of the surety company to collect from the principals the amount of the debt and all of its expenses as agreed in the application for the bond.

This court will take notice of its own decision in determining the rights of surety and principal on a supersedeas bond given to secure a judgment which was subsequently affirmed by this court.

12 Arizona, 348, reversed.

THE facts are stated in the opinion.

Mr. Eugene S. Ives for appellant.

Mr. Henry S. Van Dyke and *Mr. Frank P. Flint*, with whom *Mr. G. Bullard* was on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action to recover the sum of $10,528.33 and certain

expenses on account of a judgment recovered against appellees and paid by appellant as surety on an appeal bond executed at the request of appellees.

The action was brought and tried in the District Court of Santa Cruz County, Second Judicial District of the Territory of Arizona, and resulted in a judgment for the sum of $14,683.25 in favor of appellant. On appeal to the Supreme Court of the Territory the judgment was reversed. Thereupon the case was brought here.

There is no dispute about the facts. One Epes Randolph recovered a judgment against the appellees for the sum of $10,528.33, from which they appealed to the Supreme Court of the Territory. They applied to appellant for a bond to be given on appeal to stay the judgment. In the application for the bond they covenanted "to reimburse said company [appellant] for any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature, which said company shall, or may, for any cause, at any time, sustain or incur, or be put to for, or by reason or in consequence of said company having entered into, or executed said bond."

The judgment against appellees was affirmed by the Supreme Court and a judgment rendered against them, and the Guaranty Company (appellant here) for the amount recovered in the lower court, with interest and costs, on the twenty-seventh of March, 1908.

About the twenty-fourth of June, 1908, the company received notice from the Governor of the Territory to the effect that the judgment of the Supreme Court had not been paid; that more than thirty days had elapsed from its rendition, and that unless it was paid or sufficient excuse for its non-payment shown, the company would forfeit its rights to transact business as a surety company in Arizona. The company notified appellees by telegraph of this notice, but they failed to pay the judgment or to perfect an appeal from it to this court, and therefore the

company (appellant) paid Randolph the amount due on the judgment and interest amounting to the sum of $11,484.95. The appellant also incurred certain expenses which, with the judgment paid, amounted in all to the sum of $13,911.70.

With unimportant variations, the complaint alleged the facts which were found by the court. The appellees demurred to the complaint for insufficiency and also answered, denying some of its allegations and admitting others. They admitted the recovery of judgment against them and the application for the bond, but denied that the surety company had received notice from the Governor, as alleged, or that the company paid Randolph for them in satisfaction of the judgment any sum of money or that any sum was due. They alleged that after the judgment was affirmed by the Supreme Court of the Territory and a rehearing denied, notice of appeal to this court was duly given and that the cause was transferred to this court, where it was at the time of the answer; that no execution had been issued on the judgment and that if the company had paid the judgment it did so by reason of its own negligence, voluntarily, and not at the request of appellees, or by any order of the court, or in satisfaction of the judgment.

"The testimony shows," the Supreme Court said (p. 352), "that on March 27, 1908, the judgment of the district court was affirmed in this court, and that pursuant to the provisions of paragraph 1592, Civil Code of 1901, judgment was also entered against the Guaranty company as surety upon the appeal bond. Thereafter, within the time allowed by law, a motion for a rehearing was made, which motion was denied by this court May 19, 1908. The action having been tried before the court without a jury, an appeal to the supreme court of the United States from the judgment of the court was prayed, and was allowed by one of the justices of the court on

June 20, 1908. In the order allowing the appeal it was directed that the judgment be stayed upon the appellants filing their supersedeas bond in the sum of $20,000, to be approved by any justice of this court. This order was filed with the clerk June 22, 1908. A bond in proper form was approved by one of the justices on July fourteenth, and filed with the clerk on July 15, 1908. Citation was issued July 18, 1908, and served on July 31, 1908. It also appears that on or about June 18th, the judgment creditor, Randolph, demanded of the Guaranty company that it pay the judgment; that on June 24, 1908, the Guaranty company paid the judgment in full, and thereafter, and as a part of this transaction, took from Randolph a bond, with collateral security, for the return of the amount paid him, with interest, should the supreme court of the United States reverse the judgment of this court."

The Supreme Court sustained the trial court in holding the complaint sufficient and stating a cause of action, but it decided that the court erred in giving judgment for the amount paid by the company to Randolph, because it had not surrendered to appellees, its principals, the security it had taken from Randolph. The court, however, decided (p. 359) that the company could recover from appellees "such amounts as it reasonably expended in connection with the adjustment of the matter, for which it holds no security." These expenses were found to amount to the sum of $544.50, upon which interest was adjudged at 6 per cent from August 3, 1908, to the date of the judgment. The judgment of the District Court was modified and reduced to the amount indicated, and, as modified, affirmed, "but without prejudice to the rights of the Guaranty company to bring such further action as may be necessary to establish its rights, should a right to reimbursement of the amount of the judgment accrue to it."

The bond taken by appellant of Randolph, the judg-

ment creditor, is made the determining element by the Supreme Court of the Territory. The bond was the outcome of certain conversations, prior to the payment of the judgment, between a representative of the company and Randolph. A disagreement arose as to the effect of the conversations, the representative contending that Randolph agreed to refund the money if it should appear under any proceeding which should be started that it was not proper for the company to have paid the money. Randolph's attorney contended that as a supersedeas bond might have been filed at the very moment that the money was being paid, in the event that it should transpire that such bond was filed prior to the payment, Randolph would return the money. In consequence of this dispute, Randolph executed a bond to the Guaranty Company in the sum of $20,000, which recited the proceedings in the litigation and payment of the judgment to Randolph, and that the appellees herein were, on the twenty-fourth of June, 1908, proceeding to appeal to the Supreme Court of the United States, but had not, on said date, perfected their appeal, but "have, at the date of these presents, duly appealed to the Supreme Court of the United States from the said judgment," it was agreed that if that court should affirm the judgment, or if it should reverse the judgment and Randolph should refund the money paid to him by the company, then the obligation to be void, otherwise to remain in full force and effect. Randolph further agreed as collateral security for the bond that he would deposit, and he did deposit, with the Guaranty Company 25,000 shares of the capital stock of the Huntington Beach Company with the right in the company, if Randolph should not refund the money after the reversal of the judgment by the Supreme Court of the United States, to sell the stock and apply the proceeds to the payment of the amount paid by it, the company. Upon the affirmance of the judgment or dismissal of the appeal

the stock was to be returned to Randolph, and Randolph had the right to withdraw such stock and substitute other collateral security.

The Supreme Court of the Territory, as we have seen, made this bond and security the controlling factor in its decision. The court held that the payment of the judgment was not premature—in other words, not voluntary. In this we agree with the court. Appellant was not bound to await the issuance of an execution. The affirmance of the judgment fixed its liability. *Babbitt* v. *Finn*, 101 U. S. 7, 15. And in determining the character of the payment as voluntary or negligent, as alleged by appellees in their answer, the threat of the Governor must be given account, even if it be granted that he had no power, as held by the Supreme Court of the Territory in this case, to revoke the license of appellant to do business in the Territory. Such ruling had not then been made, and an attempted exercise of such power would have been injurious to appellant to yield to or resist. Appellant certainly acted in good faith, and discharged the duty that it was assured it had assumed under the law. However, this may not be of consequence, and we pass to the consideration of the ground upon which the Supreme Court of the Territory based its decision. The court held, as we have seen, that appellant was justified in paying the judgment, and, having paid the judgment, it was entitled to reimbursement, but to no more, the court said, than reimbursement, and held that the only outlay it had incurred was for certain expenses, and limited the judgment to their amount.

The court argued that appellant was secured for all else, and that therefore its payment was not "an absolute one, but one conditioned that the judgment be affirmed by the Supreme Court, since it has taken and holds security satisfactory to it for the return of the money with interest, in the event the judgment is re-

versed." And such event happening, the court concluded, would result in the payment to appellant twice. In other words, if the judgment should be sustained it would collect the amount of appellees; if the judgment should be reversed it would collect the amount of Randolph. This, the court said, would be inequitable and that therefore appellant could not "claim reimbursement from its principals until its actual loss is ascertained, or at least that it may not recover without surrendering the security to its principals."

The court's conclusion, we think, is not justified. It would indeed be inequitable to permit appellant to collect more than once the money paid by it, but once, at least, it is entitled, a result which it seeks by this suit. Having paid money for its principals it did not "speculate" out of them by reinforcing their responsibility to it by taking security from Randolph. It was bound by the judgment, which it paid equally with appellees, though on account of them. It was under an absolute duty to pay, but there were contingencies upon which the payment would have to be refunded by Randolph, and to secure itself it took security from him. We repeat, it was not speculating out of its principals, but was benefiting them. It acquired securities to which they could be subrogated in the event the judgment obtained by Randolph should be reversed. This represents the parties' rights on this record. In addition, however, we may say that we know that the judgment was not reversed and that appellees' liability to Randolph has been affirmed. *Sandoval* v. *Randolph*, 222 U. S. 161.

Judgment reversed and cause remanded to the Supreme Court of the State of Arizona for further proceedings not inconsistent with this opinion.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY *v.* McCUE, ET AL.

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

No. 138. Argued December 20, 21, 1911.—Decided February 19, 1912.

The obligation of a contract depends upon the law of the State where made.

A life insurance policy which by its terms does not become a completed contract until delivery on payment of first premium is to be construed as a contract made in the State where the first premium is paid and the policy delivered, notwithstanding a recital that it is to be construed as though made in another State. *Equitable Life Society* v. *Clements*, 140 U. S. 226.

In this case, *held*, that a policy issued by a Wisconsin company on the life of a resident of Virginia, to whom it was delivered in that State on payment of the first premium, is a Virginia contract.

Even though a policy in a mutual life insurance company be a property right, it is the measure of rights of every one thereunder, and if the owner thereof cannot recover because it would be against public policy to permit a recovery, neither can the innocent heirs of that person recover.

A policy of life insurance, silent on the point, does not cover death by the hand of the law. This is consonant with the rulings of the Virginia courts.

Quære: Whether in a case of this nature this court would have to yield to the determination of what a state court has declared to be its public policy.

Quære: What the public policy of the State of Wisconsin is on the liability of an insurance company for death of the insured by the hand of the law.

167 Fed. Rep. 435, reversed.

THE facts, which involve the liability of a life insurance company on a policy on the life of one who came to his death by hanging after conviction and sentence for mur-

der, and the construction of the policy itself, as well as by what law it is to be construed, are stated in the opinion.

Mr. William H. White, Jr., and *Mr. William H. White*, with whom *Mr. George H. Noyes* and *Mr. John R. Dyer* were on the brief, for petitioner:

The policy was not a Wisconsin contract but a Virginia contract, because the application was made, the premium paid, and the policy delivered in Virginia. *Equitable Life Assur. Soc.* v. *Clements*, 140 U. S. 226; *Mutual Life Ins. Co. of New York* v. *Cohen*, 179 U. S. 262; *Northwestern Life Ins. Co.* v. *Elliott*, 5 Fed. Rep. 225, 228. See also *Knights of Pythias* v. *Meyer*, 198 U. S. 508; *Ritter* v. *Mut. Life Ins. Co.*, 169 U. S. 139.

The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life. *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389; *St. Johns* v. *The Amer. Mut. Life Ins. Co.*, 13 N. Y. 31–38; *Rosenplanter* v. *Prov. Sav. Life Assur. Soc.*, 96 Fed. Rep. 721; *Mutual Life* v. *Cohen*, 179 U. S. 262; *Hicks* v. *National Life Ins. Co.*, 60 Fed. Rep. 690; 25 Cyc. 748; Minor on the Conflict of Laws, 399; and see *Cravins* v. *N. Y. Life Ins. Co.*, 148 Missouri, 600; *Wall* v. *Equitable Life Assur. Soc.*, 32 Fed. Rep. 273; *Mutual Life Ins. Co.* v. *Robinson*, 54 Fed. Rep. 580; *Equitable Life Ins. Co.* v. *Winning*, 58 Fed. Rep. 541; *McMaster* v. *N. Y. &c. Co.*, 78 Fed. Rep. 33, 37; *Assurance Society* v. *Clements*, 140 U. S. 226.

The contract is one to be construed by the general commercial law of the country as enforced by the Federal Courts regardless of that of the State where it was made. *Swift* v. *Tyson*, 16 Pet. 1, 18; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 246; *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Manhattan Life Ins. Co.* v. *Boughton*, 109 U. S. 121;

Pleasant Township v. *Ætna Life Insurance Co.*, 138 U. S. 67; *Lake Shore &c. R. R. Co.* v. *Prentice*, 147 U. S. 101, 106.

A policy of insurance is a contract, the construction of which should come within the general commercial law. *Carpenter* v. *The Providence Ins. Co.*, 16 Pet. 495, 511; *Washburn & Moen Mfg. Co.* v. *Reliance Marine Ins. Co.*, 106 Fed. Rep. 116–7; aff'd 179 U. S. 1; *The Barnstable*, 181 U. S. 464, 470; *Northwestern Nat'l Life Ins. Co.* v. *Riggs*, 203 U. S. 255.

The laws of Wisconsin do not authorize a recovery in this case: *Patterson* v. *Natural Premium &c. Ins. Co.*, 100 Wisconsin, 118; *McCoy* v. *Northwestern Relief Ass'n*, 92 Wisconsin, 577; *Whitfield* v. *Ætna Life Ins. Co.*, 205 U. S. 489.

There can be no recovery on a life insurance policy where the insured is legally executed, the policy being silent on the subject. *Amicable Society* v. *Bolland*, 4 Bligh (N. S.), 194; *Burt* v. *Union Central Ins. Co.*, 187 U. S. 362, 365; *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139.

To permit a recovery when death has resulted from a violation of law is contrary to public policy. *Hatch* v. *Mutual Life*, 120 Massachusetts, 550; *Wells* v. *New Eng. Mut. Life Ins. Co.*, 191 Pa. St. 207; *Murray* v. *N. Y. Life Ins. Co.*, 96 N. Y. 614; *Bloom* v. *Franklin Life Ins. Co.*, 97 Indiana, 478.

Mr. Daniel Harmon, with whom *Mr. H. W. Walsh* and *Mr. G. B. Sinclair* were on the brief, for respondents:

The contract upon which this suit has been brought is not void as against public policy. *Richardson* v. *Mellish*, 2 Bing. 229, 252; *Steamship Co.* v. *McGregor* (1892), App. Cas. 25, 45; *Ramboll* v. *Soojumnull*, 6 Moore, P. C. 310; *Printing Co.* v. *Sampson* L. R., 19 Eq. 465; *Moore* v. *Woolsey*, 4 E. & B. Q. B. 243; *Smith* v. *DuBose*, 78 Georgia,

413; *Richmond* v. *Dubuque R. R. Co.*, 26 Iowa, 190; *Kellogg* v. *Larkin*, 3 Pinn. 123; *S. C.*, 56 Am. Dec. 164, 168; *Swann* v. *Swann*, 21 Fed. Rep. 299; *Equitable Life Co.* v. *Waring*, 117 Georgia, 599; *The Homestead Case*, 22 Gratt. 301; *License Tax Case*, 5 Wall. 462; *Vidal* v. *Girard*, 2 How. 128; citing *Pierce* v. *Randolph*, 12 Texas, 200; *Houlton* v. *Nichols*, 96 Wisconsin, 393.

Courts are careful not to encroach unduly upon the liberty of contract. Contracts are not interfered with except where they clearly appear to be prejudicial to the public interest. No person can seriously believe that, if a life policy is paid in case of death by hanging, it has a tendency to encourage murder in order to mature the policy by being hung. If benefit to one's heirs by reason of death is an encouragement to crime to accomplish death, then the laws of descent, and the statutes abolishing attainder are equally incentives to crime. The benefit in heirs by execution of the ancestor cannot be said to be subversive of public interest.

There is nothing in the contract which in terms or by necessary implication amounts to an agreement to do an illegal act, or which requires the performance of such an act. If the policy were payable upon the sole condition of death by hanging, there might be some plausibility in such a contention.

There is nothing on the face of the policy which would render it void.

Where the consideration and the matter to be performed are both legal, plaintiff is not precluded from recovering by an infringement of the law not contemplated by the contract. *Wethrell* v. *Jones*, 3 Barn. and Adolph. 221; *Waugh* v. *Morris*, 42 L. J. Q. B. 57; *Brier* v. *Dozier* (Va.), 24 Gratt. 1; *McDonald* v. *Triple Alliance*, 57 Mo. App. 87; *Fitch* v. *Ins. Co.*, 59 N. Y. 557; *Mills* v. *Rebstock*, 29 Minnesota, 380. The validity of this contract is to be determined by the law of Wisconsin.

The law governing the obligation of this contract does not avoid it. May on Insurance, 402.

The inquiry in the Federal courts is not general, independent of any specific law, but specific as to the law of the State of the obligation.

Whether or not this contract is valid or is to be held void must be determined by the law of the State creating the obligation.

The rule that in matters of general commercial law or general jurisprudence Federal courts are not bound by state decisions does not apply to this case. *Wheaton* v. *Peters*, 8 Pet. 591; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Hudson Furniture Co.* v. *Harding*, 17 C. C. A. 203; *Chi., M. & St. P. Ry. Co.* v. *Solan* (1897), 169 U. S. 133; *Gatton* v. *Chi., R. I. & P. Ry. Co.* (Iowa), 28 L. R. A. 556; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *McClaine* v. *Prov. L. Ins. Soc.*, 49 C. C. A. 31; *Burgess* v. *Seligman*, 107 U. S. 20.

In the enforcement of statutes or the construction of statutes, the Federal courts make no extrinsic inquiry. *William* v. *Gaylord*, 186 U. S. 157; *Flash* v. *Connecticut*, 109 U. S. 37; *Whitfield* v. *Ætna Life Ins. Co.*, 205 U. S. 489.

In questions of policy, the statutes and decisions of the state courts are controlling. *Vidal* v. *Girard*, 2 How. 127; *License Tax Case*, 5 Wall. 462; *N. Y. Life Ins. Co.* v. *Craven*, 178 U. S. 389.

In determining the public policy of a State as affecting an obligation arising in that State, the Federal courts not only give great consideration to the decisions on the question by state tribunals, but they are constrained to adopt those rulings as definitive of the policy of the State.

The law of this obligation is the law of Wisconsin, the place of execution of the contract, of payment of the first premium, and of performance.

Where the application is made is immaterial unless that is the place where the final contract was closed. *Masneger*

v. *Hamilton*, 101 California, 532; *Brown* v. *Westerfield*, 47 Nebraska, 399; *Nicholson* v. *Cosmos*, 90 Indiana, 515.

The legislature of Wisconsin has expressly authorized this company to undertake this risk, and the court should refuse to narrow or limit it. The breadth of this statute cannot be limited by consideration of public policy. A statute is the authoritative and final declaration of public policy. *Carpenter's Estate*, 170 Pa. St. 203; *Hadden* v. *Barney*, 5 Wall. 518; *Shellenberger* v. *Ransom* (Neb.), 25 L. R. A. 565; *Owens* v. *Owens*, 100 N. Car. 242; *In re Runk* (Ia.), 101 N. W. Rep. 151; see also *McKinnon* v. *Lundy*, 24 Ontario, 132; *In re Gollnik's Estate*, 128 N. W. Rep. 292 (Minn.).

The decisions of Wisconsin support the recovery in this case. *Patterson* v. *Premium Ins. Co.*, 100 Wisconsin, 118.

The right asserted is a property right vested by the special statute of incorporation which is not divested by crime. This rule controls this case.

The charter controls the rights of members irrespective of the place where such rights may have been acquired. *Glenn* v. *Liggett*, 135 U. S. 533; *Smith* v. *Kernochen*, 7 How. 198; *Jellenik* v. *Huron Copper Co.*, 177 U. S. 1; *Flash* v. *Connecticut*, 109 U. S. 371.

Under the charter of the company McCue occupied the relation of a member of the company. This was a valuable property right. Upon his death this membership passed to his executors. 21 Am. & Eng. Ency., 269; *Condon* v. *Mutual Reserve Assn.*, 89 Maryland, 73, 99; *Huber* v. *Martin*, 3 L. R. A. 653.

The charter provides for devolution of the right on death. *McCoy* v. *Northwestern Relief Association*, 92 Wisconsin, 577; Angell and Ames Corp., § 410.

Where the law provides a method of devolution, that method controls and the courts do not inquire further. Broom Leg. Max., 289; *Shellenberger* v. *Ransom* (Neb.), 25 L. R. A. 565; *Ownes* v. *Ownes*, 100 N. C. 242; *Holden*

v. *Ancient Order* (Ill.), 31 L. R. A. 70; *Deem* v. *Milliken*, 6 Ohio C. Ct. Rep. 357; *Carpenter's Estate*, 170 Pa. St. 203; *McKinnon* v. *Lundy*, 24 Ont. Rep. 132; *Riggs* v. *Palmer*, 115 N. Y. 506 has been expressly disapproved by *Schellenberger* v. *Ransom*, *supra*, by *Carpenter's Estate*, *supra*, and the New York court refused to follow it in *Ellerson* v. *Westcott*, 148 N. Y. 149.

In *Collins* v. *Metropolitan Life Ins. Co.*, 93 N. W. Rep. 542, decided by the Supreme Court of Illinois a few days after this case was submitted in the Circuit Court of Appeals, a recovery was allowed.

Death on the gallows is not impliedly excepted from the risks undertaken. Public policy does not except.

The terms of the policy cover the risk.

The canon of construction, *expressio unius, etc.*, forbids a construction excepting this risk. *Hawkins* v. *United States*, 96 U. S. 689; *Schmidt* v. *Life Assn.* (Ia.), 51 L. R. A. 141; *McDonald* v. *Triple Alliance*, 57 Mo. App. 87; *Harper's Admr.* v. *Ins. Co.*, 19 Maine, 506; *Supreme Lodge* v. *Menkhausen*, *supra*; *Clever* v. *Mutual etc. Co.*, 1 Q. B. D. 147.

In excepting death from certain causes, the company has undertaken to pay in case of death from all other causes.

An insurance policy will be construed most strongly against the company, because the words are its words. *Royal Ins Co.* v. *Martin*, 192 U. S. 149.

A clause excepting similar contingencies to those under which the insured died in this case is very common in life insurance policies. The fact that this policy contains no such exception when such exception is common shows that none were intended. *Patterson* v. *Premium Ins. Co.*, 100 Wisconsin, 118; *Moore* v. *Woolsey*, 4 E. &. B. I. B. 243.

This was a risk actually covered by the policy; the premium paid was regulated from mortality tables which

are made up from statistics of deaths—all deaths in a given length of time, not deaths from certain causes, *Campbell* v. *Supreme Conclave*, 54 L. R. A. 576,—an average expectancy of life derived from experience tables embracing suicide as well as all other causes of mortality. *Lange* v. *Royal Highlanders* (Neb.), 110 N. W. Rep. 1110.

McCue had other insurance on his life. The fact that other companies paid shows their view of the contract. That so many paid shows a general custom in insurance circles that this is a risk actually covered by the policy.

The company by paying the premium into court has admitted for purposes of this action that risk of death at the hand of the law was a risk covered by this policy. 1 Hughes on Procedure, §§ 93, 202; Greenleaf Ev. (15th Ed.), 282.

If the McCue estate cannot recover, the innocent parties interested will be admitted as claimants. *Cleaver* v. *Mult. Reserve Fund L. Assn.*, 1 Q. B. 147.

In this case the infant plaintiffs, the children, do not take under McCue in this aspect of the case, by inheritance; it would be misnomer to speak of heirs inheriting personal property; their claim is directly against the company; they are *persona designata*. *Miller* v. *Reed*, 64 Connecticut, 240; *Hodge's Appeal*, 8 W. N. C. (Pa.) 209; *Mullins* v. *Thompson*, 51 Texas, 7; *Thompkins* v. *Levy*, 87 Alabama, 263; 4 Words & Phrases, p. 3254, "Heirs."

Where the assured makes a policy payable to his children, the law of Wisconsin is stated in *Patterson* v. *Premium Ins. Co.*, 100 Wisconsin, 118; *Palmer* v. *Welch*, 132 Illinois, 141; *Alexandria* v. *Parker*, 144 Illinois, 355.

Payment must be made in every case where there is any hand to receive it, and forfeiture is not to be tolerated. *Fuller* v. *Linzee*, 135 Massachusetts, 469; *Bancroft* v. *Russell*, 157 Massachusetts, 47; 31 N. E. Rep. 10; *Haskins* v. *Kendall*, 158 Massachusetts, 224; 33 N. E. Rep. 495; *Newman* v. *Covenant Mutual Ins. Asso.*, 76 Iowa, 56; 1 L.

R. A. 659; *Schmidt* v. *Northern Life Asso.* (Ia.), 51 L. R. A. 141; *Supreme Lodge* v. *Menkhausen*, 209 Illinois, 277; *N. Y. L. Ins. Co.* v. *Davis*, 96 Virginia, 737; Cooley, Briefs on Insurance, 3226.

The cases cited do not militate against recovery on the principles above set out. *Fauntleroy's Case*, 4 Bligh, 194, relied on in *Burt* v. *Union Central L. Ins. Co.*, 187 U. S. 372, does not establish any principle controlling this case, certainly as far as the infant plaintiffs are concerned; and see *Dowley* v. *Shiffer*, 36 N. Y. Supp. 869; *Moore* v. *Woolsey*, *supra*; *Lodge* v. *Menkhausen*, 101 A. S. Rep. 239; *Sun Life Ins. Co.* v. *Taylor* (Ky.), 56 S. W. Rep. 668; *Harper* v. *Ins. Co.*, 19 Maine, 506; *McDonald* v. *Triple Alliance*, 57 Mo. App. 87.

In *Burt* v. *Union Central*, 187 U. S. 362, it did not appear that there had been any legislative pronouncement of public policy nor had the courts defined the public policy governing contracts of this order, and that case can be distinguished on other grounds also. See *Halch* v. *Mut. L. Ins. Co.*, 120 Massachusetts, 550.

The present policy of the law is to require of insurance companies a strict liability for their losses. *Lord* v. *Dall*, 12 Massachusetts, 115; *Fidelity and Casualty Co.* v. *Erchleiss*, 30 L. R. A. 587; *A. R. R.* v. *M. T. & D. Co.*, 38 L. R. A. 116; *Trenton P. R. R. Co.* v. *Guarantors L. I. Co.*, 44 L. R. A. 213. See *Water* v. *Merchants &c. Ins. Co.*, 11 Pet. 213; *Phœnix Ins. Co.* v. *Erie Trans. Co.*, 117 U. S. 312; *Courtemanches* v. *Supreme Court, I. O. of O.*, 136 Michigan, 30; *Supreme Lodge* v. *Gelbke*, 64 N. E. Rep. 1058; *S. C.*, 198 Illinois, 365; *Gootzman* v. *C. Mut. Ins. Co.*, 3 Hun (N. Y.), 515; *Griffin* v. *Western Mut. Asso.*, 20 Nebraska, 620; *Cluff* v. *Mut. Life Ins. Co.*, 99 Massachusetts, 317; *Wareck* v. *Mutual Reserve*, 62 Minnesota, 39; *Simpson* v. *Life Ins. Co.*, 115 N. Car. 393; *Mutual Reserve Asso.* v. *Payne*, 32 S. W. Rep. (Tex.) 1036; *Supreme Court of Honor* v. *Updegraff*, 68 Kansas, 474.

The legislatures also have made provision for the protection of persons contracting with insurance companies. See Penna. Stat., Laws, 1881, p. 20; Kentucky Stat., § 679; New York, 3 Rev. Stat. (8th Ed.), p. 1688; 2 Cooley Briefs on Ins. 1189; Mo. Rev. Stat., § 5982.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is whether death by the hand of the law in execution of a conviction and sentence for murder, is covered by a policy of life insurance though such manner of death is not excepted from the policy, there being no question of the justness of the sentence.

The case was in equity and brought in the Corporation Court for the city of Charlottesville, State of Virginia, by respondents, children and sole heirs of James S. McCue, by Marshall Dinwiddie, their next friend, upon a policy of life insurance issued to McCue by petitioner, named herein as the insurance company.

The main defense of the insurance company was (there were some technical defenses with which we are not concerned) that McCue came to his death by hanging after conviction and sentence for the murder of his wife.

The suit was brought under the laws of the Commonwealth of Virginia against the insurance company, the People's National Bank, of Charlottesville, as garnishee, and the executors of McCue's estate.

The case was removed on the petition of the insurance company on the ground of a separable controversy to the Circuit Court of the United States for the Western District of Virginia. In that court there was a demurrer filed to the bill which raised the question as to the proper arrangement of the parties and whether the heirs or the executors were the parties to recover on the policy, assuming that the insurance company was liable. In the answer

the same questions were again raised and all liability of the insurance company denied, principally on the ground of the manner by which McCue came to his death.

At the trial the technical defenses were waived and by agreement of the parties the heirs of McCue and his executors were treated as parties plaintiff. The court considering the cause as one at law, and a jury having been waived by the parties, adjudged on the pleadings and an agreed statement of facts, "that the plaintiffs take nothing by their bill, and that said defendant go without day," with costs, the latter to be paid by a deposit made in the registry of the court in refund of the premium paid by McCue, as far as it would go. The judgment was reversed by the Court of Appeals and a new trial ordered. This certiorari was then petitioned for and allowed.

The facts as agreed are these: The insurance company is a corporation duly organized under the laws of Wisconsin and a citizen and resident thereof. It is a mutual insurance company, with the power and obligations given to and imposed upon it by certain acts of the legislature of Wisconsin, which acts constitute its charter.

The People's National Bank of Charlottesville was made a party solely as garnishee, it having certain sums of money belonging to the insurance company in its possession.

McCue made written application to the insurance company in his own handwriting for the policy in suit, in pursuance of which the policy was issued for the sum of $15,000 on his life. He paid premiums as follows: When the policy was delivered to him he gave his note for the sum of $427.50 for the premium to E. L. Carroll and L. Fitzgerald, payable to their order, six months after date, at the Jefferson National Bank, Charlottesville, Virginia. Carroll & Fitzgerald at the time were soliciting insurance for T. A. Cary, the general agent of the insurance company in Virginia. The note was endorsed by Carroll &

Fitzgerald to Cary, with the following memorandum attached: "$427.50. Hold this note in Mr. Cary's office (don't use bank.) Notify Mr. McC. about thirty days before due, and send it to E. L. Carroll for collection." Carroll & Fitzgerald gave their individual notes to Mr. Cary, amounting to $427.50, on which he advanced the money to the company and held the notes for collection, with McCue's note as collateral.

The company received, at its home office in Milwaukee, the amount of the premium in cash from Cary on May 2, 1904, but had no knowledge of the note arrangement between McCue, Carroll & Fitzgerald and Cary. The note was paid by McCue by checks after he had been arrested, he protesting his innocence, "which facts were known to Cary." The note arrangement was a general custom among soliciting agents for the company. Other facts will be noted hereafter.

The main question in the case is, as we said, the liability of the company under the circumstances. Or, to put it more abstractly for the present purpose of our discussion, whether a policy of life insurance insures against death by a legal execution for crime?

The question was before this court in *Burt* v. *Union Central Life Insurance Company*, 187 U. S. 362. In the policy passed on, as in the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: "Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?" And answering, after discussion, we said (p. 365): "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the inser-

tion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for." Cases were cited, among others *Ritter* v. *Mutual Life Insurance Company*, 169 U. S. 139. There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. And the conclusion was based, among other considerations, upon public policy, the court saying (p. 154) that "a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment."

These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications, and we pass by, therefore, the very interesting argument of counsel for respondents as to the indefinite and variable notions which may be entertained of such policy according to times and places and the temperaments of courts, and the danger of permitting its uncertain conceptions to control or supersede the freedom of parties to make and to be bound by contracts deliberately made. We come, therefore, immediately to the special contention of respondents, that the contract in controversy is a Wisconsin contract, and is not offensive to the public policy of that State or to its laws, but was indeed, as it is contended, made in conformity to the laws of that State, and carries all of their obligations.

The obligation of a contract undoubtedly depends upon

the law under which it is made. In which State, then, Virginia or Wisconsin, was the policy made? In *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226, the question arose whether the contract of insurance sued on was made in New York or Missouri. The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the office of the company, provided that the contract between the parties was completely set forth in the policy and the application therefor, taken together. The application declared that the contract should not take effect until the first premium should have been actually paid during the life of the person proposed for assurance. Two annual premiums were paid in Missouri, and the policy, at the request of the assured, was transmitted to him in Missouri, and there delivered to him. The court said (p. 232): "Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

In *Mutual Life Insurance Company of New York* v. *Cohen*, 179 U. S. 262, the insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in Montana. It was held (p. 264) that "under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that State." Citing *Equitable Life Assurance Society* v. *Clements*, *supra*.

The same conditions existed in *Mutual Life Insurance Company* v. *Hill*, 193 U. S. 551, and it was decided, the two cases above mentioned being cited, that the policy of insurance involved was a Washington contract, not a New York contract.

In the case at bar the application was made by McCue at Charlottesville, Virginia, February 25, 1904, and the policy was delivered to him there on March 15, 1904, when he gave his note for the premium which was payable at that place and subsequently paid there. And it is provided in the policy that it should not take effect until the first premium should be actually paid. Following that provision is this: "In witness whereof the Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract, this fifteenth day of March, one thousand nine hundred and four." But manifestly this was not intended to affect the preceding provision fixing the time when the policy should go into effect, nor the legal consequences which followed from it. In *Equitable Life Assurance Society* v. *Clements* the policy was executed at the company's office in New York. The exact conditions therefore existed which made, in the cases cited, the policies involved therein not New York contracts but, respectively, Missouri, Montana and Washington contracts. The policy, therefore, in the case at bar, must be held to be a Virginia and not a Wisconsin contract.

Respondents, however, contend that "the right asserted is a property right vested by the special statute of incorporation which is not divested by crime," and that "the charter controls the rights of members irrespective of the place where such rights may have been acquired." To support the contention that the right asserted is a property right, respondents adduce §§ 1, 4, 7 and 20 of the charter. Their argument is brief and direct, and we may quote it. It is as follows: "Under the charter of the company McCue occupied the relation of a member of the company. This was a valuable property right. Upon his death this membership passed to his executors." And further: "The charter of the company, § 1, provided that certain persons

named 'and all other persons who may hereafter associate with them in the manner hereinafter prescribed shall be, and are, declared a body politic and corporate.' Section 4 prescribes that persons who shall hereafter insure with the company 'shall thereby become members thereof.' And section 7 prescribes the manner in which this membership is to be perfected. 'Every person who shall become a member of this association, by effecting insurance therein, shall, the first time he effects insurance, pay the rates fixed by the trustees,' etc. There can be no doubt, then, that McCue was a member of this corporation. He insured with the company, and thereby he became a member. His interest in the company was fixed by the amount of his insurance. This membership constituted a vested property right. He was eligible as an officer, and entitled to vote in the management of the company (s. 20); entitled to the dividends on the surplus and profits (§ 2, § 13) and was a joint owner of the assets of the company." But this is assuming what is to be proved. It may be true that a person who insures with the company becomes a member thereof and that his interest is fixed at the amount of his insurance. But what constitutes his title or right? Necessarily his policy. What entitles him to a realization of the benefits of his membership? Necessarily, again, his policy, if the manner of his death be not a violation of it. We need not follow counsel, therefore, through their argument as to the rights of property and the rules of its devolution, which, it is contended, must obtain, whatever be the act or guilt of the person producing it. The question before us, and the only question, is: What rights did McCue's estate and children get by his policy? And we are brought back to the simple dispute as to whether the policy covers death by the hand of the law. This court has pronounced on that dispute, and its ruling must prevail in the Federal courts of Virginia, in which State the contract was made. And it is consonant with the ruling in the

state courts. In *Plunkett* v. *Supreme Conclave Improved Order of Heptasophs*, 105 Virginia, 643, a certificate of membership in the conclave, which was issued to one Charles W. Plunkett, his wife being beneficiary, was considered. One of the conditions was that Plunkett comply with the laws, rules and regulations then governing the conclave or that might in the future be enacted. There was no provision against suicide in the laws, rules or regulations when the certificate was issued. Such a provision was subsequently enacted. Plunkett committed suicide, and the Order refused to pay benefits. Plunkett's wife brought suit to recover them and asserted a vested interest in the benefits under the certificate. The contention was rejected. The trial court held that the forfeiture of the rights under the certificate, if the insured while sane committed suicide, was valid, because (1) it involved no vested right of the insured, and (2) because it was a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death. And the court added (p. 646): "Inasmuch as the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the new by-law is valid, because there can be no such thing as a vested right for a sane man to commit suicide, and for the further reason that it is nothing more than the written expression of the provision which the law had read into the contract at its inception."

The Supreme Court of Appeals affirmed the judgment, quoting the reasoning of the trial court, and added to it the considerations of public policy expressed in the *Burt Case* and *Ritter Case*, *supra*, and other cases. If the public policy of Virginia were the same as, it is contended, that of Wisconsin is, whether this court should have to yield it, we are not called upon to decide.

Being of opinion that McCue's policy was a Virginia contract, it may be unnecessary to review the cases relied

on by the respondents, which they contend declare the public policy of the State of Wisconsin. It may, however, be said that the cases are not absolutely definite.

Two cases only are cited, *McCoy* v. *Northwestern Mutual Relief Association*, 92 Wisconsin, 577, and *Patterson* v. *The Natural Premium Ins. Co.*, 100 Wisconsin, 118. We will not consider the facts in the first case. It is enough to say that the court, following a ruling that it had pronounced in other cases, said (p. 582), "if a contract for life insurance does not provide against liability in case of death by suicide or self-destruction, then such cause of death does not constitute a defense," citing four cases. The second also presented one of suicide, the insured being sane. It was contended that the policy did not cover such a risk, because (1) an incontestable clause (there being one) in the contract, did not cover such a death; (2) if it could be held so in terms it would be void as against public policy; (3) suicide was a crime and hence within a stipulation against death in violation of law.

The reliance of the insurance company to support its contentions was upon the *Ritter Case*, *supra*. The court, however, reiterated its former ruling as to death by suicide, though it recognized the cogency of the reasoning of the *Ritter Case*, that the insured should do nothing to accelerate the contingency of the policy, saying (p. 122): "were the question a new one in the law" the argument, "would be well nigh irresistible especially where, as in the *Ritter Case*, the policy runs in favor of the estate of the insured, and the proceeds will go to the enrichment of such estate, instead of to other beneficiaries."

There were other beneficiaries in the case, the policy having been assigned with the consent of the company to the children of the insured. Commenting further on that fact, the court said it brought the case within the principle of certain cases which were cited, but added "nor would the application of that principle to this case necessarily

conflict with the *Ritter Case*, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives, and yet not prevent a recovery in case of a policy in favor of beneficiaries who had a subsisting vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured." McCue's policy was in favor of his estate and comes within the concession made by the Supreme Court to the reasoning of the *Ritter Case*.

The court did not discuss considerations of public policy, but we may assume it found nothing offensive to such policy in a contract of insurance which covered death by suicide, and it may be supposed that the court would find nothing repugnant to public policy in a contract which did not except death for crime. However, we need not speculate, as the Wisconsin law does not control the policy in suit.

One other contention of respondents remains to be noticed. It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above, the policy is the measure of the rights of everybody under it, and as it does not cover death by the law there cannot be recovery either by McCue's estate or by his children.

Judgment of the Court of Appeals is reversed, and that of the Circuit Court is *Affirmed.*

NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY *v.* DISTRICT OF COLUMBIA.

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

No. 145. Argued December 22, 1911.—Decided February 19, 1912.

The Union Station Act of February 28, 1903, 32 Stat. 909, c. 856, imposed larger liabilities on the railroad company for necessary changes than did the earlier act of February 22, 1901, 31 Stat. 767, c. 353, and provided for the payment of a sum of money to the railroad company. The work contemplated by the later act included material changes whether within or outside of the right of way.

Under the contract made by the plaintiff in this case with the District of Columbia for the latter to make the necessary changes, the District is entitled to be paid for all the work outside of, as well as within, the railroad's right of way.

Independently of the statute, and on the evidence as to the intention of the parties, the contract is properly construed as including work outside of as well as within the right of way.

33 App. D. C. 377, affirmed.

THE facts, which involve the construction of certain acts of Congress for the erection of the Union Station and the elimination of grade-crossings in the District of Columbia, are stated in the opinion.

Mr. James H. Hayden for plaintiff in error.

Mr. Edward H. Thomas for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action of assumpsit by plaintiff in error in the Supreme

Court of the District of Columbia to recover the sum of $7,172.97 claimed by it as the amount of unexpended balances of three deposits made by it with the District to cover the cost of certain work undertaken by the District for it.

The case was tried to a jury which, under the instructions of the court, returned a verdict for the plaintiff in the sum of $1,089.79, with interest, upon which judgment was duly entered. The judgment was affirmed by the Court of Appeals. We shall refer to plaintiff in error as plaintiff and to the defendant in error as the District.

The controversy grows out of work required to be done by certain acts of Congress for the elimination of grade crossings on the line of the Baltimore & Ohio Railroad Company in the city of Washington, and requiring the railroad company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes. Act of February 12, 1901, 31 Stat. 767, c. 353. The scheme of improvement was quite extensive and the act described in detail the changes to be made in the grades of streets in connection with the change of the location of the railroad company's tracks and station.

Section 9 of the act is the one with which we have most concern. It provides as follows, omitting parts not essential to be quoted:

"SEC. 9. That the entire cost and expenses of the revision, changes, relocations, and improvements of and in said railroad, as authorized and required by the preceding sections of this Act, and of all structures connected therewith or incidental thereto, shall be borne, paid, and defrayed in manner following, to wit: The said Baltimore and Potomac Railroad Company shall bear, pay, and defray all cost and expenses of relocation, elevation, and depression of its tracks within the limits of its right of way as are authorized and required by this Act. . . . All other costs, expenses and damages resulting from, in-

cidental to, or connected with the revisions, changes, and improvements in alignment and grades of said railroad, or the relocations thereof by this Act required and authorized and from changes in the grades of the streets or the railroad . . . shall be borne, paid, and defrayed in manner following, to wit: Fifty per centum thereof by the United States and the remaining fifty per centum thereof by the District of Columbia. . . . All work within the limits of said railroad company's right of way . . . shall be done by said railroad company to the satisfaction and approval of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance of the said work. And all work which is without the limits of the right of way . . . shall be done by the District of Columbia."

There were quite radical modifications of the plan for the railroad terminal made by an act passed in 1903. February 28, 1903, 32 Stat. 909, c. 856. Among other things, it provided for the construction of tunnels. It is, however, contended by plaintiff that the distribution of the cost of the work, as provided in § 9 of the prior act, was not changed. The District contends that the deposits made by plaintiff were for work to be done by the latter, and that the work which was done by it, the District, was upon construction neither contemplated nor authorized by the act of 1901, but was embraced in the new location directed by the act of 1903, and was imposed by the latter act upon the railroad company, and was done by the plaintiff as agent of the railroad company.

In pursuance of the acts of Congress the railroad company prepared a plat of its proposed line, extending from Second Street and Virginia Avenue southwest to First Street and Massachusetts Avenue northeast. This embraced the change necessary to connect its tracks with the

new Union Station. The plat shows the course of the tunnels in question. The railroad company engaged plaintiff to construct the tunnels, and plaintiff proposed to the District that the District perform that portion of the work involved in changing and relocating the sewers and water mains.

The following letter was written by the Engineer Commissioner of the District to plaintiff:

"WASHINGTON, *July* 22, 1903.

"The New York Continental Jewell Filtration Company,
New York, N. Y.:

"GENTLEMEN: Referring to our oral conversation of July 16, in which you requested that the sewer and water changes necessary on account of the construction of the tunnel of the Pennsylvania R. R. Company, this city, be made by this office, and the plat which you left with me, I would state that the estimated cost of making the changes in the sewers is $7,693.00, and of changes in water mains is $488. Deposit slips for these amounts are herewith, and the deposits should be made separately, and upon receipt of the deposits the work will be done by this office. The Water Department made some modifications of the plan suggested by you in the drawing which you left, with the object of obtaining better circulation, and the sewer division increases the size and slope of the proposed new portion of sewer. I return your suggested plan.

"Very respectfully, JOHN BIDDLE,
"*Major, Corps of Engineers, U. S. A.,*
"*Engineer Commissioner, D. C.*"

Subsequently letters were addressed to plaintiff containing estimates of necessary changes in the water mains and sewers caused by the construction of the tunnel, respectively, $488 and $7,693, and stating that if plaintiff wished the District to do the work it should deposit those amounts with the Collector of Taxes of the District. The

letters were dated, respectively, the twentieth and twenty-first of July, 1903.

The plaintiff accepted the District's offer to make the changes upon making the deposit indicated.

There was another change requested by plaintiff and undertaken by the District, an estimate of which was furnished and a deposit of the amount made by plaintiff.

On May 11, 1904, and after the completion of the work, the plaintiff wrote a letter to the District, in which it stated that it had deposited with the Collector of Taxes of the District certain amounts for sewer changes and water main changes "within the right of way" at certain designated points, and asking for a statement of the work and a return of the unexpended balances. Receiving no reply, plaintiff addressed another letter to the District of the same purport. There was other correspondence, which need not be given, as it is agreed that plaintiff had deposited $7,693 to cover the cost of changes in sewers and the sums of $488 and $600 to cover the cost of changes in water mains, that there was expended on sewers within the right of way the sum of $1,565.41, and on water mains, $42.62, total $1,608.03, which, being deducted from the amount deposited by plaintiff, would leave an unexpended balance of $7,172.97, if plaintiff's contention be correct. If, on the other hand, the contention of the District be correct and plaintiff is chargeable with cost of work done outside of the right of way, there would be a balance returnable of only $1,089.79.

The contention of the plaintiff is, as we have seen, that the railroad company was only required to defray the cost of work within the limits of its right of way and that plaintiff's obligation is not greater, as it only undertook to do the work for the railroad company. In other words, plaintiff contends that the acts of 1901 and 1903 are the test of the rights of the parties. The District contends, on the other hand, that those acts do not control the case.

The case made by the pleadings and the evidence, the District insists, "is one of simple contract composed of an offer or request by the plaintiff to the defendant, which the defendant accepted and performed." It is further urged by the District that if the acts of 1901 and 1903 can be regarded as pertinent, all of the parties, the District, the plaintiff and the railroad, construed them in accordance with the contention of the District. It is urged further that the act of 1901 contained no reference to changes in water mains and tunnels, and that the act of 1903 "imposed upon the railroad the obligation to do the entire work, thus modifying the former act, and, in return, provided for the payment of a large sum of money to the railroad."

It is very certain that the act of 1903 introduced new features into the scheme provided for by the act of 1901 and gives support to the contention of the District. It was testified by the Assistant Engineer of the District as follows: "The tunnel was not contemplated in the act of 1901. It was built pursuant to the act of 1903, and takes the place of the connection that would have been made to the Sixth Street station, had that station remained, as contemplated by the act of 1901. There was no tunnel at this point contemplated by the act of 1901."

But without dwelling further upon this contention, we shall pass to the other contention of the District. The declaration in the case alleges that plaintiff, "acting in that behalf as the agent of the Philadelphia, Baltimore & Washington Railroad Company, was engaged in constructing for said company certain tunnels at and about the intersection of New Jersey Avenue and D Street," which the railroad company was required to construct under the acts of Congress of 1901 and 1903.

It is alleged that the construction of the tunnels made necessary the change in the location of certain sewers and water mains. That estimates were made by the Dis-

trict and notice given thereof to plaintiff conveying an offer by it to make the changes, provided plaintiff would deposit the cost thereof with the District. That the plaintiff did so upon the condition that the District would use so much of the deposit as would be necessary to make the changes "which the railroad company was required to perform or pay for" and return whatever balances there might be to plaintiff. The balances due are stated.

Issue was joined on the declaration by the District and it set up besides affirmative matter of defense.

It will be observed that a contract between the plaintiff and the District is alleged, and we are to inquire whether it was established or whether some other contract was established. The facts show that the company approached the commissioners for the purpose of having the District undertake the work, as will be seen by the letter of July 22, 1903, which we have quoted above, submitting a plan of the work, which was changed somewhat by the Commissioners. The letter was addressed to plaintiff and contained these significant words: "The estimated cost to you for making the necessary changes in sewers caused by the construction of tunnel N. J. Ave. and D Street, S. E., is $7,693.00." In the other letters the same words are used, as to water mains, the expense being stated at $488 and $600.

Plaintiff contends that under the circumstances those words were sufficient to cause it "to believe that the District understood that the 'necessary changes' would involve costs to be defrayed by the Government, or at any rate some party other than the company." But this could only be on the supposition that the act of 1901 controlled and was thought by the District to control. The District thought otherwise—thought the act of 1903 controlled and required the work to be done at the expense of the railroad company and therefore by its agent, the plaintiff, and, granting this position could be disputed,

it nevertheless gives meaning to the language it used when addressing plaintiff as undertaking the work and all of the work, that outside and that within, of the railroad's right of way. And we do not see how plaintiff could have understood otherwise. If the words did not necessarily of themselves point to plaintiff as the party to defray the expense, the amount of the deposit required indicated that it was to cover the work outside of the right of way. The estimate of costs and deposits required amounted to $8,781.00, and yet it is admitted that the cost of the work within the right of way or space covered by the tunnels was only $1,608.03. The difference is too great to have been overlooked or its importance and meaning misunderstood. It is attempted to be explained, but inadequately. The necessity of the work was seen by plaintiff's engineer in charge, and he also saw the work going on daily outside of the right of way. He explained as follows: "We knew that the estimated amount was excessive for that which was solely within the right of way, but we considered that we were protected in the matter by the law. I did not know the cost of taking out 64 feet of sewer and putting it back. I had no estimate on it. I consider $7,693 for taking out 64 feet of sewer an excessive amount. I did not know that it could be done within $1,600. I made no estimate at all. I know that the total estimate submitted was largely in excess of the cost of work required within the right of way. . . . It was largely in excess, 50 per cent or more, but I only looked at it in a general way. I did not know it was 80 per cent more, and did not figure out the actual or approximate cost."

We repeat the explanation is inadequate. An excess of more than fifty per cent in an estimate of the work within the right of way necessarily pointed to some other work and plaintiff was called upon then to make objection if it had any. If it had objected the District might have

refused to deal with it and insisted upon the responsibility of the railroad company. It is now in a different situation. This record does not show that the railroad company ever disputed its responsibility. Indeed there is evidence which makes the other way.

Judgment affirmed.

JACOB *v.* ROBERTS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 169. Argued January 25, 1912.—Decided February 19, 1912.

While an essential element of due process of law is opportunity to be heard, a necessary condition of which is notice, *Simon* v. *Craft*, 182 U. S. 427, personal notice is not always necessary. *Ballard* v. *Hunter*, 204 U. S. 241.

In this case, *held*, that the proceedings for service by publication show sufficient inquiry was made to ascertain the whereabouts of the persons to be served and who were served by publication under provisions of § 412 of the Code of Civil Procedure of California, and that due process of law was not denied by service in that manner.

154 California, 307, affirmed.

THE facts, which involve the question of whether due process of law was afforded by substituted service of process under the statutes of California, are stated in the opinion.

Mr. Sam Ferry Smith, for plaintiffs in error:

The judgment was rendered in a proceeding, and constituted a proceeding, wherein the only service of process made, or attempted to be made, was substituted or constructive. Such service did not give reasonable and ade-

quate opportunity of being heard therein, prior to the rendition of such judgment. It therefore did not constitute due process of law, and such proceedings were in violation of the constitutional right guaranteed by Fourteenth Amendment. "Due process of law," as the meaning of these words has been developed in American decisions, implies the administration of law according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. *Arndt* v. *Griggs*, 134 U. S. 321; *Belcher* v. *Chambers*, 53 California, 635; *Braly* v. *Seaman*, 30 California, 611; *Burton* v. *Platter*, 53 Fed. Rep. 903; *Cooper* v. *Newell*, 173 U. S. 555; *De La Montanya* v. *De La Montanya*, 112 California, 109; *Galpin* v. *Page*, 18 Wall. 350, 368; *Hagar* v. *Reclamation District*, 111 U. S. 708; *Happy* v. *Mosher*, 48 N. Y. 317; *Hahn* v. *Kelly*, 34 California, 407; *Hart* v. *Sansom*, 110 U. S. 151; *Holden* v. *Hardy*, 169 U. S. 389; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Mallett* v. *State*, 181 U. S. 589; *Marx* v. *Ebner*, 180 U. S. 314; *Neff* v. *Pennoyer*, 17 Fed. Rep. 1279; *Pennoyer* v. *Neff*, 95 U. S. 737; *Roberts* v. *Jacobs*, 154 California, 307; *Roller* v. *Holly*, 176 U. S. 402; *Ricketson* v. *Richardson*, 26 California, 149; *Rue* v. *Quinn*, 137 California, 651; *Scott* v. *McNeal*, 154 U. S. 34; *Shepherd* v. *Ware*, 48 N. W. Rep. 774; *State* v. *Guilbert*, 47 N. E. Rep. 557; *Simon* v. *Craft*, 182 U. S. 436; *Thompson* v. *Circuit Judge*, 54 Michigan, 237; *Wilson* v. *Standefer*, 184 U. S. 399, 415; *Johnson* v. *Hunter*, 147 Fed. Rep. 133; *Howard* v. *De Cordovia*, 177 U. S. 609; *Flint* v. *Coffin*, 176 Fed. Rep. 877; *Wheeler* v. *Cobb*, 75 N. Car. 22; *Romig* v. *Gillett*, 187 U. S. 111, 117; *Stillman* v. *Rosenberg*, 78 N. W. Rep. 913; *Grigsby* v. *Wopschall*, 127 N. W. Rep. (S. Dak.) 605; *Cochran* v. *Markley*, 87 N. W. Rep. 2.

Mr. William J. Mossholder, with whom *Mr. Samuel Herrick* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question involved is whether a judgment quieting title to a piece of land in California against plaintiffs in error upon substituted process of the publication of the summons under the statutes of that State constitutes due process of law under the Fourteenth Amendment to the Constitution of the United States.

The judgment was rendered in 1897, and eight years afterwards the entry of judgment was set aside by the trial court upon petition of plaintiffs in error on the ground that the facts set out in the affidavit for the order of publication did not show the due diligence required by section 412 of the Code of Civil Procedure of the State. The order was reversed by the Supreme Court of the State. 154 California 307.

The action against plaintiffs in error was brought by defendant in error in the Superior Court in the County of San Diego, State of California, by verified complaint on March 25, 1897, upon which summons was issued and returned not served because defendants in the action (plaintiffs in error) could not be found. An amended complaint was filed April 3, 1897. It described the land as lots in the city of San Diego, of which it alleged that the plaintiffs, defendants in error here, were then and had been for a long time in possession, claiming title in fee. It also contained the usual allegations that the defendants, and each of them, claimed some estate or interest in the land, and that it was entirely without any right whatever. It was prayed that the defendants be required to set forth the nature of their or his claim, that it be determined by the decree of the court, and that they and each of them be forever enjoined from asserting any claim in and to the lands adverse to the plaintiffs. General relief was prayed.

Summons was issued and the sheriff's certificate of re-

turn recited that "after diligent search and inquiry," he was unable to find the "defendants or either or any of them in this San Diego County."

An affidavit for publication of summons was then presented to the court and filed. It recited the proceedings, including the issue of the summons and its return by the sheriff, as we have stated, and further set forth the following, among other matters:

"That the cause of action is fully set forth in his verified complaint on file herein; that said defendants, or either or any of them, after due diligence, cannot be found within this State, and this affiant, in support thereof, states the following facts and circumstances:

"That affiant, for the purpose of finding said defendants and ascertain their place of residence, has made due and diligent inquiry of the old residents of the City of San Diego, the former neighbors of said defendants, and is informed by D. Choate, who has lived in the City of San Diego over twenty-five years, that he thinks the defendants are not within the State of California, and he does not know of their residence and has not heard anything of them, or either of them or of their residence or post-office address, for more than twenty years, and this affiant is informed by George W. Hazzard, who has lived in San Diego for over twenty-five years, that he has no knowledge as to the whereabouts of the said defendants, or either of them. Plaintiff also made inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty informed plaintiff that he did not know the address or residence or where the defendants, or either of them, could be found, and did not believe that they were in the State."

The affidavit also stated that inquiry was made of certain county and city officers and that they all—

"stated to affiant that they did not know the residence of the defendants, or either of them, their post-office

address or where they could be found; and none of the above-named parties had heard of the post-office address or residence of the defendants, or either of them, since they have resided in the said city of San Diego.

"The affiant has made other diligent inquiry to find said defendants, or either or any of them, and has not been able to find them or any of them within—. The affiant has no knowledge of the residence or post-office address of the defendants or either of them or where the defendants, or either of them, could be found. This affiant, therefore, says that personal service of said summons cannot be made on the defendants—Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either or any of them."

An order of publication was duly made, and the summons duly published in accordance therewith. Judgment by default was subsequently duly entered.

The assignments of error all express the contention that the trial court was without jurisdiction to render the judgment against plaintiffs in error, and that hence their property has been taken without due process of law.

Undoubtedly, as contended by plaintiffs in error, the essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice. *Simon* v. *Craft*, 182 U. S. 427. But personal notice is not in all cases necessary. There may be, and necessarily must be, some form of constructive service. *Ballard* v. *Hunter*, 204 U. S. 241. Upon this, however, we do not enlarge, as we do not understand plaintiffs in error contest it. They recognize that substituted service of judicial process may be authorized, but they contend that it can only be authorized when "it is impossible or impracticable to obtain actual service, and when so authorized the substituted service provided for in the statute must be of such character that it will be *reasonably probable* that the party whose property is placed in jeop-

ardy will be apprised of the pendency of the action and will be afforded a *reasonable opportunity* to appear therein and make his defenses." (The italics are ours.) We do not understand that plaintiffs in error attack the kind or time of publication as not giving a reasonable probability of notice or opportunity to be heard, but attack the showing upon which it was made; in other words, that the showing was not sufficient to authorize the publication of notice, the showing not being legally sufficient to justify a resort to that form of notice. It is true plaintiffs in error say that "the designation of the newspaper and the length of time of publication must necessarily depend upon the residence of the defendant, or at least his probable whereabouts, unless it is disclosed by the affidavit that plaintiff has no knowledge on the subject, and that he has exercised due diligence to inform himself." These quotations from the argument of plaintiffs in error we make as exhibiting the elements of their contentions.

We make no reference to the statute of the State, as that as written is not attacked except, it may be, as it is applied by the Supreme Court of the State in this and prior decisions. We say "prior decisions" because the court puts its ruling explicitly on one of its prior decisions and rejects the contention that it had overruled other decisions.

We now turn to what the papers in the case exhibit and what they explicitly or impliedly establish. The property involved was lots in the city of San Diego, of which the plaintiffs in the action, defendants in error here, were in possession at the time of commencing the action, and had been for a long time. The fact has some force. San Diego was of size and importance enough to make it worth while for those having interest in property to assert it. Plaintiffs in error, however, permitted defendants in error to be in possession of property which they now say was and is theirs. Why, they do not explain, nor

where they were. They rest upon the face of the papers, and they having that right we will consider the sufficiency of the papers under the statute.

We have set out the affidavit. It shows inquiry of the whereabouts of plaintiffs in error of their former neighbors and other residents of San Diego. One of them replied that he had not heard of them, of their residence or post-office address, for over twenty-five years. Another also had not heard from them and did not believe they were in the State. Inquiry was also made of nineteen county officers and three state officers, sheriffs, county clerks; tax collectors, county and state; assessors, county and state, and of the postmasters of the State. Neighbors, residents and officers who, in the intercourse and business of life would almost necessarily come in contact with plaintiffs in error or hear from them, had no knowledge of them. It may, however, be said, and indeed is said, that other parts of the State were not searched, and that this was necessary, as the process of the court could run to every county in the State. The requirement is extreme and we are cited to no cases in which it is decided to be necessary. The affidavit shows besides that defendant in error made diligent inquiry to find plaintiffs in error and had no knowledge of their residence or post-office address or of either of them or where they or either of them could be found.

We think plaintiffs in error were afforded due process.

Judgment affirmed.

KER AND COMPANY *v.* COUDEN.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 11. Argued January 27, 1912.—Decided February 19, 1912.

The question of ownership under the Spanish law of accessions to the shore by accretion and alluvion has been a vexed one.

The Roman law is not like a deed or a modern code prepared *uno flatu*, but history has played a large part in its development.

Under the civil law, the seashore flowed by the tides, unlike the banks of rivers, was public property, belonging, in Spain, to the sovereign.

Under the Spanish Law of Waters of 1866, which became effective in the Philippines in 1871, lands added to the shore by accessions and accretions belong to the public domain unless and until the government shall decide they are no longer needed for public utilities and shall declare them to belong to the adjacent estates.

This rule applies not only to accessions to the shore while it is washed by the tide, but also to additions which actually become dry land.

The doctrine that accessions to the shore of the sea by accretion belong to the public domain and not to the adjacent estate has been adopted by the leading civil law countries, including France, Italy and Spain.

In determining what law is applicable to titles in the Philippines, this court deals with Spanish law as prevailing in the Philippines, and not with law which prevails in this country whether of mixed antecedents or the common law.

Where a case is brought up on an appeal on a single question, in regard to which there is no error, judgment below will be affirmed.

THE facts, which involve the title to land in the Philippine Islands formed by action of the sea, are stated in the opinion.

Mr. Oscar Sutro, with whom *Mr. E. S. Pillsbury, Mr. Aldis B. Browne, Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for plaintiff in error:

The Supreme Court of the Philippines erred in holding

that the law, as written in the Partidas, declares that land above seashore formed by accretion from the sea belongs to the Crown and not to the riparian owner. Laws 3, 4, 6, 24, Tit. 28, 3d Partidas.

From the premise that the accessory follows the principal, the conclusion necessarily follows that, under the said Laws 3 and 4 of Title 28 of the Third Partida, the ownership of land, formed by accretion through the action of the sea, is in the riparian proprietor, after it has ceased to be washed by the tides.

From the express language of these definitions it appears that what is "shore" on the border of the sea during a particular year is to be determined by the high-water mark during that year, and that if the year following such particular year the high-water line has receded, then, at the end of such later year, the land between the high-water mark of the earlier year and the high-water mark of the later year is no longer "shore," for the waters have not covered it "when it rises its highest in all the year." And being then neither air, rain, water, sea nor shore, it does not "belong in common to all creatures," for, having expressly mentioned the particular things which "belong in common to all creatures," the lawmakers have thereby impliedly said that no other things than those enumerated "belong in common to all creatures." *Expressio unius est exclusio alterius. United States* v. *Arredondo*, 6 Pet. 691; *Sturges* v. *The Collector*, 12 Wall. 19; *Arthur* v. *Cumming*, 91 U. S. 362.

The "shore" at the civil law extended to that part of the land washed by the highest tides. *Galveston* v. *Menard*, 23 Texas, 349, 399; Hall, Mexican Law, 448; Civil Code, Mexico, Art. 802.

Equally as at the common law, the shore, at civil law, was the line of high tide. *United States* v. *Pacheco*, 2 Wall. 587, 590.

The rule at common law, as under the Partidas, is

that the "shore" of the sea belongs to the Crown for the use of the public. But the rule at common law is that accretions from the sea belong to the riparian owner. *Kent* v. *Yarborough*, 1 Dow. & Clark, 178; 3 Kent's Comm. 428; 2 Black. Comm. 262; *New Orleans* v. *United States*, 10 Pet. 662; *Saulet* v. *Shepherd*, 4 Wall. 502; *Banks* v. *Ogden*, 2 Wall. 57; *St. Clair* v. *Lovingston*, 23 Wall. 46; *Jefferis* v. *Omaha Land Co.*, 134 U. S. 178; *Shively* v. *Bowlby*, 152 U. S. 1.

The Law of Ports of 1880 superseded the Law of Waters of 1866.

It thus affirmatively appears from the Law of Waters and from the Law of Ports that the meaning of the term "shore," as used therein, is limited to the area actually being washed by the waters of the sea, and must be held that in the Partidas, the earlier statute, the word "shore" was used in the same sense; for it is a settled rule for the construction of statutes that where it appears from a later statute *in pari materia* that a term is therein used in a particular sense, then it is to be presumed that, in the earlier statute, such term was used in the same sense. *Alexander* v. *Alexandria*, 5 Cranch (U. S.), 1; *United States* v. *Freeman*, 3 How. 556; *Harrison* v. *Vose*, 9 How. 372; *Harris* v. *Runnels*, 12 How. 80; *Farmers' &c. Bank* v. *Dearing*, 91 U. S. 29.

When Laws 3 and 4 of Title 28 of the Third Partida and Laws 6 and 24 of the same title are considered together, the only inference that can be drawn therefrom is that accretions to the "shore" of the sea do not belong to the Crown, even if it be assumed that, as held by the courts below, the term "shore," as used in the Partidas, includes land at any previous time washed by the tides. *Hare* v. *Horton*, 5 Barn. and Ad. 160.

Under the rule that statutes, if doubtful, must receive a reasonable construction, it follows that, under the Partidas, the title to land formed by accretion on the

borders of the sea is not in the Crown, but is in the riparian proprietor. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Beley* v. *Naphtaly*, 169 U. S. 353; *Chesapeake &c. R. Co.* v. *Miller*, 114 U. S. 176, 187.

All reason is against the said interpretation put upon the Partidas by the court. *New Orleans* v. *United States*, 10 Pet. 662, 717; *Jefferis* v. *Omaha Land Co.*, 134 U. S. 178, 192; 2 Black. Comm. 262; *Banks* v. *Ogden*, 2 Wall. 57, 67; *Lamprey* v. *Metcalf*, 52 Minnesota, 181.

Under the rule that, where a statute of one State is adopted by another, it is to be presumed that the interpretation placed upon the original statute is also adopted, and under the Partidas, accretions from the sea do not belong to the Crown, but belong to the riparian owner.

The laws of Spain, as embodied in the Partidas, were drawn largely from the Institutes of Justinian. Hannis Taylor, "Science of Jurisprudence," 162.

The interpretation placed upon the provisions of the Roman law by the writers upon that subject ought to be followed in construing a statute of a country which has adopted such statute from the civil law. *Viterbo* v. *Friedlander*, 120 U. S. 707; *Groves* v. *Sentell*, 153 U. S. 465; *Meyer* v. *Richards*, 163 U. S. 385; Lord Mackenzie's Roman Law, 177; Angell on Tide Waters, 2d ed. 249.

None of the authorities cited by the lower courts in support of their said conclusion lends any support thereto.

The authorities support the contention of the appellant that, under the Partidas, accretions formed by the action of the sea, when they become dry land, by reason of the recession of the high-water mark, belong to the riparian owner. Amandi, Civil Code, Vol. 2, p. 95; Scaevola, Commentary on Civil Code, Vol. 6, 338; Escriche, Dictionary of Law, p. 449.

Under the Law of Waters of 1866, which went into effect in the Philippines in September, 1871, title to lands

formed by accretion vested in the riparian proprietor, and not in the Crown.

This is the doctrine in Louisiana, where the civil law prevails. *Municipality No. 2* v. *Orleans Cotton Press*, 18 Louisiana, 122; *St. Clair County* v. *Lovingston*, 23 Wall. 46, cited with approval in *Nebraska* v. *Iowa*, 143 U. S. 369, and *Shively* v. *Bowlby*, 152 U. S. 1, and followed by the state courts in *Freeland* v. *Penn. R. Co.*, 197 Pa. St. 529, and *Knudson* v. *Omanson*, 10 Utah, 124.

The various provisions of the Law of Waters affirmatively show that the term "shore," as used in that law, includes land being swept by the tides, only, and that when, by reason of accretions, the high-tide line recedes from such land it thereupon ceases to be "shore." Articles 4, 8, 9 of the Law of Waters sustain the contention of plaintiff in error that under the express provisions of the Law of Waters, accretions from the sea, when they are no longer covered by the tides, belong to the riparian owner, and are not a part of the public domain.

The provisions of the Law of Ports of 1880 make it clear that Article 4 of the Law of Waters of 1866 does not have the effect of vesting title to accretions, which have become dry land, in the Government. *Alexander* v. *Alexandria*, 5 Cranch, 1.

The second sentence of Art. 4 of the Law of Waters constitutes a clear recognition of the fact that it was not intended that, under the said law, accretions which had become dry land by reason of the recession of the sea should belong to the Government.

If the lawmakers had intended that, under the Law of Waters, accretions from the sea should be a part of the public domain, even after they had become dry land, they would have said so, and would not have left the question to be settled by the uncertain result of litigation and judicial decision. *National Bank* v. *Matthews*, 98 U. S. 621, 627.

In a case like this, if there is any doubt or ambiguity in the Spanish law, the applicant should have the benefit of the doubt. *Cariño* v. *Insular Government*, 212 U. S. 449, 460.

The Solicitor General for defendant in error:

The land in controversy, having been formed from time to time since the year 1811, down to the present, by accession or accretion, occasioned by the action of the sea, became, as it was formed, a part of the public domain of Spain, and, as such, became, upon the acquisition by it of the Philippine Islands, a part of the public domain of the United States.

All agree that the law as to accretions prior to September 24, 1871, is to be found in the "Codigo de las Siete Partidas." "The Compilation of the Laws of the Kingdoms of the Indies" contained nothing upon the subject, but it was provided by those laws that where they were silent the laws of Castile should be applied both as to right and remedy.

The Partidas bearing upon the case, directly or indirectly, are: Law 1. What is meant by dominion, and how many kinds there are. Law 2. That there is a distinction between the things of this world; that some of them belong to all creatures living; and others not. Law 3. What the things are which belong in common to all creatures living. Law 4. Every man who chooses, may build a house or cabin upon the seashore, as a retreat; and he may erect there, any other edifice whatever, to serve his purposes; provided he does not thereby interfere with the use of the shore, which every one has a right in common to enjoy. He may also build vessels; stretch and mend his nets. Law 5. That he who finds gold, pearls or precious stones on the seashore, acquires the property of them. Law 6. That every one may make use of ports, rivers and public roads. Law 26. The in-

crease which a river makes by accretion to an estate belongs to him to whose estate it is carried, and he who lost it has no claim whatever to it. But not so if by avulsion. See 1 Moreau and Carleton's Partidas, ed. 1820, pp. 334 *et seq.*

In these laws there is a signal difference between the seashore and the river bank. The sea and its shore belong in common to all the living creatures of the world.

The Law of Waters of August 3, 1866, was promulgated, and became effective in the Philippines on September 24, 1871.

While differing from the Partidas in some details, it rests upon the same principle, that the seashore or beach is public property. See Arts. 1, 4, 8, 9, 10. By Art. 4 lands which attach themselves to the shore by accretions and deposits caused by the sea, are of public ownership.

Spanish commentators upon the law of Spain support the position of the Government. 2 Arrazola, Enciclopedia Española Derecho y Administracion, Madrid, 1849, pp. 580–583; 2 Gutierrez Fernandez, Treatise Codigos o Estudios Fundamentales, 86; 7 Alcubilla, Diccionario de la Administracion Española, ed. of 1887, 7, 108.

While Angell on Tide Waters sustains the law of accretions, as contended for by the plaintiffs, as the doctrine of the Roman, French, Spanish, and Louisiana jurisprudence, he is mistaken. See Art. 454 of the Civil Code of Italy, 1865; §§ 556–7, Code Napoleon; 2 Marcadé; Explication, du Code Napoléon, 5th ed., Vol. 2, 439; Littré, in his French dictionary, *sub* "lais" as meaning in law "alluvian." Section 557, present Civil Code of France, Blackwood's translation; Digest of Civil Laws in force in 1808 in Orleans Territory, book 2, 106; and see *Zeller* v. *Yacht Club*, 34 La. Ann. 837.

The weight of authority is against the writers cited by plaintiffs in error, and there is absolutely no authority

to support the contention of plaintiffs as to accretions made since the Law of Waters of 1866 went into effect.

No Spanish authority questions the validity of either the Law of Waters of 1866 or the Law of Ports of 1880. The former owners themselves believed that the Law of Waters applied, that the State had the prior and paramount right to the land and could use it for a public purpose, and that the right of the adjacent owner attached only when the lands were to be put to private use.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by Ker and Company to recover possession of land held by the defendant under a claim of title in the United States. The land is the present extremity of Sangley Point, in the Province of Cavite and island of Luzon, projecting into Manila Bay. It has been formed gradually by action of the sea; all of it since 1811, about three-quarters since 1856, and a part since 1871. For a long time the property was used by the Spanish Navy and it now is occupied by the present Government as a naval station, works costing more than half a million dollars having been erected upon it. The plaintiffs claim title under conveyances from the owner of the upland. The Philippine courts held that under the Partidas, III, Tit. 28, Laws 3, 4, 6, 24 and 26, and the Law of Waters of 1866, the title to the accretions remained in the Government, and the vexed question has been brought to this court.

That the question is a vexed one is shown not only by the different views of Spanish commentators but by the contrary provisions of modern codes and by the occasional intimations of the doctors of the Roman law. Justinian's Institutes, 2, 1, 20 (Gaius II. 70), followed by the Partidas, 3, 28, 26, give the alluvial increase of river banks to

the owner of the bank. If this is to be taken as an example illustrating a general principle there is an end of the matter. But the Roman law is not like a deed or a modern code prepared *uno flatu*. History plays too large a part to make it safe to generalize from a single passage in so easy a fashion. Alongside of the rule as to rivers we find that the right of alluvion is not recognized for lakes and ponds, D. 41, 1, 12, a rule often repeated in the civil law codes, *e. g.*, Philippine Civil Code of 1889, Arts. 366, 367. Code Napoleon, Art. 550. Italy, Civil Code, 1865, Art. 454. Mexico, Art. 797. If we are to generalize, the analogy of lakes to the sea is closer than that of rivers.—We find further that *In agris limitatis jus alluvionis locum non habet.* And the right of alluvion is denied for the *agrum manu captum*, which was *limitatum* in order that it might be known (exactly) what was granted. D. 41, 1, 16. The gloss of Accursius treats this as the reason for denying the *jus alluvionis*. If this reason again were generalized, it might lead to a contrary result from the passage in the Institutes. Grotius treats the whole matter as arbitrary, to be governed by local rules, and both the doctrine as to rivers and the distinction as to accurately bounded lands as rational enough. De Jure B. & P. Lib. 2, cap. 8, 11, 12. A respectable modern writer thinks that it was a mistake to preserve the passage concerning definitely bounded grants in the Digest, 1 Demangeat, Droit Romain, 2d ed. 441 ('antiquirt' Puchta, Pandekten, § 165), but so far as we have observed this is an exceptional view, and from the older commentators that we have examined down to the late brilliant and admirable work of Girard, Droit Romain, 4th ed. 324, this passage seems to be accepted as a part of the law. At all events it shows that, as we have said, it is unsafe to go much beyond what we find in the books. And to illustrate a little further the uncertainty as to the Roman doctrine we may add that Donellus mentions

the opinion that alluvion from the sea goes to the private owner only to remark that the texts cited do not support it, De Jur. Civ. IV, c. 27, 1 Opera (ed. 1828), 839 n., and treats the rule of the Institutes as peculiar to rivers, as also Vinnius in his comment on the passage stating the rule seems to do, while Huberus, on the other hand, thinks that rivers furnish the principle that ought to prevail. Praelectiones, II, Tit. 1, 34.

The seashore flowed by the tides, unlike the banks of rivers, was public property; in Spain belonging to the sovereign power. Inst. II, Tit. 1. 3, 4, 5. D. 43, 8, 3. Partidas, III, Tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III, Tit. 28. Law 31. Inst. 2. 2, 23. D. 41. 1. 7, 5. But we are less concerned with the theory than with precedent in a matter like this, whether we agree with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably embodies it. The Law of Waters of 1866, which became effective in the Philippines in September, 1871, and the validity of which we see no reason to doubt, after declaring like the Partidas that the shores (playas), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use, Arts. 1, 3, goes on thus: "Art. 4. The lands added to the shores by the accessions and accretions caused by the sea belong to the public domain. When they are not (longer) washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of special industries, nor for the

coast guard service, the Government shall [will?] declare them property of the adjacent estates, in increase of the same."

Notwithstanding the argument that this article is only a futile declaration concerning accessions to the shore while it remains such in a literal sense, that is, washed by the tide, we think it plain that it includes and principally means additions that turn the shore to dry land. These all remain subject to public ownership unless and until the Government shall decide that they are not needed for the purposes mentioned and shall declare them to belong to the adjacent estates. The later provision in Article 9, that the public easement for salvage, &c., shall advance and recede as the sea recedes or advances, simply determines that neither public nor private ownership shall exclude the customary public use from the new place. The Spanish Law of Ports of 1880, like the Law of Waters, asserts the title of the State although it confers private rights when there is no public need.

The presumption that the foregoing provisions of the Law of Waters express the understanding of the codifiers as to what the earlier law had been, becomes almost inexpugnable when we find that the other leading civil law countries have adopted the same doctrine. The Code Napoleon, after laying down the Roman rule for alluvion in rivers, Art. 556, 557, adds at the end of the latter Article: "Ce droit n'a pas lieu à l'égard des relais des la mer," which seems to have been adopted without controversy at the Conférence. See further Marcadé, Explication, 5th ed., vol. 2, p. 439. And compare 2 Hall's Am. Law Journal, 307, 324, 329, 333. The Civil Code of Italy, 1865, Art. 454, is to similar effect. See also, Chile, Civil Code, Art. 650. The Supreme Court of Louisiana in like manner confines the private acquisition of alluvion to rivers and running streams, and denies

the private right in the case of lakes and the sea. *Zeller* v. *Yacht Club,* 34 La. Ann. 837. And the provision of the Louisiana Code, Art. 510, is like those of France, Italy and Spain. The court of first instance below refers to judgments of the Supreme Court of Spain that seems to look in the same direction. We have neither heard nor found anything on the other side that seems to us to approach the foregoing considerations in weight, not to speak of the respect that we must feel for the concurrent opinion of both the courts below upon a matter of local law with which they are accustomed to deal. Of course we are dealing with the law of the Philippines, not with that which prevails in this country, whether of mixed antecedents or the common law.

As the case was brought up on the single question that we have discussed the judgment of the court below must be affirmed.

Judgment affirmed.

MR. JUSTICE MCKENNA, dissenting.

I cannot agree with the conclusion of the court. It seems to be conceded that it is not necessarily determined by the authorities which are cited. I think the better deduction from them is that they only declare the constant integrity of the shore, and the dominion of the government over it whether it recede or advance. When it ceases to be washed by the tides or the seas it becomes part of the upland and belongs to the owner of the upland. And this is but the application of the principle, said to be of natural justice, that he who loses by the encroachments of the sea should gain by its recession. *Banks* v. *Ogden,* 2 Wall. 57, 67.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* O'CONNOR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 162. Argued January 24, 25, 1912.—Decided February 19, 1912.

One denying the legality of a tax should have a clear and certain remedy; and where he cannot interfere by injunction, an action to recover back is the alternative, unless he waits until the State commences an action and subjects himself to penalties and risks.

Courts have been too slow to recognize implied duress, in payment of taxes, where payment thereof would result disadvantageously.

Where, in addition to money penalties for delay in payment of a tax, there is forfeiture of right to do business and risk of having contracts declared illegal in case of non-payment of disputed tax, the payment is made under duress.

Where a state officer receives money for a tax paid under duress with notice of its illegality, he has no right thereto and the name of the State does not protect him from suit.

Where a state statute provides for refunding taxes erroneously paid to a state officer, it contemplates a suit against such officer to recover the taxes paid under protest and duress.

THE facts, which involve the right to recover payments for taxes paid under duress and what constitutes duress, are stated in the opinion.

Mr. Robert Dunlap, with whom *Mr. H. T. Rogers* and *Mr. Gardiner Lathrop* were on the brief, for plaintiff in error:

When the railway company in 1899 paid to the State of Colorado the fees required of foreign corporations by the law of 1897, and otherwise complied with the laws then in force, it obtained a vested or contract right to transact its business as a foreign corporation within that State

and the subsequent law of 1907, which attempted to impose an additional annual license tax for the same privileges, impaired the obligation of the contract between the railway company and the State created by virtue of a compliance with the law of 1897. *American Smelting Co.* v. *Colorado*, 204 U. S. 107; *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339; *Attorney General* v. *Bank*, 4 Jones Eq. (N. C.) 287; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *New York &c. R. R. Co.* v. *Pennsylvania*, 153 U. S. 628; *Wendover* v. *City*, 15 B. Monroe (Ky.), 258; *Bank* v. *Knoop*, 16 Howard, 369; *Commonwealth* v. *Mobile & Ohio R. R. Co.*, 23 Ky. L. R. 784; *Seaboard Air Line* v. *Railroad Commission*, 155 Fed. Rep. 792; *Railway Company* v. *Ludwig*, 156 Fed. Rep. 152; *West Un. Tel. Co.* v. *Julian*, 169 Fed. Rep. 166; *Railroad Company* v. *Cross*, 171 Fed. Rep. 480; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *California* v. *Pacific R. R. Company*, 127 U. S. 40; *Penn. R. R. Co.* v. *Philadelphia*, 220 Pa. St. 100; *People* v. *O'Brien*, 111 N. Y. 53.

The statute of 1907 as applied to the plaintiff imposes an unjust burden upon interstate commerce and is, therefore, invalid. *Henderson* v. *New York*, 92 U. S. 259, 268; *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *West Un. Tel. Co.*, 216 U. S. 146; *Daniels* v. *Tearney*, 102 U. S. 421; *Willis* v. *Commissioners*, 86 Fed. Rep. 872; *Butler* v. *Ellerbe*, 44 So. Car. 269; Cooley's Const. Lim., 7th ed., 364*n*.

The statute of 1907 is imposed upon privileges and rights beyond the jurisdiction of the State of Colorado, and, therefore, deprives the railway company of its property without due process of law.

A franchise or privilege granted by another State would not be subject to the taxing power of Colorado. *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *California* v. *Pacific R. R. Co.*, 127 U. S. 2.

A tax levied upon or in respect to property without the jurisdiction of the State is clearly invalid. *L. & W. R.* v. *Pennsylvania*, 198 U. S. 341; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1.

Payment of the tax by plaintiff was involuntary and is, therefore, recoverable from the defendant in a legal action. *Swift Company* v. *United States*, 111 U. S. 22; *Erskine* v. *Van Arsdale*, 15 Wall. 75; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17; *United States* v. *Edmonston*, 181 U. S. 505, 506; *Arkansas Building Assoc.* v. *Madden*, 175 U. S. 269; *Philadelphia* v. *Diehl*, 5 Wall. 720; *Herold* v. *Kahn*, 159 Fed. Rep. 608; *Scottish Union & Nat. Ins. Co.* v. *Herriott*, 109 Iowa, 606; *Steele* v. *Williams*, 8 Exch. 625.

A payment under protest to avoid the imposition of penalties is involuntary. *Ratterman* v. *Am. Expr. Co.*, 49 Oh. St. 608; *Catoir* v. *Watterson*, 38 Oh. St. 319; *United States* v. *Rothstein*, 187 Fed. Rep. 268; *Chicago* v. *Northwestern Mutual Ins. Co.*, 218 Illinois, 40.

The officer who, under color of office exacts and receives an illegal fee or charge is not protected by law because he acts without the law and is, therefore, personally liable especially if notified at the time that suit will be brought to recover back the amount. *Steele* v. *Williams*, 8 Exch. 625; *Ripley* v. *Gelston*, 9 Johns. 201; *Bank* v. *Watkins*, 21 Michigan, 483–489; *Ogden* v. *Maxwell*, 3 Blatch. 319; *Elliott* v. *Swartout*, 10 Peters, 137.

The cases on defendant in error's brief are clearly distinguishable; and see *State* v. *Nelson*, 41 Minnesota, 25; *Brisbane* v. *Dacres*, 5 Taunt. 153; *Dew* v. *Parsons*, 2 B. & A. 562.

On moral duress see: *Atkinson* v. *Denby*, 6 H. & N. 778; *Morgan* v. *Palmer*, 2 Barn. & Cress. 729, 734.

Payment under protest of illegal tax for privilege of doing or continuing in business and to avoid penalties

and disabilities incurred by refusal, is regarded as involuntary. *West. Union Tel. Co.* v. *Mayer,* 28 Oh. St. 521, 527, and 528; *Baker* v. *Cincinnati,* 11 Oh. St. 538; *Hendy* v. *Soule,* 1 Deady, 400; *Harvey & Boyd* v. *Town of Olney,* 42 Illinois, 336; *Virginia Coupon Cases,* 114 U. S. 270, 286.

Mr. Archibald A. Lee, with whom *Mr. Benjamin Griffith,* Attorney General of Colorado, was on the brief, for defendant in error:

The payment by plaintiff was voluntary and is not recoverable. *Radich* v. *Hutchins,* 95 U. S. 210, 213.

There was no need for the plaintiff to make payment to emancipate person or property from an existing duress, for, under the terms of the statute, the corporate existence, property or business of the plaintiff could not have been affected except upon determination of a suit which might, at the option of the attorney general, be instituted. *Lamborn* v. *County Commissioners,* 97 U. S. 181; *Railroad Co.* v. *Commissioners,* 98 U. S. 541, 543; *Little* v. *Bowers,* 134 U. S. 547; *Chesebrough* v. *United States,* 192 U. S. 253; *United States* v. *Cuba Mail S. S. Co.,* 200 U. S. 488; *Oceanic S. S. Co.* v. *Tappan,* 16 Blatchf. 296; *Benson* v. *Monroe,* 7 Cush. 125, 131; *Claflin* v. *McDonough,* 33 Missouri, 412; *Wolfe* v. *Marshal,* 52 Missouri, 167; *Baltimore* v. *Lefferman,* 45 Am. Dec. 145, 153; *Johnson* v. *Cook County,* 53 Oregon, 329; *Weber* v. *Kirkendall,* 4 Nebraska, 766, 770; *Sonoma County Tax Case,* 13 Fed. Rep. 789; 2 Cooley on Taxation (3d ed.), pp. 1495–1501.

The general rule is that where an unfounded and illegal demand is made upon a person and the law furnishes him with an adequate protection against it, or gives him an adequate remedy, and instead of taking what the law gives him or the remedy it furnishes, he pays what is demanded, such payment is deemed to be a voluntary one. 30 Cyc. 1311; *Manning* v. *Polling,* 114 Iowa, 20, 24, 27; *Wessel* v.

Johnston Land Co., 3 N. Dak. 160; *DeGraff* v. *Ramsey County*, 46 Minnesota, 319.

The plaintiff could have enjoined any effort to enforce the collection of the tax. *Ludwig* v. *West Un. Tel. Co.*, 216 U. S. 146.

The plaintiff should have waited until an action was brought either to collect the tax or to suspend its right to do business, and should then in such action have raised the questions which it is attempted to raise in this suit as the basis of a right to recover, or should have proceeded by injunction. The fact that it paid under protest does not make the payment involuntary. *Railroad Co.* v. *Commissioners*, 98 U. S. 541, 544; *Swift & Company* v. *United States*, 111 U. S. 22.

The cases cited by plaintiff in error do not sustain its contention.

The plaintiff is not entitled to this remedy against this defendant. *Elliott* v. *Swartout*, 10 Peters, 137; *Davis* v. *Bader*, 54 Missouri, 168, 169; *Fish* v. *Higbee*, 22 R. I. 223, 224, 225; *King* v. *United States*, 99 U. S. 229.

If the defendant holds the money in wrong of the State, it is still the money of the State, and an action on behalf of the plaintiff will not lie to recover it of him. *Long* v. *Frue*, 104 U. S. 223; *Waters* v. *State*, 1 Gill, 302, 308.

Payment of a demand which can only be enforced by the decision of a court of justice is voluntary. *Maxwell* v. *San Luis Obispo*, 71 California, 466; *Southern Ry. Co.* v. *Mayor*, 141 Alabama, 493; *Betts* v. *Village*, 93 Michigan, 77; *Brewing Co.* v. *State*, 19 S. Dak. 302.

The plaintiff was protected by right to an injunction. *West. Un. Tel. Co.* v. *Andrews*, 216 U. S. 165.

The forfeiture of right to do business was not self-executing. *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540, 547; *Frost* v. *Frostburg Coal Co.*, 24 Howard, 278, 283; *Galveston &c. Ry. Co.* v. *The State*, 81 Texas, 572, 595; *Briggs* v. *Canal Co.*, 137 Massachusetts, 71.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover taxes paid under duress and protest, the plaintiff contending that the law under which the tax was levied is unconstitutional. A demurrer to the declaration was sustained by the Circuit Court. The tax is a tax of two cents upon each one thousand dollars of the plaintiff's capital stock. Session Laws of Colorado, 1907, c. 211 (April 1, 1907). The plaintiff is a Kansas corporation. The greater part of its property and business is outside of the State of Colorado, and of the business done within that State but a small proportion is local, the greater part being commerce among the States. Therefore it is obvious that the tax is of the kind decided by this court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to business wholly within the State. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. *Pullman Co.* v. *Kansas*, 216 U. S. 56. *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146. The defendant did not argue that the tax could be maintained, but contended only that the payment was voluntary and that the defendant is not the proper person to be sued.

It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as

distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms. See *Ex parte Young*, 209 U. S. 123, 146. If he should seek an injunction on the principle of that case and of *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165, he would run the same risk as if he waited to be sued.

In this case the law, beside giving an action of debt to the State, provides that every corporation that fails to pay the tax shall forfeit its right to do business within the State until the tax is paid, and also shall pay a penalty of ten per cent. for every six months or fractional part of six months of default after May 1 of each year. It may be that the forfeiture of the right to do business would not be authoritatively established except by a *quo warranto* provided for in a following section, but before or without the proceeding the effect of the forfeiture clause upon the plaintiff's subsequent contracts and business might be serious, (see *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146), and in any event the penalty would go on accruing during all the time that might be spent before the validity of the defence could be adjudged. As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of opinion that the pay-

ment was made under duress. See *Gaar, Scott & Co.* v. *Shannon*, decided this day, *post*, p. 468.

The other question is whether the defendant is liable to the suit. The defendant collected the money and it is alleged that he still has it. He was notified when he received it that the plaintiff disputed his right. If he had no right, as he had not, to collect the money, his doing so in the name of the State cannot protect him. *Erskine* v. *Van Arsdale*, 15 Wall. 75. See *Virginia Coupon Cases*, 114 U. S. 270. It is said that the money as soon as collected belonged to the State. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the State, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the State should attempt to hold him after he had been required to repay the sum. Moreover it would seem that the statute contemplated the course taken by the plaintiff and provided against any difficulty in which the Secretary of State otherwise might find himself in case of a disputed tax. For it provides by § 6 that 'if it shall be determined in any action at law or in equity that any corporation has erroneously paid said tax to the Secretary of State,' upon the filing of a certified copy of the judgment the auditor may draw a warrant for the refunding of the tax and the state treasurer may pay it. We must presume that a judgment in the present action would satisfy the law.

Judgment reversed.

COLLINS *v.* THE STATE OF TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 165. Argued January 25, 26, 1912.—Decided February 19, 1912.

Where the party attacking the constitutionality of a statute has not suffered, the court will not speculate whether others may suffer.

Under its police power a State may constitutionally prescribe conditions to insure competence in those practising the healing art in its various branches, including those in which drugs are not administered—such as osteopathy. *Dent* v. *West Virginia*, 129 U. S. 114.

The Texas statute of 1907, establishing a Board of Medical Examiners, and conditions under which persons will be licensed to practise osteopathy, does not deprive one who refuses to apply for a license thereunder of his property without due process of law, or deny him the equal protection of the law.

In this case the writ of error to review a judgment denying plaintiff in error his release on *habeas corpus* is not dismissed but determined on the merits, as the single constitutional question goes to the jurisdiction of the state court, and has arisen as plainly as it ever will. *Bailey* v. *Alabama*, 211 U. S. 452, distinguished.

THE facts, which involve the constitutionality of certain provisions of the statute of Texas establishing the Board of Medical Examiners, are stated in the opinion.

Mr. Millard Patterson, with whom *Mr. Jo. F. Woodson*, was on the brief, for plaintiff in error:

The statute deprives plaintiff in error of his property without due process of law, and denies him the equal protection of the law.

The last two clauses of the Fourteenth Amendment are restrictions upon the exercise of arbitrary and capricious power over persons and property when exercised by the State through any of its agencies. *Ex parte Vir-*

ginia, 100 U. S. 339; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Holden* v. *Hardy*, 169 U. S. 366; *Barbier* v. *Connolly*, 113 U. S. 27; *Nelson* v. *The State Board of Health*, 57 S. W. Rep. 504; *State* v. *Mylod*, 40 Atl. Rep. (R. I.) 753; *State* v. *Biggs*, 46 S. E. Rep. 401 (N. Car.); *State* v. *Liffring*, 55 N. E. Rep. 168 (Ohio); *State* v. *McKnight*, 42 S. E. Rep. 580 (N. Car.); *Bennett* v. *Ware*, 61 S. E. Rep. 548; *State* v. *Biggs*, 46 S. E. Rep. 401.

The words "bona fide" and "reputable" in the description of the medical school of which one is to be a graduate mean, as stated in section seven of the act, that it shall be a school having a course of instruction as high as the better class of medical schools in the United States.

The acts, under the facts of this case, discriminate against plaintiff in error as an osteopath, and violate the Fourteenth Amendment, in that they discriminate in favor of nurses who practise not only nursing, but treat minor ailments; in favor of masseurs who, in their particular spheres of labor, treat diseases, light disorders and injuries, and charge therefor money and other compensation; and also discriminate in favor of druggists, who prescribe remedies and charge therefor.

If Chapter 123 applies to an osteopath who practises only as such, it discriminates against osteopaths in providing for the issuance of a verification license to legal practitioners of medicine who were practising under the provisions of previous laws, or under diplomas of reputable and legal colleges of medicine, there being no provision in the law for the issuing of a verification license to osteopaths.

The acts are in violation of the Fourteenth Amendment in discriminating against osteopaths in requiring that they should have a diploma from a bona fide medical school before they can present themselves for examination before the Medical Board of Examiners for a license to prac-

tise, and in requiring them to accept a license to practise medicine.

To require plaintiff to obtain a diploma from a medical college as defined in said act, and to require him to pass an examination in the scientific branches of medicine before he could be granted a license to practise osteopathy is a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine, in contravention of the Fourteenth Amendment. *Watson* v. *Maryland*, 218 U. S. 173; *Reetz* v. *Michigan*, 188 U. S. 505, distinguished.

Mr. Jewell P. Lightfoot, Attorney General of Texas, with whom *Mr. James D. Walthall*, *Mr. C. E. Lane*, *Mr. James N. Wilkerson*, *Mr. Timothy J. Scofield* and *Mr. Frank J. Loesch* were on the brief, for defendant in error:

The acts do not violate the privileges or immunities clause; that provision applies only to those privileges and immunities which are incident to citizenship of the United States as distinguished from citizenship of the several States. *Slaughter House Cases*, 16 Wall. 36, 74; *Bartmeyer* v. *Iowa*, 18 Wall. 129; *Miller* v. *Texas*, 153 U. S. 535; *Orr* v. *Gilman*, 183 U. S. 278; *Re Kemmler*, 136 U. S. 436; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Reese*, 92 U. S. 214; *Hall* v. *DeCuir*, 95 U. S. 485; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Presser* v. *Illinois*, 116 U. S. 252.

The right to practise medicine without regulation is not one of such privileges and immunities. *Supra* and *Dent* v. *West Virginia*, 129 U. S. 114.

The acts under consideration do not violate the due process clause. They were passed under the police power of the State, and are a proper exercise of that power in scope and purpose. The details of such legislation rest primarily within the discretion of the state legislature. This court can only interfere when fundamental rights guaranteed un-

der the Federal Constitution are violated by such statutes. *Watson* v. *Maryland*, 218 U. S. 173; *Dent* v. *West Virginia*, 129 U. S. 114; *Reetz* v. *Michigan*, 188 U. S. 505; *Hawker* v. *New York*, 170 U. S. 189; *Meffert* v. *Packer*, 195 U. S. 625; *Williams* v. *Arkansas*, 217 U. S. 79; *People* v. *Apfelbaum*, 251 Illinois, 18; *State* v. *Smith*, 135 S. W. Rep. 465; *Parks* v. *State*, 159 Indiana, 211; *Feller* v. *State Examiners*, 34 Minnesota, 391; *Burroughs* v. *Webster*, 150 Indiana, 607; *Bragg* v. *State*, 134 Alabama, 165; *State* v. *Buswell*, 40 Nebraska, 158; *Little* v. *State*, 60 Nebraska, 749; *State* v. *Gravett*, 65 Oh. St. 289; *State* v. *Marble*, 72 Oh. St. 21; *People* v. *Allcutt*, 102 N. Y. Supp. 678, aff'd 189 N. Y. 517; *People* v. *Mulford*, 125 N. Y. Supp. 680, aff'd 202 N. Y. 624; *People* v. *Reetz*, 127 Michigan, 87; *People* v. *Phippin*, 70 Michigan, 6; *State* v. *Miller*, 146 Iowa, 521; *State* v. *Adkins*, 145 Iowa, 671; *State* v. *Wilhite*, 132 Iowa, 226; *State* v. *Edmunds*, 127 Iowa, 333; *State* v. *Heath*, 125 Iowa, 585; *State* v. *Bair*, 112 Iowa, 466; *Foster* v. *Police Commissioners*, 102 California, 483; *Scholle* v. *State*, 90 Maryland, 729; *State* v. *Yegge*, 19 S. Dak. 234.

The provisions of this statute are not such as result in any arbitrary deprivation of plaintiff in error's liberty or property, or of his right to engage in a lawful calling. Cases *supra* and *Commonwealth* v. *Porn*, 196 Massachusetts, 326; *Bandel* v. *Dept. of Health*, 193 N. Y. 133; McGehee on Due Process of Law, 52.

The act is not void as exceeding the police power of the State on account of any menace to the public, such as the danger of being exposed to the administration of drugs by persons not skilled in their administration.

This court is not concerned with the wisdom or policy of the act, so long as the act fairly secures or tends to secure the objects sought to be attained by it and is not patently unreasonable. *Otis* v. *Parker*, 187 U. S. 606.

The act does not violate the equal protection clause.

The state legislature has the power to make regulations

of the character involved herein, and the details of such legislation rest primarily within the discretion of the state legislature. Cases *supra*.

The classification made in the statute is not arbitrary, unreasonable or oppressive, and was within the legislative power of the State, as having a fair relation to the objects of the statute. Within the sphere of its operation it affects alike all persons similarly situated.

Plaintiff in error does not, and cannot on the record in this case, contend that the Board of Medical Examiners of Texas has been guilty of any unfair or unjust action toward him. His contentions are based upon fancied inequalities of the statute which arise only on his own theory of how the act would have been construed by the board had he in fact requested from it authority to practise, or the right to take an examination as provided by the act.

While the construction of the act by the Court of Criminal Appeals of the State of Texas may not, perhaps, be in all respects conclusive upon this court, that construction is one toward which this court will lean. Cases *supra*, and see *Atchison &c. Railroad Co.* v. *Matthews*, 174 U. S. 96, 101; *Marchant* v. *Penna. R. R. Co.*, 153 U. S. 380; *Baltimore Traction Co.* v. *Belt R. Co.*, 151 U. S. 137; *Minneapolis &c. R. Co.* v. *Minnesota*, 193 U. S. 53; McGehee on Due Process, 37, 40, 306, note 7.

The act will be taken in this court as construed by the Court of Criminal Appeals of the State of Texas to include in the "practise of medicine" the practise of osteopathy. 57 Tex. Crim. 2.

The act must also be taken as not in conflict with the constitution of Texas. *Reetz* v. *Michigan*, 188 U. S. 505.

The object of the statute is to protect the sick and afflicted from the pretensions of the ignorant, the unskilled and the unscrupulous. The statute was passed to protect the health and promote the welfare of the people of Texas,

and to protect them from imposition and fraud. It seeks to prohibit and punish fraud, deception, charlatanry and quackery in the practice of healing, to prevent empiricism, and to bring the practice under such control that, as far as possible, the ignorant, the unscientific, the unskilled, and the unscrupulous practitioner may be excluded. Cases *supra; State* v. *Oredson*, 96 Minnesota, 509; *O'Neil* v. *State*, 115 Tennessee, 427; *People* v. *Blue Mountain Joe*, 129 Illinois, 370; *State* v. *Bair*, 112 Iowa, 466; *Commonwealth* v. *Jewelle*, 199 Massachusetts, 558; *People* v. *Phippin*, 70 Michigan, 6, 19.

In construing the act consideration must be given to the purpose of the legislature, and to the mischief intended to be guarded against. Whether it is fair and reasonable and a valid exercise of the police power, or arbitrary and capricious must be determined in the light of the object sought to be attained by the act. 1 Kent's Comm. 462; 2 Sutherland's Stat. Const. (2d ed. by Lewis), §§ 370–376, 456.

There is no vested right to practise either the medical or legal profession, free from supervision and regulation by the State. *Broadwell* v. *Illinois*, 16 Wall. 130; *Reetz* v. *Michigan*, 188 U. S. 505; *Hawker* v. *New York*, 170 U. S. 189; *People* v. *King*, 110 N. Y. 418; *People* v. *Phippin*, 70 Michigan, 6; 22 Am. & Eng. Ency. of Law (2d ed.), 9, 780.

The statute does not infringe the provisions of the *ex post facto* clause; see cases *supra; Eastman* v. *State*, 109 Indiana, 281; *State* v. *Creditor*, 44 Kansas, 568; *Craig* v. *Medical Examiners*, 12 Montana, 211; *State* v. *Coleman*, 64 Oh. St. 377.

This statute is not an unconstitutional interference with vested rights. *Allopathic State Board* v. *Fowler*, 50 La. Ann. 1358; *People* v. *Moorman*, 86 Michigan, 433; *Williams* v. *People*, 121 Illinois, 87; *Thompson* v. *Staats*, 15 Wend. (N. Y.) 395; *Hewitt* v. *Charier*, 16 Pick. (Mass.)

395; *State* v. *Hale*, 15 Missouri, 606; *Bibber* v. *Simpson*, 50 Maine, 181; *Dankworth* v. *State*, 136 S. W. Rep. 788.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to the Texas Court of Criminal Appeals upon a judgment denying the plaintiff in error a release by habeas corpus. The plaintiff in error is held upon an information charging him with practising medicine for money by treating a named patient for hay fever by osteopathy, without having registered his authority as required by a Texas statute of April 17, 1907, c. 123 (Gen. Laws, 1907, p. 224). He denies the constitutionality of the act.

The statute establishes a Board of Medical Examiners and requires "all legal practitioners of medicine in this State, who, practising under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a State Medical Examining Board of this State" to prove their diplomas, or existing license, or exemption existing under any law; whereupon they are to receive a verification license. § 6. By § 7 applicants not licensed under § 6 must pass an examination, conditioned among other things on their being graduates of "bona fide reputable medical schools;" schools to be considered reputable "whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each." By § 9 the examinations are to be fair to every school of medicine, are to be conducted on the scientific branches of medicine only, and are to include anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and

medical jurisprudence. Those who pass are to be granted licenses to practise medicine. By § 10 nothing in the act is to be construed to discriminate against any particular system, and the act is not to apply to dentists legally registered and confining themselves to dentistry, nurses who practise only nursing, masseurs, or surgeons of the United States Army, Navy, &c., in the performance of their duties.

The only other material sections of the act are §§ 13 and 14, the former of which declares that "any person shall be regarded as practising medicine within the meaning of this act. . . . (2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." By § 14 any person practising medicine in violation of the act is punished by fine and imprisonment, and is not to recover anything for the services rendered.

The facts charged against the plaintiff in error are admitted. It also is admitted that before the passage of the statute he had spent $5,000 in fitting up his place, and was deriving a net income from his calling of at least the same sum. He held a diploma from the chartered American School of Osteopathy, Kirksville, Missouri, after a full two years' course of study there, but it does not appear that he presented this diploma to the Board of Medical Examiners or attempted to secure either a verification license or license in any form. The Board in passing upon qualifications does not examine in therapeutics or materia medica, which, it will be observed, are not mentioned in the act. On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him contrary to the Fourteenth Amendment of the Constitution of the United States. If he has not suffered we are not called upon to speculate upon other cases, or

to decide whether the followers of Christian Science or other people might in some event have cause to complain.

We are far from agreeing with the plaintiff in error that the definition of practising medicine in § 13 is arbitrary or irrational, but it would be immaterial if it were, as its only object is to explain who fall within the purview of the act. That it does, and of course we follow the Texas court in its decision that the plaintiff in error is included. It is true that he does not administer drugs, but he practises what at least purports to be the healing art. The State constitutionally may prescribe conditions to such practice considered by it to be necessary or useful to secure competence in those who follow it. We should presume, until the Texas courts say otherwise, that the reference in § 4 to the diploma of a reputable and legal college of medicine, and the confining in § 7 of examinations to graduates of reputable medical schools, use the words medicine and medical with the same broad sense as § 13, and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of osteopathy. In short, the statute says that if you want to do what it calls practising medicine you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school by the act for the purpose of showing that it satisfies the statutory requirements. He cannot say that it would not have been regarded as doing so, because he has not tried. *Dent* v. *West Virginia*, 129 U. S. 114, 124.

An osteopath professes, the plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centres. It is intelligible therefore that the State should require of him a scientific training. *Dent* v. *West Virginia*, 129 U. S. 114; *Watson* v. *Maryland*, 218 U. S. 173. He like others

must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the State requires him to prove. The same considerations that justify including him justify excluding the lower grades from the law. *Watson* v. *Maryland*, 218 U. S. 173, 179, 180. Again, it is not an answer to say that the plaintiff in error is prosecuted for a single case. If the legislature may prohibit a general practice for money except on the condition stated, it may attach the same conditions to a single transaction of a kind not likely to occur otherwise than as an instance of a general practice. A distinction between gratuitous and paid for services was made in the Maryland statute sustained in *Watson* v. *Maryland*, 218 U. S. 173, 178. Finally, the law is not made invalid as against the plaintiff in error by the fact that he had an established business when the law was passed. *Dent* v. *West Virginia*, 129 U. S. 114. *Reetz* v. *Michigan*, 188 U. S. 505, 510.

The objections that prevailed against a writ of error like this in *Bailey* v. *Alabama*, 211 U. S. 452, do not exist here. There as here it was attempted to interrupt the ordinary course of a trial by habeas corpus, and there as here the State allowed the attempt and discharged the writ on the merits. But in that case it did not appear that the constitutional question relied upon had arisen or necessarily would arise, although afterwards it did. 219 U. S. 219. But here the facts are admitted, the question appears as plainly as it ever will, and is supposed to go to the jurisdiction of the court. Therefore we have discussed the case on the merits; perhaps more than it needed in view of the decisions cited and others that establish the right of the State to adopt a policy even upon

medical matters concerning which there is difference of opinion and dispute. *Hawker* v. *New York*, 170 U. S. 189; *Meffert* v. *Packer*, 195 U. S. 625; *Jacobson* v. *Massachusetts*, 197 U. S. 11. See also *Williams* v. *Arkansas*, 217 U. S. 79.

Judgment affirmed.

MEYER, AUDITOR OF THE STATE OF OKLAHOMA, *v.* WELLS, FARGO & COMPANY.

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

No. 624. Argued January 16, 1912.—Decided February 19, 1912.

In estimating for taxation the proportion of income of a corporation doing interstate business, a State cannot include income from investments in bonds and lands outside of the State. *Fargo* v. *Hart*, 193 U. S. 490.

The Oklahoma tax on gross revenue of corporations of 1910, as far as it affects express companies, is not a property tax but a tax on all revenue, including that received from interstate commerce, and as such is an unconstitutional burden on interstate commerce. *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217.

Where a state statute requires that a corporation doing both interstate and intrastate business return its gross receipts from all sources, the taxing feature of the statute cannot be construed as relating only to receipts from intrastate commerce, and sustained separately in that respect.

Complainant in an equity suit to restrain the collection of a state tax on gross receipts, on the ground that the act is unconstitutional because it includes receipts from interstate commerce, is not bound, in order to maintain the bill, to tender so much as would have fallen on intrastate receipts. *People's Bank* v. *Marye*, 191 U. S. 272, distinguished.

The court cannot reshape a taxing statute which includes elements beyond the State's power of taxation simply because it embraces elements that it might have reached had the statute been drawn with a different measure and intent.

THE facts, which involve the constitutionality of provisions of the statute of 1910 of the State of Oklahoma imposing a revenue tax upon receipts of express companies, are stated in the opinion.

Mr. Charles West, Attorney General of Oklahoma, for appellant.

Mr. S. T. Bledsoe, with whom *Mr. J. R. Cottingham* and *Mr. C. W. Stockton* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill for an injunction against a tax alleged to be unconstitutional as a regulation of commerce among the States. Upon demurrer three judges sitting in the Circuit Court granted the injunction, and the defendant appealed to this court. The statute in question (March 10, 1910, Sess. Laws 1910, c. 44, p. 65) is entitled 'An Act providing for the levy and collection of a gross revenue tax from public service corporations in this State' and from persons engaged in certain mining and similar occupations. By § 2 "Every corporation hereinafter named shall pay the state a gross revenue tax . . . which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation equal to the per centum of the gross receipts hereinafter provided, if such public service corporation operate wholly within the state, and if such public service corporation operates partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business;" with a proviso for fixing a different proportion if it "more fairly represents the proportion which

the gross receipts of any such public service corporation for any year within this state bear to its total gross receipts." By § 3 the per centum to be paid by express companies (such as the plaintiff is), is three per cent. of the gross receipts, and, 'for the purpose of determining the amount of such tax,' they are required to report under oath the gross receipts 'from every source whatsoever.'

The plaintiff's receipts are largely from commerce among the States, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo* v. *Hart*, 193 U. S. 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside. But we see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, as to show that, if one is not copied from the other, they have a common source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that.

It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session this really was a property tax. But the scope and purport of the act, so far as it affects express companies, are too obvious to admit such a view. The tax is "in addition to the taxes levied and collected upon

an ad valorem basis." Even if we read the words which follow without a comma, viz. "upon the property and assets of such corporation," as not qualifying those which immediately precede but as attempting to characterize the "gross revenue tax" as a tax on such property and assets, nevertheless all the property and assets are the subject of the ad valorem taxes referred to. Therefore this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, given in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 226, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162–165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above on the authority of *Fargo* v. *Hart*, 193 U. S. 490, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the State. We may add in this connection that this same requirement as to the total gross receipts shows that it is impossible to save the constitutionality of the act by construing it as referring only to the receipts from commerce wholly within the State.

We do not gather that the appellant has any objection to testing the validity of this tax in an equity suit, or that any such objection was made below. *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530. Therefore we do not consider whether there are any facts to take the case out of the general rule established by the cases collected in *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276. See *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165. It was objected, however, that

the bill cannot be maintained for want of a tender of so much of the tax as would have fallen on the receipts from commerce wholly within the State. But that requirement hardly can be made in this case, which is not like one where the law simply fails to allow certain proper deductions. *People's National Bank* v. *Marye*, 191 U. S. 272. Whether the statute could be construed as separable of course would be ultimately for the state court in any event. *Telegraph Co.* v. *Texas*, 105 U. S. 460. But we see no possible construction on which it could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. For, to recur to the statute, it is not simply a tax on all gross receipts within the State, which possibly might be read as intended to reach such receipts as it could, even if less than all, *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the State has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent.

Decree affirmed.

POWERS *v.* UNITED STATES.

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

No. 152. Argued January 22, 1912.—Decided February 19, 1912.

The objection that there was no *venire facias* summoning the grand jury is waived unless seasonably taken.

When the case gets to this court if the indictment shows that the grand jury was duly selected and sworn, it is enough to show the proper swearing of the grand jury. *Crain* v. *United States*, 162 U. S. 625, distinguished.

Where the conviction is a general one, one good count is sufficient to warrant affirmance. *Dunton* v. *United States*, 156 U. S. 185.

In this case the statements in the record as to the calling and impaneling of the petit jury sufficiently disclose, upon proceedings in error, that the petit jury was sworn.

Where the accused voluntarily becomes a witness in his own behalf before a commission, it is not essential to the admissibility of his testimony that he be first warned that what he says may be used against him. *Wilson* v. *United States*, 162 U. S. 613.

Where the record does not show that the accused on the preliminary hearing claimed his privilege under the Fifth Amendment or was ignorant of it but does show that he testified voluntarily and understandingly, his testimony cannot be excluded when subsequently offered at his trial.

A defendant testifying voluntarily, thereby waiving his privilege, may be fully cross-examined as to the testimony given, and in this case *held* that the cross-examination did not exceed the proper limits.

Section 860, Rev. Stat., has no bearing on the introduction in the same criminal proceeding of testimony of accused given voluntarily. *Tucker* v. *United States*, 151 U. S. 164.

THE facts, which involve the validity of a sentence after conviction for violating §§ 3258, 3279, 3281 and 3242 of the Revised Statutes of the United States, are stated in the opinion.

Mr. S. H. Sutherland, with whom *Mr. R. A. Ayers* was on the brief, for plaintiff in error:

There can be no grand jury for a United States court unless ordered by the judge, and the only method of summoning a grand jury is by *venire facias*. Rev. Stat., §§ 803, 810; 4 Fed. Stat. Ann. 742–744; *United States* v. *Antz*, 16 Fed. Rep. 119; *United States* v. *Reed*, 2 Blatchf. 435.

The grand jury which returned this bill of indictment was never sworn, and therefore could not return a true bill of indictment. Under Amendment V no court of the United States has authority to try a person without an indictment returned by a grand jury for an offense of this kind. *Ex parte Bain*, 121 U. S. 1; *Rowe* v. *State*, 20 So. Rep. (Ala.) 459; 2 Sawy. C. C. 667; Bishop Criminal Procedure, § 1357; *Barker* v. *State*, 39 Arkansas, 180; *Lyman* v. *People*, 7 Brad. (Ill.) 345; *Foster* v. *State*, 31 Mississippi, 421; *Abram* v. *State*, 25 Mississippi, 589; *Stokes* v. *State*, 24 Mississippi, 621; 4 Bl. Com. 302; 1 Chit. Crim. L. 178; Cooley's Const. L. 318.

It takes both impaneling and swearing to constitute a grand jury. Whatever is essential in a criminal proceeding to deprive a person of his liberty must appear of record and nothing is taken by intendment or implication. *Ball's Case*, 140 U. S. 118; *Hopt* v. *Utah*, 110 U. S. 574; *United States* v. *Crane*, 162 U. S. 625; *Barnes' Case*, 92 Virginia, 722; *Jones' Case*, 87 Virginia, 63; *Spurgeon's Case*, 86 Virginia, 652; *Cawood's Case*, 2 Virginia Cases, 527; *Rich* v. *People*, 1 Tex. App. 206.

No inference that they were sworn can be drawn from the word impaneled. *Layman* v. *People*, 7 Brad. (Ill. App.) 345; *Zapf* v. *State*, 35 Florida, 210; 7 So. Rep. 225; see also *State* v. *Potter*, 18 Connecticut, 166; *Porter* v. *People*, 7 How. Pr. (N. Y.) 441.

This right cannot be waived by a plea of not guilty like the waiver to the qualification of a grand juror. *United*

States v. *Gale*, 109 U. S. 65; *Rodriguez* v. *United States*, 198 U. S. 156; *Watson's Case*, 87 Virginia, 612; *Curtis' Case*, 87 Virginia, 589; *Abram* v. *State*, 25 Mississippi, 589.

The indictment was defective and the fourth and sixth counts should have been stricken out. Wh. Cr. Pl. and Pr., § 239; *United States* v. *Cook*, 17 Wall. 168.

The jury that tried this case was not summoned as required by law. A jury must be selected and summoned as required by law and it is indispensable that it should so appear. 1 Bish. Crim. Pro., § 1357; *Johnson* v. *State*, 47 Alabama, 62; *Jones* v. *State*, 5 Alabama, 656; *State* v. *Rollins*, 2 Fost, 528; *Warren* v. *State*, 1 Green, 106; *Harriman* v. *State*, 2 Id. 207.

Colly's testimony should have been rejected or stricken out. *Fitzpatrick* v. *United States*, 178 U. S. 304; *Bram* v. *United States*, 168 U. S. 532; *Brown* v. *Walker*, 161 U. S. 561; *Counselman* v. *Hitchcock*, 142 U. S. 562; *United States* v. *Ball*, 81 Fed. Rep. 837; *Cullen's Case*, 24 Gratt. 721; Cooley's Const. Lim., 6th ed. 385; McKelvey on Ev. 299; *Rex* v. *Garbett*, Dennison's Crown Cases, 236; 2 Car. & K. 474; 1 Greenl. on Ev., 16th ed., §§ 216, 254*a*, 469*b*.

The admission of Powers before the commissioner was not such an admission as amounted to a judicial confession; it is essential it be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. 1 Greenl. on Ev., § 216.

A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matter stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own and calling him in the subsequent progress of the cause. *Phila. & Trenton Ry. Co.* v. *Stimpson*, 14 Pet. 448; *Miller* v. *Miller*, 92 Virginia, 510; 1 Greenl. on Ev. 445.

The defendant could stop at any place he chose and the cross-examination could only go to facts and circumstances

connected with the direct examination. Cooley's Const. Lim., 6th ed., 384–386. His constitutional privilege protects him from cross-examination on any point not touched in his examination in chief. *State* v. *Lurch*, 12 Oregon, 99; 6 Pac. Rep. 408; *State* v. *Bacon*, 13 Oregon, 143; 8 Pac. Rep. 393; 57 Am. Rep. 8; *State* v. *Saunders*, 14 Oregon, 300; 12 Pac. Rep. 441; *State* v. *Gallo*, 18 Oregon, 435; 23 Pac. Rep. 264.

If the defendant after going on the stand in his own behalf refused to answer any question on cross-examination he could not be punished for it. The remedy in this case for the Government would be to strike out his evidence in chief.

Powers going on the stand before the commissioner and giving testimony did not waive the constitutional privilege as to such testimony at a later stage. *Cullen's Case*, 24 Gratt. (Va.) 624. For this evidence was clearly extorted by compulsion through fear of imprisonment.

The waiver of the privilege must always be made understandingly and willingly, and generally after being fully warned by the court. *Cullen* v. *Commonwealth*, 24 Gratt. 624; 1 Greenl. on Ev., § 451.

The confession by the defendant was made under such circumstances that it was not admissible evidence even had it been made out of court. *Bram* v. *United States*, *supra; United States* v. *Ball*, 81 Fed. Rep. 837.

The guaranty must have a broad and liberal construction in favor of the party and rights which it was intended to secure. *Counselman* v. *Hitchcock*, *supra; Boyd* v. *United States*, 116 U. S. 616; *Wilson* v. *United States*, 221 U. S. 361; § 860, Rev. Stat.

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

The omission of the commissioner to advise the de-

fendant of his privilege was not a breach of the privilege.

Furthermore, this defendant in fact resisted giving the answer and did so only under compulsion. There was nothing to show that he was not fully cognizant of his rights. *Wilson* v. *United States*, 162 U. S. 613, 623.

The warning as to the privilege is not essential. Wigmore on Evidence, § 2269.

Unless defendant's privilege was violated at the preliminary hearing, it was not violated at all, for Colly's quotation at the final trial, of what defendant had previously said, was no new breach of the privilege.

Defendant could not have been compelled to testify personally at his final trial, even though he voluntarily testified at the preliminary hearing.

The testimony below was that of Colly, not of the defendant. The defendant was not on the witness stand. No new pressure was exerted on him. If his former admissions were not improperly extorted by the commissioner, it was competent for Colly to testify as to them, just as to formal confessions. *Wilson* v. *United States*, 162 U. S. 613, 623; *Hardy* v. *United States*, 186 U. S. 224, 228; *Moore* v. *Commonwealth*, 29 Leigh (Va.), 701; *State* v. *Branham*, 13 S. Car. 389; *State* v. *Melton*, 120 N. Car. 591; *Jackson* v. *State*, 39 Oh. St. 37; *Ortiz* v. *State*, 30 Florida, 256; *State* v. *Burrell*, 27 Montana, 282; Wigmore, §§ 850, 852, 2276.

The admissions of the defendant were not improperly obtained at the preliminary hearing before the commissioner, because they fell within his waiver of privilege.

No objection on the score of relevancy was taken to this testimony either before the commissioner or on the trial; and, in the discretion of the court, it was plainly relevant, both as bearing on the defendant's explanation of his presence at the still particularly charged, *Wood* v. *United States*, 16 Pet. 342; *Buckley* v. *United States*, 4 How.

251, 259; Wigmore on Evidence, §§ 215, 242, 300, 371, and as bearing on his credibility, *Tla-Koo-Yel-Lee* v. *United States*, 167 U. S. 274; *Johnson* v. *Jones*, 1 Black, 209, 225; *Langhorne* v. *Commonwealth*, 76 Virginia, 1016; Wigmore on Evidence, § 988 (p. 1142), § 983 (p. 1114).

A defendant who takes the stand waives privilege as to questions along both these lines. *Brown* v. *Walker*, 161 U. S. 597; *State* v. *Wentworth*, 65 Maine, 234, 243; *Guy* v. *State*, 90 Maryland, 29; *Lawrence* v. *State*, 103 Maryland, 17; *State* v. *Ober*, 52 N. H. 459; *R. R. Co.* v. *D'Aoust*, 3 Ont. L. R. 653.

An accused taking the stand may be asked as to prior convictions. *Norfolk* v. *Gaylord*, 28 Connecticut, 309.

Defendant was not privileged as to other acts of intercourse. *State* v. *Klitzke*, 46 Minnesota, 343.

Bastardy; defendant denying the intercourse charged, compelled to testify as to other intercourse. *People* v. *Dupounce* (Mich.), 94 N. W. Rep. 388.

The waiver extends to "any question, material to the case, which would in the case of any other witness be legitimate cross-examination," even though it involves some other crime; here applied to questions concerning the rape intercourse which led to the charge of bastardy. *Connors* v. *People*, 50 N. Y. 240.

Assault; questions as to former arrests, to affect credibility, allowed. *People* v. *Casey*, 72 N. Y. 393, 398.

Questions as to former assaults, to affect credibility, allowed. *People* v. *Tice*, 131 N. Y. 651, 655.

Approving *Connors* v. *People;* defendant not privileged as to questions affecting his credibility. *People* v. *Webster*, 139 N. Y. 73, 84; *People* v. *Tice* followed; *People* v. *Rozelle*, 78 California, 84.

Defendant may be cross-examined by the same rule as other witnesses, except that the court has no discretion. *People* v. *Meyer*, 75 California, 383.

Privilege waived as to cross-examination to character.

People v. *Gallagher*, 100 California, 466; *People* v. *Arnold*, 116 California, 682, 687; *Smith* v. *State*, 137 Alabama, 22.

He becomes "subject to cross-examination and impeachment as are other witnesses." In *People* v. *Dole* (Cal.), 51 Pac. Rep. 945; a question as to a former admission was allowed, and *State* v. *Gaylord*, 35 Connecticut, 203, 207, a murder case, cross-examination as to credit, was allowed.

The controversy whether the waiver of privilege by a defendant extends to all things relevant to the issue, as held in *Guy* v. *State*, 90 Maryland, 29; *Lawrence* v. *State*, 103 Maryland, 17; *Commonwealth* v. *Nichols*, 114 Massachusetts, 287; *Spies* v. *People*, 122 Illinois, 255; *State* v. *Griswold*, 67 Connecticut, 290; *Clark* v. *Jones*, 87 Alabama, 71; *State* v. *McGee*, 25 So. Car. 247; *People* v. *Conroy*, 153 N. Y. 174; *People* v. *Tice*, 131 N. Y. 651, 655; 8th Ency. Pl. & Pr. 147, 151; Wigmore, § 2276, or is limited to the scope of proper cross-examination, as was perhaps intimated (though not decided) in *Spies* v. *Illinois*, 123 U. S. 131, 180; *Fitzpatrick* v. *United States*, 178 U. S. 304, 314; *Sawyer* v. *United States*, 202 U. S. 150, 165, is deemed immaterial here because the field of the direct examination was the whole fact of guilt or innocence, and any cross-examination that was relevant was necessarily within that field. Indeed, this is generally the case where the witness claiming the privilege is the defendant. Wigmore, § 2276, p. 3155.

The error, if any, was harmless.

There is nothing to indicate that the defendant was in the least degree prejudiced by the alleged error, and the discretion of the trial court should not be disturbed. *Holt* v. *United States*, 218 U. S. 245; *Rea* v. *Missouri*, 17 Wall. 532; *Willis* v. *Russell*, 100 U. S. 621, 625.

The further grounds of error advanced in the brief were not assigned, nor have they any merit. Plaintiff in error claims here for the first time that neither the grand jury nor the petit jury were summoned or sworn.

The defect, if any, was waived. *Rodriguez* v. *United States*, 198 U. S. 156; *United States* v. *Gale*, 109 U. S. 65; *Agnew* v. *United States*, 165 U. S. 36; *McInerney* v. *United States*, 147 Fed. Rep. 183.

MR. JUSTICE DAY delivered the opinion of the court.

Plaintiff in error (hereinafter called defendant) was convicted in the District Court of the United States for the Western District of Virginia under an indictment charging him with the violation of §§ 3258, 3279, 3281 and 3242 of the Revised Statutes of the United States. He was sentenced to a fine of $100 and to be imprisoned for a period of thirty days.

The indictment contained seven counts, charging the defendant substantially as follows: That he had in his possession a still and distilling apparatus for the production of spirituous liquors without having had such still and apparatus registered (first count); that he carried on the business of a distiller of spirituous liquors without having given bond (second count), and with the intent to defraud the United States of the tax on such liquors (third count), and also carried on the business of a retail liquor dealer without having paid the special tax therefor (seventh count); that he worked in a distillery for the production of spirituous liquors upon which no "Registered Distillery" sign was displayed (fourth count), and that he delivered raw material, namely, meal, to (sixth count), and conveyed distilled spirits from (fifth count), such distillery.

The case comes to this court, because of the alleged violation of a constitutional right, in compelling the defendant to be a witness against himself. This contention is developed in the bill of exceptions, which shows that at a preliminary hearing before a United States commissioner, after a witness for the Government had testified that he had seen the defendant beating apples at a "still

place" near the home of one Preston Powers, and about four miles from defendant's home, the defendant, without counsel and not having been instructed by the commissioner, voluntarily, in his own behalf, testified that he had beaten apples about thirty steps from the still place; that Preston Powers had hired him for seventy-five cents a day, and had set him to work beating apples, but that he had no interest in the apples, the product from them or the still, and no control of the still, and had merely been hired by the day at a fixed price; that thereupon M. P. Colly, deputy marshal, asked him if he had not worked at a distillery within two years of the warrant in this case, at another time and place, which question the defendant refused to answer until informed by the commissioner, and by the deputy marshal, that unless he did so he would be committed to jail, and he then testified that "he had worked at a distillery and made some brandy last fall near his house, and he paid Preston Powers to assist him"; that upon the trial of the case in the District Court that court, over the objection of the defendant, admitted the testimony of Colly, who repeated the proceedings before the commissioner, including the testimony of defendant, and that the court refused to strike out Colly's testimony or to instruct the jury to disregard it, upon the motion of defendant's counsel, to all of which, at the time, counsel for defendant duly excepted.

The contentions of the defendant are that the judgment should be reversed for the following reasons:

1st. There was no *venire facias* summoning the grand jury which found this purported indictment.

2nd. The said grand jury was not sworn and consequently could not find an indictment.

3rd. The indictment was defective and the demurrer should have been sustained to the fourth and sixth counts.

4th. The petit jury that tried this case was not sworn nor summoned.

5th. The testimony of Colly was illegal and incompetent testimony, and should have been rejected when offered, and if received striken out on counsel's motion.

As to the first, that there was no *venire facias* summoning the grand jury, there is nothing in the record to show that this objection, if tenable at all, was taken before plea or, indeed, at any time during the trial. Objections of this character are waived unless seasonably taken. *United States* v. *Gale*, 109 U. S. 65; *Agnew* v. *United States*, 165 U. S. 36; *Rodriguez* v. *United States*, 198 U. S. 156; *McInerney* v. *United States*, 147 Fed. Rep. 183.

The same observation applies to the second assignment of error, that the grand jury is not shown by the record to have been sworn. The indictment recites that the grand jury was selected, impaneled, sworn and charged, and that they on their oaths present, etc. At this stage of the proceedings this is enough to show the proper swearing of the grand jury. In *Crain* v. *United States*, 162 U. S. 625, cited by counsel for defendant, the record was destitute of any showing that the accused was arraigned or pleaded to the indictment. See *Pointer* v. *United States*, 151 U. S. 396, 418.

As to the assignment of error that there were certain defective counts in the indictment, the conviction was a general one, and, even if the counts were defective, as alleged, one good count, sufficient to sustain the sentence, is all that is required to warrant the affirmation of a judgment in error proceedings. *Dunbar* v. *United States*, 156 U. S. 185.

As to the objection that the petit jury was not sworn: The record discloses that they were "called and empaneled," and, "being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak, and having heard the evidence, the arguments of counsel, and charge of the judge, retired to consider their verdict, and upon their oaths do say," etc. We

think that this sufficiently discloses, upon proceedings in error after conviction, that the petit jury was duly sworn.

The chief objection contended for in argument concerns the admission in the District Court of the testimony of the defendant before the commissioner. The admission of this testimony is claimed to have worked a violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution, which protects him against self-incrimination. It appears from the bill of exceptions that the defendant voluntarily took the stand and testified in his own behalf. This he might do under the Federal statute (March 16, 1878, 20 Stat. 30, c. 37), making the defendant a competent witness, "at his own request, but not otherwise." We are of the opinion that it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him. In *Wilson* v. *United States*, 162 U. S. 613, Wilson was charged with murder. Before a United States commissioner, upon a preliminary hearing, he made a statement which was admitted at the trial. He had no counsel, was not warned or told of his right to refuse to testify, but there was testimony tending to show that the statement was voluntary. At pages 623, 624, this court said:

"And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. Joy on Confessions, * 45, * 48, and cases cited.

". . . . He [Wilson] did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. . . . He did not have the aid of counsel;

and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

In the present case, it does not appear that the witness claimed his privilege, or was ignorant of it, or that if he had known of it would not have answered—indeed, the record shows that his testimony was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial.

As to the contention that the cross-examination before the commissioner shown in the bill of exceptions was improperly extorted from the witness under threat of commitment, an examination of the bill of exceptions, we think, requires an answer overruling this exception. There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant, who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. "Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens" and may be fully cross-examined as to the testimony voluntarily given. *Reagan* v. *United States*, 157 U. S. 301, 305. The rule is thus stated in *Brown* v. *Walker*, 161 U. S. 591, 597:

"Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev., § 451; *Dixon* v. *Vale*, 1 C. & P. 278; *East* v. *Chapman*,

2 C. & P. 570; *S. C.*, M. & M. 46; *State* v. *K*——, 4 N. H. 562; *Low* v. *Mitchell*, 18 Maine, 372; *Coburn* v. *Odell*, 10 Fost. (N. H.) 540; *Norfolk* v. *Gaylord*, 28 Connecticut, 309; *Austin* v. *Poiner*, 1 Sim. 348; *Commonwealth* v. *Pratt*, 126 Massachusetts, 462; *Chamberlain* v. *Willson*, 12 Vermont, 491; *Lockett* v. *State*, 63 Alabama, 5; *People* v. *Freshour*, 55 California, 375.

"So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. *State* v. *Wentworth*, 65 Maine, 234; *State* v. *Witham*, 72 Maine, 531; *State* v. *Ober*, 52 N. H. 492; *Commonwealth* v. *Bonner*, 97 Massachusetts, 587; *Commonwealth* v. *Morgan*, 107 Massachusetts, 199; *Commonwealth* v. *Mullen*, 97 Massachusetts, 545; *Connors* v. *People*, 50 N. Y. 240; *People* v. *Casey*, 72 N. Y. 393."

But it is contended by the defendant that the bill of exceptions shows that the alleged cross-examination was entirely irrelevant and improper, and not a legitimate cross-examination of the defendant's testimony in his own behalf. It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits, as already stated, that he was at a place about thirty steps from the still, beating apples, as testified by the Government's witness; that Preston Powers had hired him to work for him at the price of seventy-five cents a day, and that he put him to beating apples; that the witness had no interest in the apples or the product thereof and no interest in the still, but was merely hired to work by the day at the price of 75 cents. Having taken the stand in his own behalf, and given the testimony above recited, tending to show that he was not guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief. The cross-examination, in the answer elicited, tended to

show that defendant had worked at a distillery the fall before with Preston Powers, the man he alleged he was working for at beating apples on the occasion when the Government witness saw him near the still, and had made brandy near his house, and had paid Preston Powers to assist him. This, we think, might be regarded as having some relevancy to the defendant's claim as to the innocent character of his occupation at the time charged. It had a tendency to show that defendant knew the character of the occupation in which he was then engaged, having worked before with Preston Powers at a distillery and made brandy with him, and did not exceed the limits of a proper cross-examination of the witness. As to the suggestion that § 860 of the Revised Statutes prevented the introduction of the testimony given by defendant before the commissioner, that section, providing that no pleading nor any discovery or evidence obtained from a party by means of a judicial proceeding, shall be used in evidence against him in a criminal proceeding, can have no bearing, where, as in the present case, the accused voluntarily testified in his own behalf in the course of the same proceeding, thereby himself opening the door to legitimate cross-examination. See *Tucker* v. *United States*, 151 U. S. 164, 168.

Judgment affirmed.

ROCCA *v.* THOMPSON.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 292. Argued January 17, 18, 1912.—Decided February 19, 1912.

Instructions of the head of a Department must be read in light of the statute directly bearing on the subject; and so *held* that instructions of the Secretary of State to consuls in regard to administering effects of citizens of the United States dying in foreign lands must be read in the light of § 1709, Rev. Stat.

There is no Federal probate law, but right to administer property left by a foreigner within the jurisdiction of a State is primarily committed to state law.

Quære: Whether it is within the treaty-making power of the National Government to provide by treaty with foreign nations for administration of property of foreigners dying within a State, and to commit such administration to consuls of the nation to which deceased owed allegiance.

"Intervene in the possession and administration of the deceased" as the expression is used in the Argentine Treaty of 1853, is to be construed as permitting the consul of either contracting nation to temporarily possess the estate of his national for the purpose of protecting it, before it comes under the jurisdiction of the laws of the country, or to protect the interests of his national in an administration already instituted otherwise than by him.

Under the Argentine Treaty of 1853 a consul has not the right to the original administration of the estate of a deceased national to the exclusion of one authorized by local law to administer the estate.

While treaties are to be liberally construed, they are to be read in the light of conditions existing when entered into with a view to effecting the objects of the contracting states.

The law of the Argentine Republic, as brought to the attention of this court, does not give to consuls of foreign countries the right to administer the estates of deceased nationals, but only to appoint an executor, which appointment is to be communicated to the testamentary judge.

Quære: Whether the most favored nation clause included in the treaty with Italy of 1878 carries the provisions of the Argentine Treaty of

1853 in regard to the administration by consuls of the estates of deceased nationals.

In California, the public administrator is entitled to administer the estate of an Italian citizen dying and leaving an estate in California, in preference to the Consul-General of the Kingdom of Italy; and so *held* after construing the provisions of the treaty of 1878 with Italy, and that of 1853 with the Argentine Republic.

157 California, 552, affirmed.

THE facts, which involve the construction of the provisions of the treaty of 1878 with Italy and that of 1853 with the Argentine Republic in regard to the right of consuls to administer estates of their respective natives dying in the United States, are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Paul Fuller*, *Mr. Ambrose Gherini*, *Mr. Howard Thayer Kingsbury* and *Mr. Charles Cheyney Hyde* were on the brief, for plaintiff in error:

The treaty clauses in question, conferring the right of administration of the estates of deceased nationals upon the respective consuls, became part of the municipal law of California without further legislation and superseded any state statute not consistent therewith.

Should a state law and treaty be in conflict, the state law must give way. *Head Money Cases*, 112 U. S. 598; *United States* v. *Forty-three Gallons Whisky*, 93 U. S. 197, 198; *Ware* v. *Hilton*, 3 Dall. 235.

Treaty provisions in regard to rights in estates must be construed in most liberal fashion, and are always paramount to state legislation. *Shanks* v. *Dupont*, 3 Pet. 249; *Geofroy* v. *Riggs*, 133 U. S. 267; *Hauenstein* v. *Lynham*, 100 U. S. 488–490; and see *Wyman, Petitioner*, 191 Massachusetts, 276, criticising *Lanfear* v. *Ritchie*, 9 La. Ann. 96, as insisting on the doctrine of state rights too strongly. *People* v. *Gerke*, 5 California, 381, 384; *Forbes* v. *Scannell*, 13 California, 243, 276.

The language of the Argentine treaty contemplates ad-

ministration of estates of deceased nationals by the respective consuls.

The decision of the Supreme Court of California virtually challenges the constitutionality of the treaty, and logically and impliedly at least, although not avowedly, takes the ground that the treaty cannot supersede the local law as to administration.

The treaty must be interpreted in the light of the civil law as well as of the common law.

It is the general practice under the law of nations for consuls, upon the death of one of their nationals, to take part in caring for the property left by him, especially in case of intestacy, and seeing that it reaches its destination.

The laws of the United States on this subject are, therefore, nothing more than a codification of international usage. See Guide Pratique des Consulats, by de Clercq and de Vallat, Vol. I, 522.

For the general powers of United States consuls, see Secretary Marcy's circular of 1855. 5 Moore, Int. Law Dig., Vol. 5, 117, § 1709; Consular Regulations of the United States; Consul's Powers under the Treaties, § 411; Argentine Republic and Colombia, 161.

For duties under favored nation clause, see § 78, Consular Regulations. Provisions occur in many treaties with foreign countries: see Art. 15, Treaty of 1880 with Belgium; Treaty of 1851 with Costa Rica, Art. 8; Treaty of 1864 with Honduras; Tenth Article of the Treaty of 1859 with Paraguay; Treaty of 1856 with Persia, Art. VI; Treaty of 1887 with Peru.

The international sanctity of such a treaty clause is instanced by the decision of the Mixed Commission in the arbitration of the Vergil claim between Peru and the United States of 1857. 4 Moore, Int. Arb. 4390.

For judicial precedents as to the right of consuls to administration, see *In re Wyman,* 191 Massachusetts, 276;

In re Fattosini, 33 N. Y. Misc. 18; *S. C.*, 67 N. Y. Supp. 1119; *In re Tartaglio* (Sur. Ct.), 12 N. Y. Misc. 245; *In re Lobrasciano*, 38 Misc. Rep. (N. Y.) 415; *S. C.*, 77 N. Y. Supp. 1040; *Matter of Logiorata*, 34 Misc. Rep. 31; *Aspinwall* v. *Queen's Proctor*, 2 Curteis Rep. 241; *Succession of Thompson*, 9 La. Ann. 96.

The view maintained by the Italian Government is supported by Devlin in his work on the Treaty Making Power, § 202.

The plain intent of the Argentine treaty, as indicated by its terms, and as evidenced in the development of international law, certainly was that the consuls should have those rights as to possession, liquidation and care of the estate which necessarily involve administration.

Under the most favored nation clause, the estates of Americans dying in Italy are guaranteed the utmost measure of consular protection that Italy may at any time accord to the estates of other nationals dying within her borders, and the converse is stipulated as to the estates of Italian subjects in the United States.

As to the interpretation of the most favored nation clause, see Mr. Hay and Mr. Hill, For. Rels., 1901, 278 (cited Moore, Int. Law, Vol. V, 318, 319); 19 Ops. Atty. Genl. 468, 470; Speed, 11 Ops. Atty. Genl. 508; 5 Moore, Int. Law, 260, 313.

The rule that the advantages of the most favored nation clause cannot be insisted upon unless reciprocal advantages are created in favor of the country upon whom the demand for favorable treatment is made does not apply, as in the present case the stipulations of the treaty are in terms reciprocal. See cases gathered in 5 Moore's International Digest, 278.

Under *Bartram* v. *Robertson*, 122 U. S. 116, and *Whitney* v. *Robertson*, 124 U. S. 190, there was a lack of equivalent which alone can make the most favored nation clause inapplicable. 2 For. Rel., 1895, 1121.

Mr. T. W. Hickey, with whom *Mr. Eustace Cullinan* was on the brief, for defendant in error:

The Argentine treaty does not give to consular officers of either nation the right to letters of administration in any case.

Naturally, an American court will not recognize a claim so repugnant to the general policy of our law unless it clearly appears not only that the two powers which were parties to the treaty intended but also that the American Federal Government had the authority to confer such extraordinary privileges on consular officers.

The treaty does not grant expressly the right to administer on estates. It grants only the right to "intervene" in the possession, administration and judicial liquidation.

For definition of "intervene" see Anderson's Law Dictionary; Bouvier's Law Dictionary.

In Civil Law, see Pothier, Proc. Civile, part 1, ch. 2, S. B., § 3—cited by Bouvier. 8 Ops. Atty. Genl. 99.

The word "intervene" was not ignorantly or carelessly used in the treaty. *The Neck*, 138 Fed. Rep. 144.

The cases cited by plaintiff in error can be distinguished from this case, or were not carefully considered.

Authorities on international law do not sustain plaintiff in error's contention. Vattel, Book II, ch. 17, § 287.

A consul cannot demand letters of administration conformably with the laws of California unless he takes an oath of allegiance which an alien cannot in conscience take. *Cohen* v. *Wright*, 22 California, 309.

By the terms of the treaty the consul may intervene only in conformity with the laws of the country. For. Rel. U. S., 1890, 255.

The Italian Government has acquiesced in the interpretation of the Argentine treaty suggested by defendant in error. For. Rel. U. S., 1894, 366.

The treaty with Italy entitles the Italian Consul Gen-

eral to such rights as may be granted to the officers of the same grade of the most favored nation; but it cannot be said that the right to administer on estates has been granted to Argentine consuls when no Argentine consul, since the treaty was made, has ever demanded or received letters of administration by virtue of the treaty.

The most favored nation clause which appears in our treaty with Italy appears also in our treaties with Belgium, Germany, Great Britain, Greece, Guatemala, Netherlands, Roumania, Servia and Spain. That our consuls and the consuls of those other nations do not possess this right, see 242 MS. Dom. Let. 522, archives State Department. See provisions in Consular Convention of 1878, between Italy and the United States, Art. XVI, which is also to be found in the conventions with Belgium, 1880, Art. XV; Germany, 1871, Art. X; Great Britain, 1899, Art. III; Greece, 1902, Art. II; Guatemala, 1901, Art. III; Netherlands, 1878, Art. XV; Roumania, 1881, Art. XV; Servia, 1881, Art. II, and Spain, 1902, Art. III.

If the parties to the Argentine treaty had intended to concede to consuls a right so extraordinary, so subversive of the ordinary routine of the settlement of estates, so directly at variance with usage in countries not barbarian or semi-barbarian, so offensive to the usual notions of the due rights of kindred, as the right to letters of administration in precedence of the resident heirs, they would have made the intention plain. If the language of the treaty does not definitely and manifestly express such an intention, should not courts give the treaty a construction more in conformity with the customs, and more consistent with the notions of national dignity, prevalent in civilized states?

The most favored nation clause in the treaty with Italy does not entitle the Italian consular officers to demand whatever privileges may be accorded to Argentine

consular officers under the treaty with the Argentine Republic.

For the meaning of the most favored nation clause, see 6 Op. Atty. Gen. 148; *Whitney* v. *Robertson*, 124 U. S. 190; *Bartram* v. *Robertson*, 122 U. S. 116; 5 Moore's Dig. Int. Law, 257 to 319; State Department Archives (160 MS. Dom. Let. 481).

If the United States has conceded to Argentine consuls the right to administer, the right was granted in return for a like right, and other rights, granted to the United States and its consuls. Italy cannot obtain gratis under the most favored nation clause a right for which the Argentine Republic has paid a price.

The Italian Consul General has to prove that the Italian Government concedes to American consuls in Italy the right to administer on the estates of intestate American citizens dying there, but, under the law, there is no way in which that fact can be proved in an American court except by a legislative act of the United States, declaring the fact to exist and commanding American courts to recognize a like right in Italian consuls. *Foster* v. *Neilson*, 2 Pet. 314; 2 Rose's Notes on U. S. Reps. 837–841; *Taylor* v. *Morton*, 2 Curt. 463.

Should the treaty-making authority in the United States provide by treaty that Argentine consuls shall have the right, in preference to the local heirs, creditors, or public administrator, to administer on the estates of citizens of the Argentine Republic dying intestate in the United States, the treaty in that respect would be void as being in excess of the constitutional powers of the treaty-making authority and a violation of the rights reserved to the States. *In re Ah Lung*, 18 Fed. Rep. 28; see note to 81 Am. Dec. 536; 5 Moore, Dig. Int. Law, 230–231.

There are doubtless limits to the treaty-making power, *Hauenstein* v. *Lynham*, 100 U. S. 490, as there are of all others arising under the Constitution. See *People* v.

Naglee, 1 California, 247; *People* v. *Gerke*, 5 California, 383; *The License Cases*, 5 How. 613; *Turner* v. *Baptist Union*, 5 McLean, 347; opinions collected in 5 Moore, Dig. Int. Law, 170 *et seq.*, holding that a treaty which invades the rights reserved to the States and affects the right to legislate concerning matters exclusively within the jurisdiction of the states' governments will not be enforced by the courts under the Constitution as the supreme law of the land.

There is no Federal law of administration and the administration of estates is a matter customarily left to the States. *Frederickson* v. *Louisiana*, 23 How. 445; *Mayer* v. *Grima*, 8 How. 490.

Mr. Justice Day delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of California to review a judgment in which that court held that the public administrator was entitled to letters of administration upon the estate of an Italian citizen, dying and leaving an estate in California, in preference to the Consul General of the Kingdom of Italy.

The facts are briefly these: Giuseppe Ghio, a subject of the Kingdom of Italy, died intestate on the twenty-seventh day of April, 1908, in San Joaquin County, California, leaving a personal estate. Ghio resided in the State of California. His widow and heirs-at-law, being minor children, resided in Italy. Plaintiff in error, Salvatore L. Rocca, was the Consul General of the Kingdom of Italy for California, Nevada, Washington and Alaska Territory.

Upon the death of Ghio, Consul General Rocca made application to the Superior Court of California for letters of administration upon Ghio's estate. The defendant in error, Thompson, as public administrator, made application for administration upon the same estate under the laws of California. The Superior Court held that the

public administrator was entitled to administer the estate. The same view was taken in the Supreme Court of California. 157 California, 552. From the latter decision a writ of error was granted, which brings the case here.

The Consul General bases his claim to administer the estate upon certain provisions of the treaty of May 8, 1878 (20 Stat. 725), between Italy and the United States. Arts. XVI and XVII read as follows:

"Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

"Article XVII. The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attachés, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favoured nation." (20 U. S. Stats. at Large, p. 732.)

While article XVI only requires notice to the Italian consul or consular agent of the death of an Italian citizen in the United States, article XVII gives to consuls and similar officers of the Italian nation the rights, prerogatives, immunities and privileges which are or may be hereafter granted to an officer of the same grade of the most favored nation. It is the contention of the plaintiff in error that this favored nation clause in the Italian treaty gives him the right to administer estates of Italian citizens dying in this country, because of the privilege conferred upon consuls of the Argentine Republic by the treaty between that country and the United States, of July 27, 1853 (10 Stat. 1005), article IX of which provides:

"If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-General or Consul of the nation to which the deceased belonged, or the representative of such Consul-General or Consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." (10 U. S. Stats. at Large, p. 1009.)

From this statement of the case it is apparent that the question at the foundation of the determination of the rights of the parties is found in the proper interpretation of the clause of the Argentine treaty just quoted. The question is: Does that treaty give to consuls of the Argentine Republic the right to administer the estate of citizens of that Republic dying in the United States, and a like privilege to consuls of the United States as to citizens of this country dying in the Argentine Republic? The question has been the subject of considerable litigation and has been diversely determined in the courts of this country which have had it under consideration.

The surrogate of Westchester County, New York, in two cases, *In re Fattosini's Estate*, 67 N. Y. Supp. 1119, and *In re Lobrasciano's Estate*, 77 N. Y. Supp. 1040, has held that the treaty of Italy of 1878, in the most favored nation clause, carried the benefit of the Argentine treaty to the consuls of Italy, and that the Argentine treaty conferred the right of administration upon the consuls of that country. In *Wyman, Petitioner*, 191 Massachusetts, 276, the Supreme Judicial Court of that State, as to Russian consuls, under the most favored nation clause in the Russian treaty, followed the surrogate's court of Westchester county, observing that the cases were well considered and covered the entire ground. The Supreme Court of Alabama, in *Carpigiani* v. *Hall*, 55 So. Rep. 248,

followed the decisions in New York and Massachusetts just referred to, and in *In re Scutella's Estate*, 129 N. Y. Supp. 20, the Appellate Division of the Supreme Court of New York pursued the same course.

A contrary view was expressed by the surrogate court of New York County in *In re Logiorato's Estate*, 69 N. Y. Supp. 507, and by the Supreme Court of Louisiana in *Lanfear* v. *Ritchie*, 9 La. Ann. 96.

An examination of the cases which have held in favor of the right of a Consul-General to administer the estate, to the exclusion of the public administrator, makes it apparent that the *Lobrasciano Case*, which is the fullest upon the subject, is the one that has been followed without independent reasoning upon the part of the courts adopting it.

In that case the right of a consul to administer the estates of deceased citizens of his country is based, not only upon the interpretation of the treaties involved, but as well upon the law of nations giving the right to consuls to administer such estates. In the opinion some citations are made from early instructions of Secretaries of State, emphasizing the right and duty of consuls to administer upon the effects of citizens of the United States dying in foreign lands.

But these instructions must be read in the light of the statute of the United States, § 1709,[1] Rev. Stat., which,

[1] "Sec. 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where

while it recognizes the right of consuls and vice-consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, leaving there no legal representative, partner or trustee; to inventory the same, and to collect debts, provides in the fifth paragraph of the section that, if at any time before the transmission to the United States Treasury of the balance of the estate the legal representative appears and demands his effects in the hands of the consul, they shall be delivered up and he shall cease further proceedings, and the duties imposed are where "the laws of the country permit."

The consular regulations of the United States tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law or usage, to administer the estate, or, in that character, to aid any other person in so administering it, without judicial authorization. Section 409 of the Consular Regulations is as follows:

"A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate,

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he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the Treasurer of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting and transmitting them, to be disposed of pursuant to the law of the decedent's state—7 Op. Att. Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

In Moore's International Law Digest, Vol. 5, p. 123, a letter of Mr. Hay, Secretary of State, under date of February 3, 1900, is quoted to the effect that the right of a United States consular officer to intervene by way of observing proceedings in relation to the property of deceased Americans leaving no representatives in foreign countries, is not understood to involve any interference with the functions of a public administrator.

In this country the right to administer property left by a foreigner within the jurisdiction of a State is primarily committed to state law. It seems to be so regulated in the State of California, by giving the administration of such property to the public administrator. There is, of course, no Federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the National Government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the States, and to commit such administration to the consular officers of the Nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance.

This determination depends, primarily, upon the construction of Art. 9 of the Argentine treaty of 1853, giving to the consular officers of the respective countries, as to citizens dying intestate, the right "to intervene in the

possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." It will be observed that, whether in the possession, the administration or the judicial liquidation of the estate, the sole right conferred is that of intervention and that conformably with the laws of the country. Does this mean the right to administer the property of such decedent and to supersede the local law as to the administration of such estate? The right to intervene at once suggests the privilege to enter into a proceeding already begun, rather than the right to take and administer the property.

Literally, to intervene means, as the derivation of the word indicates [*inter*, between, and *venire*, come], to come between. Such is the primary definition of the word given in Webster's Dictionary and in the Century Dictionary. When the term is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, a proceeding already instituted, as a creditor may intervene in a foreclosure suit to enforce a lien upon property or some right in connection therewith; a stockholder may sometimes intervene in a suit brought by a corporation; the Government is sometimes allowed to intervene in suits between private parties to protect a public interest, and whether we look to the English ecclesiastical law, the civil law, from which the Argentine law is derived, or the common law, the meaning is the same.

"In ecclesiastical law.—The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chit. Pr. 492; 3 Chit. Commer. Law, 633; 2 Hagg. Const. 137; 3 Phillim. Ecc. Law, 586.

"In the civil law.—The act by which a third party demands to be received as a party in a suit pending between other persons.

"The intervention is made either for the purpose of being joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Poth. Proc. Civile, pt. 1, c. 2, § 7, no. 3.

"In practice.—A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them. *Logan* v. *Greenlaw* (C. C.), 12 Fed. Rep. 16; *Fischer* v. *Hanna*, 8 Colo. App. 471, 47 Pac. Rep. 303; *Gale* v. *Frazier*, 4 Dakota, 196, 30 N. W. Rep. 138; *Reay* v. *Butler* (Cal.), 7 Pac. Rep. 671." Black's Law Dictionary, p. 651.

Emphasis is laid upon the right under the Argentine treaty to intervene in *possession*, as well as administration and judicial liquidation; but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of a citizen of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.

So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the Consul-General, to the exclusion of one authorized by local law to administer the estate.

But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects

and purposes of the States thereby contracting. *In re Ross, Petitioner*, 140 U. S. 453, 475.

It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887 (August 31, 1887, 25 Stat. 1444), it was declared in Art. 33, (p. 1461), as follows:

"Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or representatives the consuls or vice-consuls of either party shall be ex-officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea whose property may be brought within their district."

And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided:

"In the event of any citizens of either of the two Contracting Parties dying without will or testament, in the territory of the other Contracting Party, the consul-general, consul, vice-consul-general, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul-general, or vice-consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and

creditors, and, moreover, have the right to be appointed as administrator of such estate."

The Argentine treaty was made in 1853, and the Italian treaty in 1878. In 1894, correspondence between Baron Fava, the then Italian Ambassador, and Mr. Uhl, Acting Secretary of State, shows that the Italian Ambassador proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen. It was the view of the Department of State of the United States, then expressed, that, as the administration of estates in the United States was under the control of the respective States, the proposed international agreement should not be made. The Acting Secretary of State adverted to the practical difficulties of giving such administration to consular officers, often remotely located from the place where the estate was situated. See Moore's International Law Digest, Vol. 5, p. 122.

The learned counsel for the plaintiff in error, in his supplemental brief, has referred to a statement of the law of the Argentine Confederation of 1865, English translation published in Vol. 58, British and Foreign State Papers, p. 455, in which it is said that a foreigner dying intestate, without leaving a wife or lawful heirs in the Argentine Republic, or where he dies leaving a will, the heirs being foreigners absent from the country and the executor being also absent, the consul of the deceased foreigner's nation is given the right to intervene in the arrangement of his affairs. In Arts. III and IV it is declared:

"III. Consular intervention shall be confined to—1st. Sealing up the goods, furniture and papers of the deceased, after giving due notice to the local authorities, provided always that the death has taken place within the Consular district. 2d. Appointing executors.

"IV. The Consuls shall at once communicate to the testamentary Judge the appointment of such executors."

It is contended that the right secured to a foreign consul to appoint an executor under this act of 1865 is evidence of the fact that the Argentine Republic is carrying out the treaty in the sense contended for by the plaintiff in error; but in this law certainly no right of administration is given to the consul of a foreign country. It is true, he may appoint an executor, which appointment it is provided is to be at once communicated to the testamentary judge.

In Art. VIII the same law provides that executors shall perform their charge in accordance with the laws of the country. Art. XIII declares that the rights granted by the law shall be only in favor of the nations which cede equal privileges to Argentine consuls and citizens.

Our conclusion then is that, if it should be conceded for this purpose that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian Government in the respect contended for, (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of decease.

We find no error in the judgment of the Supreme Court of the State of California, and the same is

Affirmed.

UNITED STATES EXPRESS COMPANY *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 708. Argued January 16, 17, 1912.—Decided February 19, 1912.

In determining whether a state tax on earnings is constitutional this court is bound by the decision of the state court as to what classes of earnings are included in estimating the earnings to be taxed.

A State may tax property within the State although it is used in interstate commerce.

A State may not burden interstate commerce by taxing its commerce, but it may measure the value of property of a corporation engaged in interstate commerce within the State by the gross receipts, and impose a tax thereon if the same is in lieu of all taxes upon the property of such corporation. *Oklahoma* v. *Wells, Fargo & Co.*, *ante*, p. 298, distinguished.

It is difficult, at times, to draw the line between state taxes that are unconstitutional as burdening interstate commerce and a legitimate property tax measured in part by income from interstate commerce. While the determination by the state court that a tax so measured is a property tax is not binding on this court, in this case, this court will not say that the conclusion is not well founded.

The Minnesota statutes, Revised Laws, 1905, Chapter 11, taxing express companies on their property employed within the State six per cent of the gross receipts in lieu of all other taxes, is an exercise in good faith of legitimate taxing power, and is not an unconstitutional burden upon interstate commerce.

THE facts, which involve the constitutionality of a statute of the State of Minnesota taxing express companies, are stated in the opinion.

Mr. Robert E. Olds and *Mr. Frank B. Kellogg*, with whom *Mr. C. A. Severance* was on the brief, for plaintiff in error:

The Minnesota statute, as construed by the courts of

that State, imposes a tax upon gross receipts arising from interstate commerce. The construction given the statute is not only unnecessary but erroneous. *Pacific Express Co.* v. *Seibert*, 142 U. S. 339.

The earnings from interstate transfer business constitute receipts derived from interstate commerce. That the carrier operated a line wholly within the State is immaterial, so long as the function which it performed was a part of a continuous journey from one State to another, under a single, continuous contract of carriage. Whether carried on by one, or by two or more express companies, the commerce involved is itself interstate, and no part of it can be divested of its interstate character by the incidental circumstance that it may be carried on by one of the companies wholly within state lines. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Fargo* v. *Michigan*, 121 U. S. 20; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 343, 344; *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 119; *New York* v. *Knight*, 192 U. S. 21; *Galveston & San Ant. Ry. Co.* v. *Texas*, 210 U. S. 217; *Southern Pacific Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *People* v. *Miller*, 178 N. Y. 194.

The tax upon the receipts from "interstate transfer business" is invalid as an attempt by the State to impose a direct burden upon interstate commerce. *State Freight Tax*, 15 Wall. 232; while in *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Railroad Co.* v. *Maryland*, 21 Wall. 456; *Peik* v. *Chic. & N. W. Ry. Co.*, 94 U. S. 164; *Munn* v. *Illinois*, 94 U. S. 113; *C., B. & Q. Ry. Co.* v. *Iowa*, 94 U. S. 155; the rate making power of the State was sustained, in *Wabash, St. L. & P. Ry. Co.* v. *Illinois*, 118 U. S. 557, the power of the States over interstate rates was definitely denied; and see cases *supra* and *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640; overruling *Osborne* v. *Mobile*, 16 Wall. 479; *Western Union Telegraph Co.* v. *Pennsylvania*, 128 U. S. 39; *Western Union*

Telegraph Co. v. *Alabama*, 132 U. S. 472; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *Crutcher* v. *Kentucky*, 141 U. S. 47.

The cases of *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431; *Louis. & Nashv. R. R.* v. *Kentucky*, 161 U. S. 677, were sustained only because laid on intrastate receipts.

By the latest announcement of this court, in *Galveston, Harrisburg & San Antonio R. R. Co.* v. *Texas*, 210 U. S. 217, an act was held unconstitutional because it laid a tax directly upon the gross receipts.

The Supreme Court of Minnesota has sustained the tax at bar on the theory that it is a tax upon the property of the company and not upon the earnings.

It has been held, however, that property outside of the State cannot be taxed by the State. *Fargo* v. *Hart*, 193 U. S. 490.

The lieu of other taxes clause does not make the act constitutional. The State of Minnesota cannot, by merely refraining from levying the ordinary property taxes against a company engaged in interstate commerce, acquire the right to tax the interstate commerce carried on by that company. If this could be done then all restraints upon state action in this respect could be released by mere non-action, and it would become a perfectly simple matter for States to acquire a free hand in taxing such commerce. There is hardly any branch of interstate commerce which can be carried on without the use of property in some form. On the hypothesis under discussion, all that any State need do, under such circumstances, is to neglect to tax the tangible property and then impose a direct tax upon the gross receipts arising from the business. *Fargo* v. *Michigan*, 121 U. S. 230; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56.

Transportation between two points within the same State but passing out of the State intermediately is inter-

state commerce. *Lehigh Valley Ry. Co.* v. *Pennsylvania*, 145 U. S. 192; *Hanley* v. *Kansas Southern Rd. Co.*, 187 U. S. 617.

Mr. Lyndon A. Smith, Attorney General of Minnesota, and *Mr. William J. Stevenson*, with whom *Mr. George T. Simpson* was on the brief, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Minnesota, bringing in review a judgment of that court sustaining a tax assessed against the United States Express Company. 114 Minnesota, 346.

The Express Company is an unincorporated association, with its principal office in the State of New York, engaged in the express business in the United States. The business is carried on under contracts between the Company and railroads for the transportation by the railroad companies of goods forwarded by the Express Company, upon the payment by the Express Company, as compensation for such service, of a certain percentage of the gross receipts of the Express Company derived from the business carried over the lines of the railroads. Under such contracts the Company is engaged in carrying on express business over many lines of railroads in the United States, amounting in the aggregate to some 30,000 miles of road. It carries on express business in this manner in the State of Minnesota upon the Chicago, Rock Island & Pacific Railway, Duluth & Iron Range Railroad and, for a time, the Chicago, Milwaukee & St. Paul Railway. The Company has offices in many States, the District of Columbia and Canada and in various European countries. It has about fifty offices in the State of Minnesota.

The law in question (Revised Laws of Minnesota, 1905, Chapter 11), provides for the taxation of express companies. Section 1013 of the act requires every ex-

press company doing business in the State, between January 1 and February 1, to file with the state auditor, in such form as he may prescribe, a statement, duly verified, showing the entire receipts, including all sums earned or charged, whether received or not, for business done within the State, including its proportion of gross receipts for business done in the State by such company in connection with other companies. The statement must further show the amount actually paid by such express company to the railroads within the State for the transportation of its freight for the year, giving the amount paid to each railroad company; and also show the entire receipts of the company for business done within the State, including its proportion of gross receipts for business done within the State in connection with other companies, after deducting the amounts paid for transportation to railroads within the State. Section 1015 provides that the auditor shall annually, between March 1 and April 1, ascertain the gross receipts of such company by deducting the sums thus annually paid by it for the transportation of freight within the State from its entire receipts for business done in the State, including its proportion for business done within the State in connection with other companies.

Section 1019 provides that annually, on or before March 15, the auditor shall assess upon each company a tax of six per cent. upon its gross receipts for business done in the State for the preceding calendar year, as determined by the auditor, which shall be in lieu of all taxes upon its property, and shall deliver to the state treasurer for collection a draft upon the company for such sum.

The action was brought by the State of Minnesota to recover certain items which it was claimed were omitted from the returns of the Express Company, and which were properly the subject of taxation under the statute. Under the stipulated facts these items embraced in paragraph III of complaint, Schedule No. 1, consist of:

"Earnings of $54,209.19 constituting earnings on express business for the years 1899 to 1908, inclusive, which express business was made up entirely of shipments delivered by the shipper to an express company in the State of Minnesota, consigned to an ultimate consignee at a second point in the state of Minnesota, which shipments were forwarded by express between the point of origin and point of destination over lines of railroad, which lines were partly within and partly without the state of Minnesota. That is to say, all of these shipments necessarily passed out of the state of Minnesota in transit. Said amount, namely, $54,209.19, is based upon the total earnings on said shipments and is not that part of said earnings apportionable to the transportation which was performed within the state of Minnesota. In arriving at said amount the total earnings received by the Express Company upon said shipments have been taken regardless of what proportion of the through carry was performed within the state of Minnesota. About 91 per cent of the mileage under this item is within Minnesota."

Alleged omitted earnings on which back taxes were claimed under paragraph III of complaint, Schedule No. 2, such omitted earnings amounting to $9,702.89, on which back taxes were claimed of $504.47, were made up as follows:

"Earnings derived by the company from the following express shipments: (a) Shipments received by an express company from a shipper at a point of origin outside of the state of Minnesota addressed to and destined to a consignee within the state of Minnesota; or (b) shipments delivered to an express company by a shipper in the state of Minnesota and addressed to and destined to a consignee without the state of Minnesota; or (c) shipments delivered to an express company by a shipper without the state of Minnesota and addressed to and destined to a consignee without the state of Minnesota, passing through the

state of Minnesota in transit, as to all of which said shipments, either in class a, class b, or class c, the defendant received said shipments at a point in the state of Minnesota and forwarded them over its lines to a second point within the state of Minnesota, the transportation while in the hands of the defendant being performed wholly within the state of Minnesota. The transportation in connection with such shipments outside of the state of Minnesota was performed by connecting companies other than the defendant. Each of said shipments which constituted said amount of $9,702.89 in Schedule No. 2 of paragraph III of complaint was made upon a through rate and a through waybill and bill of lading showing the origin and ultimate destination thereof, and consisted of a single transportation transaction commencing with the delivery by the shipper to an express company and continuing until and not ending before the delivery of the shipment to the consignee at the point of ultimate destination to which the shipment was addressed."

Taxes are not claimed or collected upon shipments of express matter in the classes named where the same express company performs the transportation service both within and without the State of Minnesota.

A question was also made as to the constitutional validity of the tax upon money orders issued by the express company, but that objection has not been pressed in argument here.

The plaintiff in error contends that the assessment of the tax upon its earnings from shipments by a consignor in the State of Minnesota to an ultimate consignee within the State, which shipments were forwarded by express between the points of origin and destination over railroads partly within and partly without the State of Minnesota (paragraph III, Schedule No. 1), is an unconstitutional exaction, in that it is an attempt of the State to regulate interstate commerce, and is without due process of law.

As to such shipments, the Supreme Court held that nine per cent. of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent. of the mileage was within the State. For this part of the decision the Minnesota court relied upon *Lehigh Valley R. R. Co.* v. *Pennsylvania*, 145 U. S. 192. An examination of that case shows that it is decisive of the present one on this point, and we need not further discuss this feature of the case.

As to the transportation described in paragraph III, Schedule No. 2, from points within the State to points without the State, from points without the State to points within the State, and from points without the State to points without the State, passing through the State, the transportation outside of the State being performed by connecting companies, the Supreme Court of Minnesota held that it was the intention of the legislature, in the statute under consideration, to include the earnings from these classes within the State in the gross receipts upon which the tax is based. This construction of the statute is binding upon us.

The transportation was made upon a through rate and through bill of lading, and, it is stipulated, consisted of a single transportation transaction, commencing with the delivery by the shipper to the Express Company and continuing until the delivery of the shipment to the consignee at the ultimate destination. This was clearly interstate commerce, and the Federal question made in this connection is: Is this tax a burden upon interstate commerce, and, therefore, an infraction of the exclusive power of Congress, under the Constitution, to regulate commerce among the States?

It is thoroughly well settled in this court that state laws may not burden interstate commerce. As one form of burden may exist in taxing the conduct of interstate

commerce, such taxation has been uniformly condemned. Examples of cases of that character may be found in *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Western Union Telegraph Co.* v. *Pennsylvania*, 128 U. S. 39; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217.

While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the State by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.

In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, this court sustained a tax which required every railroad operated within the State to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the State, such gross receipts being derived from its entire business, state and interstate. The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the State.

In *Wisconsin & Michigan Railway Co.* v. *Powers*, 191 U. S. 379, a tax was sustained which made the income of the railway company within the State, including interstate earnings, the *prima facie* measure of the value of the property within the State for the purpose of taxation. In the course of the opinion this court said (p. 387):

"In form the tax is a tax on 'the property and business of such railroad corporation operated within the State,' computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217."

A question, in principle, not unlike the one here presented, came before this court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. In that case it was contended that the income of the corporations sought to be taxed under the Federal law, included, as to some of the companies, large investments in municipal bonds and other securities beyond the Federal power of taxation. It was held, after a review of some of the previous cases in this court, that, where the tax was within the legitimate authority of the Federal Government, it might be measured, in part, by the income from property not in itself taxable, and the distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power and to measure a legitimate tax by income derived, in part at least, from the use of such property. *Flint* v. *Stone Tracy Co.*, *supra*, 162, 3, 4 and 5.

The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Ficklen* v. *Shelby County*, 145 U. S. 1, 22. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. *supra*, wherein the possible differences between the decisions in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. *supra*, and *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. *supra*, were commented upon and ex-

plained. Mr. Justice Holmes, speaking for the court, said (p. 227):

"'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697. See *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can."

In that case the statute of Texas was condemned, because it appeared to the court to be an attempt to reach the receipts from interstate commerce by a tax of one per cent., or what was equal to the same thing, on gross receipts arising from such commerce, when it appeared from the judgment of the state court and the argument on behalf of the State that another tax on the property had already been levied, covering its full value as a going concern. The tax under consideration was held to be merely an effort to reach the gross receipts, not disguised by the name of an occupation tax or in any way helped by the words "equal to."

Upon like reasoning the statute of Oklahoma was con-

demned in the case of *Oklahoma* v. *Wells, Fargo & Co.*, decided to-day, *ante*, p. 298.

Appreciating the difficulty emphasized in the *Galveston Case* of drawing the line between taxes that burden interstate commerce and those whereby the legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The Supreme Court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the State, which, under their construction of the tax, included the earnings here in question. That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the state constitution, and was intended to afford a means of valuing the property of express companies within the State. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

The statute itself provides that the assessments under it "shall be in lieu of all taxes upon its property." In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham in *McHenry* v. *Alford*, 168 U. S. 651, 671, while it was not necessary to the decision of the case, is nevertheless apposite:

"When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon

the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

The tax in the present case is not like those held invalid in the *Galveston Case* and the *Oklahoma Case*, being in addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation, seeking to reach the value of the property of such companies in the State, measured by the receipts from business done within the State. The statute was not aimed exclusively at the avails of interstate commerce (*Philadelphia Steamship Co.* v. *Pennsylvania*, *supra*), but, as in the *Maine Case*, was an attempt to measure the amount of tax within the admitted power of the State by income derived, in part, from the conduct of interstate commerce. The property of express companies, being much of it of an intangible character, is difficult to reach and properly assess for taxation. This difficulty led this court in *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *S. C.*, 166 U. S. 185, to sustain a tax upon the property of an express company, which property was considered a part of one money-earning organization extending through many States.

As this court said in *Postal Tel. Co.* v. *Adams*, 155 U. S. 688–696, 697:

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction

may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo* v. *Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the State and the assessment made. The statute embraces receipts from all the business done within the State, including much which is purely local.

Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the State.

We find no error in the judgment of the Supreme Court of the State of Minnesota, and it is

Affirmed.

LINCOLN GAS AND ELECTRIC LIGHT CO. *v.* CITY OF LINCOLN.

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

No. 83. Argued December 6, 7, 1911.—Decided February 19, 1912.

Every legislative rate case presents three questions of prime importance: reasonable value of the plant; probable effect of the reduced rate upon future net income; deductions from gross receipts as a fund to preserve plant from depreciation.

A legislative rate for a public service corporation is presumed to be sufficient to produce a fair return on the plant, and the burden of showing that it is confiscatory rests upon those attacking it.

A public service corporation is entitled to a fair return upon the fair value of the plant at the time of the inquiry as to reasonableness of rates imposed, *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439; but in this case not decided what such a rate would be on a gas and electric plant in Nebraska.

Where a legislative rate contest involves ascertainment by testimony of experts and auditors of valuation of plant, capitalization, gross receipts, net earnings, depreciation and other elements, the proper practice is to refer the case at the outset to a skilled master, upon whose report specific errors can be assigned and ruled upon. *Chicago, Milwaukee & St. Paul Railway* v. *Tompkins*, 176 U. S. 167.

What sum should be annually deducted from gross or net receipts of a public service corporation for depreciation and replacement and how it should be applied, are novel and grave problems, and, in the absence of a full report as to every element involved, this court is not justified in passing upon them.

The operation of an ordinance establishing a rate for gas will not be enjoined unless complainant enters into a bond to account to consumers for all overcharges in case the ordinance is eventually sustained.

THE facts, which involve the validity of an ordinance of the City of Lincoln, Nebraska, regulating charges for gas furnished to consumers, are stated in the opinion.

Mr. Halleck F. Rose, with whom *Mr. Charles A. Frueauff*, *Mr. Edmund C. Strobe* and *Mr. John F. Stout* were on the brief, for appellant:

Any deprivation of the right of a public utility company to a reasonable return upon the value of its property devoted to the public service, accomplished by legislative adoption of inadequate rates, is a deprivation of property without due process of law, and a confiscation thereof to the public use without just compensation, and a denial of the equal protection of the laws, in violation of the Fourteenth Amendment. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego L. & T. Co.* v. *National City*, 174 U. S. 739; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167; *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257; *Atlantic Coast Line* v. *North Carolina Corp. Com.*, 206 U. S. 1.

Appellant's case as made by the proofs, ought not to be prejudiced by the circumstances that it sought injunctive relief in the first instance, without submitting to the confiscatory rates. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 40.

The inviolability of property, under the rule of the Constitution, prohibits establishment of gas rates in Lincoln, Nebraska, at a rate so low as to deprive the capital employed in that service of a smaller rate of earning than eight per cent. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 40, 51; *State Journal Printing Co.* v. *Madison Gas & Electric Co.*, 4 Wis. R. C. R. 464.

As to what is a reasonable rate of net earnings, see *Water Co.* v. *Des Moines*, September 16, 1911, 192 Fed. Rep. 193; *Havelock* v. *Lincoln Traction Co.*, May 17, 1911 (see Report Nebraska State Railway Commission for 1911), both holding that where the rate of interest on fixed interest-bearing securities in any given locality is

five per cent., a maximum return to the investors in electric railways would not be unreasonable or excessive at eight per cent.

The prevailing rates of interest in the community where the enterprise is executed cannot be wholly ignored. While the court has not committed itself to the doctrine that earnings may not be reduced, in any case, below the legal rate, there is reason and authority for the contention that the fair return required by the Constitution must not be less than the legal rate of interest. *Brymer* v. *Butler Water Co.*, 179 Pa. St. 251; *Pa. R. Co.* v. *Philadelphia County*, 220 Pa. St. 115; *Chicago Union Traction Co.* v. *Board of Equalization*, 114 Fed. Rep. 561; *Louisville & N. R. Co.* v. *Brown*, 123 Fed. Rep. 951; *Central R. Co.* v. *R. Com.*, 161 Fed. Rep. 925; *Milwaukee Electric R. & L. Co.* v. *Milwaukee*, 87 Fed. Rep. 585; *Southern P. Co.* v. *Railroad Commissioners*, 78 Fed. Rep. 261; *People* v. *Tax Commissioner*, 12 N. Y. Supp. 392; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 598.

That appellant's stocks and bonds are in excess of the cost of the plant is shown not to have added to the cost of the service, nor increased the cost of operation and maintenance.

In practical operation, the gas service furnished by appellant is necessarily burdened with an annual depreciation charge, exceeding $20,000. Appellant is not compensated for this necessary cost of the service under the dollar rate; and the consequent burden upon appellant's general revenues, from this cause, was not accounted for in the opinion and decree of the Circuit Court.

Employment of the sinking fund method of computing depreciation, whereby the public appropriates the earnings accumulated at compound interest on each item of annual depreciation during the life term of the equipment, is neither lawful nor compatible with the system of valuing the whole property for revenue purposes at its depre-

ciated value. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 13; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 52.

The reduction of appellant's revenues by the municipal regulations adopted, and the occupation taxes levied, in 1906, was, on its face, so radical and destructive, in view of appellant's past experience, that appellant could not accommodate its business thereto. Insolvency or resistance of further rate reductions were its only alternatives.

The issue is whether the ordinance requiring the dollar rate to become effective December 1, 1906, is valid; not whether the lapse of time would develop conditions justifying that rate at some future date, but whether its enforcement at the time it was assailed by the bill and arrested by injunction would have operated to confiscate the whole or a part of appellant's fair and just capital earnings.

The valuation of $566,073.59 on which the Circuit Court found appellant was entitled to a reasonable return, is much less than the actual capital employed in its gas service, as shown by the proofs.

There should be included in the valuation portion of appellant's capital represented by the use of or interest on money expended in construction of its plant during the period of building, and until it was possible to put it on some reasonable revenue basis to enable the plant to carry its own interest or an equivalent capital earning burden. The interest, or charge for use of the capital, is incident to and a part of the cost of construction. If not allowed in the construction account, it is wholly lost to the investor. *Brunswick District* v. *Maine Water Co.*, 99 Maine, 371; *Shepard* v. *Northern Pac. Ry. Co.*, 184 Fed. Rep. 809.

Some substantial sum should be allowed as a capital investment for franchise rights, or "going value," or both. The items of franchise and going value both represent legitimate subjects for investment of the primary capital. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 311, 345;

Waterworks v. *Kansas City*, 62 Fed. Rep. 853; *Omaha* v. *Omaha Water Co.*, 218 U. S. 202.

If capital valuations be tested by actual experience in construction, or by the purchase price paid by the present owner, the sum stated in the opinion of the lower court must be greatly increased. *Smyth* v. *Ames*, 169 U. S. 546, 547.

The validity of that part of the decree which arrests the operation of the occupation tax ordinance, so far as questioned by the city on jurisdictional grounds, should be determined on this appeal.

Mr. Fred C. Foster and *Mr. W. M. Morning* for appellees:

The fixing of rates to be charged by public service corporations is a legislative act, whether the rate is fixed by direct act of the legislature, or by a subordinate body or board exercising delegated authority. *Knoxville* v. *Water Co.*, 212 U. S. 1; *McChord* v. *Louisville & N. R. Co.*, 183 U. S. 483; *Smyth* v. *Ames*, 169 U. S. 466; *Atlantic Coast Line* v. *Nor. Car. Corp. Com.*, 206 U. S. 1; *Saratoga Springs* v. *Saratoga Gas Co.*, 191 N. Y. 123; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 395; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

The rate fixed by this ordinance not having been put to a practical test, but having been suspended by this injunction, the ordinance will be upheld unless the case is one leaving no just or fair doubt that the rate, if enforced, would be confiscatory. Cases *supra*, and *San Diego Land Co.* v. *National City*, 174 U. S. 739; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439. That is not this case.

In an investigation of the legality of maximum rates fixed by law, to be charged by public service corporations, two principal questions are to be considered: The present reasonable value of the property or plant devoted by the

corporation to the public service; the net earnings probably arising under the new rate established. The new rate permits the net earnings of the corporation which would probably arise from the operation of its business after deducting necessary and reasonable charges and expenses to be a fair return upon the value of that which it employs for the public convenience. Cases *supra* and *Smyth* v. *Ames*, 169 U. S. 466; *Grain Shippers* v. *Railroad Co.*, 8 I. C. C. Rep. 158; *Steenerson* v. *Great Northern Ry. Co.*, 69 Minnesota, 353; *Danville* v. *Southern Ry. Co.*, 8 I. C. C. Rep. 409; *Redlands &c. Co.* v. *Redlands*, 121 California, 365; *American Asphalt Assn.* v. *Uintah Ry. Co.*, 13 I. C. C. Rep. 207.

In estimating the present reasonable value of appellant's property devoted to the public service in the operation of its gas business, from whatever standpoint it is discussed, it cannot exceed the amount found below.

It is the duty of a public service corporation to provide a reconstruction fund to take care of new construction and all permanent improvements, and these should not be charged to operating expenses. *Ill. Cent. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441; Wyman, Pub. Service Corp., § 1163.

Where items of this character have been paid for from current receipts and charged to operating expense, they should be excluded from consideration in estimating the value of the property upon which the company is entitled to earn dividends, or excluded from the operating expenses of a single year. *San Diego Water Co.* v. *San Diego*, 118 California, 556, 574; *Ill. Cent. R. Co.* v. *Interstate Commerce Com.*, 206 U. S. 441.

No part of a depreciation fund, accumulated by a public service corporation from its receipts, can be added to the capital upon which it is entitled to earn dividends, and where this has been done the burden is on the company to show to what extent it has been done, in order

that it may be segregated in a rate investigation. *Water Co.* v. *Knoxville, supra; Louisiana Railroad Comm.* v. *Cumberland T. & T. Co.*, 212 U. S. 414.

Capitalization affords no evidence of present value. *Knoxville* v. *Water Co.*, 212 U. S. 1; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Water Co.* v. *San Diego*, 118 California, 556; *Water Co.* v. *Redlands* (Cal.), 53 Pac. Rep. 843; *Southern Pac. Co.* v. *Bartine*, 170 Fed. Rep. 725, 751; *San Diego L. & T. Co.* v. *Jasper*, 189 U. S. 439.

The income of the year succeeding the passage of the ordinance is proper to be considered, even though the ordinance has not been put into effect. *Water Co.* v. *Knoxville*, 212 U. S. 1, 14.

The value of the franchise should not be included. *Willcox* v. *Gas Co.*, 212 U. S. 19, distinguished; Wyman on Public Service Corporations, § 1104.

In this case there is no evidence of franchise value.

Before a public service corporation can successfully attack a legislative rate as confiscatory, it must show that the effect of the operation of the rate will so reduce the earnings from its entire business as to deprive it of a reasonable return upon the value of its entire property used in the public service. *St. Louis R. R. Co.* v. *Gill*, 156 U. S. 649; *People ex rel.* v. *Alton Ry.*, 176 Illinois, 512; *Delaware St. Grange* v. *N. Y. Ry. Co.*, 3 I. C. C. Rep. 554; *Wilkesbarre* v. *Spring-Brook*, 4 Lack. Leg. News. 367; *Steenerson* v. *Great Northern*, 69 Minnesota, 353; *M. & S. R. Co.* v. *Minnesota*, 186 U. S. 257; *St. John* v. *Railway*, 22 Wallace, 136; *So. Pac. Ry.* v. *Railroad Co.*, 78 Fed. Rep. 236; *Atlantic Coast Line* v. *Nor. Car. Corp.*, 206 U. S. 1.

The burden of proof is on the corporation to show proper apportionment, and the right to segregate the two departments of the corporation (if it exists at all) so as to enable complainant to withdraw from this investigation all of the property and earnings of the electrical department, imposes the burden upon the company to make

full and detailed disclosure of the facts necessary to enable the court to intelligently determine that apportionment. *Grand Trunk Ry. Co.* v. *Wellman*, 143 U. S. 339, 345; *State* v. *Adams Express Co.* (Neb.), 122 N. W. Rep. 691; *Steenerson* v. *Great Northern*, 69 Minnesota, 353.

A sufficient showing must be made by a public service company when it assails a rate as confiscatory, that it cuts down its net income below the point of reasonable compensation. Cases *supra*.

In *Willcox* v. *Gas Co.*, *supra*, this court recognized the strong probability that the earnings would increase under the reduced rate as a factor to be considered.

Rates may be unreasonable and yet not confiscatory. *Railroad Commission* v. *Cumberland T. & T. Co.*, 212 U. S. 414, 420; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Southern Pac.* v. *Bartine*, 170 Fed. Rep. 727.

The court will not concern itself with the matter of alleged discrimination between customers, nor as to whether the new rate might operate to require some customers to be carried at a loss, so long as the rate will yield a reasonable rate of return on the entire business. *Willcox* v. *Gas Co.*, 212 U. S. 19; *Nor. Pac. R. Co.* v. *North Dakota*, 216 U. S. 279; *St. Louis R. R. Co.* v. *Gill*, 156 U. S. 649; *People ex rel.* v. *Alton Ry.*, 176 Illinois, 512, and other cases, *supra*.

Mr. Justice Lurton delivered the opinion of the court.

This case involves the validity of an ordinance regulating the appellant's charges for gas furnished to consumers, and forbidding a charge in excess of one dollar per thousand feet. The bill assailed the rate as confiscatory, and, therefore, a taking of property without compensation. The ordinance rests upon legislative power to regulate the charges of such public service companies.

The sufficiency of the price prescribed to produce a fair profit upon the value of the property employed in the business is to be strongly presumed. The burden of showing its confiscatory character rests, therefore, upon the complaining company.

The court below, upon a final hearing, held that the appellant had not made out its case and dismissed the bill, with leave to renew the litigation, if, upon actual operation under the ordinance, the returns upon its business should not prove reasonably remunerative. The ordinance was never put in force. Within a few days after it went into effect this bill was filed and an injunction, *pendente lite*, granted, which was continued in force down to the final decree, and when this appeal was allowed, was, by order of the court allowing it, continued pending the appeal, under a bond conditioned to account for all over-charges if the ordinance should be sustained.

The case was not referred to a master, as is the usual course in such cases, although there was a great mass of conflicting evidence relating to the value of the plant, cost of operation and gross and net income. Neither did the court make specific findings of fact to which specific objection could be made. Such facts as may be said to constitute "findings of fact" appear in the way of large conclusions in the course of the opinion found in the record.

In this, as in every other legislative rate case, there are presented three questions of prime importance: First, the present reasonable value of the company's plant engaged in the regulated business; second, what will be the probable effect of the reduced rate upon the future net income from the property engaged in serving the public; and, third, in ascertaining the probable net income under the reduced rates prescribed, what deduction, if any, should be made from the gross receipts as a fund to preserve the property from future depreciation.

The valuation fixed by the court is the main point of attack. That the company is entitled to a fair return upon the value of the property at the time of the inquiry, is the rule. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 442.

The court, as one means of finding the present value of the gas-making plant, found that the present cost of replacing it would be $566,073.59. The items which enter into this valuation, and the reason for reaching this result, as stated in the opinion, are shown by the paragraphs here set out:

"In determining for what amount the plant could be reconstructed, I have accepted in the main the testimony of complainant's witnesses as being the most satisfactory, and I find that the plant could be reconstructed for the following sums:

Coal gas apparatus	$80,605 00
Water gas apparatus	29,278 00
Mains in dirt streets	90,578 00
Mains in paved streets	130,027 00
Gas services, etc	107,106 82
Gas meters in use	36,282 90
Meter connections	6,304 00
Piping for gas ranges	16,500 00
	$496,681 72
Engineering expenses (2½%)	12,417 04
Real estate	4,000 00
Present value of buildings	24,643 00
Contingent expenses in construction	25,000 00
Cost of organizing company	3,000 00
	$565,741 76

"While the evidence as to the depreciation is somewhat vague and indefinite, I think, upon the items ag-

gregating said $496,681.72, there should be deducted for depreciation 10 per cent, amounting to the sum of $49,668.17, making the total present valuation of the plant $516,073.59; but it is apparent that, for the successful and economical operation of the plant, a certain amount of working capital is required. This amount I find to be $50,000, making the total value of complainant's investment, upon which it is entitled to a reasonable return, $566,073.59.

"While it is true that the testimony shows that the complainant has not such working capital but has purchased upon credit the supplies necessary to operate, yet I think that, in determining what is a reasonable compensation, a working capital should be considered."

But the appellant does not accept the valuation thus fixed. It contends that there should be added to that the following:

Steam-boiler for water gas	$2,225 00
Under-estimate of present value of buildings	10,000 00
Under-estimate of working capital	10,000 00
Under-estimate of meter connections	6,102 00
Under-estimate contingent expense of construction	37,500 00
Interest on idle capital during construction	40,000 00
Promotion of business, or going value and franchise, as elements in replacement value	100,000 00
	205,852 00
Add court's valuation	566,073 59
	$771,925 59

The appellee, on the other hand, in support of the gen-

eral decree dismissing the bill, joins issue upon each of these items, and insists that if the court shall see fit to go into the evidence, it will find that the plant has been greatly over-valued. It particularly objects to the large item of $107,000 for gas service, and to the item of $50,000 added to the value of the property as "working capital," and says that the incorrectness of this is seen in the admission that the appellant has in fact no such working capital engaged in the business. Appellee further contends that the "expense of operation" in 1907 includes reconstruction or replacement work, and that such items enlarge the operating expenses of that year unduly and correspondingly reduce the net income. If the expense of operating the plant for that year is to be accepted as the standard by which the operating expenses of future years are to be estimated, the objection is serious if the facts are as claimed.

The appellant further claims that the sum of $8,000 deducted from the net income, as a permanent protection against future depreciation in the value of the plant, is too small, and should be much larger. Upon this there was conflicting expert testimony. Upon all of these questions of valuation and of operating expense there is much evidence, and much of it conflicting. The findings of the court, as before stated, are of too comprehensive a character to be of much help in dealing with the details which are embraced.

But it is urged that even upon the valuation fixed by the court the estimated future net income will be little over five per cent., and, in consideration of the character of the property and the high average interest rate prevailing in Nebraska, this is not a reasonable or fair return and demonstrates the confiscatory character of the ordinance. But if the $8,000 first deducted from the receipts and laid aside as a permanent fund to meet future depreciation be taken into account, the estimated future

net income with the rate in force will exceed six per cent.

Nor did the Circuit Court hold that a net profit of five and two-tenths per cent. would be a fair and reasonable return upon the value of the property employed. What the court found was, in substance, that at least an income of that amount was certain, aside from the amount reserved for a permanent preservation fund. What the court said was this:

"While complainant, I think, is entitled to at least six per cent. upon the money invested, it does not appear that the reduced rate would not yield that sum. It is quite probable that the reduced rate would considerably increase the consumption of gas and thus increase the complainant's net profits.

"The record shows that in June, 1904, complainant voluntarily reduced its rates from approximately $1.50 per thousand to $1.20, and the amount of gas consumed, and net profits resulting, considerably increased. The inquiry in cases of this character is not alone what has complainant theretofore earned but it is what will be the effect of the ordinance reducing the rate upon the future net earnings of the company, and it devolves upon complainant to show not that the past rates have not produced a reasonable return but that the rate prescribed by the ordinance will not in future produce a reasonable return."

This case is full of difficult and grave questions. Such conclusions as to facts as are found in the court's opinion are not helpful when, as here, errors are assigned which open up substantially the whole case. The cause should have gone at the beginning to a skilled master, upon whose report specific errors could have been assigned and a ruling from the court obtained.

In the case of *Chicago, M. &c. Ry.* v. *Tompkins,* 176 U. S. 167, 179, 180, this court was called upon to review

a decree upholding a state-made railroad rate which had been unsuccessfully attacked as confiscatory. In that case, as in this, the matter had not been referred to a master, but had been decided by the Circuit Court upon the whole of the evidence. It came to this court upon such a variety of questions of fact and law as to practically open up the whole case. Impressed with the seriousness of the questions involved this court remanded the case for a reference and report by a skilled master. As to this practice, this court said:

"The question then arises what disposition of the case shall this court make. Ought we to examine the testimony, find the facts, and from those facts, deduce the proper conclusion?

"It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. . . . We are of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general

or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests."

The question as to what sum, if any, upon the facts of this case should be annually deducted from the net income as a permanent maintenance or replacement fund, is novel and presents a grave problem.

Conflicting expert evidence has been introduced presenting radically different theories as to the necessity, character and amount of such a fund, and as to how it should be created, preserved and expended. Some of this evidence puts the sum to be annually deducted and set aside as a permanent fund at five per cent. upon the value of the plant at the time of deduction. It is obvious that if this view is sound there will be little or nothing of the net income left for distribution among shareholders, and no basis for legislative rate reduction now, and none likely until such time as the income from the permanent fund will keep up the plant. The work of reconstructing and replacing old parts by new in a plant of this kind must, in the very nature of things, be going on constantly. Heretofore it seems to have been so well and continuously done that the value of the plant as a whole has suffered less than one per cent. per annum if the total depreciation be distributed through the more than thirty years of operation. So far as can be now seen, reconstruction and replacement charges have, up to the present time, been borne by current revenue, with the result that the revenue remaining in the single year of 1907 showed a net surplus of $73,851.83, a sum large enough, if distributed to shareholders upon the basis of the value of property engaged in the business as claimed by appellant, to have paid a dividend of ten per cent., and about fifteen per cent. upon the valuation settled by the Circuit Court.

There is no finding as to the extent of the application

of the revenue of 1907 to reconstruction or replacement, as distinguished from current repairs and operating expenses. It is, however, plainly inferable that the revenue of that year was used to the extent necessary. If, in the past, reconstruction and replacement charges have been met out of current expenses, the fact must be taken into consideration, both when we come to estimating future net income and in determining what sum shall be annually set aside to guard against future depreciation. This doubtless influenced the court below in settling upon the amount of $8,000 as a sufficient annual appropriation of income as insurance against future depreciation. But if the constantly recurring necessity to do reconstruction or replacement work was in 1907 met out of the current income of that year, thereby diminishing the net income, the fact should be given weight in estimating future net income; otherwise there will be a double deduction on that account, first, by paying such charges as they occur, and thereafter by a contribution out of the remaining income for the same object.

The facts found are not full enough to at all justify this court in dealing with this problem of a replacement fund.

There should be a full report upon past depreciation, past expense for reconstruction or replacement, and past operating expenses, including current repairs. We should be advised as to the gross receipts for recent years, and just how these receipts have been expended. Then the amount to be set aside for future depreciation will depend upon the character and probable life of the property and the method adopted in the past to preserve the property. It can be readily seen that the amount to be annually set aside may be such as to forbid rate reductions because of the requirement of such a fund. The matter is one first for a skilled master, who should make a full report upon the value of the property, the receipts and the expenses of operation and the sums paid out on re-

construction and replacements, and in dividends in recent years.

For the reasons indicated, we direct that the decree be *Reversed, and the cause remanded to the District Court to refer the case to a competent and skilled master, to report fully his findings upon all of the questions raised by either party, separately, and with leave to both parties to take any additional evidence they may wish within a time to be fixed by the court, and that that court upon such report proceed as equity shall require. It is further ordered for the protection of all parties that the injunction granted in the court below continue in force until final decree there, upon condition that the appellant enter into a new bond, with sureties satisfactory to the court below, to account for all overcharges to consumers since the original restraining order in the event the ordinance shall be sustained, and that if such bond be not made within twenty days after the filing of the mandate that the injunction stand dissolved.*

THE SAN PEDRO.[1]

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

No. 155. Submitted December 22, 1911.—Decided February 19, 1912.

The manifest object of the fifty-fourth rule in admiralty cannot be defeated solely because its enforcement might involve expense, delay or inconvenience.

The limited liability proceedings under §§ 4283 *et seq.*, Rev. Stat., is

[1] Docket title: Metropolitan Redwood Lumber Co., Claimant of the Steamer "San Pedro," Appellant, *v.* Charles P. Doe, Owner of the American Steamer "George W. Elder," et al.

in its nature exclusive of any separate suit against an owner on account of the ship. The monition which issued after surrender and stipulation for value requires every person to assert his claim in that case.

One having a claim for salvage against a vessel whose owners have instituted proceedings under §§ 4283 *et seq.*, Rev. Stat., cannot proceed in admiralty in a separate suit, and must prove his claim in the limited liability proceeding.

The issuing of an injunction in the limited liability proceeding is not necessary to stop proceedings in other courts on claims against the vessel or its owners. Power to grant an injunction exists under § 4283, Rev. Stat., but when the procedure required by rule 54 has been followed, the monition itself has the effect of a statutory injunction. *Providence, & N. Y. Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578.

Quære: Whether liability for towage into port of a vessel after collision is a claim like one for repairs by reason of the collision for which the owners of the injured vessel may recover from guilty colliding vessel.

Under §§ 4283, 4284, Rev. Stat., as amended by § 18 of the act of June 26, 1884, 23 Stat. 55, c. 12, any and all debts and liabilities of the owner incurred on account of the ship without his privity or fault are included in the limited liability proceeding, including claim for salvage after collision. *Richardson* v. *Harmon*, 222 U. S. 96.

Quære: Whether a highly meritorious salvage service, benefiting alike the owner and creditors of a vessel, is entitled to preference from the fund.

THE facts, which involve the construction of the statutes limiting liability of vessel owners and practice and procedure thereunder, are stated in the opinion.

Mr. William Denman and *Mr. Charles Page* for appellant:

The cost of salving the *San Pedro* is a damage arising from the collision and hence should be litigated in the limitation proceeding. *The Charles G. Lister*, 174 Fed. Rep. 288; *The Cepheus*, 24 Fed. Rep. 507; Marsden on Collisions, 6th ed., 110.

The court is obliged to take cognizance of the salvage in the limitation proceedings for a variety of purposes.

The damages collected from the negligent ship by the

injured one must be paid into the fund if the injured vessel seeks a limitation. *O'Brien* v. *Miller*, 168 U. S. 299. The damages recovered as compensation for the payment of salvage would therefore be a part of the fund.

The liabilities of the owners of vessels arising from a collision are to be litigated in a limitation proceeding just as any other liabilities inflicted on the owner of a vessel which has suffered injury. *Norwich Co.* v. *Wright*, 13 Wall. 104.

As damages from the collision were to be adjudicated in the limitation proceeding, the jurisdiction of the District Court of the libel ceased as soon as the stipulation for value required by rule 54 was filed in the limitation proceeding.

The statutory injunction provided for in Rev. Stat., § 4285, arises as well when a stipulation is given as upon a surrender and *ipso facto* ousts the other courts of jurisdiction without the service of any writ on the parties litigant. *Providence S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 600; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527, 550; *The Dimock*, 52 Fed. Rep. 598; *Morrison* v. *District Court of the United States*, 147 U. S. 14.

Even if the *San Pedro* was in fault, the claim against her owners for salvage is not a damage consequential from the collision which could be recovered from the persons wrongfully causing the collision. The salvage liability is a damage consequent from the collision for which the owner is liable, whether or not he can shift that liability to some one else.

The real question is whether the collision is the proximate cause of the damages for which the owners are liable in the salvage suit and it must be patent beyond all cavil that the collision was the sole cause.

There is no disputed question of fact involved in the appeal.

The hardship to neither party can affect the question of

jurisdiction. *Providence S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578.

The salvage proceeding here before the court is separate and distinct from the proceeding for limitation of liability. An appeal in the one can in no way bring up the record in the other.

If, when the salvage claimant subsequently appeared, he was dissatisfied with the amount of the stipulation, his plain remedy was to move for an increase of the appraisement, a right which any claimant has. *In re Morrison*, 147 U. S. 14 at 35.

Mr. F. A. Cutler, Mr. F. R. Sweasey, Mr. J. N. Gillett, Mr. Aldis B. Browne, Mr. Alexander Britton and *Mr. Evans Browne* for appellees:

Appellant, having participated in this separate salvage proceeding throughout up to and including their stipulation of March 5, 1909, upon which date every issue has been resolved and every essential element determined, should not thereafter, while there was lacking but the mere mechanical act of signing and filing a second decree embodying merely the complete mathematical computations, be permitted to escape this award made after full and fair hearing and force a new trial of the matters involved in another proceeding by virtue solely of the suggestion of pending limitation of liability proceedings.

The issuing of an injunction as an essential step in the enforcement of the provisions of the statute has been recognized in numerous cases. *The Lotta*, 150 Fed. Rep. 219; *Delaware River Ferry Co.* v. *Amos*, 179 Fed. Rep. 756, 758; *In re Morrison*, 147 U. S. 14, 35; *Morgan* v. *Sturges*, 154 U. S. 256, 270; *In re Providence &c. S. S. Co.*, 20 Fed. Cas. No. 11,451; *S. C.*, 6 Ben. 124; *The H. F. Dimock*, 52 Fed. Rep. 598, 601; *Norwich & N. Y. Trans. Co.* v. *Wright*, 13 Wall. 104; *In re Long Island Transf. Co.*, 5 Fed. Rep. 629.

The salvage claim is not a damage under provisions of §§ 4283 *et seq.; Norwich & N. Y. Trans. Co.* v. *Wright,* 13 Wall. 104; *The Doris Eckhoff,* 30 Fed. Rep. 140.

Where, as in the present instance, the collision was caused by negligence of appellant itself and no damages whatever are recoverable against the owner of the other vessel on account of payment of salvage or other loss, there is no case of damage to appellant. *The Charles G. Lister,* 174 Fed. Rep. 288; *O'Brien* v. *Miller,* 168 U. S. 299.

The provisions of § 4284 are not only limited in effect to losses suffered by others than the one petitioning for limitation of liability, but deal solely with losses subject to a pro-rata payment from the sum for which such owner may be liable. *In re Catskill,* 95 Fed. Rep. 702.

Section 4285 is expressly limited to the liability of the owner for loss or destruction of any property, goods or merchandise if he shall transfer his interest in such vessel and freight to a trustee for the benefit of such claimants. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578.

This salvage claim being entirely independent of the issues involved in the limitation of liability proceedings, is not embraced within either the letter or the spirit of §§ 4283 to 4285, Revised Statutes.

The salvage services were subsequent to termination of voyage.

Prior to the rendition of the salvage services the steamer *San Pedro* had been abandoned by her crew and was a derelict.

The commissioner's report appraising the vessel was based upon the value of the vessel immediately following the collision and while she lay wrecked in the ocean.

The adoption by the court of this report, appraising the vessel at a point in the ocean immediately after the wreck, involves an implied finding of fact that the voyage was broken up and terminated at that point. *Place* v. *Norwich*

& N. Y. Trans. Co., 118 U. S. 468; *The Pine Forest*, 129 Fed. Rep. 700, 705; *Gokey* v. *Fort*, 44 Fed. Rep. 364; *The Abbie C. Stubbs*, 28 Fed. Rep. 719; *The Giles Loring*, 48 Fed. Rep. 463, 472; *The Rose Culkin*, 52 Fed. Rep. 328; *The Doris Eckhoff*, 30 Fed. Rep. 140; *The Great Western*, 118 U. S. 520, 525.

A voyage is terminated by abandonment at sea. Carver, Carriage by Sea, §§ 307–308; Spencer on Marine Collisions, § 220.

The stipulation should be in an amount equal to the value of the ship at the time her voyage was terminated and is to be estimated by deducting from the value at the port of safety the value of the salvage services. *Pacific Coast Co.* v. *Reynolds*, 114 Fed. Rep. 877; *The Abbie C. Stubbs*, 28 Fed. Rep. 719; *The Pine Forest*, 129 Fed. Rep. 705; *The Anna*, 47 Fed. Rep. 525; Benedict, Admiralty, 4th ed., § 371.

The District Court having, at the instigation of appellant, adopted a point of time immediately after the collision as the termination of the voyage, which fact is therefore determined for this appeal, that is the point of time at which the value of the vessel and freight pending is to be fixed and also the point of time when the liability to be limited must be ascertained. *In re Meyer*, 74 Fed. Rep. 881, 897, and cases cited.

Appellant is estopped by its own action in regard to the appraisement from now endeavoring to force the court to deduct the amount of the salvage services from the salved value of the vessel in fixing the amount of the stipulation for value, and thereafter force the salvors to seek payment for their services out of such stipulation for value.

Mr. Justice Lurton delivered the opinion of the court.

In an independent libel proceeding instituted in the

District Court by the owner of the steamer *George W. Elder*, against the Metropolitan Lumber Company, the claimant of the steamer *San Pedro*, the libellant, recovered a decree for services rendered in towing her to port after she had been injured in a collision with the steamer *Columbia* off the coast of California. This decree was rendered at a time when there was pending in the same court a separate proceeding for limitation of liability brought by the Metropolitan Lumber Company, as owner of the *San Pedro*.

Before coming to the substantial questions, we may notice certain objections to any judgment which shall operate to set aside the decree in favor of the appellees. It is said that the appellant does not assail the decree in respect to its merits or the amount of the allowance; that nothing but further delay, expense and inconvenience will result if appellees are required to present and again prove the claim in the liability cause; and, finally, it is said that the pendency of the other suit was not pleaded until the case was about to be heard upon immaterial objections to the commissioner's report.

Conceding all that can be said about the expense, delay and inconvenience which will result if the salvage claimants are to be required to present their claim in the limited liability case, yet far greater confusion must result if such objections are enough to defeat the manifest object of the fifty-fourth rule. This court, in furtherance of the apparent purpose of Congress to limit the liability of vessel owners (Revised Statutes, §§ 4283–5), has, by that rule, prescribed how an owner may avail himself of the benefit of the statute. The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case.

The appellant, owner of the *San Pedro*, appears to have proceeded strictly in compliance with the fifty-fourth admiralty rule. There was a due appraisement of the *San Pedro* and her pending freight and a stipulation entered into, with sureties, for the value so appraised, and a monition duly issued, requiring all persons to present their claims and make proof. In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every other court, Federal or state, to stop all further proceedings in separate suits upon claims to which the limited liability act applied.

Nor is the issuance of an injunction necessary to stop proceedings in separate or independent suits upon such claims. Power to grant an injunction exists under § 4285, Revised Statutes, when necessary to maintain the exclusiveness of the jurisdiction; but when the procedure provided by rule 54 has been followed and a monition has issued "against all persons claiming damages . . . citing them to appear before said court and make proof of their respective claims," etc., it is the duty of every other court, when the pendency of such a liability petition is pleaded, to stop. The very nature of the proceeding and the monition has the effect of a statutory injunction. Indeed, that is the express declaration of the statute.

The view we take of the statutory injunction declared by § 4285, Revised Statutes, and of its application to cases where the vessel has been surrendered and a stipulation entered into as provided by admiralty rule 54, as a proceeding tantamount to a "transfer" of the ship as authorized by § 4285, Revised Statutes, is fully supported by the leading case of *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594, 599, 600 and 601. That was a suit in a state court against the owner of a steamship to recover for goods lost by the burning of a steamer. While the suit was pending the owner filed his petition

in the proper District Court for the benefit of the limited liability statute. The proceedings seem to have been conducted in accordance with admiralty rule 54, but, in addition, the petitioners made application, as permitted by that rule, for an order restraining the prosecution of "all and any suits" against the owner in respect of claims subject to the provisions of the act. The owner and defendant in the suit pending in the state court thereupon, by plea, set up the limited liability suit as a reason why the state court should proceed no further. This was overruled. Later the defendant therein pleaded the final decree in the liability suit as a bar to any decree in the state court against him, as owner. This, too, was disregarded, and a decree rendered against the owner for the claim for damages caused by the burning of the steamer and the plaintiff's goods. This was affirmed in the Supreme Judicial Court of Massachusetts and brought here upon writ of error. After a consideration of the meaning and purpose of the limited liability act of 1851 (March 3, 1851, 9 Stat. 635, c. 43), §§ 4283, 4284 and 4285, Revised Statutes, and of admiralty rule 54, the court said (p. 594):

"We have deemed it proper to examine thus fully the foundation on which the rules adopted in December term, 1871, were based, because, if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits in different courts, or even in the same court by separate claimants, against the ship owners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose."

Later, the court added (pp. 599, 600):

"Proceedings under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-

matter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims."

* * * * * * * *

"The operation of the act, in this behalf, cannot be regarded as confined to cases of actual 'transfer,' (which is merely allowed as a sufficient compliance with the law), but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owners' interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested."

It was urged in that case that by virtue of § 720, Revised Statutes, the District Court had no authority to issue an injunction. But as to this, the court said (p. 600):

"This view of the statutory injunction, and of its effect upon separate actions and proceedings, renders it unnecessary to determine the question as to the legality of the writ of injunction issued by the District Court. Although we have little doubt of its legality, the question can only be properly raised on an application for an attachment for disobeying it. As the writ was issued prior to the adoption of the Revised Statutes, the power to issue it was not affected by any supposed change of the law introduced into the revision, by the 720th section of which the prohibition of the act of 1793 in regard to injunctions against proceedings in state courts has this exception appended to it: 'except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' Under the rule of '*expressio unius*' this express exception may be urged as having the effect of exclud-

ing any other exception; though it is observable that the injunction clause in the act of 1851 is preserved without change in section 4285 of the Revised Statutes, and will probably be construed as having its original effect, due to its chronological relation to the act of 1793."

But after an intimation that § 720 did not apply, the court added (p. 601):

"But, as before indicated, the legality of the writ of injunction is not involved in this case. In our opinion the state court, in overruling the plea of the defendants, which set up the proceedings pending in the District Court, and in ordering the cause to stand for trial; and again, on the trial, in overruling as a defense the proceedings and decree of the District Court as set up in the amended answer, disregarded the due effect, as well as the express provisions, of the act of 1851, and therein committed error. It was the duty of the court, as well when the proceedings pending in the District Court were pleaded and verified by profert of the record, as when the decree of said court was pleaded and proved, to have obeyed the injunction of the act of Congress, which declared that 'all claims and proceedings shall cease.'"

But it is contended that a salvage claim, such as the one here involved is not a claim for "damages or injury by collision" within the meaning of § 4283, Revised Statutes, and therefore not one to which the limited liability act applies; that the damages there referred to are damages by collision to other vessels and their cargo, and that the expense of being towed to port is a claim like one for repairs. It is also said that even if the vessel owners may be able to include what they must pay for such a service in the damages recoverable from the guilty vessel, it is notwithstanding not a damage arising from collision within the meaning of that section.

But we need not consider whether the claim is one against the owner of the character described either in

§ 4283 or the succeeding, § 4284. Those sections have been amended by the eighteenth section of the act of June 26, 1884 (23 Stat. 55, c. 121), so as to include "any and all debts and liabilities" of the owner incurred on account of the ship without his privity or fault. *Richardson* v. *Harmon*, 222 U. S. 96.

The service was rendered to the *res*, benefiting alike owner and creditors. The claim is, therefore, of a highly meritorious character. But the question of preference in payment out of the fund is one to be determined in the limited liability case. We, therefore, express no opinion as to whether such a claim may be preferred or must share pro rata with others.

The court below erred in proceeding to render a decree after the pendency of the suit for a limitation of liability was pleaded.

Decree reversed.

CUEBAS Y ARREDONDO *v.* CUEBAS Y ARREDONDO.

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

No. 159. Submitted January 24, 1912.—Decided February 19, 1912.

Errors assigned as to finding of citizenship of a party dismissed from the suit at instance of appellant are not here for review except as to the force and effect to be given to a decree *pro confesso* against other defendants before dismissal of the bill.

Under the Foraker Act of April 12, 1900, 31 Stat. 85, c. 191, jurisdiction of the District Court of the United States was that of the District and Circuit Courts of the United States; the additional jurisdiction conferred by the act of March 2, 1901, 31 Stat. 953, c. 812, did not extend the jurisdiction so as to embrace all controversies in which any litigant on either side is a citizen of the United States or a subject of a foreign country.

The District Court of the United States for Porto Rico has not jurisdiction of a cause in which the sole plaintiff is a citizen of Porto Rico and any of the defendants are citizens of Porto Rico, notwithstanding one or more of the defendants may be citizens of the United States or of a foreign country.

By the act of March 2, 1901, Congress did extend the jurisdiction of the United States District Court for Porto Rico by cutting down the necessary jurisdictional amount and dispensing with diversity of state citizenship, by substituting United States citizenship therefor.

The final decree following a *pro confesso* order is only such a decree as would be authorized by the state of the pleadings when the order was entered.

If a bill is fatally defective, showing that the court had no jurisdiction, it is error to allow a *pro confesso;* the order should be vacated, and the defaulting defendant allowed to defend.

Where an amendment is allowed that changes the character of the bill and creates a jurisdiction not theretofore existing, the court should set aside a default and give time to defend.

A decree *nunc pro tunc* presupposes a decree allowed or ordered, but not entered through inadvertence of the court, or a decree under advisement when the death of a party occurs. *Mitchell* v. *Overman,* 103 U. S. 62.

No attempt at revision having been made at any time, there is no ground to enter a decree *nunc pro tunc* in this case on any known ground of equity procedure. *Gray* v. *Brignardello,* 1 Wall. 627.

3 Porto Rico Fed. Rep. 67, affirmed.

THE appellant, asserting herself to be a citizen of the Island of Porto Rico, filed this bill to foreclose a mortgage upon a plantation on the Island called "Carmelita." The defendants to the bill were three in number, namely, Cuebas y Arredondo, alleged to be a citizen of the United States, residing in Porto Rico, Francisco Antongiorgi, described as a citizen of and residing in Porto Rico, and El Banco Territorial y Agricola, alleged to be a corporation organized under the laws of Spain, and a citizen thereof, doing business in the Island of Porto Rico, with its principal place of business in the city of San Juan.

The averments as to the title and encumbrances upon

the said plantation, and the interests asserted by way of lien, or mortgage, by the defendants Antongiorgi and El Banco Territorial, etc., hereafter referred to as the Bank, are complex, and for the purposes of this case, upon the question now for decision, need not be stated otherwise than to say that the bill alleged that they "have or claim some interest in said mortgaged premises, or in some part thereof, as purchasers, mortgagees, or otherwise, the exact nature and extent of which interests are unknown to your orator, if any at all they have, but the same are inferior and subsequent to the lien of the mortgage of your orator and subject thereto."

Aside from the usual prayer for a decree declaring and enforcing the lien of the mortgage asserted by a sale, etc., the bill asked that "the defendants and all persons claiming under them subsequent to the commencement of this suit, and all other persons although not parties to this suit who have any liens or claims thereon by or under any such subsequent judgment or decree, either as purchaser, incumbrancer or otherwise, may be barred and foreclosed of all equity of redemption in the said premises and that your orator may have such other and further relief as the nature of the case may require, and as to this court may seem meet and agreeable to equity and good conscience."

The bill was filed April 6, 1904, in the District Court of the United States for Porto Rico.

On July 11, 1903, the three named defendants, though duly summoned to appear by a rule day named and make their defense, made default, and the bill was on that day taken for confessed under equity rule 19, *et seq.*

In March, 1905, the bank was permitted to file its answer, in which it denied the equities of the bill and asserted its own superior right under mortgages, judicial sale, and by estoppel.

In October, 1906, it was permitted to withdraw its answer, and file a plea to the jurisdiction. That plea was

in these words, omitting the formal parts and conclusion:

"That this Court ought not to further take cognizance of the said bill of complaint because this defendant says that at the time of the filing of the same the Complainant herein was and still is a citizen of the Island of Porto-Rico and resident of the same and this defendant was and is a corporation organized and doing business under and by virtue of the laws of said Island of Porto-Rico and was and is a citizen of the same, and each and all of the other defendants herein are citizens and residents of the said Island of Porto-Rico, and that therefore this is a suit by and between citizens and residents of the said Island of Porto-Rico, of which this Court has no jurisdiction.

"That, as shown by the said Bill of Complaint, the jurisdiction of this Court over and of this suit is sought to be maintained not by reason of any Federal question being involved herein, but solely and only by reason of the alleged diverse citizenship of the parties herein and hereto and that as shown by the allegation of the said Bill of Complaint, the defendant is alleged to be a citizen of Spain and another of the defendants, to wit: Felipe Cuebas y Arredondo, is alleged to be a citizen of the United States of America and another of said defendants, to wit: Francisco Antongiorgi, is alleged to be a citizen of Porto-Rico, and that therefore it affirmatively appears by the allegations of the said Bill, if the same are true as therein alleged, that this is a case of which this court has not jurisdiction."

After first overruling this plea, for reasons set out in an opinion (4 P. R. Fed. Rep. 208), a rehearing was allowed and the plea sustained upon the ground that the bank was not a corporation of Spain, but one existing under the laws of Porto Rico, and a citizen of that Island for jurisdictional purposes (4 P. R. Fed. Rep. 509).

Prior to this action upon the plea of the bank, the date

not appearing, the complainant voluntarily dismissed her bill as to Francisco Antongiorgi, whom the bill had averred to be a citizen of Porto Rico.

The judgment on the plea of the bank, above set out, was, that for lack of the requisite diversity of citizenship the bill should stand dismissed, "unless within five days from this date the bill can be amended so as to give the court jurisdiction."

Thereupon complainant entered an order, entitled: "Irene Cuebas y Arredondo *vs.* Felipe Cuebas y Arredondo et al.," which is in these words:

"Comes now the Complainant above named, by her Solicitors F. L. Cornwell and N. B. K. Pettingill, and, in pursuance of the permission granted by the Court in its order of the 7th day of June, 1909, conditionally dismissing said bill of complaint, hereby amend their said bill of complaint for the purpose of retaining jurisdiction in this Court by dismissing the same as to said defendant El Banco Territorial y Agricola.

"And in order to make said bill of complaint conform to such dismissal they hereby amend the same in the following particulars to wit:

"1. By striking from the same the last four lines of the preliminary paragraph of said bill in which the parties thereto are stated.

"2. By striking out paragraph number X of said bill of complaint.

"3. By striking out the name of said El Banco Territorial y Agricola wherever the same appears in the prayer for relief and in the prayer for process contained in said bill.

"And said bill of complaint having been heretofore amended so as to dismiss one Francisco Antongiorgi as a defendant therein and being now amended so as to dismiss the same as to said El Banco Territorial y Agricola, complainant hereby elects to proceed with the same as against the defendant Felipe Cuebas as sole defendant."

Thereupon the complainant moved the court for a final decree against the sole defendant, Felipe Cuebas, "as of a date prior to the death of Felipe Cuebas, so as to avoid the necessity for reviving as against his succession," etc. This the court denied, and dismissed the bill.

From this decree an appeal has been prosecuted.

Mr. Frederick L. Cornwell and *Mr. N. B. K. Pettingill*, for appellant:

The court below had jurisdiction of the case and of the bank as a party thereto.

The defendant bank was, in law, a Spanish corporation. It did not cease to be Spanish because by the cession of Porto Rico its field of activity was no longer within Spanish territory. *Society &c.* v. *New Haven*, 8 Wheat. 464, 483; *Society &c.* v. *Pawlet*, 4 Pet. 480, 502.

Even if the bank was not a Spanish corporation, the presence of one party defendant, who was a citizen of the United States, was sufficient to give the court jurisdiction of the cause and of all proper parties thereto.

A corporation owes allegiance to the sovereignty which created it and must be considered a citizen or subject of that sovereign. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Insurance Co.* v. *Francis*, 11 Wall. 210; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Jellenik* v. *Huron Copper Co.*, 177 U. S. 1.

The existence of the bank as a Spanish corporation could only be terminated by legal dissolution or by forfeiture by that sovereignty. *Frost* v. *Frostburgh Coal Co.*, 24 How. 278.

One foreigner or citizen of the United States is a party sufficient to sustain jurisdiction.

This question has never come before this court for adjudication. The original construction given the statute by the court below was right. That result is logical.

It is consistent with the ordinary and simple meaning

of the language used. If Congress had intended to restrict the jurisdiction to cases where all parties, either plaintiff or defendant, were within its provisions, it could very easily have made that meaning plain.

For definitions of the word "either" see Webster, as "one or another of any number". That definition is applied as its ordinary legal meaning. *Lafoy* v. *Campbell*, 42 N. J. Eq. 34; *Messer* v. *Jones*, 88 Maine, 349, 356; *Ft. Worth Co.* v. *Rosedale Co.*, 68 Texas, 169; *Dew* v. *Barnes*, 54 No. Car. 149; *Graham* v. *Graham*, 23 W. Va. 36, 43; *People* v. *Willis*, 39 N. Y. Supp. 987, 989.

The word "parties" is used in its sense of ordinary legal acceptation analogous to its use in such phrases as "necessary parties," "indispensable parties," "parties litigant," etc. There is nothing to show that Congress intended to use the word in any technical or restricted sense. This court will take judicial notice of political conditions and the general purposes of legislation and so doing it is matter of history that the Federal court of Porto Rico was established, and its jurisdiction afterwards enlarged by this amendment, for the very purpose of securing full protection to the property rights of the American citizens and foreigners resident in Porto Rico.

As the object of the amendment was to enlarge the jurisdiction, it should be liberally construed for that purpose.

In *Valecilla* v. *Hermano*, 2 Porto Rico Fed. Rep. 46, the District Court followed this court in *Smith* v. *Lyon*, 133 U. S. 316, construing the jurisdictional acts respecting diverse citizenship, enacted for the purpose of meeting conditions in the States the very opposite of those to meet which the Porto Rican statute under discussion was enacted.

But see distinction aptly expressed in *Garrozi* v. *Dastas*, 204 U. S. 73.

Therefore, whether or not the defendant bank was in

such sense an alien institution as to aid in sustaining the jurisdiction, that jurisdiction properly and sufficiently attached because one of the parties defendant—and the only indispensable one—was a citizen of the United States.

The defendant bank is not an indispensable party. *Brewster* v. *Wakefield*, 22 How. 118, 128; *Nalie* v. *Young*, 160 U. S. 642; *Jerome* v. *McCarter*, 94 U. S. 736.

Whether, therefore, the bank was a prior or subsequent mortgagee as a matter of law, it was nothing more than a mortgagee, and could not have been, under the above authorities, an indispensable party.

Laches is not a defense to a suit for foreclosure of mortgage, that defense being confined to cases of a character where no statute of limitations is directly applicable and the jurisdiction is not concurrent. Story's Equity Juris. (13th ed.), § 1520; *Rankin* v. *Scott*, 12 Wheat. 177; *Cross* v. *Allen*, 141 U. S. 528; *Met. N. Bank* v. *Dispatch Co.*, 149 U. S. 448; *Boone* v. *Pierpont*, 28 N. J. Eq. 7; *Diefenthaler* v. *New York*, 111 N. Y. 331; *Fullwood* v. *Fullwood*, 9 Ch. Div. 176; *In re Baker*, 20 Ch. Div. 230.

A court cannot relegate a litigant to another forum merely because, in its opinion, such course would be more expedient. *McClellan* v. *Garland*, 217 U. S. 268, 282.

Where a Federal court will be deprived of its jurisdiction based upon the character of the parties by the presence of some party not absolutely indispensable, a complainant will be allowed to dismiss as to any such party if a proper decree can be entered in his absence which does not affect his interest—which was exactly what complainant asked leave to do when forced to dismiss as to the bank. *Vattier* v. *Hinde*, 7 Pet. 252, 261; *Horn* v. *Lockhart*, 17 Wall. 570, 579; *Tug &c. Co.* v. *Brigel*, 30 C. C. A. 415; *Boatman's Bk.* v. *Fitzlen*, 68 C. C. A. 288, 296.

This suit was begun before the one in the insular court, and by the filing of a foreclosure bill the mortgaged property is theoretically placed *in custodia legis*. Hence the

court below and not the insular court "first took possession of the *res.*" *Farmers' L. & T. Co.* v. *Lake St. E. R. Co.*, 177 U. S. 51.

A decree should have been granted against defendant Cuebas.

Under the provisions of equity rules 18 and 19, a complainant after an order *pro confesso* is entitled without the production of supporting proof to such a decree as is warranted by the allegations of his bill. *Thompson* v. *Wooster*, 114 U. S. 104; *Ohio Cent. R. Co.* v. *Central Trust Co.*, 133 U. S. 83, 90.

The court's refusal of this request of complainant was not based upon any question of proof, but upon the supposed infirmities of the bill itself.

Upon the death of a party defendant during the progress of a cause the court may, upon request of complainant, enter its final decree *nunc pro tunc* as of a date prior to such death so as to avoid the necessity of proceedings for revivor. *Mitchell* v. *Overman*, 103 U. S. 62; *New Orleans* v. *Gaines' Adm'r*, 138 U. S. 595, 612; *Campbell* v. *Misier*, 4 Johns. Ch. 342.

No brief filed for appellees.

Mr. F. Kingbury Curtis and *Mr. Henry A. Stickney*, by leave of the court, filed a brief as *amici curiæ* on behalf of Banco Territorial y Agricola:

Since the bank is not a party to the appeal, the questions raised by the first, second and third assignments of error are not before this court for determination. *Marshall Field & Co.* v. *Wolf & Bro. Co.*, 120 Fed. Rep. 815; *Wilson* v. *Kiesel*, 164 U. S. 248; *Boyd* v. *Stuttgart & A. R. R.*, 84 Fed. Rep. 9; *Ill. Trust & Sav. Bank* v. *Kilbourne*, 76 Fed. Rep. 883; *Davis* v. *Trust Co.*, 152 U. S. 590; *Grand Is. & W. C. R. Co.* v. *Sweeney*, 95 Fed. Rep. 396; 103 Fed. Rep. 342, 348.

By the voluntary dismissal as against the bank, the complainant is precluded from questioning the decision of the court below to the effect that it had no jurisdiction in the cause while the bank was a party defendant. *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52 at p. 54.

The court below correctly decided that with the bank as a party defendant there was no jurisdiction in this cause.

MR. JUSTICE LURTON, after stating the facts as above, delivered the opinion of the court.

The bank is not a party to this appeal. The appellant has elected to dismiss her bill, both as to it and the other Porto Rican defendant, Antongiorgi, for the express purpose of creating jurisdiction of a suit between complainant, a citizen of the Island of Porto Rico, and the remaining original defendant, Felipe Cuebas, a citizen of the United States. Her bill, as amended, contains no reference to the bank, or even of its existence. It was the bill, as thus amended, which was dismissed by the court. We mention this because two of the errors assigned and argued in the brief of counsel for appellant relate to the action of the court, first, in holding that the bank was in law a citizen of Porto Rico, and, second, in holding that, that being so, the jurisdiction of the court to maintain the suit, with citizens of Porto Rico, on both sides of the case, would be defeated. The action of the court in respect to the matter first mentioned is not here for review, and the other only in so far as it may become necessary to deal with it for the purpose of determining the force and effect to be given to the decree *pro confesso* against Felipe Cuebas.

It was not error in the situation of this case to deny a final decree against the succession of Felipe Cuebas upon the foundation of the *pro confesso* order made on a rule day five years theretofore. When that *pro confesso* was

taken against Cuebas the suit was one of which the District Court had no cognizance. The sole complainant was a citizen of Porto Rico, and Cuebas was a citizen of the United States and therefore subject to be sued in that court by the complainant, if the citizenship of the other persons on the same side was such as not to defeat jurisdiction. But that was not the case. One of them, Francisco Antongiorgi, was alleged in the bill to be a citizen of the Island of Porto Rico. The other defendant, the bank, was averred to be a corporation organized under the laws of Spain and a citizen thereof. But later, as we have already stated, the bank's plea that it was a corporation under the laws of Porto Rico and a citizen of Porto Rico was sustained. The case was, then, one which, upon the face of the bill, showed that one of the defendants had a citizenship common with that of the complainant, and later it turned out that a second had a like citizenship.

It is not and cannot be claimed that the complainant's bill asserted any right, title or claim arising under the laws or Constitution of the United States. If, therefore, the District Court had jurisdiction, it must depend upon diversity of citizenship alone.

It is claimed that the fact that one of the three defendants was a citizen of the United States conferred jurisdiction, although the other two were Porto Ricans, with a citizenship identical with that of the complainant. That this would not have been so under the Foraker act of 1900 is conceded. That act gave to the District Court for Porto Rico the jurisdiction of the United States District Courts, and added to that the jurisdiction of cases cognizable in Circuit Courts of the United States. The contention is that this extraordinary stretch of jurisdiction is conferred by the third section of the act of March 2, 1901, c. 812, 31 Stat. 953. That section reads as follows:

"That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Shortly stated, the construction placed upon this section is, that the word "parties" is not used collectively, meaning all of the litigants on the one side or the other, but is intended as if the word "litigants" had been used, and that the words "or either of them" means "any of them," and that the jurisdiction conferred embraces all controversies in which any litigant on either side is a citizen of the United States or a subject of a foreign country.

The construction contended for is out of accord with that placed upon the act in *Vallecillo* v. *Bertran*, 2 P. R. Fed. Rep. 46, a construction constantly adhered to by the court below since 1906. It is also a construction out of harmony with a long line of decisions of this court construing the jurisdictional clauses in the various statutes dealing with the question of jurisdiction dependent upon diversity of citizenship. The first of the decisions referred to involved the meaning of the clause in the Judiciary Act of 1789, conferring jurisdiction over controversies "where an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State." The question arose in *Strawbridge* v. *Curtiss*, 3 Cranch, 267, whether it was essential to jurisdiction that all of the parties on one side should have a citizenship different from that of all of the parties on the other. In that case the complainants were citizens of Massachusetts and some of the defendants were citizens of the same State. But one of the defendants was a citizen

of Vermont, and this fact was claimed to give jurisdiction. To this, the court, by Chief Justice Marshall, said:

"The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

This construction of that clause and of like words in later statutes, concerning jurisdiction dependent upon diversity of citizenship has been followed in many cases, among them being *Coal Co.* v. *Blatchford*, 11 Wall. 172, and *Smith* v. *Lyon*, 133 U. S. 315. In the case first referred to Mr. Justice Field stated the matter in words quite as applicable here, by saying: "If there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several co-defendants each defendant must be liable to be sued, or the jurisdiction cannot be sustained."

In view of these decisions we should be slow to conclude that Congress intended any other rule as to the arrangement of the parties where diversity of citizenship is the basis of jurisdiction than that laid down in construing like statutes upon the same subject. The contention that from the evident intention of Congress to enlarge the jurisdiction of the court we should infer an intent to confer jurisdiction to the extent claimed is without merit. Congress, in very plain words, did extend the jurisdiction, first, by cutting down the necessary jurisdictional amount to one thousand dollars, and second, by dispensing with diversity of state citizenship. United States citizenship is substituted for diverse state citizenship.

We, therefore, conclude that the court had no jurisdiction of this cause when the *pro confesso* order was entered against Felipe Cuebas.

The final decree following a *pro confesso* order is only such a decree as would be authorized by the state of the pleadings when the order was entered. *Frow* v. *De La Vega*, 15 Wall. 552; Daniel's Chancery Pl. & Pr., pp. 525–528, 5th ed., and notes; *Simmonds* v. *Palles*, 2 Jones and La Touche's 489; *Hardwick* v. *Bassett*, 25 Michigan, 149; *McDonald* v. *Mobile Life Ins. Co.*, 56 Alabama, 468. If the bill was fatally defective upon its face, showing that the court had no jurisdiction, it was error to allow a *pro confesso*, and upon the court's attention being called to it, it should have vacated the order and allowed the defaulting defendant to defend. *Nelson* v. *Eaton*, 66 Fed. Rep. 376; *Blythe* v. *Hinckley*, 84 Fed. Rep. 228, 244; *Eldred* v. *Am. Palace Car Co.*, 103 Fed. Rep. 209.

That the bill was subsequently amended so as to confer jurisdiction against Cuebas as sole defendant, by dismissing the bill against the other two defendants and striking out the prayer of the bill that any and every claim, interest, or incumbrance be forever barred and cut off, did not justify a decree based upon the order *pro confesso* made prior thereto. Upon such amendment being made, so completely changing the character of the bill, creating a jurisdiction which had not theretofore existed, the court should have set aside the default and given time to defend.

But the allowance of a final decree *nunc pro tunc* would have been still more inadmissible. Cuebas had been then dead for, apparently, some years. There had been no revivor. If there had been his representatives would doubtless have moved to vacate the *pro confesso* decree upon the ground suggested, and it would have been error to have denied that motion. The motion to enter a decree as of a day before his death would, if allowed, have been fruitless, for it would bear a date antecedent to the acquirement of jurisdiction, and therefore erroneous, if of any validity.

But no decree *nunc pro tunc* was admissible. Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court; or a decree in a cause which is under advisement when the death of a party occurs. *Mitchell* v. *Overman*, 103 U. S. 62. There is no claim that a final decree in pursuance of the allegations of the bill had ever been directed and through inadvertence of either court or counsel omitted from entry. There was, therefore, no authority for a decree *nunc pro tunc* upon any known ground of equity procedure. *Gray* v. *Brignardello*, 1 Wall. 627.

No effort to revive the cause against the succession of Cuebas was at any time made. The complainant stood upon her right to a final decree *nunc pro tunc*. When this was denied she still made no effort to revive the cause, though Cuebas had been dead a long time. It was not error in such circumstances to dismiss the bill.

Decree affirmed.

CITY OF CINCINNATI *v.* LOUISVILLE & NASHVILLE RAILROAD CO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 385. Submitted January 9, 1912.—Decided February 19, 1912.

After its admission into the Union, the legislative power of the State of Ohio was not restricted in any way by the provisions of Article 2 of the Northwest Ordinance of 1787, except as limited by its own constitution, and that State has every power of eminent domain which pertains to the other States.

Article 2 of the Northwest Ordinance did not forbid the appropriation by eminent domain of a contract dedicating land to the common use and benefit of a town.

The act of the Ohio legislature of 1908, § 3283, and the ordinance of

the city of Cincinnati thereunder, condemning a right of way across the public landing at Cincinnati, are not unconstitutional as impairing the obligation of the contract dedicating the landing as a common for the use and benefit of the town forever.

A dedication of land as a common for use and benefits of the town forever as shown on a plan, and the acceptance by the town and the sale of lots under the plan constitutes a contract the obligation whereof is protected by the contract clause of the Federal Constitution.

The right of every State to exercise the power of eminent domain as to every description of property is an inherent power without which it cannot perform its functions.

The power of eminent domain was not surrendered by the States to the United States or affected by the Federal Constitution except that it must be exercised with due process of law and on compensation being made.

The power of eminent domain extends to tangibles and intangibles, including choses in action, contracts and charters.

An appropriation under eminent domain with compensation of a contract neither challenges its validity nor impairs the obligation. It is a taking, not an impairment, of its obligation.

Every contract, whether between the State and an individual or between individuals only, is subject to the law of eminent domain, for there enters into every engagement the unwritten condition that it is subject to appropriation for public use.

The ordinance of the Northwest Territory ceased to be, in itself, obligatory upon the States carved from that Territory after their admission into the Union as States, except so far as adopted by the States themselves and made a part of the laws thereof.

On its admission, whatever the conditions may have been prior thereto, whether from the conditions of the Northwest Ordinance or other territorial government, a State at once becomes entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States, and all limitations on sovereignty in the act of admission not subsequently adopted by the State itself are inoperative. *Coyle* v. *Oklahoma*, 221 U. S. 559.

When the United States as an independent sovereign creates a territorial government with legislative authority, subject only to limitations of the creating act, it will be presumed to grant to the new dependent government the vital powers incident to and necessary to sovereignty unless it plainly appears to be withheld.

The right to appropriate property being a necessary incident to sov-

ereignty, Art. 2 of the Northwest Ordinance giving power only to take property in a public exigency for compensation, will be broadly construed as simply limiting the general right of eminent domain by the requirement that compensation be made.

A public exigency exists for the common preservation when the legislature declares that for a *bona fide* public purpose there should be a right of way for a common carrier across a particular piece of property, and in such a case the propriety of the appropriation cannot be questioned by any other authority. *United States* v. *Jones*, 109 U. S. 519.

Quære: Whether the only power of eminent domain to which a contract is subordinate is the power as it existed at the time that the contract was made or at the time of appropriation.

82 Oh. St. 466, affirmed.

THE facts, which involve the constitutionality of a municipal ordinance of Cincinnati and statute under which it was passed permitting condemnation for a right of way, are stated in the opinion.

Mr. Edward M. Ballard and *Mr. Albert Bettinger* for plaintiff in error:

The dedication of the public landing in January, 1789, was a contract between the dedicators and the subsequently created city of Cincinnati, by which the latter became perpetually obligated to hold the same in trust for the public; and inasmuch as the power of eminent domain then residing in the Northwest Territory was, by the ordinance of 1787, limited to cases for the common preservation, no greater power was read into the contract, and therefore the application of § 3283*a* to this public landing impairs the obligation of that contract. *Fletcher* v. *Peck*, 6 Cr. 87, 136.

The law of eminent domain only as it existed at the time of the dedication like all other laws then existing was read into the contract of dedication.

Where the plenary power of eminent domain exists at the time contracts are entered into, the subsequent

exercise of the right by the sovereign does not impair their obligations.

In the case at bar, however, when the contract dedicating the public landing was made in January, 1789, no power of eminent domain resided in the Northwest Territory, which was not a sovereign but only a dependency of the Confederate States. The only power of eminent domain then existent was that which was conferred upon the Territory by the ordinance of 1787, and which was limited to the taking of private property only for the common preservation in cases of public exigencies. *Von Hoffman* v. *Quincy*, 4 Wall. 535, 555; *McCracken* v. *Hayward*, 2 How. 608, 612.

As to what laws do and do not impair the obligation of contracts, see *Smith* v. *Parsons*, 1 Ohio, 236, 240; *Goodale* v. *Fennell*, 27 Oh. St. 426; *Sturges* v. *Crowningshield*, 4 Wheat. 122; *Green* v. *Biddle*, 8 Wheat. 1.

It is clear that only such laws as are in force at the time the contract is made become terms of it, and that subsequent laws do not apply to previously made contracts if their effect would be to impair the obligation of the same.

Constitutional provisions, equally with legislative enactments, come within the inhibition against the impairment of contractual obligations; *Railroad Co.* v. *McClure*, 10 Wall. 511, 515; *Shreveport* v. *Cole*, 129 U. S. 36, 42; *Gunn* v. *Barry*, 15 Wall. 610, 623; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131, 135; *Clay County* v. *Society for Savings*, 104 U. S. 579; *Dodge* v. *Woolsey*, 18 How. 331; *Matheny* v. *Golden*, 5 Oh. St. 369.

A contract which fixes the perpetual use to which the land shall be put, cannot by subsequent enlargement of the power of eminent domain be taken for a different use.

The inhibition against the impairment of contractual obligations is found in all the fundamental laws of the country from the beginning, and is absolute. *Toledo Bank* v. *Bond*, 1 Oh. St. 623, 687.

The contract in this case does not fall within the class of contracts that are made under a government then possessing the power of eminent domain, which is asserted against the contract, but was made under a government, whose power of eminent domain was limited to the "common preservation" in cases of public exigencies.

The phrase "equal footing with the original States in all respects whatever," does not mean that each new State had to come into the Union with its inherent power of eminent domain unabridged and unlimited, or with its power of eminent domain the same as the original States. It means that with respect to the National Government they must be on an equal footing with the original States. The new States must have the same obligations toward the National Government, and are entitled to the same privileges as the original States. In all other respects each State is supreme within her own territorial limits, free to frame her own constitution, enact her own laws, abridge her sovereignty, and therefore to limit her inherent right of eminent domain. *Matheny* v. *Golden*, 5 Oh. St. 369, 370; *Case* v. *Toftus*, 39 Fed. Rep. 730; *State* v. *Boone*, 84 Oh. St. 346, 359; *Spooner* v. *McConnell*, 1 McLean, 337, 348; *Land* v. *Manistee River Imp. Co.*, 123 U. S. 288, 295; *Coyle* v. *Smith*, 221 U. S. 559, 567, 579, recognize the right of a State to be supreme in its own territory after its admission into the Union.

As to the right of the State to alter or abridge the power of eminent domain by a change in the Constitution, see *Toledo Bank* v. *Bond*, 1 Oh. St. 622, 688.

It cannot be said that because of the dedicators' knowledge that a new State was to be formed, the contract of dedication was made subject to whatever power of eminent domain the new State should by its constitution retain.

The power of eminent domain is not any greater than the right of a State to alter or destroy her municipal corporations, either by constitutional change or legislative

act. Each is an attribute of sovereignty, but such alteration or destruction is within the constitutional inhibition against impairing the obligation of contracts. *Graham* v. *Folsom*, 200 U. S. 248, 253.

Only the power of eminent domain as it existed in the Northwest Territory at the time of the dedication in January, 1789, was read into the contract of dedication, and the exercise of any different power of eminent domain impairs the obligations of that contract, and is forbidden by the United States Constitution.

The only power of eminent domain in the Northwest Territory under the ordinance of 1787 was where "the public exigencies made it necessary for the common preservation."

Where a political community is a dependency as distinguished from a sovereignty, having no inherent power of eminent domain, it may acquire the power by delegation from the sovereignty of which it is a dependency.

Thus the power of eminent domain inheres in the Federal Government and the States by virtue of their sovereignty, while it does not inhere in the Territories of the Federal Government, which, instead of possessing sovereignty, are mere subordinate political divisions or dependencies of the Federal Government, and therefore have only such power of eminent domain as is delegated to them.

As the Northwest Territory was a dependency of the Confederacy, without sovereignty, it possessed no inherent power of eminent domain but only such power as was in some way conferred upon it. *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Chappel* v. *United States*, 160 U. S. 499; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668.

The power of eminent domain was not conferred by the provision that no man shall be deprived of his liberty or property, but by the judgment of his peers or the law of

the land. *Den* v. *Hoboken Land & Imp. Co.*, 18 How. 272, 276.

The phrase "due process of law" has been variously defined, but it is now well settled that it has reference to ordinary judicial proceedings in court. *Hagar* v. *Reclamation District*, 111 U. S. 701, 708; *Turpin* v. *Lemon*, 187 U. S. 51, 58; *Hurtado* v. *California*, 110 U. S. 516, 537; and see definition given by Mr. Webster in his argument in the *Dartmouth College Case*, 4 Wheat. 518, 581.

Another reason for the claim that the power of eminent domain was limited to a taking for the common preservation is that the framers of the ordinance by express provision safeguarded the rights of the people by insuring compensation when their property is taken for the "common preservation," while no such restriction is made with reference to taking private property for other public uses.

The reason is clear. The United States after the adoption of the Federal Constitution had the inherent power of eminent domain, and to guard against the arbitrary exercise of the power, compensation was secured to the owner, and the taking had to be "by due process of law." The Northwest Territory, on the other hand, had no power of eminent domain except for the "common preservation" and there was, therefore, no need for a provision for compensation except when taken for the common preservation. See the only case on the subject, *Newcomb* v. *Smith*, 1 Chandler (Wis.), 71.

The power of eminent domain was not conferred on the Northwest Territory by the provision in the ordinance that "the governor, legislative council and house of representatives shall have authority to make laws in all cases for the good government of the district," etc.

Mr. J. B. Foraker and *Mr. Ellis G. Kinkead* for defendant in error:

Under the ordinance of 1787, there was conferred upon

the territorial legislature the power of eminent domain. *Giesy* v. *Railroad Co.*, 4 Oh. St. 308.

Whatever limitations the ordinance contained upon the exercise by the territorial legislature of the power of eminent domain, they became of no effect upon the organization and admission of the State of Ohio into the Union.

The State of Ohio has had since 1802 the full power of eminent domain, excepting such part as is reserved to the Federal Government; there is no land within the State of Ohio not subject to the State's power of eminent domain. That power is a right of sovereignty superior to any private right of property, however or whenever acquired. Against the sovereignty no private rights avail. Contracts are not protected from it by the Federal Constitution or the state constitution, for the very contract may itself be appropriated by the State in the exercise of this power. Art. I, § 10 of the Federal Constitution, forbidding a State to pass any law impairing the obligation of contracts, was not to limit the exercise by the State of the power of eminent domain. When the effect of such exercise is to appropriate a contract right for which compensation is given, the contract is not thereby impaired or abrogated, but its validity is recognized, and all rights thereunder merely pass by forcible purchase to the State. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Offield* v. *Railroad Company*, 203 U. S. 372, 382; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 582.

All land within Ohio has at all times since its occupation by civilized governmental authority been subject to the right of eminent domain.

This court has repeatedly held that the ordinance of 1787 ceased to be operative in the territory of States subsequently formed out of the Northwest Territory. *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Huse* v. *Glover*, 119 U. S. 543; *Sand* v. *Manistee River Imp. Co.*, 123 U. S. 288, 295; *Hamilton* v. *Vicksburg &c. R. R. Co.*, 119

U. S. 280, 284; *Cardwell* v. *Bridge Company*, 113 U. S. 205, 210, 212; *Ward* v. *Racehorse*, 163 U. S. 504.

In *Coyle* v. *Oklahoma*, 221 U. S. 559, these cases and others to the same effect were fully reviewed and approved. The decision in all these cases rests upon the fact that all States admitted into the Union subsequent to the adoption of the Federal Constitution must come in on an equal footing with the original States in all respects.

Mr. Justice Lurton delivered the opinion of the court.

Under an act of the legislature of the State of Ohio of May 9, 1908 (Laws 1908, p. 308), being § 3283–a, and an ordinance of the city of Cincinnati in pursuance of that act, the defendant railroad company instituted, in a court of the State of Ohio, a suit to condemn a right of way for an elevated railroad track across the public landing at Cincinnati. Pending the condemnation proceeding the city of Cincinnati filed a bill in one of the Common Pleas Courts to enjoin the railroad company from constructing its railway across said public landing in pursuance of its agreement and contract with the city under the ordinance mentioned, and to restrain the prosecution of its pending petition for the condemnation of an easement of way across the landing. The ground upon which it was sought to stop the condemnation proceeding and prevent the company from constructing its elevated tracks across the public landing was that § 3283–a, Revised Statutes of Ohio, under which alone an easement of way might be appropriated, was repugnant to Art. I, § 10 of the Constitution of the United States, forbidding any State to pass any law impairing the obligation of a contract, in so far as § 3283–a, applied to the particular property across which an easement of way was sought to be appropriated.

That section, so far as necessary to be here stated, provides that upon compliance therewith any railroad

company owning or operating a railroad wholly or partially within the State might "use and occupy for an elevated track any portion of any public ground lying within the limits of any municipality and dedicated to the public for use as a public ground, common, landing or wharf, or for any other public purpose," excepting streets, alleys and public roads. It is provided that before instituting a proceeding for the appropriation of the needed easement, which is to be according to a general statute referred to, such company shall submit plans for the structure, and come to an agreement with the city council of the municipality concerned, as to the terms and conditions upon which the easement shall be occupied.

The proprietors of the grant of land upon which the city of Cincinnati was originally laid out, made a plan or plat of the proposed town, according to which plan a strip of ground between Front street and the Ohio river was set apart "as a common for the use and benefit of the town forever." The effect of the sale of the town lots under this plan has long since been held to constitute a dedication of the river front strip to the public use and to have vested in the city of Cincinnati a valid title in trust for the public use in the same manner that streets were held under the same plat or plan. *City of Cincinnati* v. *White*, 6 Pet. 431. This dedication was made in 1789, and the property has ever since been used as a public landing or wharf.

A demurrer to the petition was sustained by the Court of Common Pleas, and the bill dismissed. This was affirmed upon appeal to the Circuit Court, and again affirmed upon appeal to the Supreme Court of the State.

That the dedication in 1789, and acceptance by the then town of Cincinnati constitutes a contract with the dedicators obligatory upon the town and its successor, the city of Cincinnati, may be conceded. The contention is that the Ohio act of May 9, 1908, now § 3283-a,

Revised Statutes of Ohio, is an impairment of the contract, forbidden by the tenth section of the first Article of the Constitution of the United States. But the right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions. It is a power not surrendered to the United States and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, a law authorizing it, and provision made for compensation. This power extends to tangibles and intangibles alike. A chose in action, a charter, or any kind of contract, are, along with land and movables, within the sweep of this sovereign authority.

The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *The West River Bridge Co.* v. *Dix*, 6 How. 507; *N. O. Gas Co.* v. *La. Light Co.*, 115 U. S. 650; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Offield* v. *Railroad Co.*, 203 U. S. 372.

Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use. *The West River Bridge Co.*

v. *Dix*, 6 How. 507; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 691–2.

These general propositions are not challenged.

But it is said, that the right of appropriating private property to a public use possessed by the State of Ohio is only that which is defined and limited by the second article of the ordinance of 1787 (July 13, 1787, 1 Stat. 52), creating a government for the Northwest Territory, which embraced the territory which later became the State of Ohio. That ordinance, after providing for a territorial government, declares certain political principles to be fundamental and that they should constitute the "basis of all laws, constitutions and governments," thereafter organized out of that territory and should be regarded as "articles of compact between the original States and the people and States in the said territory, and be unalterable unless by common consent." The article referred to and claimed now to be still obligatory, is in these words:

"No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

But the ordinance of 1787 as an instrument limiting the powers of government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of States to be carved out of that Territory, ceased to be, in itself, obligatory upon such States from and after their admission into the Union as States, except in so far as adopted by such States and made a part of the law thereof. This has been the view of this court so often announced as to need no further argument: *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Permoli* v. *First Municipality*, 3 How. 589; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688.

In *Escanaba Co.* v. *Chicago, supra,* it was said:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States *in all respects whatever.*' 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River."

In *Coyle* v. *Oklahoma,* 221 U. S. 559, the case of *Escanaba Co.* v. *Chicago,* and the cases cited therein, were fully reviewed and held applicable to conditions imposed by Congress in the enabling act under which Oklahoma was admitted, and all limitations in that act were held inoperative after admission, in so far as they had not been subsequently adopted by the State and were in derogation of the equality in power of that State with the other States of the Union.

It is next contended that whether the provisions of Art. 2 now constitute the irrevocable fundamental law of Ohio or not, that that provision was the only law of eminent domain existing in 1789, and as such is to be regarded as read into the contract of dedication, and, therefore, is the only power of eminent domain to which that contract was subordinate. Upon this hypothesis is based the contention that any subsequent law of Ohio authorizing a taking of this property for a purpose or use not within

the terms of the ordinance of 1787 is a law impairing the obligation of a contract.

But the assumption that the power of eminent domain possessed by the Northwest Territory in 1787 was limited as claimed is untenable. The clause referred to assumes the existence of a general power of eminent domain in the Government, and provides that when exerted there must be full compensation for the property taken or the services required. That this is so is apparent not only from the language of the clause, but from a general consideration of the purpose and object of the Congressional act in which the article appears. The ordinance of 1787 was a law providing for the government of the territory of the United States northwest of the River Ohio. It provided for the appointment of a governor and secretary and for the appointment of judges and the organization of courts with common-law jurisdiction. To the governor and judges was granted legislative power to adopt and publish such laws of the original States as should seem to be adapted to the conditions, which were to be and remain in force unless disapproved by Congress. Authority to elect a legislature was conferred when there should be five thousand inhabitants.

Upon this Article 2, heretofore set out, is claimed to be a contractual limitation, based upon the contract of dedication, by which this particular strip of river front is forever protected against an exercise of the power of eminent domain by the State of Ohio, except where "the public exigency makes it necessary for the common preservation." If we assume, for argument, that an affirmative limitation upon the right of appropriating property to any public purpose would so enter into any contract as to forever afterwards bind the hands of the State, no such situation is here presented. Article 2 is not a grant of power, but a limitation upon the power of eminent domain assumed to exist. It was conferred upon the governor and judges

by the power to adopt and publish the laws of any original State deemed appropriate, and by the second section there was conferred upon the governor and legislature, when organized, "authority to make laws in all cases . . . not repugnant to the principles and articles in this ordinance established and declared." This legislative power, temporarily in the governor and a majority of the judges, and then in the governor and the legislature, when organized, included, by necessary implication, the general power to provide for the appropriation of private property for public purposes. If this is not the case, then the ordinance granted no power of that kind whatever, for the clause above cited is obviously a mere restriction by which compensation is required.

This right of appropriating private property to a public use is one of the powers vital to the public welfare of every self-governing community. It is a power which this court has described as an "incident to sovereignty," a power which "belongs to every independent government." In *United States* v. *Jones*, 109 U. S. 513, 518, it was said:

"The provision found in the Fifth Amendment to the federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the general government—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—cannot be transferred to a State any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority."

That the Northwest Territory was not a State, but a

mere territorial dependency is of no consequence. The United States was an independent sovereign, and when it created a territorial government with legislative authority subject only to the limitations of the creating act, it granted to this new dependent government this vital power unless it plainly appears that it was withheld.

The denial of such a power to this new government intended as the forerunner of a group of States west of the Ohio, or its restriction to purposes of necessary defense only, as appellant would construe the language of the article above set out, is not to be easily or lightly presumed. The power was one necessary to the work which this pioneer community was set on doing. It was a power well nigh as essential to the existence of the government as the taxing power. The language of Chief Justice Taney in the *Charles River Bridge Case*, 11 Pet. 420, 547, when speaking of a contention that the State of Massachusetts had surrendered the power, by granting a charter for the construction of a particular bridge, to appropriate that bridge so authorized, is apt and appropriate, when we are asked to construe the ordinance of 1787 as denying to the government of the Northwest Territory a power so important to the welfare of its people. Upon this he said:

"But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserv-

ing it undiminished. And when a corporation alleges, that a State has surrendered for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass; the community have a right to insist, in the language of this court above quoted, 'that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

Nor should the particular language of the article above set out be given a narrow or hypercritical meaning. The plain purpose was but to limit the general right of eminent domain by the requirement that compensation should be made. A public "exigency" exists, for the "common preservation," when the legislature declares that for a bona fide public purpose there should be a right of way for a common carrier across a particular piece of property. The uses to which § 3283–a authorizes a condemnation of a right of way are undeniably public and not private uses. When that is the case, "the propriety or expediency of the appropriation cannot be called in question by any other authority." *United States* v. *Jones*, 109 U. S. 519.

It follows then, first, that the legislative power of the State of Ohio was not restricted in any way by the provisions of the second article of the ordinance of 1787 after its admission to the Union, and it has every power of eminent domain which pertains to other States, unless limited by its own constitution; and, second, that if the law of eminent domain as it existed at the time of the dedication is to be read into the contract, that that law, properly interpreted, was not such as to forbid an appropriation such as is here involved.

The judgment of the Supreme Court of Ohio must, therefore, be

Affirmed.

UNITED STATES *v.* CITROEN.

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

No. 30. Argued November 1, 1911.—Decided February 19, 1912.

In order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself in the condition in which it is imported.

A prescribed rate of duty cannot be escaped by disguise or artifice; but if the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured for the purpose of being imported at a lower rate.

The court is not concerned with reasons for a distinction in the tariff act,—it is enough that Congress made it.

Pearls, unset and unstrung, are dutiable under par. 436 of the tariff act of 1897 at ten per centum and not under par. 434 at sixty per centum, because capable of, or intended for, being strung as a necklace.

The fact that a pearl has been drilled—as is the case with more than seventy-five per cent. of all large pearls when they come from the wholesale dealers—does not take it out of par. 436 and make it dutiable under par. 434 at sixty per centum.

Congress will not be presumed in framing a tariff act to have contemplated a radical departure from the policy of former tariff legislation when it will also be necessary to presume that Congress in doing so also disregarded facts of the trade.

After reviewing provisions of former tariff acts and prior decisions in regard to pearls and the duties to be levied upon them, *held*, that pearls, not strung or set, although suitable for being strung as a necklace are not to be classed by similitude under par. 434 and subjected to the higher duty of sixty per centum.

Where a tariff act, as that of 1897, provides for pearls set or strung, and for pearls not strung or set, it will not be presumed that Congress intended to leave an unenumerated class of pearls to be classed by similitude.

166 Fed. Rep. 693, 92 C. C. A. 365, affirmed.

THE facts, which involve the construction of paragraphs 434 and 436 of the tariff act of 1897 as applied to pearls, are stated in the opinion.

Mr. Assistant to the Attorney General Fowler for the United States:

The Circuit Court of Appeals improperly adopted as the facts the findings of the Board of General Appraisers. *Apgar* v. *United States*, 78 Fed. Rep. 332, 334.

The new evidence introduced in the Circuit Court was, in substance, that the pearls were assembled into a complete necklace and were a necklace, and were so worn by the purchaser, before importation.

Had this evidence been before the board, the board would, according to its own declaration, have overruled the protest and affirmed the collector's classification.

The decision of the Circuit Court of Appeals conflicts with the well-recognized rule laid down in other cases for the assessment of duties upon pearls. *Tiffany* v. *United States*, 103 Fed. Rep. 619.

A perforated pearl is not in its natural state, although the cost of perforation is but trifling. The amount of expense cannot be considered in determining whether the pearl has been changed from its natural state. *Seeberger* v. *Farwell,* 139 U. S. 608; *Tiffany* v. *United States,* 105 Fed. Rep. 766; *Tiffany* v. *United States,* 112 Fed. Rep. 672; *Neresheimer* v. *United States,* 131 Fed. Rep. 977.

In the various cases relating to the assessment of duties upon drilled pearls, three theories have been advanced: First. The one adopted by Judge Coxe, in the second *Tiffany Case,* 105 Fed. Rep. 766, holding them assessable as strung pearls under the similitude clause; second, the rule adopted by the Circuit Court of Appeals in the same *Tiffany Case* and approved in the *Neresheimer Case, supra,* and applied in the present case, that such pearls must be classified under the similitude clause as belonging to either par. 434 or 436; and third, the method suggested, but not followed, by the Circuit Court of Appeals in the present case, that pars. 434 and 436 embrace all kinds of pearls, and the similitude clause has no application.

That this last method is not the correct one, is clearly shown by Judge Lacombe in the first *Tiffany Case.* See provisions relating to pearls in the previous tariff acts. Paragraphs 452 and 453 of the act of October 1, 1890 (26 Stat. 600); pars. 337 and 338 of the act of August 28, 1894, c. 349, 28 Stat. 534.

The finding of fact by Judge Lacombe is not only abundantly sustained by the evidence, but when the evidence is taken as a whole no other inference can be drawn therefrom.

Years were spent in the collection of these pearls. They were assorted and selected as to size, quality, etc., and kept intact for years, and became well known in the trade as a collection for a valuable necklace.

When an article is separated into its component parts, which parts are imported separately, they are assessable

for duty as if the article were imported as a whole. *United States* v. *Schoverling*, 146 U. S. 76; *United States* v. *Irwin*, 78 Fed. Rep. 799; *Isaacs* v. *Jonas*, 148 U. S. 648; *Read* v. *Certain Merchandise*, 103 Fed. Rep. 197; *McMillan Co.* v. *United States*, 116 Fed. Rep. 1018.

The right of an importer to so manufacture his goods as to reduce the rate of duty extends only to its manufacture, and does not permit him to change its character after manufacture in order to avoid a higher rate of duty. *Merritt* v. *Welsh*, 104 U. S. 694, 700; *Seeberger* v. *Farwell*, 139 U. S. 608; *Vantine & Co.* v. *United States*, 155 Fed. Rep. 149.

The court will consider the intent of an importer to defraud the revenue, and also whether or not a certain element or ingredient of the imported article is a trifling or substantial portion thereof, unless such consideration is prohibited by the language of the statute. *Falk* v. *Robertson*, 137 U. S. 225; *Seeberger* v. *Schlesinger*, 152 U. S. 581, 587.

The pearls in question were jewelry or parts thereof, finished or unfinished, and therefore were properly classified under par. 434.

Mr. W. Wickham Smith, with whom *Mr. John K. Maxwell* was on the brief, for respondent:

The Circuit Court of Appeals did not pursue any improper method with regard to the findings of the Board of General Appraisers.

The findings of the board should always be adopted by tribunals of review except where they are without evidence to support them, where they are against the weight of evidence, or where they have been overborne by new testimony taken in the Circuit Court. *Gabriel & Schall* v. *United States*, 123 Fed. Rep. 296; *White* v. *United States*, 72 Fed. Rep. 251; *In re Van Blankensteyn*, 56 Fed. Rep. 474; *In re Kursheedt Mfg. Co.*, 49 Fed Rep. 633; *In re White*,

53 Fed. Rep. 787; *Marine* v. *Lyon*, 65 Fed. Rep. 992; *In re Bing*, 66 Fed. Rep. 727; *Mexican Onyx Co.* v. *United States*, 66 Fed. Rep. 732; *Belcher* v. *United States*, 91 Fed. Rep. 975; *Myers* v. *United States*, 110 Fed Rep. 940; *Leerburger* v. *United States*, 113 Fed. Rep. 976; *United States* v. *Jackson*, 113 Fed. Rep. 1000; *United States* v. *Riebe*, 1 Customs App. 19.

As to the new evidence taken in the Circuit Court, one of the witnesses did not contradict the testimony taken before the board, and if he had, one witness's testimony could not be allowed to upset a finding of the board made on the testimony of a number of witnesses. *Page* v. *United States*, 113 Fed. Rep. 1006; *Bromley* v. *United States*, 154 Fed. Rep. 399.

There is nothing in the evidence of the purchaser to justify the assertion made by the Government that the pearls "were a necklace" and "were delivered to her as a necklace" at Newport.

If the decision of the Circuit Court of Appeals conflicts with other decisions in pearl cases, that constitutes no reason for its reversal.

As to the so-called finding of facts by Judge Lacombe, there was ample testimony to support it.

The Government's argument as to an article separated into its component parts (which parts are imported separately), as well as the authorities cited thereunder, are wholly irrelevant to the point involved in this controversy. *United States* v. *Irwin*, 78 Fed. Rep. 799; *Isaacs* v. *Jonas*, 148 U. S. 648, do not apply to this case.

The contention of the Government, that an importer has no right to change the character of goods after manufacture in order to avoid a higher rate of duty, is not only irrelevant, but unsound.

Every importer has a right to have his goods assessed for duty at the appropriate rate as and what they are

when they come into the port and before the customs officers. *Seeberger* v. *Farwell*, 139 U. S. 608; *Worthington* v. *Robbins*, 139 U. S. 337; *Merritt* v. *Welsh*, 104 U. S. 694; *United States* v. *Wotton*, 53 Fed. Rep. 344; *Johnson* v. *United States*, 123 Fed. Rep. 997; *Godwin* v. *United States*, 66 Fed. Rep. 739; *Paturel* v. *Robertson*, 41 Fed. Rep. 329; *Hunter* v. *United States*, 143 Fed. Rep. 914; *Stone & Downer* v. *United States*, 147 Fed. Rep. 603, 605; *Mautner* v. *United States*, 84 Fed. Rep. 155; *In re Blumenthal*, 51 Fed. Rep. 76; *United States* v. *Levitt*, 26 Fed. Cas. 919; *In re Schoverling*, 45 Fed. Rep. 349; aff'd in *United States* v. *Schoverling*, 146 U. S. 76.

The pearls could certainly not be held dutiable as jewelry or parts thereof and assessed accordingly under par. 434 at 60 per cent.

The Government's claim is an unjust one.

In all cases of doubt as to the meaning of a revenue statute, the decision should be in favor of the importer who has to pay the tax, and there never was a case more strongly calling for the application of that rule than the case at bar. *United States* v. *Wigglesworth*, 2 Story, 369; *Rice* v. *United States*, 53 Fed. Rep. 910; *Hartranft* v. *Wiegman*, 121 U. S. 609; *Mathewson* v. *United States*, 71 Fed. Rep. 394; *United States* v. *Adams*, 54 Fed. Rep. 147; *Adams* v. *Bancroft*, 3 Sumner, 384; *McCoy* v. *Hedden*, 38 Fed Rep. 89; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *Hempstead* v. *Thomas*, 122 Fed. Rep. 538; *Hayes* v. *United States*, 150 Fed. Rep. 63, 66; *United States* v. *Merck*, 91 Fed. Rep. 639; *Franklin Sugar Refining Co.* v. *United States*, 142 Fed. Rep. 376, 382; *Powers* v. *Barney*, 5 Blatchf. 202; *S. C.*, 19 Fed. Cas. 1234; *United States* v. *Davis*, 54 Fed. Rep. 147; *United States* v. *Michelin Tire Co.*, 1 Customs App. 518; *United States* v. *Hatters' Fur Exchange*, 1 Customs App. 198; *United States* v. *Matagrin*, 1 Customs App. 309, 312; *Woolworth* v. *United States*, 1 Customs App. 120.

MR. JUSTICE HUGHES delivered the opinion of the court.

Bernard Citroen, on June 11, 1906, imported into the United States thirty-seven drilled pearls—unset and unstrung—divided into five lots, separately inclosed. The collector classified them by similitude "as pearls set or strung, or jewelry," dutiable at sixty per cent. ad valorem under par. 434 of the tariff act of 1897. 30 Stat. 151, p. 192. The Board of General Appraisers sustained the importer's protest, holding the pearls to be dutiable by similitude at ten per cent. under par. 436. The Circuit Court, on additional testimony, reversed this ruling and affirmed that of the collector, and this decision was, in turn, reversed by the Circuit Court of Appeals, which held that the board was right. 92 C. C. A. 365; 166 Fed. Rep. 693. The case comes here on certiorari.

The paragraphs of the act of 1897 (30 Stat., p. 192), which are in question, read as follows:

"434. Articles commonly known as jewelry, and parts thereof, finished or unfinished, not specially provided for in this Act, including precious stones set, pearls set or strung, and cameos in frames, sixty per centum ad valorem.

"436. Pearls in their natural state, not strung or set, ten per centum ad valorem."

The pearls had been purchased by the importer's brother and had been offered for sale, collectively and in lots, in Paris, London and Berlin, and to show that the collection was a desirable one for a necklace they had been strung from time to time on a silk cord. It appeared that Mrs. Leeds, the present owner, had seen the pearls in Paris, both loose and on a string. As she testified they were brought to her hotel "both on the string and off the string; it was strung up at odd times, then it was taken apart and other pearls were put in and others taken out, so it

was strung several times." She was permitted to wear the pearls as a necklace; and finally bought them, it being agreed that they should be delivered to her in this country. They were so delivered in the condition in which they were imported, without string or clasp, and to these the purchaser subsequently added six pearls and formed the necklace she desired.

With respect to the character of the imported collection the Board of General Appraisers found: "Pearls of greater dimensions than the average are comparatively rare; hence it frequently requires several years' search in order to secure a sufficient number to form a necklace, all accurately matched in the essential features of size, color and luster. Such a collection thus assembled would, no doubt, command a higher price than the aggregate value of the separate pearls. On the other hand, a sufficient number of pearls, although of large size, required to form a necklace, matched as to size, but not otherwise, except a mere regard for comparative color, could be assembled within a short time and at a price based upon the cost of each separate pearl. In order to dispose of thirty or more pearls to one purchaser, such a collection would usually be sold at a less price than the aggregate would amount to were each pearl sold separately. The evidence shows and we find that the pearls in question belong to the latter and not to the first class." T. D. 28,246; G. A. 6617. And as to these facts there is nothing in the evidence introduced in the Circuit Court which requires a different conclusion.

The questions presented are (1) whether the pearls fall directly within the description of the paragraph (434) relating to jewelry, and (2), if not, whether they are brought within this paragraph, through similitude, by virtue of § 7. 30 Stat. 205.

First. The rule is well established that "in order to produce uniformity in the imposition of duties, the duti-

able classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington* v. *Robbins*, 139 U. S. 337, 341; *Dwight* v. *Merritt*, 140 U. S. 213, 219; *United States* v. *Schoverling*, 146 U. S. 76, 82; *United States* v. *Irwin*, C. C. A., 2d Cir. 78 Fed. Rep. 799, 802. This, of course, does not mean that a prescribed rate of duty can be escaped by resort to disguise or artifice. When it is found that the article imported is in fact the article described in a particular paragraph of the tariff act, an effort to make it appear otherwise is simply a fraud on the revenue and cannot be permitted to succeed. *Falk* v. *Robertson*, 137 U. S. 225, 232. But when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate. *Merritt* v. *Welsh*, 104 U. S. 694, 704; *Seeberger* v. *Farwell*, 139 U. S. 608, 611. "So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." *Merritt* v. *Welsh*, *supra*. The inquiry must be—Does the article, as imported, fall within the description sought to be applied?

In the paragraph as to jewelry (434) Congress expressly defined what pearls were to be included. The paragraph reads, "including . . . pearls set or strung." It does not say pearls that can be strung, or that are assorted or matched so as to be suitable for a necklace, but pearls "set or strung." We are not concerned with the reason for the distinction; it is enough that Congress made it. Had these pearls never been strung before importation, no one would be heard to argue that they fell directly within the description of paragraph 434 because they could be strung, or had been collected for the purpose of string-

ing or of being worn as a necklace. Loose pearls—however valuable the collection—however carefully matched or desirable for a necklace—are not "pearls set or strung."

Nor can it be said that pearls, imported unstrung, are brought within the description of paragraph 434 because, at some time, or from time to time, previous to importation, they have been put on a string temporarily for purposes of display. The paragraph does not use a generic definition which could be deemed to define pearls previously strung though imported unstrung, but refers—in terms which shelter no ambiguity—to their condition when imported. It is not a case of parts of a described article, separately packed to avoid the specified duty on the article as a whole. *United States* v. *Schoverling, supra; Isaacs* v. *Jonas*, 148 U. S. 648; *United States* v. *Irwin, supra.* For here, the imported pearls, whether regarded separately or taken as a collection, are not within the description. It is idle to comment on the relative value of a string to hold the pearls, for this is immaterial. The statute has furnished the test and we are not at liberty to make another.

Second. Although the pearls do not fall directly within paragraph 434, the question remains whether they are brought within it by similitude. The similitude clause (§ 7) applies to articles not enumerated in the tariff act, and hence it governs the rate in this case only if it be found that the pearls are excluded from the description of paragraph 436, which enumerates "pearls in their natural state, not strung or set." May it fairly be said that in these two classes of pearls—those "set or strung" and those "in their natural state, not strung or set"—Congress intended to describe all pearls, or is there a sort of pearls, for example, those drilled and matched so as to be suitable for a necklace, which must be said to have been left unenumerated?

In the customs act of 1816 (3 Stat. 310) a duty of seven

and a half per cent. ad valorem was laid on "precious stones and pearls of all kinds, set or not set." The act of 1842 (5 Stat. 548, 555) made the duty seven per cent. "on gems, pearls, or precious stones." That of 1846 (9 Stat. 42, 45, 48) fixed the rate at thirty per cent. for "diamonds, gems, pearls, rubies, and other precious stones, and imitations of precious stones, when set in gold, silver, or other metal," and at ten per cent. on "diamonds, gems, pearls, rubies, and other precious stones, and imitations thereof, when not set." In 1857 (11 Stat. 192) and in 1861 (12 Stat. 178, 190), the same distinction was maintained.

In the Revised Statutes (§ 2504, p. 484) we find the following: "Precious stones and jewelry.—Diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones, when not set: ten per centum ad valorem; when set in gold, silver, or other metal, or on imitations thereof, and all other jewelry: twenty-five per centum ad valorem." In 1883 (22 Stat. 488, 513, 514) the rate of duty was made twenty-five per cent for "jewelry of all kinds" and ten per cent. for "precious stones of all kinds." In 1890 (26 Stat. 600, 601) the jewelry paragraph (452), which fixed the rate at fifty per cent. embraced all articles, not elsewhere specially provided for, which were composed of precious metals or imitations thereof (including those set with pearls) and known commercially as jewelry; and the following paragraph (453) read: "Pearls, ten per centum ad valorem." By the act of 1894 (28 Stat. 509, 534) the jewelry rate was reduced to thirty-five per cent.; the paragraph as to pearls was changed so that instead of describing pearls generally it read: "Pearls, including pearls strung but not set, ten per centum ad valorem," and pearls set were placed with precious stones set, with a duty of thirty per cent.

It will thus be observed that when pearls were enumerated in the tariff acts prior to that of 1897, the enumeration

was evidently intended to be comprehensive and covered all pearls not included in the provision for jewelry. The act of 1897 placed "pearls set or strung" in the jewelry paragraph, and then provided the rate of ten per cent. for "pearls in their natural state, not strung or set."

To complete the review of the statutes, it may be added that in 1909, when new tariff legislation was under consideration, it was proposed, in the light of the decisions to which we shall presently refer, that there should be inserted in the act a clause providing that "collections of pearls selected, matched, or graded shall be dutiable as jewelry;" and the House bill so provided. H. R. Bill No. 1438, par. 447, 61st Cong., 1st sess., Cong. Rec., Vol. 44, p. 1510. Congress not only refused to make this insertion, but instead, retaining the existing rate on unstrung and unset pearls, omitted the phrase "in their natural state," and further clarified the provision by inserting the words "drilled or undrilled," so that the clause in the act of 1909 reads: "Pearls and parts thereof, drilled or undrilled, but not set or strung, ten per centum ad valorem." (36 Stat. 68.)

The difficulties that beset the construction of paragraph 436 of the act of 1897 sufficiently appear in the cases which have been brought before the courts. In 1898, Tiffany & Company imported pierced pearls described in the invoices as "pearls drilled, but not strung." They were assessed for duty at twenty per cent. as unenumerated articles, manufactured in whole or part, under § 6. The Circuit Court (103 Fed. Rep. 619) held that the phrase "pearls in their natural state" was a new phrase wholly unknown to merchants; that the words, having no commercial meaning, must be interpreted in their plain, natural sense; and that a drilled pearl was not a pearl in the natural state. It was pointed out that the selection made by Congress in the use of these words, so interpreted, seemed an unfortunate one as the effect was to

attach a higher duty to the lower article. The conclusion was that Congress had not, as presumably it intended to do, covered all kinds of pearls in the various jewelry paragraphs, but had "left a kind of pearl to be covered by one of the catch-all paragraphs," and this the court could not correct. The assessment was sustained.

On a later importation of drilled pearls this decision was followed by the collector, and the ruling was affirmed by the Circuit Court. T. D. 22,140, G. A. 4692; *Tiffany* v. *United States* (1901), 105 Fed. Rep. 766. But, while overruling the importer's protest, the court stated that the similitude clause should operate before the general clause providing for unenumerated manufactured articles and that the imported pearls bore a closer resemblance to strung pearls than to pearls in their natural state. This was in effect to hold that drilled pearls were dutiable under the jewelry paragraph at sixty per cent.

This decision was reversed by the Circuit Court of Appeals. *Tiffany* v. *United States* (1901), 50 C. C. A. (2d Cir.) 419; 112 Fed. Rep. 672. It was ruled that the pearls were not covered by either of the paragraphs 434 and 436; that the similitude clause should be applied; and that the drilled pearls more closely resembled pearls in their natural state than strung pearls and hence that the pearls in question were dutiable at ten per cent. (This was followed in T. D. 23,751, G. A. 5149.) The court, however, indicated that there would be an exception to this rule when the pearls had been so selected as to produce a collection "worth more than the aggregate values of the individual pearls composing it."

Meanwhile, Neresheimer & Company had imported two lots of drilled pearls, in March and November, 1901, respectively, one being forty-five and the other thirty-nine in number, the total value exceeding $123,000. At first they were assessed at the rate of twenty per cent.; but after the decision of the Court of Appeals in the *Tiffany*

Case, supra, both entries were reliquidated and the articles were assessed by the collector as "pearls strung" at sixty per cent. This was sustained by the Board of General Appraisers (1902), T. D. 23,748, G. A. 5146. The board found that the pearls "were imported in a morocco case, with silk lining, forming a groove running lengthwise, in which the pearls were placed and by which they were held; that they were all matched and assorted as to quality, size, color, and shape, and arranged in a graduated order, the center being the largest, and gradually decreasing in size to the last pearl at each end; that the pearls were invoiced as 'drilled pearls,' and are drilled, and when the boxes were opened gave the appearance of necklaces; that they each constituted extraordinary collections of such and were of the finest ever imported into this country; that by reason of this matching and assortment they in each case possessed a value greatly in excess of the aggregate values of the individual pearls composing the collection."

The Circuit Court affirmed the action of the board. *Neresheimer & Co.* v. *United States* (1903), 131 Fed. Rep. 977. But on appeal the decision was reversed by the Circuit Court of Appeals (1904), 68 C. C. A. (2d Cir.) 654; 136 Fed. Rep. 86. Reviewing the conflicting testimony, the Court of Appeals concluded that the evidence did not warrant a finding that the pearls had been assorted so as to acquire the increased value as a collection which would bring them within the exception suggested in the *Tiffany Case*. It was held that they were dutiable at ten per cent. "by similitude to paragraph 436."

In 1905, Charles E. Rushmore imported eighty-five pearls which the appraiser, in a special report, stated had "been carefully selected, matched, and assorted, and, in fact, are said to have been strung, and require only to be restrung to form a necklace. They are in the same condition as those passed upon by the board in G. A.

5146 (T. D. 23,748)." The Board of General Appraisers, upon this report, reversed the ruling of the collector and decided that the duty was ten per cent., on the authority of the *Neresheimer Case, supra.* No appeal was taken by the Government from this decision; it was rendered on January 21, 1905, and was circulated by the Treasury Department for the information and guidance of officers of customs and others concerned.

It thus appears that prior to 1906, when Citroen imported the pearls now in question, unstrung pearls, though drilled and matched so that they were ready to be strung as a necklace, had been held dutiable at ten per cent. The fact that they were reported to have been previously strung abroad had not been deemed of consequence in the *Rushmore Case*, and the Government had acquiesced in the ruling. Further, the exception indicated by the court in the *Tiffany* and *Neresheimer Cases* was negatived by the Board of General Appraisers, which in Citroen's case found that the pearls were not matched as to color and luster with such care as would enhance their value as a collection. T. D. 28,246, G. A. 6617. And the Circuit Court of Appeals, reversing the Circuit Court, held that there was no reason to disturb these findings. "It is fair to assume," said the Court of Appeals (p. 695), that the ruling in the *Rushmore Case* "actuated the appellant (Citroen) in importing and selling the pearls." And it is now asserted by his counsel at this bar that should the Government succeed, Citroen would be the only person who would have paid sixty per cent. duty on a collection of pearls of the sort which these have been found to be.

Later—in 1909—while the act of 1897 was still in force, Tiffany & Company imported fifty-nine pearls divided into four packages, all loose and all drilled. It appeared from the testimony before the Board of General Appraisers that M. Guggenheim, the ultimate purchaser,

visited the Paris establishment of Tiffany & Company, for the purpose of purchasing a necklace for his wife and finding nothing suitable in stock he requested the salesman to get a number of pearls together to make the desired necklace. The assortment was finally completed, a sketch being made of the necklace as it would appear when finished; and an order was given for the necklace to be made by Tiffany & Company at New York from the pearls selected. While it was not shown that the pearls had been worn abroad, it was found that they may have been, "and probably were temporarily strung in the Paris establishment one or more times to show how the string of pearls would appear as a necklace." On the authority of the decision of the Circuit Court of Appeals in Citroen's case, the Board of General Appraisers sustained the importer's protest, holding that the pearls were dutiable either directly or by similitude at ten per cent. under paragraph 436. T. D. 29,542, G. A. 6864. This was sustained by the Circuit Court (*United States* v. *Tiffany & Company*, 172 Fed. Rep. 300), and its decision was affirmed by the Circuit Court of Appeals, 101 C. C. A. (2d Cir.) 665; 178 Fed. Rep. 1006. Petition for writ of certiorari was denied by this court. 218 U. S. 675.

In its opinion in the present case, the court below (166 Fed. Rep. 696) forcibly expressed its dissatisfaction with the effort to resolve the doubt as to the meaning of the statute by a comparison "depending not upon an examination of the articles themselves, but often upon extrinsic evidence obtained long afterwards." It was a comparison, said the court, "which cannot be uniform, which imposes 10 per cent. upon one aggregation of pearls and sixty per cent. upon a similar aggregation, the rate depending upon the ability to obtain evidence of prior use in foreign countries. A comparison which does not admit of a fixed, definite rule, which encourages partiality, promotes injustice, and has broken down in practical

application. This is illustrated by the fact that in the cases which have come to the attention of the court the most marked contrariety of opinion has developed as to whether the respective collection was matched for a necklace, and whether a larger price could be obtained for the pearls singly or in combination." The Court of Appeals also stated that it would incline to the opinion, were the question an open one in that court, "that drilled pearls are not excluded from paragraph 436."

In this view we think the court was right. As was pointed out by the Board of General Appraisers: "Pearls just as they come from the shell are, strictly speaking, only such as are in their natural state." But the statute deals with the pearls of commerce. It appears that over seventy-five per cent. of all large pearls when they first come into the hands of wholesale dealers are drilled, usually in a somewhat primitive manner by the pearl fishers. It cannot be supposed that Congress contemplated such a disregard of the facts of trade, and such a radical departure from the policy of former tariff legislation, as would be involved in a construction of paragraph 436 which would exclude drilled pearls. Moreover, the language of the paragraph is "pearls in their natural state, not strung or set." This implies that the description includes pearls that can be strung or set, and pearls cannot be strung unless perforated. The words do not exclude, but embrace pearls that have been pierced, provided they are unstrung and unset.

But if drilled pearls, when neither strung nor set, are included in paragraph 436, the fact that they have been matched or assorted so as to form a collection suitable for stringing, or of being worn strung, does not take them out of the paragraph. Its language makes no distinction of that sort. The selection, or matching, does not alter the character of the pearls.

We are of the opinion that, as in former tariff acts to

which reference has been made, Congress intended to cover and did cover all pearls in the two paragraphs and did not leave a class of pearls unenumerated. The words in paragraph 436 are to be taken as describing a condition in antithesis to that described in paragraph 434, under which, if strung or set, imported pearls are dutiable as jewelry. Such an interpretation provides a simple and workable test, permitting certainty and impartiality in administration which should preëminently characterize the operation of tariff laws, and fulfills, as we believe, the purpose of Congress.

We conclude that the similitude clause has no application and that upon the facts shown the pearls imported in this case were dutiable under paragraph 436 at ten per cent.

Judgment affirmed.

FERRIS *v.* FROHMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 44. Submitted November 7, 1911.—Decided February 19, 1912.

Although complainant may assert his own common-law copyright to his play, if he alleges that defendant has obtained a copyright for the play sought to be enjoined, and the defendant stands upon the copyright and is enjoined, a Federal right is set up and denied, and this court has jurisdiction to review the judgment, under § 709, Rev. Stat.

Under the law as it existed in 1894, after a play had been performed in England, the rights of the owner to protection against the unauthorized production in England is only that given by the statutes; but the deprivation of common-law rights by force of the statutes was limited by territorial bounds within which the statute was operative.

Public representation in this, or in another, country of a dramatic composition, not printed and published, does not deprive the owner of his common-law right save by operation of statute.

At common law the public performance of a play is not an abandonment to public use.

The purpose and effect of the copyright law is not to render fruits of piracy secure; and a copyright does not protect one producing a play which is substantially a copy of an unprinted and unpublished play, the common-law property right whereof is in another.

238 Illinois, 430, affirmed.

THE facts, which involve the right of authors to unpublished dramatic compositions and productions on the stage, are stated in the opinion.

Mr. Charles H. Aldrich, with whom *Mr. Charles R. Aldrich*, *Mr. Charles G. McRoberts* and *Mr. L. E. Chipman* were on the brief, for plaintiff in error:

Plaintiff in error properly claimed below that the play which he was presenting and against which the injunction was sought, was protected by copyright under § 4952, Rev. Stat., and that the assertion of common-law rights in a drama which had been copyrighted in England by its authors who were citizens of Great Britain was in conflict with the copyright arrangements between Great Britain and this country and the act of March 3, 1891.

The final decision of the Supreme Court of Illinois was against these claimed rights and a Federal question is therefore involved. *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 153; *C., B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561, 580, 581; *Murdock* v. *Memphis*, 20 Wall. 635; *Pickering* v. *Lomax*, 145 U. S. 310; *U. P. R. R. Co.* v. *Colburn*, 164 U. S. 383; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 68; *Dale Tile Company* v. *Hyatt*, 125 U. S. 46; *Atherton* v. *Fowler*, 91 U. S. 143.

There could have been no decision in favor of the plaintiff below that did not in effect deny the right claimed under the copyright laws of the United States by the defendant below. In such case there is a Federal question whether mentioned in the opinion of the court below or not. *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 153; *C., B. & Q. Ry.*

Co. v. *Illinois*, 200 U. S. 561, 580, 581; *Murray* v. *Chatterton*, 96 U. S. 432, 441, 442.

The statute 5 & 6 Vict., c. 45, § 20, makes public performance of a dramatic work with the author's or owner's consent equivalent to the first publication of a book.

And in England it is held that performance in the United States with the owner's consent terminates the author's playright in England and makes the performing right *publici juris*. *Boucicault* v. *Chatterton*, 5 L. R. Ch. Div. 267; *Boucicault* v. *Delafield*, 1 H. & M. 597; 7 & 8 Vict., c. 12, § 19; Drone on Copyright, 583; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815, 847, 852, 856; *Chappell* v. *Purday*, 14 M. & W. 303; *Boosey* v. *Purday*, 4 Ex. Rep. 145.

The performing right or playright had no existence at common law separate and apart from the manuscript of the author, but dates its origin from 3 & 4 Wm. IV, c. 15, and in this country from the act of Congress, August 18, 1856, 11 Stat. 138. *Boucicault* v. *Chatterton*, L. R. 5 Ch. Div. 269; *Wall* v. *Taylor*, 9 L. R. Q. B. D. 727, 730; *Donaldson* v. *Beckett*, 4 Burr. 2408; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815, 920.

The English act was passed to give the right of performance and was brought about by the decision in *Murray* v. *Elliston*, 5 B. & Ald. 657; *Chappell* v. *Boosey*, 21 Ch. Div. 232, 241.

The public performance of a drama is in all respects analogous to the right to multiply copies of a book. It is not a common-law right distinct from the manuscript. Cases *supra* and *Wheaton* v. *Peters*, 8 Pet. 590; *Banks* v. *Manchester*, 129 U. S. 123, 151; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 15.

The statutes and decisions cited make public performance of the play a "publication" equivalent to the publication of a book and the word should have the same meaning in the law of literary property in this country if that equality of right with respect to such property as between

the citizens of the United States and those of the Kingdom of Great Britain intended by the international copyright arrangement and the acts passed to carry it into effect is not to be defeated.

There can be but one publication and it makes no difference where this is made if with the consent of the author or proprietor. *The Mikado Case*, 25 Fed. Rep. 183; Drone on Copyright, pp. 293, 295 and 577; *Boucicault* v. *Wood*, Fed. Cases, No. 1683; *Pierce* v. *Bushnell Mfg. Co.* v. *Werckmeister*, 72 Fed. Rep. 54; 7 Amer. & Eng. Ency. of Law, 2d ed., p. 528, sub. Copyright; 25 Cyc. 1495, and cases cited.

The contention of defendant in error is rendered presumptively unsound by the history of the struggle for international copyright arrangements. 2 Sen. Doc., 24th Cong., 2d Session, Doc. 179, and Messages of President therein; Report Royal Commissioners on Copyright; § 4971, Rev. Stat.; Act March 3, 1891, 26 Stat. 1106–1110.

It was not the intention of Congress to give to foreign citizens and composers advantages in this country which, according to the international copyright convention, were to be denied to citizens of this country abroad. *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 15.

No copyright can be obtained in this country after a publication in this or any foreign country. Rev. Stat., § 4956.

Publication puts an end to common-law rights and all rights of the author or proprietor, unless he at the same time takes steps to initiate and secure statutory rights. Drone on Copyright, pp. 100–104; MacGillivray on Copyright, 36–38; *Mercantile Agency* v. *Jewelers' Pub. Co.*, 155 N. Y. 241; *Mifflin* v. *White Co.*, 190 U. S. 260; *Mifflin* v. *Dutton*, 190 U. S. 265.

The two rights do not coexist in the same composition. Drone on Copyright, pp. 100–104; *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 346; *Fraser* v. *Yack*, 116 Fed. Rep.

285; *Mercantile Agency* v. *Jewelers' Pub. Co.*, 155 N. Y. 241; *Tompkins* v. *Halleck*, 133 Massachusetts, 32, 36.

The claim that this proposition should be limited by adding the words "in the same country," or equivalent words, as contended by counsel for defendant in error, is without foundation.

Copyright in a book or drama is the exclusive right of the owner to multiply and dispose of copies; this is where the drama is treated as a book. Playright is the exclusive right of public performance of the dramatic or musical composition. There is no reason why one should cease upon publication, or when devoted to unrestricted public use, and not the other.

Mr. Levy Mayer for defendants in error:

This court has no jurisdiction of the present writ of error. *Appleby* v. *Buffalo*, 221 U. S. 524; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Harding* v. *Illinois*, 196 U. S. 78; *Howard* v. *Fleming*, 191 U. S. 126; *Home for Incurables* v. *New York*, 187 U. S. 155; *De Lamars* v. *Nesbitt*, 177 U. S. 523; *Sayward* v. *Denney*, 158 U. S. 180.

The public performance in England of a manuscript play which under the British statutes is made a publication and deprives the author of his common-law right of exclusive representation, does not deprive the author of such common-law right in this country where public performance is not deemed a publication. *Crowe* v. *Aiken*, 2 Biss. 208; *S. C.*, Fed. Cas. No. 3441; *Palmer* v. *De Witt*, 2 Sweeny, 530; *S. C.*, 40 How. Pr. 293; aff'd 47 N. Y. 532; *Tompkins* v. *Halleck*, 133 Massachusetts, 32; Drone on Copyright, 118–121, 554, 574; Wandell, Law of the Theater, 479; 25 Cyc. 1497.

At common law and before the passage of copyright statutes an author had an exclusive property right in his manuscript. Cases *supra*, and see Drone on Copyright, 102.

The public performance of a manuscript drama is not in this country a publication, but the author still retains his common-law right to its exclusive representation. Drone on Copyright Law, 119; cases *supra* and *Boucicault* v. *Hart*, 13 Blatchf. 47; *S. C.*, Fed. Cas. No. 1692; *Aronson* v. *Fleckenstein*, 28 Fed. Rep. 75; 25 Cyc. 1497, and cases cited.

A different rule prevails in England by statute. Stat. 3 & 4 Wm. IV, c. 15; Stat. 5 & 6 Vict., c. 45, § 20; *Boucicault* v. *Delafield*, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, 5 Ch. Div. 267; Drone on Copyright, pp. 574, 605, 656; MacGillivray on Copyright, 126; Scrutton on Copyright, 3d ed., 72.

The provisions of the English statutes in regard to registration of dramatic compositions are permissive only. Drone on Copyright, pp. 280, 603; MacGillivray on Copyright, 47, 133; Scrutton on Copyright, 3d ed., 88; 8 Halsbury's Laws of England, 179; *Russell* v. *Smith*, 12 Q. B. [Ad. & El. (N. S.)], 217; *Clark* v. *Bishop*, 27 L. T. (N. S.) 908.

The *lex domicilii* cannot fix the status of literary property where the author seeks to enforce rights in respect thereto in a foreign country. 1 Morgan, Law of Literature, 479; Drone on Copyright, 581; Story's Conflict of Laws, § 550; cases *supra*, and *Baglin* v. *Cusenier Company*, 221 U. S. 580; *Minor* v. *Cardwell*, 37 Missouri, 350.

Mr. Justice Hughes delivered the opinion of the court.

This is a writ of error to the Supreme Court of Illinois.

The suit was brought by Charles Frohman, Charles Haddon Chambers, and Stephano Gatti (defendants in error), to restrain the production of what was alleged to be a piratical copy of a play known as "The Fatal Card." Its authors were Charles Haddon Chambers and B. C. Stephenson, British subjects resident in London, who com-

posed it there in 1894. The firm of A. & S. Gatti, theatrical managers of London, of which the complainant Gatti is the surviving partner, became interested with the authors and on September 6, 1894, the play was first performed in London. It was registered under the British Statutes on October 31, 1894, and again on November 8, 1894. Charles Frohman, of New York, by agreement of June 13, 1894, obtained the right of production in this country for five years. On March 25, 1895, Frohman acquired all the interest of Stephenson in the play in and for the United States, and it was extensively represented under his supervision. It was not copyrighted here.

George E. McFarlane made an adaptation of this play, called it by the same name, and transferred it to the plaintiff in error, Richard Ferris, of Illinois, who copyrighted it in August, 1900, under the laws of the United States, and later caused it to be performed in various places in this country. The adapted play differed from the original in various details, but not in its essential features.

The Superior Court of Cook County found that the complainants were the sole owners of the original play; that it had never been published or otherwise dedicated to the public in the United States or elsewhere; and that the Ferris play was substantially identical with it. Ferris was directed to account, and was perpetually restrained from producing the adaptation which he had copyrighted. The Appellate Court for the First District reversed the decree (131 Ill. App. 307), but on appeal to the Supreme Court of Illinois this decision was reversed and the decree of the Superior Court was affirmed. 238 Illinois, 430.

The defendants in error contest the jurisdiction of this court upon the ground that the bill was based entirely upon a common-law right of property, and insist that the upholding of this right by the state court raises no Federal question. But the complainants sued, not simply to maintain their common-law right in the original play,

but by virtue of it to prevent the defendant from producing the adapted play which he had copyrighted under the laws of the United States. They challenged a right which the copyright, if sustainable, secured. R. S. 4952. It was necessary for them to make the challenge, for they could not succeed unless this right were denied. Ferris stood upon the copyright. That it had been obtained was alleged in the bill, was averred in the answer, and was found by the court. The fact that the court reached its conclusion in favor of the complainants, by a consideration, on common-law principles, of their property in the original play does not alter the effect of the decision. By the decree Ferris was permanently enjoined "from in any manner using, . . . selling, producing, or performing . . . the said defendant's copyrighted play hereinbefore referred to for any purpose." The decision thus denied to him a Federal right specially set up and claimed within the meaning of § 709 of the Revised Statutes of the United States. This court, therefore, has jurisdiction. *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 580, 581; *McGuire* v. *Commonwealth*, 3 Wall. 382, 385; *Anderson* v. *Carkins*, 135 U. S. 483, 486; *Shively* v. *Bowlby*, 152 U. S. 1, 9; *Northern Pacific R. R. Co.* v. *Colburn*, 164 U. S. 383, 385, 386; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, 68.

The substantial identity of the two plays was not disputed in the appellate courts of Illinois and must be deemed to be established. The contention was, and is, that after the public performance of the original play in London in 1894, the owners had no common-law right, but only the rights conferred by the British statutes; and that Frohman's interest (save the license which expired in 1899) was subsequently acquired. Hence, it is said, the play not being copyrighted in the United States was *publici juris* here and the adapter was entitled to use it as common material.

Performing right was not within the provisions of 8 Anne, c. 19, which gave to authors the sole liberty of printing their books. *Coleman* v. *Wathen*, 5 T. R. 245. The act of 1833, known as "Bulwer-Lytton's Act," conferred statutory playright in perpetuity throughout the British dominions, in the case of dramatic pieces not printed and published; and for a stated term, if printed and published. 3 & 4 Wm. IV, c. 15. By § 20 of the Copyright Act of 1842, 5 & 6 Vict., c. 45, it was provided that the sole liberty of representing any dramatic piece should be the property of the author and his assigns for the term therein specified for the duration of copyright in books. The section continued: "and the Provisions hereinbefore enacted in respect of the Property of such Copyright, and of registering the same, shall apply to the Liberty of representing or performing any Dramatic Piece or Musical Composition, as if the same were herein expressly reënacted and applied thereto, save and except that the first public Representation or Performance of any Dramatic Piece or Musical Composition shall be deemed equivalent, in the Construction of this Act, to the first Publication of any Book." Mr. Scrutton, in his work on copyright (4th ed., p. 77), states that it is "probable, though there is no express decision to that effect, that the court, following *Donaldson* v. *Beckett* (2 Bro. Cases in Parl. 129), would hold the common-law right destroyed by the statutory provisions after first performance in public." Compare MacGillivray on Copyright, pp. 122, 127, 128. And it may be assumed, in this case, that after the play had been performed the right of the owners to protection against its unauthorized production in England was only that given by the statutes.

Further, in the absence of a copyright convention, there is no playright in England in the case of a play, not printed and published, where the first public performance has taken place outside the British dominions. This

results from § 19 of the act of 7 & 8 Vict., c. 12, known as the International Copyright Act, which provides: "Neither the Author of any Book, nor the Author or Composer of any Dramatic Piece or Musical Composition, . . . which shall after the passing of this Act be first published out of Her Majesty's Dominions, shall have any Copyright therein respectively, or any exclusive Right to the public Representation or Performance thereof, otherwise than such (if any) as he may become entitled to under this Act." The provision applies to British subjects as well as to foreigners, and the words "first published" include the first performance of a play. In *Boucicault* v. *Delafield* (1 H. & M. 597), the author of the play known as "The Colleen Bawn" filed a bill to restrain a piratical production. It appeared that the play had first been represented in New York, and by reason of that fact—there being no copyright convention with the United States—it was held that, under the statute above quoted, there was no playright in England. To the same effect is *Boucicault* v. *Chatterton* (5 Ch. Div. 267), where the author unsuccessfully sought to restrain an unauthorized performance of "The Shaughraun," an unprinted play which had first been represented here.

The British Parliament, in thus fixing the limits and conditions of performing rights, was dealing with rights to be exercised within British territory. It is argued that the English authors in this case, by the law of their domicile, were without common-law right and in its stead secured the protection of the British statutes which cannot avail them here. But the British statutes did not purport to curtail any right of such authors with respect to the representation of plays outside the British dominions. They disclose no intention to destroy rights for which they provided no substitute. There is no indication of a purpose to incapacitate British citizens from holding their intellectual productions secure from interference in other

jurisdictions according to the principles of the common law. Their right was not gone *simpliciter*, but only in a qualified sense for the purposes of the statutes, and there was no convention under which the authors' work became public property in the United States. See *Saxlehner* v. *Eisner*, 179 U. S. 19, 36; *Saxlehner* v. *Wagner*, 216 U. S. 375, 381. When § 20 of the act of 5 & 6 Vict., c. 45, provided that the first public performance of a play should be deemed equivalent, in the construction of that act, to the first publication of a book, it simply defined its meaning with respect to the rights which the statutes conferred. The deprivation of the common-law right, by force of the statute, was plainly limited by the territorial bounds within which the operation of the statute was confined.

The present case is not one in which the owner of a play has printed and published it and thus, having lost his rights at common law, must depend upon statutory copyright in this country. The play in question has not been printed and published. It is not open to dispute that the authors of "The Fatal Card" had a common-law right of property in the play until it was publicly performed. *Donaldson* v. *Beckett*, 2 Bro. Cases in Parl. 129; *Prince Albert* v. *Strange*, 1 MacN. & G. 25; *Jefferys* v. *Boosey*, 4 H. L. C. 815, 962, 978. And they were entitled to protection against its unauthorized use here as well as in England. *Wheaton* v. *Peters*, 8 Pet. 591, 657; *Paige* v. *Banks*, 13 Wall. 608, 614; *Bartlett* v. *Crittenden*, 5 McLean, 32; *Crowe* v. *Aiken*, 2 Biss. 208; *Palmer* v. *De Witt*, 2 Sweeny, 530; 47 N. Y. 532.

What effect, then, had the performance of the play in England upon the rights of the owners with respect to its use in the United States? There was no statute here by virtue of which the common-law right was lost through the performance of the unpublished play. The act of August 18, 1856 (11 Stat. 138, c. 169), related only to dramatic compositions for which copyright had been

obtained in this country; its object was to secure to the author of a copyrighted play the sole right to its performance after it had been printed. *Boucicault* v. *Fox*, 5 Blatchf. 87, 97, 98. The same is true of the provisions of the Copyright Act of July 8, 1870 (16 Stat. 198, 212, 214; R. S. 4952, 4966), and of those of the act of March 3, 1891 (26 Stat. 1106, 1107), which were in force when the transactions in question occurred and this suit was brought. The fact that the act of March 3, 1891, was applicable to citizens of foreign countries, permitting to our citizens the benefit of copyright on substantially the same basis as its own citizens (§ 13), and that proclamation to this effect was made by the President with respect to Great Britain (27 Stat. 981), did not make the British statutes operative within the United States. Nor did that fact add to the provisions of the act of Congress so as to make the latter destructive of the common-law rights of English subjects in relation to the representation of plays in this country, which were not copyrighted under that act and which remained unpublished. These rights, like those of our own citizens in similar case, the act of 1891 did not disturb.

The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use. *Macklin* v. *Richardson*, Ambler, 694; *Morris* v. *Kelly*, 1 Jac. & W. 481; *Boucicault* v. *Fox*, 5 Blatchf. 87, 97; *Crowe* v. *Aiken*, 2 Biss. 208; *Palmer* v. *De Witt*, 2 Sweeny, 530, 47 N. Y. 532; *Tompkins* v. *Halleck*, 133 Massachusetts, 32. Story states the rule as follows: "So, where a dramatic performance has been allowed by the author to be acted at a theatre, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theatre without the consent of the author

or proprietor; for his permission to act it at a public theatre does not amount to an abandonment of his title to it, or to a dedication of it to the public at large." 2 Story, Eq. Jur., § 950. It has been said that the owner of a play cannot complain if the piece is reproduced from memory. *Keene* v. *Wheatley*, 9 Am. Law Reg. 33; *Keene* v. *Kimball*, 16 Gray, 545. But the distinction is without sound basis and has been repudiated. *Tompkins* v. *Halleck*, *supra*.

And, as the British statutes did not affect the common-law right of representation in this country, it is not material that the first performance of the play in question took place in England. In *Crowe* v. *Aiken* (1870), *supra*, the play "Mary Warner" had been composed by a British subject. It was transferred to the plaintiff with the exclusive right to its representation on the stage in the United States for five years from June 1, 1869. It had not been printed with the consent either of the author or of the plaintiff. It was first publicly performed in London in June, 1869, and afterwards was represented here. The court (Drummond, J.), held that the plaintiff by virtue of his common-law right was entitled to an injunction restraining an unauthorized production. In *Palmer* v. *De Witt* (1872), *supra*, the suit was brought to restrain the defendant from printing an unpublished drama called "Play," composed by a British citizen resident in London. The plaintiff on February 1, 1868, had purchased the exclusive right of printing and performing the play in the United States. On February 15, 1868, it was first performed in London. It was held that the common-law right had not been destroyed by the public representation and the plaintiff had judgment. In the case last cited, and apparently in that of *Crowe* v. *Aiken*, the transfer to the plaintiff antedated the public performance, but neither decision was rested on that distinction. In *Tompkins* v. *Halleck* (1882), *supra*, an unpublished play called

"The World" had been written in England where, after being presented, it was assigned by the author to a purchaser in New York. It was acted in that city and then transferred to the plaintiffs with the exclusive right of representation in the New England States. The plaintiffs' common-law right was sustained and an unauthorized performance was enjoined.

Our conclusion is that the complainants were the owners of the original play and exclusively entitled to produce it. Their common-law right with respect to its representation in this country had not been lost. This being so, the play of the plaintiff in error, which was substantially identical with that of the complainants, was simply a piratical composition. It was not the purpose or effect of the copyright law to render secure the fruits of piracy, and the plaintiff in error is not entitled to the protection of the statute. In other words, the claim of Federal right upon which he relies is without merit.

Judgment affirmed.

REITLER *v.* HARRIS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 99. Submitted December 13, 1911.—Decided February 19, 1912.

A state statute which makes special entries in public records *prima facie*, but not conclusive, evidence, of the validity of the proceedings referred to deals with rules of evidence and not with substantive rights.

One is not deprived of his property without due process of law by a statute making entries in public records *prima facie*, but not conclusive, evidence, of the validity of the proceedings referred to.

A contract of sale of state lands, on which periodic payments are to be made, with forfeiture in case of non-payment is not impaired by

a subsequent state statute making the official entries in public records *prima facie*, but not conclusive, evidence, of the validity of proceedings for forfeiture.

The statute of Kansas of 1907, c. 373, making entries of default and proceedings for forfeiture made in usual course of business in the records of sales of school lands *prima facie*, but not conclusive, evidence of the validity of forfeiture proceedings, is not unconstitutional either as depriving one who had previously purchased lands under the act of 1879, c. 161, § 2, of his property without due process of law, or as impairing the obligation of the contract under the act of 1879.

80 Kansas, 148, affirmed.

THE facts, which involve the constitutionality of certain provisions of the laws of the State of Kansas in regard to sale of school lands, are stated in the opinion.

Mr. F. Dumont Smith for plaintiff in error.

Mr. Frederic deC. Faust, with whom *Mr. A. C. Dyer* and *Mr. L. M. Day* were on the brief, for defendant in error.

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

This was an action in a District Court of the State of Kansas to recover the possession of a quarter section of land to which the parties were asserting adverse claims under the school-land laws of the State. The plaintiff's claim originated in a contract of purchase with the State, whereby he was required annually to pay interest on the unpaid purchase price at a stipulated rate. He failed for three years to comply with that requirement, and proceedings looking to a forfeiture of his rights under the contract resulted, in 1901, in a notation of forfeiture, as hereinafter explained. The defendant claimed under a like contract, made in 1902, upon the supposition that all rights under the prior contract had been extinguished.

In 1906, while the defendant was in possession and complying with his contract, the plaintiff made payment of the purchase price, and interest under his contract, and a patent was issued to him. The action was begun in 1907, when the defendant was still in possession and complying with his contract. The controversy turned upon the validity of the forfeiture proceedings. If they were valid the plaintiff was not entitled to recover; otherwise he was.

The statute (Laws Kansas, 1879, c. 161, § 2, p. 288) prescribing the mode of forfeiture in force since before the plaintiff's contract was made, reads as follows:

"If any purchaser of school land shall fail to pay the annual interest when the same becomes due, or the balance of the purchase money when the same becomes due, it shall be the duty of the county clerk of the county in which such land is situated, immediately to issue to the purchaser a notice in writing, notifying such purchaser of such default; and that if such purchaser fail to pay, or cause to be paid, the amount so due, together with the costs of issuing and serving such notice, within sixty days from the service thereof, the said purchaser, and all persons claiming under him, will forfeit absolutely all right and interest in and to such land under said purchase. . . . The notice above provided for shall be served by the sheriff of the county by delivering a copy thereof to such purchaser, if found in the county, also to all persons in possession of such land; and if such purchaser cannot be found, and no person is in possession of said land, then by posting the same up in a conspicuous place in the office of the county clerk. . . . Said sheriff shall serve such notice, and make due return of the time and manner of such service, within fifteen days from the time of his receipt of the same. . . . If such purchaser shall fail to pay the sum so due, and all costs incident to the issue and service of said notice, within sixty days from the time of the service or posting of such notice as above

provided, such purchaser, and all persons claiming under him, shall forfeit absolutely all rights and interest in and to such land, under and by virtue of such purchase."

Upon the trial it appeared that, while the plaintiff was in default as before indicated, the county clerk of the county wherein the land was situate issued a notice to him in conformity with this statute; that the sheriff made a return thereon within the time prescribed, reading: "Received this notice this 13th day of July, 1901, and served the same by leaving a copy with C. C. Potter, who occupied the within premises, July 17, 1907;" that, although not so stated in his return, the sheriff duly posted the notice in the office of the county clerk; that when the notice was served the plaintiff, although not so stated in the sheriff's return, was not a resident of the State and was absent therefrom; that he failed to pay the sum due within sixty days from the time of the service and posting of the notice; and that upon the expiration of that period the county clerk entered upon the school-land record of the county the notation "Land forfeited," in such connection as to refer to the plaintiff's contract. Whether or not C. C. Potter, to whom a copy of the notice was delivered, was the only person in possession of the land at the time did not appear.

After the issuance of the patent to the plaintiff, and after the action was begun, but before it was brought to trial, the state legislature enacted a statute (Laws Kansas, 1907, c. 373, pp. 538, 539), containing these provisions:

"SECTION 1. Where entries which appear upon the records of school-land sales, or of school-land-sale certificates, in the office of the county clerk of any county in this state, and purporting or shown to have been made in the usual course of the business of that office, indicate that the interest of the purchaser in the tract of land, in connection with which such entries were made had been

forfeited for default in the payment of money due the state on such purchase, and such land was thereafter sold to a new purchaser, such entries shall be *prima facie* evidence, in any action or proceeding in any court in this state, that proper notice of the purchaser's default had been issued and legal service thereof made, and that all things necessary to be done as conditions precedent to the forfeiture of the right and interest of the purchaser, and all persons claiming under him, in and to such land, had been duly and properly done and performed, and that such forfeiture had been duly declared. Any entry upon said records of the county clerk as 'canceled,' 'forfeited,' 'reverted to state,' 'state,' and the like, with or without date, shall be held to be an entry indicating that the interest of the purchaser had been forfeited."

The District Court ruled that this statute was applicable to pending causes; that the notation "Land forfeited" upon the school-land record in the county clerk's office was *prima facie* evidence of the lawful service of the forfeiture notice and of the due declaration of the forfeiture, and that this *prima facie* evidence was not overcome by the other facts disclosed at the trial, and so gave judgment for the defendant. The judgment was affirmed by the Supreme Court of the State (80 Kansas, 148), and the plaintiff then brought the case here upon the contention, denied by that court, that the statute of 1907 impaired the obligation of his contract and therefore was violative of the contract clause of the Constitution of the United States.

In our opinion, the contention cannot be sustained. The plaintiff's rights arising out of his contract were in no wise impaired by the statute of 1907. It did not interpose any obstacle to their assertion by him, and neither did it leave him without a suitable remedy for their ascertainment and enforcement. If the attempted forfeiture was invalid before, it continued to be so thereafter. The

statute dealt only with a rule of evidence, not with any substantive right. By making the entry of forfeiture upon the official record *prima facie*, but not conclusive, evidence that all preliminary steps essential to a valid forfeiture were properly taken and that the forfeiture was duly declared, it but established a rebuttable presumption, which he was at liberty to overcome by other evidence. That such a statute does not offend against either the contract clause or the due process of law clause of the Constitution, even where the change is made applicable to pending causes, is now well settled. *Pillow* v. *Roberts*, 13 How. 472, 476; *Marx* v. *Hanthorn*, 148 U. S. 172, 181; *Turpin* v. *Lemon*, 187 U. S. 51, 59; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Curtis* v. *Whitney*, 13 Wall. 68; Cooley's Const. Lim., 7th ed. 409, 524–526.

It was because the plaintiff failed to assume and carry the burden of overcoming the rebuttable presumption established by the statute that he failed in his action.

Judgment affirmed.

DIAZ *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 384. Argued November 16, 1911.—Decided February 19, 1912.

The provision against double jeopardy in the Philippine Act of July 1, 1902, 32 Stat. 691, c. 1369, § 5, is in terms restricted to instances where the second jeopardy is for the same offense as was the first. *Gavieres* v. *United States*, 220 U. S. 338.

A charge of homicide made after death of the person assaulted is not the same as a charge of the assault before the death of that person.

One cannot be put in jeopardy for the offense of homicide prior to the death of the person upon whom the crime is committed.

Jeopardy cannot extend to an offense beyond the jurisdiction of the court in which the accused is tried.

One convicted in the Philippine Islands of assault before the death of the injured person is not put in second jeopardy, within the meaning of § 5 of the Philippine Act of 1902, by being placed on trial for homicide after the death of the person assaulted as a consequence of the assault.

The right of confrontation with witnesses secured by § 5 of the Philippine Act of July 1, 1902, is in the nature of a privilege extended to, rather than a restriction placed upon, the accused, and can be waived or asserted as he sees fit.

The admission by consent of the accused, without qualification or restriction of testimony taken elsewhere, is not a denial of the right of confrontation with witnesses secured by § 5 of the Philippine Act of July 1, 1902, and when so admitted, the testimony is equally available to the Government and to the accused.

When evidence taken elsewhere is admitted generally and without restriction by consent of the accused, it is not subject to the objection that it is hearsay.

The right to be heard by himself and counsel secured to the accused in all criminal prosecutions by § 5 of the Philippine Act of July 1, 1902, is the substantial equivalent of the similar right embodied in the Sixth Amendment, by which it should be measured. *Kepner* v. *United States*, 195 U. S. 100.

One not in custody cannot avail of the right to be heard so as to defeat the right of the Government to try him by absenting himself voluntarily and claiming that under the right to be present provisions of the Sixth Amendment the trial cannot proceed.

While the rule may be otherwise in cases that are capital, or where the accused is in custody under the control of the court, or where special statutory provisions apply, where the offense is not capital, and the accused is not in custody, his voluntary absence does not nullify what has been done in, or prevent the completion of, his trial, but operates as a waiver of his right to be present and leaves the court free to proceed; and so *held* that the continuation of the trial during the voluntary absence of the accused in this case while it proceeded with his counsel present did not violate the provisions of § 5 of the Philippine Act of July 1, 1902, giving him a right to be present and heard.

Although concurrent findings of fact by both the Court of First Instance and the Supreme Court of the Philippine Islands are entitled to great respect, this court may independently examine the evidence, and in this case, after so doing it affirms the judgment.

15 Phil. Rep. 123, affirmed.

On May 30, 1906, at San Carlos, Province of Occidental Negros, Philippine Islands, Gabriel Diaz, by blows and kicks, inflicted bodily injuries upon Cornelio Alcanzaren, and by reason thereof was the next day charged before the justice of the peace of San Carlos with assault and battery. At the hearing upon that charge Diaz was found guilty of a misdemeanor and fined fifty pesetas and costs, which he paid. Subsequently, on the twenty-sixth of June, Alcanzaren died, and Diaz was then charged before the same justice of the peace with homicide, it being alleged that the death ensued from the bodily injuries. At the preliminary investigation of this charge the justice concluded that there was reasonable cause to believe that it was well founded and accordingly held the accused to await the action of the Court of First Instance. There was then filed in that court a complaint charging Diaz with the crime of homicide, not capital, upon which he subsequently was tried, found guilty, and sentenced to a term of imprisonment and other penalties.

When called upon to plead in the Court of First Instance Diaz interposed a plea of former jeopardy, supported by a copy of the record of the proceedings before the justice of the peace upon the charge of assault and battery and at the preliminary investigation, but the plea was overruled. Then, during the trial, his counsel introduced in evidence the record of those proceedings. In doing this the counsel spoke only of "the proceedings in the case for a misdemeanor," but it otherwise appears that what was meant was the record of both proceedings. Both were embraced in a single document, authenticated by a single certificate, and it clearly is disclosed that counsel on both sides and the court treated the entire document as in evidence. It embraced the testimony produced before the justice at the hearing upon the assault and battery charge and at the preliminary investigation, including the personal statement of the accused and the report of an au-

topsy, upon the body of the deceased, performed conformably to the Philippine law; and it was partly upon this testimony that the Court of First Instance rested its judgment of conviction.

On two occasions, covering the examination and cross-examination of two witnesses for the government, Diaz, who was at large on bail, voluntarily absented himself from the trial, but consented that it should proceed in his absence, but in the presence of his counsel, which it did.

Following his conviction, Diaz prosecuted an appeal to the Supreme Court of the Philippines, where, subject to a change made in the term of imprisonment (see *Trono* v. *United States*, 199 U. S. 521; *Flemister* v. *United States*, 207 U. S. 372), the conviction was sustained, 15 Philippines, 123, and the case was then brought here.

Mr. Frederic R. Coudert, with whom *Mr. Howard Thayer Kingsbury* was on the brief, for plaintiff in error:

This court has jurisdiction of the cause and power to review all questions involved therein. § 10, Philippine Civ. Govt. Act, 32 Stat. 695.

Having jurisdiction of the case there exists the power to consider any question arising on the record. *Penn Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695; *Giles* v. *Harris*, 189 U. S. 475, 486; *Horner* v. *United States*, 143 U. S. 570, 577; *Burton* v. *United States*, 196 U. S. 283, 295.

The conviction was based upon the testimony of witnesses with whom the defendant was not confronted. 32 Stat. 692; Phil. Comp. Stat., § 3270. Defendant cannot waive this right nor can he legally consent that the trial proceed in his absence. *Thompson* v. *Utah*, 170 U. S. 343, 354; *Hopt* v. *Utah*, 110 U. S. 574. *West* v. *Louisiana*, 194 U. S. 258, does not apply.

The use of the evidence against the defendant in the homicide trial was, therefore, in itself reversible error. *Motes* v. *United States*, 178 U. S. 458.

The introduction of the record of the assault case upon the homicide trial was merely in support of the defendant's plea of former jeopardy, and was so recognized by the court below (Rec., p. 51). Such record was merely evidence of the jeopardy. It was not, and could not be evidence of the facts which were in issue in the former trial. *Kirby* v. *United States*, 174 U. S. 47, 55.

The defendant's plea of former jeopardy was good and should have been sustained. A prosecution for assault and battery bars a second prosecution for homicide for the same act, where the person assaulted dies after the first and before the second prosecution.

This question appears never to have been presented to this court or to any American court of high authority, and is, therefore, open, and to be determined on principle, particularly in view of the conflicting character of the precedents in other courts. § 5 of Phil. Civ. Gov. Act; § 3281 Phil. Comp. Stat.; *Kepner* v. *United States*, 195 U. S. 100; *Trono* v. *United States*, 199 U. S. 521; *Gavieres* v. *United States*, 220 U. S. 338; Hammond's Blackstone, IV, 431; *Burton* v. *United States*, 202 U. S. 344, 380; *Carter* v. *McClaughry*, 183 U. S. 365, 395; *Hans Neilsen, Petitioner*, 131 U. S. 176.

To make the same act constitute several different crimes and prosecute for them all *seriatim* opens possibilities of persecution which the rule against second jeopardy is designed and should be made effective to prevent. *State* v. *Cooper*, 1 Green (N. J. Law), 361; *Queen* v. *Elrington*, 1 B. & S. 187; *Reg.* v. *Miles*, 17 Cox Cr. Cas. 9. See also *Reg.* v. *Stanton*, 5 Cox Cr. Cas. 324; *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; *Reg.* v. *King*, 18 Cox Cr. Cas. 447; *Blair* v. *Georgia*, 81 Georgia, 629.

See dissent in *Reg.* v. *Morris*, L. R., 1 Crown Cases Reserved, 90. In that case and in *Reg.* v. *Salvi*, 10 Cox Cr. Cas. 481 (note); *Burns and Cary* v. *The People*, 1 Park. Cr. Rep. (N. Y.) 182; *Commonwealth* v. *Roby*, 12 Pick.

(Mass.) 496; *Commonwealth* v. *Evans*, 10 Massachusetts, 25; *State* v. *Littlefield*, 70 Maine, 452, either a new fact supervenes, for which the defendant is responsible, and changes the character of the offense, thus constituting a new and distinct crime, or relates back to the time of the assault. In other words, a man may first be prosecuted and punished for his act, and afterwards for its consequences; but see *Reg.* v. *Bird*, 5 Cox Cr. Cas. 1, 20, rendered after the passage of an English statute providing that upon any indictment for felony, involving an assault, the jury might acquit of the felony and convict of the assault.

Under the laws of the Philippine Islands, upon any prosecution the court may convict of any subsidiary offense involved in the offense charged. § 3284, Phil. Comp. Stat.; *United States* v. *Pineda*, 4 Phil. Rep. 223. In the case at bar, therefore, defendant might upon the homicide trial have been convicted of the very assault for which he had already been prosecuted and fined. He has, therefore, been twice in jeopardy for the same offense, in violation of the United States Constitution and the Philippine Civil Government Act; his second prosecution was unlawful and his conviction should be set aside. *Reg.* v. *Walker*, 2 Moody & Robertson, 446.

The conviction was without any competent evidence to support it and was contrary to law.

In reviewing a judgment based on the verdict of a jury the court can always consider whether there was any evidence to sustain the conclusion reached. *Halsell* v. *Renfrew*, 202 U. S. 287, 292; *Lancaster* v. *Collins*, 115 U. S. 222, 225; Phil. Comp. Stat., §§ 2764, 2765, 3311.

The presumption of innocence is expressly provided for by the Philippine statutes. § 3309, Phil. Comp. Stat.

It is an integral and essential portion of the law of this country as laid down by this court. *Kirby* v. *United States*, 174 U. S. 47, 55; *Coffin* v. *United States*, 156 U. S. 432, 458.

The Solicitor General for the United States:

The jurisdiction of this court under the writ of error is restricted to the question, whether any rights of the defendant secured by the Constitution or statutes of the United States have been violated. *Ong Chang Wing* v. *United States*, 218 U. S. 272; *Dowdell* v. *United States*, 221 U. S. 325.

The conviction upon the prosecution for assault and battery was not a bar to the prosecution for the homicide resulting from the assault. *Grafton* v. *United States*, 206 U. S. 333; *Commonwealth* v. *Roby*, 12 Pick. (Mass.) 496; *State* v. *Littlefield*, 70 Maine, 452; *Johnson* v. *State*, 19 Tex. App. 453; 1 Bishop's New Crim. Law, § 1059.

The right of the defendant to be confronted by the witnesses against him was not violated, for the record of the preliminary investigation was in evidence by his act and with his consent, for every purpose to which it was relevant. *Hancock* v. *State*, 14 Tex. App. 392; *Rosenbaum* v. *State*, 33 Alabama, 354; *State* v. *Fooks*, 65 Iowa, 452; *Williams* v. *State*, 61 Wisconsin, 281; *Reynolds* v. *United States*, 98 U. S. 145; *Ansbro* v. *United States*, 159 U. S. 695; *West* v. *Louisiana*, 194 U. S. 258; *Paraiso* v. *United States*, 207 U. S. 368; *Weems* v. *United States*, 217 U. S. 349; *Dowdell* v. *United States*, 221 U. S. 325.

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

The provision against double jeopardy, in the Philippine Civil Government Act of July 1, 1902, 32 Stat. 691, c. 1369, § 5, is in terms restricted to instances where the second jeopardy is "for the same offense" as was the first. *Gavieres* v. *United States*, 220 U. S. 338. That was not the case here. The homicide charged against the accused in the Court of First Instance and the assault and battery for which he was tried before the justice of the peace, al-

though identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense. *Commonwealth* v. *Roby*, 12 Pick. 496; *State* v. *Littlefield*, 70 Maine, 452; *Johnson* v. *State*, 19 Tex. App. 453. Besides, under the Philippine law, the justice of the peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction. All that could be claimed for that jeopardy was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done under Phil. Comp. Stat., § 3284. *State* v. *Littlefield*, *supra*. It follows that the plea of former jeopardy disclosed no obstacle to the prosecution for homicide.

It is objected that the accused was deprived of the right, secured to him by § 5 of the Philippine Civil Government Act, *supra*, "to meet the witnesses face to face," in that the judgment of conviction for homicide was rested in part upon the testimony produced before the justice of the peace at the trial for assault and battery and at the preliminary investigation. But this objection overlooks the circumstances in which the record wherein that testimony was set forth was received in evidence. It was not offered by the Government, but by the accused, and was offered without qualification or restriction. And it is otherwise manifest that the offer included the testimony embodied in the record as well as the recitals of what

was done by the justice. It was all received just as it was offered, no objection being interposed by the Government. In some respects the testimony was favorable to the accused and in others favorable to the Government. It included a statement by the accused, who refrained from testifying in the Court of First Instance, and also the report of an autopsy which was favorable to him. In these circumstances the testimony was rightly treated as admitted generally, as applicable to any issue which it tended to prove, and as equally available to the Government and the accused. *Sears* v. *Starbird*, 78 California, 225, 230; *Diversy* v. *Kellogg*, 44 Illinois, 114, 121. True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible. *Damon* v. *Carrol*, 163 Massachusetts, 404, 408; *Sherwood* v. *Sissa*, 5 Nevada, 349, 355; *United States* v. *McCoy*, 193 U. S. 593, 598; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1, 9; *Neal* v. *Delaware*, 103 U. S. 370, 396; *Foster* v. *United States*, 178 Fed. Rep. 165, 176. And of the fact that it came from witnesses who were not present at the trial it is to be observed that the right of confrontation secured by the Philippine Civil Government Act is in the nature of a privilege extended to the accused, rather than a restriction upon him, *State* v. *McNeil*, 33 La. Ann. 1332, 1335, and that he is free to assert it or to waive it, as to him may seem advantageous. That this is so is a necessary conclusion from the adjudged cases relating to the like right secured by the constitutions of the several States and the Constitution of the United

States. Thus, it is held that the right is waived where, by the consent of the accused, the prosecution is permitted to read in evidence the testimony of an absent witness given in some prior proceeding, *Hancock* v. *State*, 14 Tex. App. 392; *Rosenbaum* v. *State*, 33 Alabama, 354; *Williams* v. *State*, 61 Wisconsin, 281; *State* v. *Polson*, 29 Iowa, 133; or a statement of what such a witness would testify, if present, as embodied in an agreement made to avoid a continuance or to dispense with the presence of the witness, *State* v. *Wagner*, 78 Missouri, 644, 648; *State* v. *Fooks*, 65 Iowa, 452; *State* v. *Mortensen*, 26 Utah, 312; *State* v. *Lewis*, 31 Washington, 75, 88; or the deposition of such a witness taken within or without the jurisdiction, *Butler* v. *State*, 97 Indiana, 378; *State* v. *Vanella*, 40 Montana, 326; *Wightman* v. *People*, 67 Barb. 44; *People* v. *Guidici*, 100 N. Y. 503, 508; *People* v. *Murray*, 52 Michigan, 288. In the last case, which involved a conviction for murder in the second degree, the question presented and the ruling thereon were stated by Judge Cooley as follows (p. 290):

"A chief ground of error relied upon is that the prosecution was allowed to put in evidence certain depositions taken out of court of witnesses not present at the trial. The facts seem to be that the attorneys for the respective parties stipulated to put in certain depositions on both sides, and they were put in accordingly. This, it is said, was in violation of the respondent's constitutional right to be confronted with his witnesses. But the court made no ruling in the matter; what was done was voluntarily done by the parties; the defendant had the benefit of the stipulation, and, for aught we can know, it may have been made chiefly in his interest. . . . The defendant undoubtedly had a constitutional right to be confronted with his witnesses. He waived that right in this case, apparently for his own supposed advantage and to obtain evidence on his own behalf. It would have been a mere impertinence for the court to have interfered and pre-

cluded this stipulation being acted upon. But it would have been more than an impertinence; it would have been gross error. And it would be palpable usurpation of power for us now to set aside a judgment for a neglect of the court not at the time complained of, but in respect to something where any other course would have been plain error. Under the view taken by the respondent it would seem that when the evidence had been obtained under his stipulation, the court was put in position where it was impossible to avoid error; for if the evidence was received, he might complain, as he does now, that his constitutional right was violated, and if the court refused to receive it when he was consenting, the respondent would be entitled to have the conviction set aside for that error."

The view that this right may be waived also was recognized by this court in *Reynolds* v. *United States*, 98 U. S. 145, 158, where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused. In that case it was said:

"The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

As here the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question,

and thereby sought to obtain an advantage from it, he waived his right of confrontation as to that testimony and cannot now complain of its consideration.

It also is objected that the accused was wrongly convicted in that the trial proceeded in part in his absence. The facts in this connection are these: The accused was represented and heard by counsel at every stage of the proceedings. He also was present in person at all the proceedings preliminary to the trial and at the time it was begun and during the major part of it. But on two occasions, in the latter part of the trial, he voluntarily absented himself and sent to the court a message expressly consenting that the trial proceed in his absence, which was done. On these occasions two witnesses for the Government were both examined and cross-examined. No complaint grounded upon his absence was made in the trial court or in the Supreme Court of the Philippines; and the objection now made is, not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence.

The Philippine laws, Comp. Stat. 1907, pp. 1004, 1005, 1006, 1009, contain the following provisions, bearing upon the presence of the accused at the proceedings upon a charge for felony:

"SEC. 3270. In all criminal prosecutions the defendant *shall be entitled* (a) to appear and defend in person and by counsel at every stage of the proceedings. . . .

"SEC. 3271. . . . If the charge is for felony (*delito*), the defendant *must* be personally present at the arraignment; . . .

"SEC. 3280. A plea of guilty can be put in *only* by the defendant himself in open court. . . .

"SEC. 3296. The defendant *must* be personally present at the time of pronouncing judgment if the conviction is for a felony; . . ."

Not only is there such a difference in the terms of these sections as naturally implies a difference in meaning, but it is evident that unless the first means something less than that the accused must be present at every stage of the proceedings there was no occasion for the provisions quoted from the others, and also that if the terms used in the others were deemed essential to express the thought that the accused must be present at particular stages of the proceedings, like terms would have been employed in the first had it been intended to make his presence equally requisite at other stages. It, therefore, is evident that the effect of these sections, when their differing terms are considered, is to make the presence of the accused indispensable at the arraignment, at the time the plea is taken, if it be one of guilt, and when judgment is pronounced, and to entitle him to be present at all other stages of the proceedings, but not to make his presence thereat indispensable. As here it does not appear, and is not claimed, that the accused was absent at any of the times when his presence was thus made indispensable, and as his absence during the latter part of the trial was not only voluntary, but coupled with an express consent that it should proceed in the presence of his counsel, as was done, it is plain that there was no infraction of the Philippine laws in that regard.

We are thus brought to the question whether the provision in § 5 of the Philippine Civil Government Act, securing to the accused in all criminal prosecutions "the right to be heard by himself and counsel," makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert but which he also may waive by his voluntary act. Of course if that provision makes his presence thus indispensable, it is of no moment that the Philippine laws do not go so far, for they cannot lessen its force or effect. An identical or similar provision is found in the constitutions of the

several States, and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there. *Kepner* v. *United States*, 195 U. S. 100, 124.

As the offense in this instance was a felony, we may put out of view the decisions dealing with this right in cases of misdemeanor. In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. *Fight* v. *State*, 7 Ohio, pt. 1, 181; *Wilson* v. *State*, 2 Oh. St. 319; *McCorkle* v. *State*, 14 Indiana, 39, 44; *Hill* v. *State*, 17 Wisconsin, 675; *Stoddard* v. *State*, 132 Wisconsin, 520; *Sahlinger* v. *People*, 102 Illinois, 241; *Gallagher* v. *People*,

211 Illinois, 158; *Barton* v. *State*, 67 Georgia, 653; *Robson* v. *State*, 83 Georgia, 166; *Price* v. *State*, 36 Mississippi, 531; *Gales* v. *State*, 64 Mississippi, 105; *State* v. *Ricks*, 32 La. Ann. 1098; *State* v. *Perkins*, 40 La. Ann. 210; *State* v. *Kelly*, 97 N. Car. 404; *Lynch* v. *Commonwealth*, 88 Pa. St. 189; *Gore* v. *State*, 52 Arkansas, 285; *State* v. *Hope*, 100 Missouri, 347; *Frey* v. *Calhoun Circuit Judge*, 107 Michigan, 130; *People* v. *Mathews*, 139 California, 527; *State* v. *Way*, 76 Kansas, 928; *Commonwealth* v. *McCarthy*, 163 Massachusetts, 458; *United States* v. *Davis*, 25 Fed. Cas. 773; *United States* v. *Loughery*, 26 Fed. Cas. 998; *Falk* v. *United States*, 15 App. D. C. 446, 454; *S. C.*, 181 U. S. 618.

The reasoning upon which this rule of decision rests is clearly indicated in *Barton* v. *State, supra*, where it is said by the Supreme Court of Georgia:

"It is the right of the defendant in cases of felony . . . to be present at all stages of the trial—especially at the rendition of the verdict, and if he be in such custody and confinement . . . as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside. . . . The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order.

"But the case is quite different when, after being present through the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room where he and his bail obligated themselves that he should be. . . . And the absolute necessity of the distinction, or the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered."

True, in that case the defendant was absent only at the reception of the verdict, but the decisions, as also the reasoning upon which they proceed, embrace absences at other stages of the trial. In *Falk* v. *United States*, *supra*, the accused, who was at large on bail, was present when the trial was begun and during the taking of a portion of the evidence for the Government, and then fled the jurisdiction. He was called and defaulted, and the trial proceeded in his absence, the remaining evidence being taken and a verdict of guilt returned. Subsequently he was apprehended, and sentence was then imposed, notwithstanding his objection that the trial had proceeded in his absence. In affirming the judgment the Court of Appeals, speaking through Mr. Justice Morris, said:

(p. 454) "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute (Rev. Stat. of U. S. Sec. 1015) he is entitled as a matter of right to be enlarged upon bail 'in all criminal cases where the offense is not punishable by death;' and, therefore, in all such cases he may by absconding prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered. And this the counsel for the appellant appear candidly to admit. But we do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the adminis-

tration of justice as to the true interests of civil liberty. . . .

(p. 460) "The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield."

But it is said that the question has been ruled otherwise by this court in *Hopt* v. *Utah*, 110 U. S. 574; *Lewis* v. *United States*, 146 U. S. 370; *Schwab* v. *Berggren*, 143 U. S. 442, and *Thompson* v. *Utah*, 170 U. S. 343. We think this is not the import of those cases. In each the accused was in custody, charged with a capital offense, and was sentenced to death. In the first, a part of the trial was had in his absence notwithstanding the territorial statute declared that he "*must* be personally present." He did not object at the time, and it subsequently was claimed that, by his silence, he had consented to what was done. But this court held otherwise, saying: "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." In the second case, "the prisoner was not brought face to face with the jury until after the challenges had been made and the selected jurors were brought into the box to be sworn," and he excepted at the

time to the mode in which the challenges were required to be made. The ruling in this court was that the making of the challenges was an essential part of the trial, and that it was the right of the accused to be brought face to face with the jurors when the challenges were made. The other two cases are even less in point. In one the question was, whether the presence of the accused was essential in proceedings on error in an appellate court, and it was held that it was not essential. And in the other the question was, whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law, to try him; and it was held that he could not.

We conclude that the Philippine laws before quoted accord to one charged with a felony the full right expressed in the congressional enactment, as that right was recognized and understood in this country at the time it was carried to the Philippines, and that in what was done in the present case there was no infringement of it.

Lastly, it is insisted that the evidence was inadequate to warrant the conviction. The trial was to the court without a jury, as is permitted in the Philippines, and both the trial court and the Supreme Court of the Islands concurred in finding the accused guilty under the evidence. Of course, these concurring findings are entitled to great respect. Nevertheless, following the rule recognized in *Wiborg* v. *United States*, 163 U. S. 632, 658, and *Clyatt* v. *United States*, 197 U. S. 207, 222, we have attentively examined the evidence as set forth in the record and discussed in the opinions of the Philippine courts, and are clearly of opinion that the conviction was warranted by it.

Judgment affirmed.

MR. JUSTICE LAMAR, dissenting.

I dissent, because the trial was conducted in accordance with the rules of procedure of the Spanish law, and in disregard of the fundamental changes made by the Bill of Rights of the Philippine Islands. The defendant was not given a speedy trial, but was kept in jeopardy during repeated and lengthy suspensions.

He was not confronted with the witnesses, but the court accepted his telegraphic waiver, and the trial thereafter proceeded without the defendant being present. Witnesses were examined, argument of counsel made, and three months later sentence was pronounced, all in his absence.

On appeal the judgment was reversed by the Supreme Court of the Philippines, not for the purpose of setting the judgment aside, but to inflict a penalty of more than twofold severity and to raise the term of imprisonment from six to fourteen years in the penitentiary.

The act of July 1, 1902, regulating the government of the Philippine Islands, does not provide for trial by jury, nor does it destroy the power of the appellate court to change the sentence in a criminal case. But the absence of the right to trial by jury, and the presence of the danger of appeal make it all the more important to enforce those safeguards copied from the Constitution of the United States and granted the people of those islands.

Barring the right to indictment and trial by jury the defendant charged with a felony before a Philippine court has substantially the same rights as though he were on trial in a United States court. And if this conviction can stand, it must be because the same things would be proper in this country, where the language of the Constitution is, in this respect, substantially the same as that of Philippine Bill of Rights.

SEC. 5. "That in all criminal prosecutions the accused

shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself."

Not only the fact that the defendant's liberty is involved, but the further fact that the decision will be a precedent in other cases, justifies a brief statement of the facts and reasons on which this dissent is based.

The opinion proceeds upon the theory that while a defendant has the right to be confronted with the witnesses, he may waive that privilege in all except capital cases. In support of that proposition many authorities are cited.

In some of these cases the defendant was voluntarily absent from the court room, for a short time, without the attention of the court being called to the fact. In others the defendant escaped while the trial was in progress. In others, having given bail, he failed to return in time to hear the verdict read. In all of them the court's decision was expressly, or by necessary implication, placed upon the ground that the defendant could not take advantage of his own wrong, and render a trial nugatory by escape or making an improper use of his bail.

These cases undoubtedly announce a correct rule. For, when the trial of a felony begins it ought to proceed in due and orderly course to verdict. The defendant has no right to force the court to order a mistrial. If he escapes or takes advantage of his bail to remain away during the trial, the court proceeds, not because it is willing that he should be absent, but because it is obliged to go on without him. But because the court is compelled so to act under

such facts, it does not follow that it could or would consent for him to be absent during the trial; or, that it would accept a formal waiver from him of the right to be confronted by the witnesses, or to be present when sentence was pronounced. As said in *Hopt's Case*, 110 U. S. 579:

"The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty. This is a mistaken view. . . . The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. . . . If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

It is true, as pointed out in the opinion of the court here, that this was said in a case where the defendant was on trial for his life. But the principle was announced in language which, repeatedly and expressly, made it applicable to felonies and wherever the defendant might be deprived of his life or liberty. The defendant, in such cases, cannot waive his right to be present when his liberty is involved, any more than when his life is at stake. And it is a misnomer to say that when he escapes or refuses to be present that he has waived the right. He has made it impossible for the court to give him his rights.

But, even if the doctrine of waiver could be extended beyond these cases of necessity, arising from flight and voluntary absence after the trial began, it would not apply in the present instance. The case was conducted from beginning to end as though it were civil litigation, with several suspensions of the trial—once for fourteen days—once for thirty days—and with three months between the argument and the rendition of the judgment. There was in this case, therefore, no compelling necessity, as in those cited in the opinion of the majority. The court accepted the defendant's waiver, as though he alone had an interest

in the method of trial,—ignoring the fact that, as said in the *Hopt Case*, "the public had an interest in his life and liberty."

In order to make this want of necessity clear it will be necessary to state some of the facts as they appear in this record.

The defendant lived in the town of San Carlos in the Province of Occidental Negros. He was charged with having killed Alcanzaren in that municipality. After a preliminary trial he was bound over to answer for the charge of homicide—equivalent to manslaughter and not punishable by death. He gave bond, and was subsequently brought to trial before the Court of First Instance, sitting at Bacolod, which, according to the maps is about 30 miles from San Carlos and on the other side of the Island. The distance between the two places by water is about 100 miles.

Diaz was arraigned and plead "not guilty" September 26, 1906. The case was several times continued, the defendant once or twice consenting. But on August 15, 1907, eleven months after arraignment, the trial began—the defendant and his counsel being present.

Two witnesses for the prosecution were examined. "At the request of the Fiscal the hearing was suspended and an order was issued for the arrest of" three absent witnesses. The record does not show to what date the court adjourned. But fourteen days later it reconvened, the defendant and his counsel again being present. The trial was resumed August 29, 1907, and two witnesses for the prosecution were examined.

The record does not show why the proceedings were again suspended, nor the date to which the court adjourned. But it does appear that after a delay of thirty days the court again reconvened, and that the judge had received a telegram from Diaz. It is copied into the record, and reads as follows:

"SAN CARLOS, *Sept.* 20/07.

Judge JOCSON, Bacolod:

I waive right to be present during examination of government witnesses.

GABRIEL DIAZ."

Other entries of the same date show that "On September 20, 1907, in open court, the Honorable Vincente Jocson of the Tenth District presiding, the Provincial Fiscal and the counsel for defendent being present, the accused himself having waived his right to be present at the trial according to a telegram just received from him, the trial of this case was resumed and Pelagio Carbajosa, a witness for the prosecution, was examined. The prosecution then rested and counsel for defendant only introduced in evidence certified copy of the proceedings," before the Justice Court. ". . . The trial was then adjourned for the purpose of allowing the Fiscal to introduce evidence in rebuttal."

The next day the court again met, the Judge, Provincial and attorney for the defendant being present, "The trial of this case was resumed and . . . a witness for the prosecution was examined in rebuttal. The Fiscal then rested his case and counsel for the accused waived his right to introduce further evidence. Both parties having rested, the Fiscal and counsel for the defendant respectively made their oral argument, and the court declared the trial closed and took the case under advisement."

The court, however, did not adjourn to a given date, nor was there even a provision that the defendant and his counsel should be notified of the time and place when judgment would be entered and sentence pronounced.

The court waited ninety days. It then delivered an opinion, entitled in the case, and dated "Bacolod, Dec. 24, 1907," in which he discussed the evidence, and concluded by finding the defendant guilty and sentencing him to

confinement in the penitentiary for six years and one day.

Notice of this sentence was evidently received by the defendant, because on January 17, 1908, he entered an appeal to the Supreme Court of the Philippines. One of the judges of that court held that "there was no competent evidence to sustain a conviction," but the majority, "notwithstanding the deficiencies and irregularities that are observable in the prosecution of this case," reversed the case, not for the purpose of setting aside the conviction, but solely for the purpose of increasing the penalty. It thereupon sentenced him to a penalty of fourteen years of *reclusion temporal*, with the accessory penalties of Art. 59 of the Penal Code.

From these facts it will be seen that the Philippine Court of First Instance was not in the situation of an American court with a jury impanelled and under the necessity either of proceeding to verdict in the defendant's absence or of discharging the jury and rendering the trial nugatory. It assumed that if Diaz was willing to be absent the court could accept his waiver. The procedure adopted was evidently in accordance with the judge's view of the Spanish law, but in disregard of the fact that, under the Bill of Rights, when the trial began the defendant stood upon his deliverance. There could thereafter be the customary adjournments from day to day, but no suspensions of the trial except "in case of urgent necessity," "and for very plain and obvious causes." *United States* v. *Perez*, 9 Wheat. 579; *Thompson* v. *United States*, 155 U. S. 271, 274.

At common law the trial of felonies was required to be completed at one sitting. Of necessity this rule had to be modified, and adjournments from day to day were finally allowed. There are a few instances in which the case was suspended for a reasonable time, in order to permit the attendance of witnesses who had been unavoidably de-

layed, or for other proper cause, in the discretion of the judge conducting the trial. But without regard to the delay of eleven months between arraignment and trial, the extremest extension heretofore allowed is insignificant by comparison with those here, first for two weeks and then for thirty days. In both these instances the record fails to show that the defendant objected, and it may be that if he can waive the right to be confronted by the witnesses he may waive the guaranty against multiplied jeopardy. For that right is not greater than the right to be present at every stage of the trial.

The court being of the opinion that the defendant need not be present at the trial, it is not surprising that he thought the defendant might also be absent when judgment was rendered and sentence pronounced. It is true that the Philippine Code expressly declares that the defendant "must be personally present at the time of pronouncing judgment if the conviction is for a felony." But that could no more add to the Bill of Rights, than a statute could repeal the requirement that the defendant should be confronted with the witnesses, and be present at every stage of the trial. That the defendant was not personally present is both the legal inference and the natural conclusion from what appears in the record. When the court took the case under advisement on September 21, 1907, it passed no order indicating when the decision would be delivered, even if it had the right to hold the defendant in suspense for days and weeks and months. There was, therefore, no reason for the defendant to be present at Bacolod on December 24, in anticipation that judgment would be entered on that date.

There are cases which hold that where the record shows that the defendant was present when the trial began, there is a presumption that he remains in attendance, and it is not necessary to repeat the statement in the record, from day to day, so as to affirmatively show that

he was present. In the present case the presumption would be the other way, because, having been absent during the last two days of the trial, there is no reason to assume that he was present when, after an indeterminate suspension, the court reconvened. At any rate there is peculiar room for the application of the rule in Federal courts announced in *Lewis* v. *United States*, 146 U. S. 370, 372, that "where the personal presence is necessary in point of law, the record must show the fact."

In my opinion the conviction was not only erroneous because the defendant was not present when the witnesses were examined and argument made, but having been unlawfully put in double jeopardy and judgment equivalent to verdict having been pronounced in his absence, he is entitled to his discharge. *Nolan* v. *State*, 55 Georgia, 521.

It may be that such views would work a radical change in criminal procedure in the Philippines. But when Congress incorporated the language of the Sixth Amendment into the act of July 1, 1902, it must have intended to make just such changes, and to require the trial to be conducted in the American manner, and, among other things, also to prohibit suspensions and undue prolongation of the hearing, so as thereby to prevent the pain and anxiety which must inevitably be suffered by a prisoner who is thus kept on a mental rack.

These considerations compel me to dissent, and to add, that if the effort to review this judgment can lawfully result in having the sentence more than doubled, it imposes a penalty on the exercise of the right, and makes it worse to appeal than to submit to conviction on a record which, the Supreme Court of the Philippines admitted, presented "irregularities and deficiencies."

GAAR, SCOTT & COMPANY *v.* SHANNON.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 88. Argued December 11, 1911.—Decided February 19, 1912.

Where the judgment of the state court rests on a matter of general law strong enough to sustain the judgment, this court cannot consider the Federal question involved; even if it were actually considered by the state court and determined adversely to plaintiff in error. *Hale* v. *Akers*, 152 U. S. 554.

Where a Federal question was properly presented and necessarily controls the determination of the case, this court has jurisdiction even if the decision is put by the state court upon some matter of local law. *West Chicago R. R. Co.* v. *Chicago*, 201 U. S. 506.

Neither a statute imposing a tax, execution thereunder, nor mere demand for payment, constitutes duress; but where the statute contains self-operating provisions by which non-payment of the tax results in severe penalties and forfeiture of right to do business, payment by one within the class affected is not voluntary but compulsory.

While a payment of the tax by one included in the class to which a statute applies in order to avoid penalties and forfeiture is compulsory, it is not so as to one not included in such class and payment thereof by such person is voluntary and not under duress.

Where the state court decides that a corporation which claims that it only does an interstate business but paid a state tax levied only upon corporations doing an intrastate business made the payment not under duress, and the record shows that the question was fairly in the case, the judgment rests upon a ground of general law broad enough to sustain it.

52 Tex. Civ. App. 644, affirmed.

IN this suit against Shannon, Secretary of State for Texas, for the recovery of taxes paid under protest, the plaintiff, Gaar, Scott & Company, alleged that it is a corporation chartered by the laws of Indiana, in which State it has its principal place of business and where it manu-

factures machinery; that in 1901 it paid the amount of franchise tax required of foreign corporations, and obtained from the State of Texas a permit to do business for ten years. This permit, it alleges, was a contract which could not be impaired, but, notwithstanding that fact, the legislature, in 1905, passed an act requiring foreign companies doing business in Texas to pay a still higher franchise tax, measured by their capital and surplus, and provided that if the same was not paid by May 1st a penalty of twenty-five per cent should be added, and if not paid by July 1st the permit to do business in the State should be forfeited "without judicial ascertainment" and the company deprived of the right to sue in the courts. It alleged that the Secretary of State had mailed to the company a circular calling attention to the provisions of the act, and thereupon, and before May 1, 1905, and again before May 1, 1906, under the duress of this statute, the company had paid the tax demanded, under protest and with written notice that it reserved the right to sue for the recovery of the amount exacted by an unconstitutional law.

The petition alleges that plaintiff "*only transacts an interstate business in the State of Texas in the sale of its manufactured products.* That it employs at Dallas and Houston, Texas, agents who solicit and superintend the soliciting of orders for the goods manufactured by it at Richmond, Indiana, . . . and that this applies to all goods sold by your petitioner in the State of Texas, and your petitioner further alleges that it was at the time its permit was granted to it to do business in the State of Texas, . . . and that it now is and has been ever since said permit was granted to it engaged in an interstate commerce business."

The only prayer was for the recovery of the taxes paid for the years 1905 and 1906. The defendant's general demurrer was sustained. 52 Tex. Civ. App. 634.

Mr. C. E. More, with whom *Mr. Almon W. Bulkley* and *Mr. J. L. Patterson* were on the brief, for plaintiffs in error.

Mr. James D. Walthall, with whom *Mr. Jewell P. Lightfoot* was on the brief, for defendant in error.

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

On writ of error to a judgment, sustaining defendant's demurrer to the complaint for the recovery of taxes paid under protest, the Court of Appeals of Texas considered all the assignments of error. It held that the permit of 1901, to do business for ten years, was not a contract and that therefore the State during that period might demand an increased or additional franchise tax. It ruled that foreign corporations might be altogether excluded, or required to pay a discriminatory tax as the condition of the right to do business in Texas. It further held that even if there had been merit in plaintiff's contention, it was not entitled to recover the taxes for 1905 and 1906, because they had been voluntarily paid.

1. If the record affords a basis for sustaining the last proposition, this court cannot consider whether the act violates the Fourteenth Amendment, or the commerce and contract clauses of the Constitution. For, as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention. *Hale* v. *Akers*, 132 U. S. 554, 564. The principle has been enforced in cases where the ruling of the state court was based on the application of the doctrine of *res adjudicata*, laches, statute of limitations, and others

similar in kind to that involving the effect of a voluntary payment. *Northern Pacific R. R. Co.* v. *Ellis*, 144 U. S. 458; *Hale* v. *Lewis*, 181 U. S. 473; *Moran* v. *Horsky*, 178 U. S. 205; *Pierce* v. *Somerset Ry.*, 171 U. S. 641, 648; *Rector* v. *Ashley*, 6 Wall. 142.

It is, however, equally well settled that if the Federal question is properly presented and necessarily controls the determination of the case, the appellate jurisdiction of this court is not defeated because the decision is put upon some matter of local law. *West Chicago R. R. Co.* v. *Chicago*, 201 U. S. 506, 520. And the plaintiff in error insists that, under this rule, the constitutionality of the statute must be decided, because the facts stated in the complaint, and admitted by the demurrer, do not afford any basis for holding that the money was voluntarily paid.

2. Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods. Or, if there is, the citizen, to avoid the consequences of the levy, may pay the money, regain the use of his property and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute, whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date a penalty of twenty-five per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as duress, than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back. *Swift Co.* v. *United States*, 111 U. S. 22, 29; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329; *Atchison, Topeka & Santa Fe R. R.*

v. *O'Connor*, decided this day, *ante*, p. 280. Otherwise plaintiff might be without any remedy whatever. For in *Arkansas Building & Loan Asso.* v. *Madden*, 175 U. S. 269, it was held that a taxpayer was not entitled to an injunction, against the enforcement of a similar statute of the State of Texas, unless he could show that there was no adequate remedy at law. And, as payment under such an act was treated as compulsory, for which suit might be maintained, and as there was nothing to indicate inability of complainant to pay, or of the defendant to respond to a judgment, the bill was dismissed without prejudice. That necessarily recognized that the plaintiff had the right to pay under protest, sue the officer for the amount exacted and recover it back in case it should be made to appear that the statute was void.

3. If, therefore, the plaintiff had been included in the class to which this statute applied, and, under the duress of its automatically enforced provisions, had paid the tax to avoid the disruption of its business, it could have maintained an action to recover the amount thus exacted. In that suit it would have been entitled to a decision on the question as to whether the statute was constitutional, and to a review of the judgment if it had been adverse to the company's contention. But the company did not, in any sense, come within the purview of the act. The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute did not require from it the payment of the tax. For the Supreme Court of Texas in *Allen* v. *Tyson-Jones Buggy Co.*, 91 Texas, 22, and *Miller* v. *Goodman*, 91 Texas, 41, had held that the franchise tax act had no application to corporations doing an interstate business. The duress of its provisions, therefore, operated only on those doing intrastate business; and if the plaintiff, on a mere demand, paid the tax imposed by a statute, applicable only to other corporations, it had no more right to recover than would a drygoods merchant who voluntarily

paid a tax illegally imposed on those engaged in the selling of liquor.

To permit those not affected by a statute to pay the sum thereby assessed, and then sue for its recovery on the ground that the act was void, would reverse the rule that "one who would strike down a State statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution." *Southern Railway Co.* v. *King*, 217 U. S. 524, 534.

What we have said shows that the question as to voluntary payment fairly arose out of the record, and was not arbitrarily injected into the case. *Leathe* v. *Thomas*, 207 U. S. 93, 99. A decision on that non-federal point could properly dispose of the plaintiff's suit to recover back what it had paid. The judgment of the Civil Court of Appeals must, therefore, be

Affirmed.

NEW MARSHALL ENGINE COMPANY *v.* MARSHALL ENGINE COMPANY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 107. Submitted December 15, 1911.—Decided February 19, 1912.

The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy.

Courts of a State may try questions of title and construe and enforce contracts relating to patents. *Wade* v. *Lawder*, 165 U. S. 624.

A suit, to compel assignment of a patent and to enjoin manufacturing and sale of articles covered thereby, because the patent is an improvement on an earlier one and included in a covenant to convey all such improvements, is based on general principles of equity, and is within the jurisdiction of the state court.

Where the injunction granted against sale of articles manufactured under a patent is only an incident to a decree for specific performance of a contract to convey the patent as an improvement of an earlier one, the relief is appropriate, and, if it does not determine questions of infringement, is within the jurisdiction of the state courts.

203 Massachusetts, 410, affirmed.

On June 1, 1886, Letters Patent 342,802, were issued to Frank J. Marshall for an improvement in Pulp Beating Engines. Shortly before the patent expired he organized the Marshall Engine Company, and on September 15, 1903, assigned to it the patent and "all improvements thereon and renewals of the same." Marshall was elected president of the company, but neglected to have the assignment recorded within the time required by law. It contained, however, a provision for further assurance, and on October 8, 1904, after the patent had expired, Marshall executed an additional instrument whereby, after reciting the former assignment, he transferred the patent and "all further improvements thereon and renewals thereof."

In September, 1903, at the time the first assignment was made, Marshall had on file an application for a patent on "an improvement on patent 411,251 granted to E. R. Marshall, and embodies features shown in patent 342,802, granted in 1886 to myself." There is no further reference in the record to patent 411,251. Marshall's application was granted, and on April 14, 1903, Letters Patent 725,349 were granted to him.

No formal assignment was made, but it is found as a fact that, between September 15, 1903, and the receivership, the complainant manufactured nine or ten engines embodying the improvement covered by patent 725,349.

On June 13, 1905, a receiver was appointed for the Marshall Engine Company. Immediately thereafter, Marshall organized under the laws of Massachusetts a new company bearing his name, and assigned to it this patent 725,349. The New Marshall Engine Company took with notice of the complainant's right.

The Marshall Engine Company, of New Jersey, claimed title to this patent 725,349 as an "Improvement" on patent 342,802, which passed by virtue of the assignment of September 15, 1903. It thereupon filed, through its receiver, a bill in the Superior Court of Franklin County, Massachusetts, asserting this title and praying that the defendants, Marshall and the New Marshall Engine Company, should be required to execute and deliver to it an assignment in due form to patent 725,349, so as to entitle it to be recorded in the Patent Office, and also that the defendants, their successors and assigns, should be enjoined from manufacturing or selling machines covered by patent 725,349.

The defendants answered, admitting or denying the several allegations of the bill, but setting up no affirmative defense. The case was referred to a Master, who found in favor of the complainant. Thereupon the defendant moved to dismiss the bill because "it presents questions involving an inquiry as to the construction and scope of the patents therein mentioned, of which questions the Federal courts have exclusive jurisdiction." The motion was overruled, and a final decree was entered in favor of the complainants. The decision was affirmed by the Supreme Judicial Court of Massachusetts, and the case was brought here by writ of error.

Mr. Edmund A. Whitman, Mr. Lyman W. Griswold and *Mr. Frank J. Lawler,* for plaintiffs in error:

The United States courts have exclusive jurisdiction of all cases arising under the patent-right and copyright

laws of the United States. Revised Stats., c. 12, § 711; Rev. Stat., §§ 4884–4886.

Plaintiff's bill alleges that defendant, Marshall, invented a certain valuable improvement in refining engines, which was an improvement upon the engine for which patent No. 342,802 had been granted to him.

One question here presented is as to the construction to be given to the law governing the assignment under which the plaintiff claims title, which clearly makes it a case for the United States courts. *Littlefield* v. *Perry*, 21 Wall. 205.

This puts in issue the nature and scope of the patent above referred to, and involves an inquiry into the nature and scope of the invention. *Aberthaw Const. Co.* v. *Ransome*, 192 Massachusetts, 434, 439.

There is a clear distinction between a case and a question under the patent laws. The former arises when the plaintiff in his opening pleading sets up a right under the patent laws as a ground for recovery. *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255.

If the assignee of a patent sets up his patent he thereby puts the title in issue, and even if it is denied by the defendant this does not make it a suit upon the contract, but it still remains a suit for infringement of a patent, and if the patent is involved it carries with it the whole case. *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, 185 U. S. 291.

The character of a case is determined by the question involved. If it appears that some right will be defeated by one construction of an United States law, or sustained by an opposite construction of such law, a case thereby arises of which the United States courts alone have jurisdiction. Cases *supra* and *Starin* v. *New York*, 115 U. S. 257.

The issue as joined brings in issue the question of the title to a patent, and also makes it necessary to go into

the nature and scope of the engines covered by said patent, and in such cases the United States courts alone have jurisdiction. *Aberthaw Construction Co.* v. *Ransome*, 192 Massachusetts, 434, at 439; *Littlefield* v. *Perry*, 21 Wall. 205, at 219.

The plaintiff in his prayer asks for relief by having the defendants enjoined from infringing upon a patent, and this makes it a case arising under the patent laws; cases *supra.*

A state court cannot issue an injunction imposing such restraint as is here asked for, protecting the plaintiff in making, using, or vending in the United States.

It would make the defendants liable to a succession of suits in each State.

Even if the complaint standing by itself makes out a case of jurisdiction, it will be taken away if the answer sets up a case of a right under the patent laws. *Robinson* v. *Anderson*, 121 U. S. 522; *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 287.

A suit in which the relief sought is an injunction against infringing a patent is one arising under the patent laws of the United States, although it incidentally involves a determination of the question of the ownership of the patent. Cases *supra*, and *Atherton Machine Co.* v. *Atwood-Morrison Co.*, 102 Fed. Rep. 949.

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. *Tennessee* v. *Davis*, 100 U. S. 257, at 264; Story on the Constitution, § 1647; *Cohens* v. *Virginia*, 6 Wheat. 82; *Peutz* v. *Bransford*, 32 Fed. Rep. 318; *White* v. *Rankin*, 144 U. S. 628; *Adriance Pratt & Co.* v. *McCormick Harvesting Co.*, 55 Fed. Rep. 256; *Wood Harvester Co.* v. *Minneapolis Harvester Co.*, 61 Fed. Rep. 256; *Reversible Lock-Nut Co.* v. *Lock-Nut Co.*, 72 Fed. Rep. 60.

Mr. Walter H. Bond for defendant in error:

The state courts had jurisdiction of the case at bar, inasmuch as it was merely an attempt to enforce rights arising *ex contractu*. *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 424; *Wade* v. *Lawder*, 165 U. S. 624; *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255. See *McFarland* v. *Stanton Mfg. Co.*, 53 N. J. Eq. 649; *Biskey Mfg. Co.* v. *Jones*, 71 Connecticut, 113; *Harris* v. *Wallace Mfg. Co.*, 95 N. E. Rep. (Ohio) 559; *Bates Machine Company* v. *Bates*, 192 Illinois, 138.

Inasmuch as the equitable title to certain letters patent passed by the agreement of September 15, 1903, irrespective of whether those letters are an improvement on a former patent, it is not necessary to find that the former are an improvement on the latter, in order to affirm the judgment of the state court; and the state courts had unquestionable jurisdiction of the suit to enforce the specific performance of the said agreement.

It must be treated as settled that before the granting of a patent, an inventor has a qualified property in his invention which is assignable. *Burton* v. *Burton Stock Car Co.*, 171 Massachusetts, 437; *Cook* v. *Sterling Electric Co.*, 118 Fed. Rep. 45; *Topliff* v. *Topliff*, 122 U. S. 121; *Haines* v. *Ryder*, 100 Massachusetts, 216.

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

The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. For courts of a State may try questions of title, and may construe and enforce contracts relating to patents. *Wade* v. *Lawder*, 165 U. S. 624, 627. The present litigation belongs to this class. The controlling fact for determination here is whether patent 725,349 belongs to the

Marshall Engine Company, of New Jersey, or to the New Marshall Engine Company, of Massachusetts. The complainant did not, by its bill in the state court, raise any question as to the validity or construction of the patent, nor did it make any claim for damages for infringement. The suit was an ordinary bill for specific performance to compel Marshall to assign to complainant the improvement on patent 342,702, in compliance with his covenant for further assurance. If patent 725,349 was an improvement thereon, as on the face of the application and letters-patent it appeared to be, then the complainant was entitled to a decree requiring Marshall to make a conveyance which could be properly recorded for the protection of the true owner.

Marshall had, however, in violation of his contract, previously assigned patent 725,349 to the New Marshall Engine Company, which took with notice of the prior transfer. This company, therefore, held the legal title as trustee for the complainant. Under the circumstances the state court had jurisdiction to pass on the question of ownership, and to enter a decree requiring Marshall, as patentee, and the New Marshall Engine Company, as trustee, to make an assignment in due form to the complainant. This jurisdiction was based on general principles of equity jurisprudence, and did not present a case arising under the patent law.

It is, however, urged that the state court was ousted of the jurisdiction to enter a decree for specific performance, because the bill went farther and prayed that the defendants, and each of them, should be enjoined from manufacturing or selling the machines covered by patent 725,349. It is claimed that this was, in effect, an application and decree for injunction against infringement, and could only be granted by a Federal court.

But the allegations of the complainant's bill do not involve any construction of the meaning or effect of pat-

ent 725,349, nor does it charge that the manufacture or sale of engines by the defendants would be an infringement of the patent, or of any right of the complainant, if, in fact, patent 725,349 belonged to the New Marshall Engine Company. The injunction was asked for only as an incident of a finding that the title was vested in the complainant. "The bill must be regarded and treated as a proceeding to enforce the specific execution of the contract referred to, and not as one to protect the complainants in the exclusive enjoyment of the patent right. . . . It is to prevent the fraudulent violation of these contracts that the complainants seek the aid of the court and ask for an injunction." *Brown* v. *Shannon*, 20 How. 56, 57. As said in *Wilson* v. *Sanford*, 10 How. 99, 102, "the injunction is to be the consequence of the decree sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside." Here the injunction asked for is to be the consequence of the decree sustaining the complainant's title. It alleges no ground for injunction unless that title is established.

The state court had jurisdiction of the subject-matter of the controversy. The relief granted was appropriate to the cause of action stated in the bill. The decree must therefore be

Affirmed.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY *v.* WALLACE.

SAME *v.* CROW.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Nos. 108, 109. Submitted December 15, 1911.—Decided February 19, 1912.

Damages caused by failure to deliver goods is not traceable to a violation of the Interstate Commerce Law, and is not within the provisions of §§ 8 and 9 of the act; the jurisdiction of the commission and the United States courts is not exclusive. *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, distinguished.

While statutes have no extra-territorial operation and courts of one government cannot enforce the penal laws of another, state courts have jurisdiction of civil and transitory actions created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which it is brought.

Jurisdiction is not defeated by implication; and there is no presumption that Congress intends to prevent state courts from exercising jurisdiction already possessed by them, and under which they have power to hear and determine causes of action created by Federal statute. *Robb* v. *Connolly*, 111 U. S. 637.

When a Federal statute creating an action, such as the Carmack amendment, is silent on the subject of jurisdiction, the presumption is that the action may be asserted in a state, as well as in a Federal, court.

The Carmack amendment to the Hepburn act of June 29, 1906, 34 Stat. 584, 595, c. 3591, is not unconstitutional. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

Quære, and not determinable in this action, as the carrier failed to plead or prove the cause of non-delivery, whether the Carmack amendment makes the initial carrier an insurer, or deprives it of the right to contract with the shipper against liability for damages not caused by its own or the connecting carrier's negligence.

Under the Carmack amendment, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another

State, it is conclusively treated as having made a through contract, *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; it thereby elects to treat connecting carriers as its agents and the presumptions are that if goods are lost the loss results from the negligence of itself or of its agents.

Under the Carmack amendment, when a carrier accepts goods for shipment to a point on another line in another State, the burden of proof falls on it as the initial carrier to prove that the loss has not resulted from some cause for which it is in law or by contract responsible.

THE facts, which involve the liability of an initial common carrier for non-delivery of goods by the connecting carrier, are stated in the opinion.

Mr. Maxwell Evarts and *Mr. James L. Bishop* for plaintiffs in error:

Plaintiff in error does not attempt to reargue *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, but contends that the Carmack amendment did not impose upon the initial carrier the obligation of an insurer of the safe delivery of the goods at destination.

There was no evidence that the loss was caused by the initial carrier or by any connecting carrier unless the mere failure to deliver was evidence that the loss was not caused by a third person. This cannot be so, unless the carrier contracted for, or the statute imposed, the obligation of an insurer of safe delivery at destination. *Matter of Release Rates*, 13 I. C. C. R., 550; *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254.

The statute does not include the liability of an insurer against loss, for which the common carrier is not culpably chargeable. It does not restrict the right of an express company to stipulate as to the value of goods and to limit its liability to the value agreed upon. *Travis* v. *Wells, Fargo & Company*, 74 Atl. Rep. 444; *Wright* v. *Adams Express Company*, 43 Pa. Supr. Ct. 40; and see *Latta* v. *Chic., St. P., M. & O. R.*, 172 Fed. Rep. 850.

By accepting the goods for transportation the defendant did not assume a contractual obligation to deliver the goods at final destination. *Muscamp* v. *Lancaster & P. R. R. Co.*, 8 Mees. & W. 421; Hutchinson on Carriers, §§ 228 *et seq.* The statute does not attempt to make a receipt or bill of lading conclusive evidence of a contract for through carriage. If it had attempted to do so, it may well be doubted whether the attempt would have been legal. *Chicago R. Co.* v. *Minnesota*, 134 U. S. 418; *Howard* v. *Moot*, 64 N. Y. 262–268; *Meyer* v. *Berlandi*, 39 Minnesota, 438; *Railway Co.* v. *Simonson*, 64 Kansas, 802; Wigmore on Evidence, § 1354.

The common law imposes upon the carrier the obligation to receive and carry the goods tendered to it for transportation over its own line even though marked for a destination beyond its own line. *United States* v. *Geddes*, 131 Fed. Rep. 452, 458.

This is the law in Texas and in other States. *Inman* v. *St. Louis S. W. R. R.*, 14 Tex. Civ. App. 39; *Seasongood* v. *Tennessee O. R. Company*, 21 Ky. L. R. 1142; and the performance of this duty may be compelled by mandamus. *So. Ex. Co.* v. *R. M. Rose Co.*, 124 Georgia, 581.

The common law also imposes upon the carrier the duty of delivery of the goods to the succeeding carrier, where they are received for transportation to a point beyond the initial carrier's line. *Michigan Cent. R. R. Co.* v. *Mineral Springs Mfg. Co.*, 16 Wall. 318; *Tift* v. *Southern Railroad*, 123 Fed. Rep. 789; *Rawson* v. *Holland*, 59 N. Y. 611. This is an obligation from which the carrier cannot release himself. Public policy, however, requires that the rule should be enforced.

These obligations of the common law are made statutory as to interstate commerce by the provisions of the Interstate Commerce Law.

Since the initial carrier was under the legal obligation to receive and carry the goods over its own line, although

marked to a destination in another State, and was likewise under the legal obligation to deliver the goods to the succeeding carrier, no inference can be drawn from the mere receipt of the goods that the railroad company intended to contract to carry the goods to destination, because of the existence upon the statute book of the Carmack amendment. Its act was not voluntary, but compulsory, and therefore there can be found no element of intention of adopting the statute as a condition of entering into the employment.

The railroad company when this bill of lading was issued claimed the statute was unconstitutional, and a statute claimed to be unconstitutional will not be regarded as inserted in the contract by implication. *Cleveland* v. *Clements Bros. Cons. Co.*, 65 N. E. Rep. 885; *S. C.*, 59 L. R. A. 775; *Palmer* v. *Tingley*, 45 N. E. Rep. 313.

The mere failure of the last connecting carrier to deliver the goods at destination was not evidence of a loss of the goods caused by the initial carrier or a connecting carrier.

To recover upon a statutory liability, the plaintiff must allege and prove each of the facts essential to establish such statutory liability. 31 Cyc.; *Richs* v. *Reed*, 19 California, 551; *Blake* v. *Russell*, 77 Maine, 492; *Hale* v. *Miss. P. R. Co.*, 36 Nebraska, 266; *Hall* v. *Palmer*, 54 Michigan, 217.

In the *Riverside Mills Case*, it was conceded that the loss of the goods was due to the negligence of the connecting carrier.

The statute as construed and enforced by the Texas courts is unconstitutional because it deprives the defendant of its property without due process of law. It has been held liable not by reason of any fault of its own or the connecting carrier, but as an insurer of the safe delivery of the goods at a destination beyond its line to which it had not contracted for transportation.

The act is unconstitutional because it requires the initial carrier to answer for a wrong done by a connecting carrier for whose act it is in no way responsible, since it is quite impossible that the statute could constitutionally make the connecting carrier the agent of the initial carrier against the will of the latter, and then on the theory of such agency hold it liable for wrongful act of the connecting carrier.

Congress cannot, without violating the Fifth Amendment, nor can any state legislature, without violating the Fourteenth Amendment, take the property of one person and give it to another, nor can either legislative body effect this by establishing forms of law with or without notice. *Wilkinson* v. *Leland*, 2 Pet. 627, 658; *Taylor* v. *Porter*, 4 Hill, 140; *Westervelt* v. *Gregg*, 2 N. Y. 202, 212; *Holden* v. *Hardy*, 169 U. S. 369, 390; *Louis. & Nash. R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 132; *Smythe* v. *Ames*, 169 U. S. 466; *Howard* v. *Ill. Cent. R. R. Co.*, 207 U. S. 463.

Nor can this legislation be sustained under the commerce clause. The Constitution was intended to establish a harmonious system by which no power was lodged in any department of the Government which could be exercised to the subversion of civil liberty.

That power, like all others vested in Congress, is subject to the limitations prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 196; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 310; *Employers' Liability Cases*, 207 U. S. 463, 502; *Hoxie* v. *N. Y. & N. H. R. Co.*, 82 Connecticut, 356.

The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before the Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by Art. IV of the Articles of Confederation, and impliedly guaranteed by Art. IV, § 2, of the Constitution of the United States as a privilege

inherent in American citizenship. *Slaughter House Cases*, 16 Wall. 36, 75; *Gibbons* v. *Ogden*, 9 Wheat. 1, 211; *Crandall* v. *Nevada*, 6 Wall. 35; *Lottery Cases*, 188 U. S. 321, 362; *Employers' Liability Cases*, 207 U. S. 463, 502.

This case is governed by the same rules as apply to cases in which it has been held that state legislation imposing rates of tariff confiscatory in character, violate the constitutional requirement of due process of law as invading property rights. *Smythe* v. *Ames*, 169 U. S. 466; *Lake Shore & M. S. R. R. Co.* v. *Smith*, 173 U. S. 685; *Cherokee Nation* v. *Southern Kansas Railway Co.*, 143 U. S. 641; *Lake Shore & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285, 301.

A corporation is a person within the protection of the Fourteenth Amendment. *Minneapolis & St. Louis R. R. Co.* v. *Beckwith*, 129 U. S. 26. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property. *Chicago Street Railway* v. *Chicago*, 142 Fed. Rep. 845. It cannot be said that the connecting carrier is in some sense associated with the said initial carrier because a through rate of freight was stipulated, and therefore the initial carrier may be made liable for a loss occurring on the line of a connecting carrier. A through rate does not necessarily indicate an agreement for a through carriage, and if it did, then the liability of the initial carrier would rest upon his obligation by contract as a carrier over the entire route to destination. It would rest upon the initial carrier's contract and not upon the statute. *Penn. Ref. Co.* v. *West N. Y. & P. R. R. Co.*, 208 U. S. 208, 222; *Chicago & N. W. Ry. Co.* v. *Osborn*, 52 Fed. Rep. 912.

The joint liability must result from some contract or agreement which would constitute them joint contractors or partners. *Wilson* v. *L. & N. R. Co.*, 103 N. Y. App. Div. 203.

The remedy attempted to be given by the statute to

the initial carrier against a connecting carrier in case of payment of loss is unconstitutional and therefore the statute is wholly void. *Warren* v. *Charleston*, 2 Gray, 84; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 634, 636; *Howard* v. *The Illinois Cent. R. R.*, 207 U. S. 461; *The Trade-Mark Cases*, 100 U. S. 82; and see *International T. B. Co.* v. *Pigg*, 217 U. S. 113; *Smeltzer* v. *St. Louis & S. F. R. Co.*, 158 Fed. Rep. 660.

If the railroad company came under any obligation to the shipper for the through carriage of the goods, then the court erred in excluding the defense of the release by the shipper of the railroad company from liability for loss or injury to the goods not occasioned by its own negligence or that of a connecting carrier.

The Interstate Commerce Commission has expressed the opinion that under this statute a stipulation for exemption from liability for losses due to causes beyond the carrier's control is grounded upon a construction of the words of the statute "caused by it or the connecting carrier."

This construction of the statute was also adopted in *Greenwald* v. *Weir*, 130 N. Y. App. Div. 696.

If this be the true construction of the statute, the court erred in excluding this defense, and this presents a Federal question because the defense was ruled out as being in contravention of the act of Congress of June, 1906.

The court below erred in refusing to give effect to the stipulation of the contract making the measure of damages the value and price of the articles at the place and time of shipment.

The stipulation that in the event of loss the amount of damages recoverable shall be the market value of the goods at the place and time of shipment, if freely and fairly entered into is valid, although the courts in Texas hold that such a provision is invalid so far as it affects the company's liability for a loss caused by negligence. *South-*

ern Pacific Ry. Co. v. *Maddox*, 75 Texas, 300. This question, being one of general commercial law and not governed by statute, this court will be governed by its own decisions and the reasons which control its action. *Michigan Cent. Ry.* v. *Myrick*, 107 U. S. 102; *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wall. 357; *Hart* v. *Penna. R. R. Co.*, 112 U. S. 331; *Matter of Released Rates*, 13 I. C. C. 559. It was not the purpose of the Carmack amendment to change this rule of law.

The right of action was created by the statute and jurisdiction to entertain it was conferred exclusively upon the Federal courts.

The state courts have not concurrent jurisdiction with Federal courts of suits brought on a statutory liability under the Interstate Commerce Law. The jurisdiction is exclusively in the Federal court. *Sheldon* v. *Wabash R. R. Co.*, 105 Fed. Rep. 785; *Van Patten* v. *Chicago, M. & St. Paul R. Co.*, 74 Fed. Rep. 901; *Northern Pacific Ry. Co.* v. *Pacific Coast Lumber Mfrs. Assn.*, C. C. A., 165 Fed. Rep. 1, 9.

Since the right of recovery rests upon a Federal statute, a Federal question is necessarily involved. *Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 205 U. S. 1; *Hoxie* v. *N. Y. & N. H. R. R. Co.*, 82 Connecticut, 356.

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

Mr. Justice Lamar delivered the opinion of the court.

In both these cases the plaintiff in error was held liable as "initial carrier" for failure to deliver mohair shipped from points in Texas to the consignee in Lowell. The company denied liability on the ground that under the contract expressed in the bills of lading its obligation and liability ceased when it duly and safely delivered the goods

to the next carrier. It excepts to various rulings of the trial court by which it was prevented from proving that it had fully complied with its contract; had duly delivered the mohair, at Galveston, to the first connecting carrier, which delivered it, at New York, to the next carrier, which, in turn, delivered it to the Boston & Maine Railroad. Neither the pleadings nor proof showed what this company did with the mohair nor the cause of its non-delivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification. This contention, however, was found against the carrier, and it was held liable to the plaintiffs. 117 S. W. Rep. 169, 170.

The question as to whether the plaintiff was entitled to recover the value of the goods at Lowell or, as provided in the bill of lading, at the point of shipment, is suggested in one of the briefs. No such issue was made in the lower court, nor is it referred to in any of the many assignments of error involving the construction and constitutionality of the Carmack amendment to the Hepburn Act of 1906, providing that where goods are received for shipment in interstate commerce the initial carrier shall be liable for damages caused by itself or connecting carriers, and making void any contract of exemption against such liability. (34 Stat. 584.)

1. The jurisdiction of the state court was attacked, first, on the ground that § 9 of the original act of 1887 provided that persons damaged by a *violation* of the statute "might make complaint before the commission . . . or in any District or Circuit Court of the United States." 24 Stat. 379.

It was contended that *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, ruled that this jurisdiction was exclusive, and from that it was argued that no suit

could be maintained in a state court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provision of §§ 8 and 9 of the act to regulate commerce. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 208.

The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.

Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb* v. *Connolly*, 111 U. S. 624, 637.

On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court as well as in those of

the United States. This presumption would be strengthened as to a statute like this passed, not only for the purpose of giving a right, but of affording a convenient remedy.

2. The question as to the constitutionality of the Carmack amendment, though ably and elaborately argued, is out of the case, having been decided adversely to the contention of the plaintiff in *Atlantic Coast Line R. R.* v. *Riverside Mills,* 219 U. S. 186, after the present suit was instituted.

The company, however, seeks to distinguish this from that on the ground that in the *Riverside Case* it was admitted that the damage to the freight was caused by the negligence of the connecting carrier. And, as the statute applies to cases where the damage is *caused* by the initial or connecting carrier, and as the cause of the loss of the goods does not appear here, it is argued that liability is to be governed by the contract, which provides that the initial carrier should not be responsible beyond its own line. Plaintiff in error insists that the Carmack amendment did not make it an insurer. Under the construction given that statute in *Matter of Released Rates,* 13 I. C. C. Rep. 550; *Patterson* v. *Adams Express Co.,* 205 Massachusetts, 254; *Travis* v. *Wells-Fargo Express Co.,* 74 Atl. Rep. 444, it claims that the initial carrier is not deprived of its right to contract with the shipper against liability for damages not caused by either carrier's negligence. But the failure to plead and to prove the cause of the non-delivery of the goods at destination precludes any determination of such questions.

Under the Carmack amendment, as already construed in the *Riverside Mills Case,* wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation

and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is

Affirmed.

McCARTHY *v.* FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA.

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

No. 122. Argued December 19, 1911.—Decided February 19, 1912.

The two-year limitation in Rev. Stat., § 5198, within which an action must be commenced against a national bank to recover double the amount of payments of usurious interest, begins to run from the time of payment of the usurious interest, and not from the time of payment of the note.

National banks are prohibited from making usurious contracts, and whenever the debtor is sued on such a contract, he may plead the usury and be relieved from payment; as to this defense there is no statute of limitations.

Where a national bank reserves or deducts usurious interest in advance, the debtor may plead usury, but may not recover double the amount paid under § 5198, Rev. Stat.

When the debtor actually makes, and the national bank knowingly receives and appropriates, a payment of usurious interest, the cause of action arises and the statute begins to run.

There is no *locus penitentiæ*. That privilege is only granted to those banks which, having charged usury, may by refusal to accept interest when tendered show that they will not carry the illegal contract into effect.

18 So. Dak. 218, affirmed.

PATRICK B. McCARTHY, under the provisions of Rev. Stat., § 5198, brought suit against the First National Bank of Rapid City, South Dakota, for twice the amount of interest paid the bank.

The complaint alleged that, the maximum legal rate being 12 per cent, McCarthy, on August 27, 1887, borrowed from the defendant $4,000, giving therefor promissory notes payable at different dates, each bearing

18 per cent interest. These notes were not paid at maturity, and from time to time were renewed at the same rate. Many payments of usurious interest were made. The debt was finally consolidated into a note, bearing 12 per cent interest, dated May 22, 1889, for $5,000, which included the original principal and unpaid interest. It was renewed and secured by mortgage July 22, 1891. McCarthy alleges that between August 27, 1887, and January 1, 1897, he paid on the original and renewal notes various sums, aggregating $3,802.74, as interest, and that the defendant "knowingly . . . applied the same to the payment of usurious interest, and endorsed the same on the said several promissory notes as interest received thereon."

On January 26, 1897, the bank instituted proceedings to foreclose the mortgage given by plaintiff, his wife and others to secure the debt. McCarthy filed a plea of usury, which was sustained, and, after purging the debt of usury and forfeiting all interest, a decree was finally entered, January 12, 1905, foreclosing the mortgage for $5,951.56, made up of the original debt of $4,000, taxes paid on the mortgaged property, and costs. On January 21 this sum was paid to the bank, and on January 25, 1905, plaintiff brought this suit for $7,605.48, or twice the amount of interest paid. The defendant set up, by its plea, that the action was barred, because not brought within two years from the date of payment of the usurious interest. The plaintiff replied that the statute only began to run from the date the debt was paid. For the purpose of showing that the payments on account of interest ($3,802.79) did not equal the amount of the original debt ($4,000), and that the judgment had been paid (Jan. 21, 1905), less than two years before suit, he offered the record in the foreclosure proceedings. It was excluded by the trial court, but incorporated in the record by bill of exceptions.

Mr. Hannis Taylor, with whom *Mr. Charles W. Brown*, *Mr. John F. Schrader* and *Mr. Clarence L. Lewis* were on the brief, for plaintiff in error:

Under § 5198, Rev. Stat., the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt. *McBroom* v. *Investment Co.*, 153 U. S. 318; *Investment Co.* v. *McBroom* (N. Mex.), 30 Pac. Rep. 859; *Duncan* v. *First Nat. Bank*, 8 Fed. Cases, 11; *First Nat. Bank* v. *Denson*, 115 Alabama, 650; 22 So. Rep. 518; *Hazeltine* v. *Cent. Nat. Bank*, 155 Missouri, 66; 56 S. W. Rep. 895; *First Nat. Bank* v. *Childs*, 130 Massachusetts, 519; *First Nat. Bank* v. *Turner* (Kan.), 43 Pac. Rep. 936; *First Nat. Bank* v. *McInturff* (Kan.), 43 Pac. Rep. 839; *Louisville Tr. Co.* v. *Ky. Nat. Bank*, 102 Fed. Rep. 442; *Same* v. *Same*, 87 Fed. Rep. 143; *Harvey* v. *Nat. L. Ins. Co.*, 60 Vermont, 209; 14 Atl. Rep. 8; *Cotton States Bldg. Co.* v. *Peightal*, 67 S. W. Rep. 524; *Wheaton* v. *Hibbard*, 20 Johns. 290; *Stevens* v. *Lincoln*, 7 Met. 525; *Saunders* v. *Lampert*, 7 Gray, 484; *Smith* v. *Robinson*, 10 Allen, 132; *Hall* v. *First Nat. Bank*, 30 Nebraska, 99; 46 N. W. Rep. 151; *Kendall* v. *Crouch* (Ky.), 11 S. W. Rep. 587; *Talbot* v. *First Nat. Bank*, 185 U. S. 172; *Talbot* v. *Sioux Nat. Bank*, 185 U. S. 182.

At common law the borrower could not recover the penalty given by the statutes relating to usury, without paying or offering to pay at least the principal of the loan, and the decisions in the *Duncan* and *McBroom cases* result from the application of common-law principles, including the doctrine of *locus penitentiæ*, to the National Bank Act. *Wheaton* v. *Hibbard*, 20 Johns. 290; *Investment Co.* v. *McBroom* (N. Mex.), 30 Pac. Rep. 859; *Stevens* v. *Lincoln*, 7 Met. 525; *Saunders* v. *Lambert*, 7 Gray, 484; *Smith* v. *Robinson*, 10 Allen, 130; *McBroom* v.

Investment Co., supra; Hazeltine v. *Central Nat. Bank, supra; First Nat. Bank* v. *Denson, supra.*

Mr. Charles L. Buell, with whom *Mr. A. K. Gardner* was on the brief, for defendant in error:

Under § 5198, Revised Statutes of United States, the limitation of two years within which the borrower may sue for double the amount of usurious interest paid and received as such commences to run from the date of the usurious transaction, viz., the date of the actual payment of usurious interest, and suit must be entered within two years from the date of such payment. Otherwise, the cause of action is barred. *McCarthy* v. *First Nat. Bank,* 121 N. W. Rep. 853; *Citizens' Nat. Bank* v. *Donnell,* 195 U. S. 369; *Brown* v. *Bank,* 169 U. S. 416; *Walsh* v. *Mayer,* 111 U. S. 36; *First Nat. Bank* v. *McCarthy,* 100 N. W. Rep. 16; *Lealos* v. *Union Nat. Bank,* 81 N. W. Rep. 56; *Smith* v. *First Nat. Bank,* 75 N. Y. Supp. 131; *First Nat. Bank* v. *Smith,* 54 N. W. Rep. 254; *Lanham* v. *First Nat. Bank,* 65 N. W. Rep. 786; *Washington Bldg. & Loan Assn.* v. *Wendlung,* 46 S. E. Rep. 296; *Monongahela Nat. Bank* v. *Overholt,* 96 Pa. St. 327; *Lebanon Nat. Bank* v. *Karmany,* 98 Pa. St. 65; *Burnside* v. *Mealer,* 80 S. W. Rep. 785; *Buntyn* v. *Nat. Bldg. & Loan Assn.,* 38 So. Rep. 345; *Citizens' Nat. Bank* v. *Donnell,* 72 S. W. Rep. 925; *Talbot* v. *Bank,* 82 N. W. Rep. 963; 76 N. W. Rep. 726; *Chadwick* v. *Menard,* 20 So. Rep. 933; Webb on Usury, § 526. Cases collected in 5 Fed. Stat. Ann. 137.

The right to maintain an action to recover the penalty prescribed by § 5198 accrues as soon as any unlawful interest is paid, and the two-year limitation begins to run from the time such payment is made. The following cases support the doctrine: *Shinkle* v. *Bank,* 22 Oh. St. 516; *Hintermister* v. *Bank,* 64 N. Y. 212; *Stephens* v. *Bank,* 88 Pa. St. 157; *Brown* v. *Bank,* 72 Pa. St. 209; *Lynch* v. *Bank,* 22 W. Va. 544; *Bank* v. *Carpenter,* 52 N. J. Law,

165; 19 Atl. Rep. 181; *Stout* v. *Bank* (Tex. Sup.), 8 S. W. Rep. 808; *Bank* v. *Alves* (Ky.), 15 S. W. Rep. 132.

Where usurious interest has been paid to a national bank the remedy afforded by § 5198, Rev. Stat., is exclusive, and is confined to an independent action to recover such usurious payments. *Schuyler Nat. Bank* v. *Gadsden*, 191 U. S. 451; *Hazeltine* v. *Central Nat. Bank*, 183 U. S. 132; *Driesbach* v. *Wilkesbarre Nat. Bank*, 104 U. S. 52; *Barnet* v. *Nat. Bank*, 98 U. S. 555; *Farmers' &c. Bank* v. *Dearing*, 91 U. S. 29; *Walsh* v. *Mayer*, 111 U. S. 31; *Stephens* v. *Monongahela Bank*, 111 U. S. 197.

Notwithstanding the fact the contract called for usurious interest, yet there was *locus penitentiæ* on the part of the bank to decline to receive the usurious interest as such at the end of the year; but if at the end of the year it did so receive and apply the usurious interest, a cause of action under the statute immediately accrued. Cases *supra*, and see also *Citizens' National Bank* v. *Gentry*, 63 S. W. Rep. 454 (Ky.); *Brown* v. *Bank*, 169 U. S. 416.

The deduction from all of the cases is that when usurious payment is made and the bank elects to accept and receive it as such, a cause of action for twice the amount so paid accrues immediately, and as a consequence the two-year statute of limitations commences to run from that date. It follows that this action is clearly barred by the two-year limitation statute.

A right to recover twice the amount of usurious interest paid under § 5198, Rev. Stat., is not conditioned on payment of the principal of the loan. *Hazeltine* v. *Central Nat. Bank*, 183 U. S. 132; see also *Lealos* v. *Union National Bank, supra;* Webb on Usury, § 526; 5 Fed. Stat. Ann. 138.

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

Section 5198 of the Revised Statutes, under which this

suit was brought, provides that "taking, receiving, reserving, or charging" more than a lawful rate of interest, when knowingly done by a national bank, shall be deemed a forfeiture of the entire interest. In case a greater than the lawful rate "has been paid, the person by whom it has been paid, may recover back twice the amount of the interest thus paid, . . . provided such action is commenced within two years from the time the usurious transaction occurred."

The debt was created in 1887, was paid in full in January, 1905, and on January 25, of the same year, the maker of the note brought suit to recover twice the amount of the interest paid thereon prior to 1897.

In considering the bank's plea that the action was barred because not brought within two years, and the plaintiff's claim that the statute only ran from the date the debt was paid, the Supreme Court of South Dakota pointed out the irreconcilable conflict in the cases dealing with this question, and, after making a careful analysis of all the authorities, reached the conclusion, in which we concur, that the statute begins to run from the date of the payment of the usurious interest. 17 S. Dak. 393. Considering this review of the decisions, we shall only discuss the statute itself, and that briefly.

National banks are prohibited from making usurious contracts. If they disregard its provisions, the law not only furnishes a defense, but gives a right of action. As to the defense, there is no statute of limitations. Whenever sued the debtor may plead the usurious contract and be relieved from paying any interest whatever. But if he elects to avail himself of the cause of action, he must sue "within two years from the time the usurious transaction occurred."

If the making of the note was the "usurious transaction," from which date the statute began to run, the anomaly of the right to recover being barred before the

cause of action arose would result in all cases where the debtor for two years after the loan failed to pay interest, even though he subsequently discharged the debt, principal and usury. If the final payment of the debt is the "usurious transaction" and suit must be brought in two years from that date, then there could never be a recovery in those cases where the debtor had paid usury, but was not able to pay the debt in full.

That the statute does not begin to run from the date of the loan, nor from the date of the satisfaction of the debt, but from the date interest is paid, appears from an analysis of the two classes of cases referred to in Rev. Stat., § 5198, noting that "interest paid" in the last clause is used in contradistinction to interest "reserved or charged," in the first sentence of the section. Banks may make ordinary loans and charge interest to be collected at the maturity of the note. But, as they usually reserve and deduct it in advance, by way of discount, the statute is framed so as to apply to cases where the interest is paid by the debtor as well as to those in which it is reserved by the bank. These deductions by way of discount are not treated as payments. They do not come out of the debtor's pocket, though they lessen the amount which he receives when the loan is made, and when sued he may plead usury and escape liability for the amount thus charged or retained. But, such reservation by the bank, not being a payment made by the debtor, he, of course, cannot avail himself of the right to maintain a suit given only to those who have paid interest.

But when the debtor actually makes a payment, as interest, and the bank knowingly receives and appropriates it as such, the usurious transaction is complete, the right of the one and the liability of the other is fixed, the cause of action arises and the statute of limitations begins to run. There is no *locus penitentiæ*. That privilege is only granted to those banks which, having charged

usury, may, by a refusal to accept interest when tendered, show that they will not carry the illegal contract into execution, and thus escape the two-fold penalty.

Those courts which hold that the statute begins to run from the payment of the debt, instead of the payment of the interest, have been influenced by statements of Mr. Justice Harlan in *McBroom* v. *Investment Co.*, 153 U. S. 318, which involved the construction of the usury statute of the Territory of New Mexico. That act differed in several respects from Rev. Stat., § 5198. But that case did not rule that in a suit under the act of Congress the statute did not run from the date usury was paid and received as such. This court did not understand that such was the meaning of that case, as appears from his opinion in *Brown* v. *National Bank*, 169 U. S. 416, which involved a construction of Rev. Stat., § 5198. For he there points out the difference between "paying" and "agreeing to pay," and says that, "if at any time the obligee actually pays usurious interest, as such, the usurious transaction must be held to have then and not before occurred, and he must sue within two years thereafter."

The Supreme Court of South Dakota properly held that the recovery of interest paid more than two years before suit was brought was barred, and its judgment is

Affirmed.

LATIMER *v.* UNITED STATES.

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

No. 151. Submitted January 15, 1912.—Decided February 19, 1912.

Congress, in framing a tariff law, will be presumed to use words of a former tariff law as having the same meaning which this court has already given to them.

This court, having held that "unmanufactured tobacco" as used in the Tariff Act of 1883, included sweepings of factories and warehouses used after importation in manufacturing cigarettes and stogies, the same meaning will be given to the same words as used in the Tariff Act of 1897. *Seeberger* v. *Castro*, 153 U. S. 32.

"Waste" as used in a tariff act generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material. "Scrap" does retain the name and quality. *Patton* v. *United States*, 159 U. S. 503.

5 Porto Rico Fed. Rep. 138, affirmed.

THE facts, which involve the classification of tobacco scraps under the Tariff Act of 1897, are stated in the opinion.

Mr. Walter F. Welch, with whom *Mr. Edward S. Hatch* was on the brief, for appellant:

The merchandise involved in this suit is waste.

Merchandise is classifiable for the purposes of duty in its condition as imported. *Worthington* v. *Robbins*, 139 U. S. 337; *Dwight* v. *Merritt*, 140 U. S. 219; *United States* v. *Schoverling*, 146 U. S. 82. It is not, therefore, a fact material to the classification of this merchandise that there are recoverable portions of it suitable, when recovered, for making cheap stogies.

All waste has a value through the recovery from it of more or less valuable constituents. A levy of ten per

cent. ad valorem on waste under the Tariff Act presupposes that waste materials are valuable.

Whether this waste is properly classifiable as waste or as tobacco unmanufactured has never been authoritatively decided. *Seeberger* v. *Castro*, 153 U. S. 32, did not decide that a tariff provision for unmanufactured tobacco is more specific than a provision for waste. See *United States* v. *Baversdorfer*, 126 Fed. Rep. 732.

The *Seeberger Case* is not an authority on the issue now here for determination and is not binding in deciding this case.

This court does not review, upon a writ of error, errors of law which do not appear of record or by bill of exceptions. *Clausen* v. *United States*, 142 U. S. 140; *Kreshower* v. *United States*, T. D. 27,826; *Sears-Roebuck & Co.* v. *United States*, T. D. 32,055.

A decided case, holding goods dutiable under a particular paragraph of a tariff act, is not binding in a later case which raises an issue as to the applicability of a paragraph not drawn to the attention of the court nor discussed in the decided case relied on.

The merchandise is more specifically provided for as "waste" than as "tobacco unmanufactured."

As the issue stated in this point has never been decided by any court previous to the decision of the court below herein, the question is open whether these tobacco sweepings are more appropriately classifiable and dutiable as "waste" than as "tobacco unmanufactured." *Brennan* v. *United States*, 136 Fed. Rep. 743.

The rule applied by the board in the case of cork bark waste, marble waste, ramie waste, jute waste and mica waste, should be applied equally to tobacco waste. *United States* v. *Reiss*, 136 Fed. Rep. 741; *Nairn Linoleum Co.* v. *United States*, 142 Fed. Rep. 214; T. D. 16,324, G. A. 3153; T. D. 23,347, G. A. 5017; T. D. 23,637, G. A. 5115; T. D. 28,050, abstract, 14,869; T. D. 31,739, G. A. 7242.

All doubtful questions must be resolved favorably to the importer. *Hartranft* v. *Wiegman*, 121 U. S. 609, 616; *Powers* v. *Barney*, 5 Blatchf. 202.

Mr. Assistant Attorney General Wemple for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

In the process of manufacturing and handling tobacco small pieces are broken from the brittle leaves and fall to the floor of the warehouse or factory. These scraps are not treated as worthless, but are swept up, and, when cleaned, are used in the manufacture of a cheap grade of cigarettes and stogies.

The plaintiff in error shipped to Porto Rico a quantity of these sweepings, and the question arose as to whether the shipment was dutiable at 10 per cent. ad valorem as "waste, not specially provided for in this Act," under § 463 of the Tariff Act of 1897; or, at 55 cents a pound as "tobacco, manufactured or unmanufactured," under § 215 of the same statute. (30 Stat. 194, 169.) The customs officer classed it as "unmanufactured tobacco," and required the payment of a duty of 55 cents a pound. The importer protested and a case was made to test the question. On appeal the General Board sustained the collector. It was affirmed by the District Court of Porto Rico, and to reverse that judgment the importer has brought the case here.

There has been some difference of opinion as to the proper classification of scrap tobacco under the various tariff acts. In *United States* v. *Schroeder*, 93 Fed. Rep. 448, a higher grade of scrap was held to be "waste" within the meaning of the Tariff Act of 1890. In *Seeberger* v. *Castro*, 153 U. S. 32, it was decided that the clippings from the ends of cigars were dutiable as unmanufactured tobacco under the Tariff Act of 1883.

The plaintiff claims that this decision has no application here, because it related to clippings which were of a higher grade than scrap, and for the further reason that, as the importer there made no claim that it should be taxed as waste, the court did not pass on that question. But it did definitely decide that such material, by whatever name called, was "unmanufactured tobacco."

The words, having received such a construction under the act of 1883, must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court. *United States* v. *Baruch*, this day decided, *ante*, p. 191. That such was the intention of Congress appears further from the fact that the duty of "10 per cent. ad valorem on waste" is found in "Schedule N—Sundries." The word as thus used generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material. *Patton* v. *United States*, 159 U. S. 500, 503. But the scrap here involved retains the name and quality of tobacco. It is tobacco, and as such it is used for making cigarettes and stogies. It was therefore taxable under Schedule F, which fixes the duty on tobacco in all its forms—manufactured or unmanufactured. The judgment is therefore

Affirmed.

MILLER *v.* KING, SUBSTITUTED FOR THE FIRST NATIONAL BANK OF FAYETTE, IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 153. Argued January 22, 23, 1912.—Decided February 19, 1912.

While a national bank cannot act as trustee and hold land for third persons, under § 5136, Rev. Stat., it may do those acts that are usual and necessary in making collections of commercial paper and evidences of debt.

A national bank, under § 5136, Rev. Stat., may be assignee of a judgment to collect and distribute the amount thereof where the assignment is not made merely to enable it to sue in its own name.

Under the law of Oregon, a national bank holding a chose in action as trustee to collect and distribute may sue in its own name.

Quære: Whether any but the Government can raise the question that a national bank in acting as trustee violates § 5136, Rev. Stat. *Kerfoot* v. *Bank*, 218 U. S. 281.

53 Oregon, 53, affirmed.

THE facts, which involve the construction of § 5136, Rev. Stat., in regard to the extent of power of a national bank to act as trustee, are stated in the opinion.

Mr. James H. Richards, with whom *Mr. Oliver O. Haga* was on the brief, for plaintiff in error:

A national bank cannot act as trustee under an express trust.

The actions of the bank in this matter and the contract which it is pretended or claimed was entered into are clearly *ultra vires* and are not binding upon either the bank or the other parties to the contract. *Cent. Transp. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538; *California Bank* v. *Kennedy*, 167 U. S. 362; *Louisville &c. R. R. Co.* v. *Louisville Trust Co.*,

174 U. S. 552; *Concord &c. Nat. Bank* v. *Hawkins*, 174 U. S. 364; *Bowen* v. *Needles Nat. Bank*, 94 Fed. Rep. 925; *Chemical Nat. Bank* v. *Havermale*, 120 California, 604; *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281; *Citizens' Nat. Bank* v. *Appleton*, 216 U. S. 196.

The doctrine of *ultra vires* has been applied most rigidly to banks operating under the national banking act. *Logan County Bank* v. *Townsend*, 139 U. S. 67; *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *First National Bank* v. *Converse*, 200 U. S. 425.

It cannot be contended that the contracts entered into in this case come within such incidental powers as shall be necessary to carry on the business of banking. *Oregon Railway & Navigation Co.* v. *Oregonian Railway Co.*, 130 U. S. 1; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 549.

Any contract or act of a national bank beyond the powers expressly conferred upon it by the statute or fairly implied therefrom and necessary in order to carry on the banking business, is *ultra vires* and void. Cases cited *supra* and *Commercial Nat. Bank* v. *Pirie*, 82 Fed. Rep. 709; *Farmers' & Merchants' Nat. Bank* v. *Smith*, 77 Fed. Rep. 129; *McCrory* v. *Chambers*, 48 Ill. App. 455; *Weckler* v. *First Nat. Bank*, 42 Maryland, 581; *First Nat. Bank* v. *Ocean Nat. Bank*, 60 N. Y. 278; *Wiley* v. *First Nat. Bank*, 47 Vermont, 546; *Third Nat. Bank* v. *Boyd*, 44 Maryland, 47; *Dresser* v. *Traders' Nat. Bank*, 165 Massachusetts, 120; *Lazear* v. *Nat. Union Bank*, 52 Maryland, 78; *Norton* v. *Bank*, 61 N. H. 589; *Cumberland &c. Co.* v. *Evansville*, 127 Fed. Rep. 187; *Davis* v. *Old Colony R. R. Co.*, 131 Massachusetts, 258.

An *ultra vires* contract is void; not merely voidable. When a contract is *ultra vires* as to one party to it, the other party to the contract may treat it as invalid. *Central Transp. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *St. L. &c. Ry. Co.* v. *Terre Haute &c. Ry. Co.*, 145 U. S. 393; *Pittsburg &c.*

Ry. Co. v. *Keokuk &c. Co.*, 131 U. S. 371; *Jacksonville N. P. R. R. & M. Co.* v. *Hooper*, 160 U. S. 514, 515; 1 Page on Contracts, § 310.

No action can be maintained on an *ultra vires* contract. Cases *supra*. No action can be maintained by the bank based on an assignment which it had no authority to accept. *Ashbury* v. *Riche*, L. R. 7 H. L. 653; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538; *De La Vergne Co.* v. *German Savings Institute*, 175 U. S. 40, 65; *Bosshardt* v. *Crescent Oil Co.*, 171 Pa. St. 120; *Thomas* v. *West Jersey Ry. Co.*, 101 U. S. 71; *Penna. R. R. Co.* v. *St. L. &c. Co.*, 118 U. S. 290.

The revocation of the bank's authority revoked all authority which the bank had in the matter. *Taylor* v. *Burns*, 203 U. S. 120; 1 Clark & Skyles on Agency, §§ 157–162 and 433; *Frink* v. *Roe*, 30 California, 296, 309; 2 Ency. L. & P. 1249–1250.

The Federal question is in time if raised at or before the hearing in the higher state courts. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *Sulley* v. *American National Bank*, 178 U. S. 289; *Rothschild* v. *Knight*, 184 U. S. 334; *Arrowsmith* v. *Harmoning*, 118 U. S. 194.

Mr. Will R. King, in propria persona, with whom *Mr. C. E. S. Wood* and *Mr. F. M. Saxton* were on the brief, for defendant in error:

This court has no jurisdiction. It does not appear from the record that a title, right, privilege or immunity was claimed under the Constitution, or a treaty, or a statute of or an authority exercised under the United States was set up in the state court and was passed upon adversely to plaintiff in error. *Zadig* v. *Baldwin*, 166 U. S. 485; *Sayward* v. *Denny*, 158 U. S. 180; *Harding* v. *Illinois*, 196 U. S. 78; *California Powder Works* v. *Davis*, 151 U. S. 389; *Schuyler Nat. Bank* v. *Bollong*, 150 U. S. 87; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

Where the provisions of the National Bank Act prohibit certain acts without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States and not by private parties. *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Xenia First Nat. Bank* v. *Stewart*, 107 U. S. 677; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240; *Union G. Mining Co.* v. *Rocky Mt. Nat. Bank*, 96 U. S. 240; *Fortier* v. *New Orleans Nat. Bank*, 112 U. S. 439; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 77; *Reynolds* v. *Crawfordsville Nat. Bank*, 112 U. S. 405; 5 Fed. Stat. Ann. 83.

A national bank may engage in the business of collecting notes, bills of exchange, and other evidence of debt as an incident of the banking business although the authority is not expressly mentioned in the statute. *Mound City Paint Co.* v. *Commercial Nat. Bank*, 4 Utah, 353; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67; *Keyes* v. *Hardin Bank*, 52 Mo. App. 323; *Hanson* v. *Heard*, 69 N. H. 190; *Newport Nat. Bank* v. *Board of Education* (Ky.), 70 S. W. Rep. 186; *Yerkes* v. *Nat. Bank*, 69 N. Y. 386; *White* v. *Third Nat. Bank*, 7 Ohio Dec. 666; *Prescott* v. *Nat. Bank* (Mass.), 32 N. E. Rep. 909.

A national bank may act as trustee of an express trust. *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281, 287; *National Bank* v. *Matthews*, 96 U. S. 621.

Rev. Stat., § 5136, contains no prohibition against a national bank taking a judgment for collection and accepting an assignment thereof for that purpose.

The Federal court will look beyond the Federal question only when it has been decided erroneously and then only to see whether there are any other matters adjudged by the state court sufficiently broad to maintain the judgment. *McLaughlin* v. *Fowler*, 154 U. S. 663; *Waters-*

Pierce Oil Co. v. *Texas*, 212 U. S. 86, 99; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240.

Questions of fact will not be reviewed on a writ of error from this court to the highest court of a State. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 99; *Eagan* v. *Hart*, 165 U. S. 188; *Clipper M. Co.* v. *Eli M. Co.*, 194 U. S. 220; *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281, 288.

Mr. Justice Lamar delivered the opinion of the court.

Miller, the plaintiff in error, was the attorney of Helmick in an action against Porter. The judgment obtained in that suit was assigned by Helmick to the First National Bank of Fayette, Idaho, which executed an instrument reciting that it would hold any money collected subject to the order of Helmick. At the time of making the assignment Helmick gave verbal instructions to pay part of the money when collected to Lauer. The bank placed the judgment in the hands of Miller, who collected the money, and, claiming to act as attorney for Helmick, paid over the proceeds to the Moss Mercantile Company, which asserted that the cause of action had been transferred to it prior to the rendition of the judgment. The bank thereupon brought suit against Miller for the recovery of the money thus collected by him and paid over to a third party. The defendant answered, denying that the bank had title; alleging that it had paid no consideration for the transfer; that it was intended to defraud creditors; setting up that Helmick had revoked the assignment and had given Miller a release. There was, however, no claim that the charter of the bank prevented it from taking the transfer or prosecuting the suit.

There were several trials of the case, and ultimately, with the consent of Helmick and Lauer, the bank assigned the judgment to King. He was substituted as plaintiff, and recovered a judgment against Miller. The case was

taken to the Supreme Court, where it was contended that a national bank could not act as trustee of an express trust so as to be able to institute and maintain a suit under the statute of Oregon, which provides that the trustee of an express trust may sue without joining the person for whose interest the action is prosecuted. The judgment was affirmed, and no Federal question is presented in the writ of error here except on the theory that, under Revised Statutes, § 5136, a national bank could not act as trustee of an express trust, and that therefore the suit was absolutely void, and could not proceed to judgment in the name of the substituted plaintiff.

A national bank cannot act as a technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage, nor take title to property to be held for the life of the grantor, with remainder to his children. Every such transaction would be voidable at the instance of the Government. *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281. But under Revised Statutes, § 5136, "it may exercise all such incidental powers as shall be necessary to carry on banking," and it may therefore act as a fiduciary and occupy a trust relation in matters connected with that business. It may do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt. It is both usual and proper for the legal title to negotiable instruments to be vested in a bank by mere endorsement for purposes of collection, holding the proceeds as the endorser directs. There is no difference in law if the title is conveyed by a lengthier and more formal instrument. In both cases the bank takes the legal title for the purpose of demand and collection. In a proper case, there is no reason why it might not go further and institute suit thereon in its own name for the recovery of what may be due. If the transfer was made, or the suit was being maintained, for purposes not

authorized by the charter of the bank, and if the defendant was in a position where his rights were prejudiced thereby, it would be incumbent on him to raise that defense at the outset of the litigation, or as soon as he learned that fact.

In this case the assignment was made in order that the bank might collect the money, pay part to Lauer, and, in effect, hold the balance on deposit to the credit of Helmick. The judgment was not transferred to the bank for the mere purpose of enabling it to bring suit in its own name. At the time of the transfer no suit was contemplated, and, indeed, none was necessary, because the money was immediately paid by Porter. Suit only became necessary when the amount collected by Miller was later improperly paid over by him to the Moss Mercantile Company. There was nothing in this transaction which was so disconnected with the banking business as to make it in violation of Rev. Stat. § 5136, even if the defendant could raise such question. *Kerfoot* v. *Bank*, 218 U. S. 281. The laws of Oregon permitted an action to be maintained by the bank in its own name. There is no Federal question before us which authorizes a reversal, and the judgment is

Affirmed.

UNITED STATES *v.* NORD DEUTSCHER LLOYD.

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

No. 611. Argued January 12, 1912.—Decided February 19, 1912.

The object of § 19 of the Immigration Act of 1907, prohibiting the owners of vessels from making any charge or receiving any security for return passage of aliens brought to this country, was to carry out a policy of preventing the transportation of aliens within the excluded class by rendering it unprofitable instead of profitable for the vessel-owner.

While a statute has no extra-territorial force, and one cannot be indicted here for what he does in a foreign country, the making of a contract in a foreign country may, as in this case, create a condition operative in this country, under which acts of omission or commission can be punished here. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, distinguished.

A vessel-owner taking security in a foreign country for the return passage of aliens brought to a port of the United States violates § 19 of the Immigration Act of 1907, and the retention of the money in the United States for the return passage is an offense at the place where it is retained.

185 Fed. Rep. 158, reversed.

WRIT of error to review a judgment sustaining an indictment charging the defendant with taking security and making charge for the return passage of aliens unlawfully brought into the United States and ordered to be returned in pursuance of the Immigration Act of February 20, 1907.

The indictment charges that the Nord Deutscher Lloyd, a German corporation, operated a line of steamers between Bremen and New York, maintaining an office and place of business in both cities. On November 25, 1910, in Bremen, it sold tickets to two aliens entitling them to passage to New York and return. Before their embarkation the defendant collected from them 150 rubles for the return passage money in steerage. On arrival in New

York the aliens were ordered to be deported to Germany as likely to become public charges, because of senility and inability to make a living. On December 16, 1910, after the unlawful bringing into this country of said aliens, and while they were liable to deportation on the vessel by which they came, the said 150 rubles were still held and retained in possession of the defendant up to (April 3, 1911) the date of filing the indictment, "the defendant so holding and retaining the same and making charge thereof for the return of such aliens, and being taken and continuously held by the said defendant, as security from the said aliens, for the payment of such charge for their return passage to Germany aforesaid, in violation and evasion of § 19 of the Immigration Laws of the United States, approved February 20, 1907. The defendant . . . by the means aforesaid, at and within the Southern District of New York, on December 16, 1910, unlawfully and wilfully did make charge for the return of aliens, so as aforesaid brought into this country in violation of law, and take security from them and keep and hold the same for the payment of such charge, then and there well knowing that such aliens had been brought to this country in violation of law."

The court sustained the demurrer on the ground that the money was paid and received in Germany, and that the facts did not amount to a violation of § 19, which provides "That all aliens brought to this country in violation of law shall, if practicable, be immediately sent back to the country whence they respectively came on the vessels bringing them. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came." And ". . . If such owner shall refuse . . . to pay the cost of their maintenance while on land, or shall *make any charge for the return of such alien, or shall take security from him for the*

payment of such charge, such owner shall be guilty of a misdemeanor."

Mr. Assistant Attorney General Harr for the United States:

The manifest purpose of the steamship company in taking, at Bremen, the 150 rubles as security for the return passage of Nuchim Dossik and his wife, was to evade the provisions of § 19 of the Immigration Act.

The statute should be construed so as to prevent this plain and palpable attempt to evade it.

Unless the indictment be sustained, the return charge will be made, and the purpose of the statute defeated. The presumption of intent to violate the statute became conclusive when the defendant, after the immigration authorities refused to admit the aliens, retained the security so taken.

The rule that penal statutes are to be strictly construed is qualified by the further one that such statutes are not to be so strictly construed as to defeat the obvious intention of the legislature. *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *American Fur Co.* v. *United States*, 2 Pet. 358, 367; *United States* v. *Morris*, 14 Pet. 464, 475; *United States* v. *Hartwell*, 6 Wall. 385, 395; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653.

The statute covers a taking of security for a return charge made previous to the bringing of the aliens into this country, where the intent to defeat the manifest purpose of the statute exists, or to treat the retention of the security, under such circumstances, as a "taking."

The statute does not only undertake to punish a charge made or security taken within the territory of the United States. To so hold would be to nullify the statute entirely, because no charge need be made for the return passage of an alien until after he had departed from the United States. The statute is broad enough to cover a

charge made or security therefor taken before the service is rendered.

The service for which the charge is made or the security taken is performed partly within the territorial waters of the United States and partly on the high seas, either of which would be sufficient to give to this country jurisdiction of acts inhibited as contrary to its policies with respect to immigration or foreign commerce. The statute applies, and the authority of Congress can be upheld, as to acts occurring in a foreign jurisdiction which are intended to interfere with the legitimate operations of the Government or to defeat the exercise of its rightful powers. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 356; *United States* v. *Craig*, 28 Fed. Rep. 795; *United States* v. *Lavarrello*, 149 Fed. Rep. 297.

The passenger acts undertake to regulate matters wholly beyond the jurisdiction of Congress except for the fact that the owners or masters of the vessels regulated bring themselves within our jurisdiction by attempting to introduce aliens into the country.

Mr. Joseph Larocque for defendant in error:

The section in question does not apply to an act done by an alien corporation in a foreign country. The section is penal and must therefore be strictly construed.

Even were it a question of doubt as to whether Congress intended to cover the case of a charge made or security taken from a person about to embark in a foreign country, the court in construing the section would be bound to exclude such an interpretation.

While a country may treat some relations between its own citizens as governed by its own law in regions subject to no sovereignty, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done.

A statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

The indictment cannot be sustained upon the theory that it charges the commission of a continuing offense.

The act which the indictment charges to be an offense had its inception and completion at Bremen, Germany. This is not the case of an offense commenced within one jurisdiction and completed in another.

While the indictment alleges that the money in question was received and collected at Bremen, Germany, it does not allege that the said money was ever sent to this country or that it has ever been held or retained by the defendant within this jurisdiction.

Section 19 does not make it a misdemeanor to make a charge or receive security from an alien in a foreign country, or to bring into this country a non-admissible alien from whom money or security therefor has been received abroad for his return passage.

Congress intended to prohibit a shipowner from exacting from an alien, who has been brought to this country in violation of law, money for his return.

If Congress had intended to make it a misdemeanor for a shipowner to retain moneys previously received abroad from an alien for his return passage, it could easily have done so in clear and concise terms.

None of the authorities cited by the learned government counsel has any bearing upon the question at issue.

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

Section 19 of the Immigration Act of 1907 (February 20,

1907, 34 Stat. 898, 904, c. 1134), is not aimed at the aliens of the excluded class, but at the owners of vessels unlawfully bringing them into this country. The Government might in large measure protect itself by inspection, rejection and order of deportation, but it is purposed, also, as far as possible, to protect the alien. He might be ignorant of our laws and ought to be deterred from incurring the expense of making a passage which could only end in his being returned to the country from whence he came. This policy could best be subserved by securing the cooperation of the transportation companies, and to this end the statute required that they should not only maintain the aliens unlawfully brought by them into this country, but should take them back free of charge. In the absence of this last provision the company might well afford to accept as passengers those known or suspected to belong to the excluded class. It would receive from them their passage money from Europe to America. If they passed the inspection the transaction was ended. If they were deported the company would be at the trifling expense of maintaining them while here. But if it could charge and secure payment for the return passage, it would collect two fares instead of one. This would have made the transportation of an excluded alien more profitable than the carrying of one who could lawfully enter. This was so obvious that the statute not only required the cost of their passage to be borne by the transportation company, but prohibited the making of a charge, or the taking of security for the return passage, which might be collected or enforced at the end of the journey.

It is said, however, that no such charge was made in New York; that the indictment shows only the case of an ordinary sale of a round-trip steerage ticket from Bremen to New York, and that what was lawfully done in Germany cannot be punished as a crime in New York.

The statute, of course, has no extra-territorial opera-

tion, and the defendant cannot be indicted here for what he did in a foreign country. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. But the parties in Germany could make a contract which would be of force in the United States. When, therefore, in Bremen, the alien paid and the defendant received the 150 rubles for a return passage they created a condition which was operative in New York. If, in that city, the company had refused to honor the ticket the alien could there have enforced his rights. In like manner, if by reason of facts occurring in New York, the statute operated to rescind the contract, the rights and duties of the parties could there be determined, and acts of commission or omission, which, as a result of the rescission, were there unlawful, could there be punished.

If, as argued, the company did nothing in New York except to retain money which had been lawfully paid in Germany, the result is not different, because, under the circumstances, non-action was equivalent to action. The indictment charges that on December 16, 1910, it was found that the aliens had been unlawfully brought into this country. The company at once was under the duty of taking them back at its own cost. Instead of returning to them the money previously received for such transportation, the defendant retained it up to the date of the indictment, April 3, 1911, with intent to make charge and secure payment for their passage to Bremen. This retention of the money, with such intent, was an affirmative violation of the statute. The company could not take the aliens back free of charge, as required by law, and at the same time retain the fare covering the same trip.

The demurrer admits that, with knowledge that it was bound to carry the excluded aliens back at its own cost, the defendant in New York made a charge, and retained the 150 rubles with intent to apply that money in satisfaction thereof. If that be true the defendant violated

the statute within the Southern District of New York, and can there be indicted and tried. The judgment must therefore be

Reversed.

METROPOLITAN WATER COMPANY *v.* KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS.

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

No. 844. Argued January 16, 1912.—Decided February 19, 1912.

A direction in the mandate that the court below proceed in accordance with the opinion operates to make the opinion a part of the mandate as completely as though set out at length.

On appeal from a mere interlocutory order the Circuit Court of Appeals may direct the bill to be dismissed if it appears that the complainant is not entitled to maintain his suit.

Where the Circuit Court of Appeals has authority to make a ruling which finally disposes of the case, and the defeated party does not successfully prosecute either the certification of the question of jurisdiction to this court, or writ of certiorari from this court, the judgment of the Circuit Court of Appeals remains conclusive upon the parties and binding upon the Circuit Court and any other court to which the case can be taken. *Brown* v. *Alton Water Company*, 222 U. S. 325.

THE Metropolitan Water Company, a corporation of the State of West Virginia, owned land which the Kaw Valley Drainage District, a corporation of the State of Kansas, desired to acquire for public purposes.

Under the provisions of the act regulating the condemnation of land, the defendant in error presented to the

Judge of the District Court of Wyandotte County, a petition for the appointment of commissioners to value the property of the complainant necessary to be condemned for drainage purposes. The Water Company immediately filed with the judge a petition to remove the case to the United States Circuit Court. After argument this petition was denied and commissioners were appointed. The complainant at once filed, in the United States Circuit Court, its bill in aid of the removal proceeding praying that the defendant and the commissioners be enjoined from further prosecuting the condemnation proceedings. Among other things it alleged that the act violated the Fourteenth Amendment because it deprived the complainant of its property before judicial ascertainment of its value and before payment—in that when the report of the commissioners was filed with the register of deeds, the defendant, on paying the amount of the award, could take possession of the property; and, though an appeal to the District Court was permitted, the defendant could retain possession in the meantime on giving bond to pay the amount of the verdict.

To this bill the defendant demurred, and after a hearing a temporary injunction was granted, restraining the defendant from proceeding further to condemn the property of the complainant. This order was reversed by the Circuit Court of Appeals, which, in an elaborate opinion, held that the statute was valid and that until an appeal was taken from the award of the commissioners the proceeding was in the nature of an inquest to determine damages, and not a "suit" within the meaning of the Removal Statute, and therefore not removable into the Federal court thereunder (186 Fed. Rep. 315)

The mandate directed "that the order granting the injunction be reversed and that the cause be, and the same is hereby, remanded to the said Circuit Court with directions for proceeding in accordance with the opinion

of this court." On the return of the mandate the Circuit Court sustained the demurrer, and, in allowing the appeal to this court, certified that it dismissed the bill solely on the ground of the want of jurisdiction.

Mr. Willard P. Hall for appellant.

Mr. L. W. Keplinger and *Mr. C. W. Trickett* for appellees submitted.

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

While in form this is an appeal from the decree of the Circuit Court for the District of Kansas, it is really an effort to review a decision of the Circuit Court of Appeals of the Eighth Circuit. From the statement of facts it is manifest that in dismissing the bill the Circuit Court merely applied the ruling that the petition for the appointment of commissioners was not the institution of a "suit" within the meaning of the Removal Act. If there was no suit which could be removed, it was not possible to maintain a bill in aid of removal proceedings thus decided to be void. When, therefore, the Circuit Court followed the opinion to its logical conclusion and dismissed the bill, it did only what it was bound to do. In obeying these directions it committed no error, and its decree cannot be reversed, even if it should appear that the Court of Appeals erred in holding that the condemnation proceedings did not amount to a suit within the meaning of the Removal Acts. The complainant had another remedy to test the correctness of that decision. It was open to it to ask the Circuit Court of Appeals to certify the question of jurisdiction to this court. If that motion had been overruled, the complainant had the further right to apply for a writ of certiorari. If the writ

had been granted, the question of jurisdiction could have been tested here. If the writ of certiorari had been then denied, the complainant would have remained bound by the decision of the Circuit Court of Appeals as the law of the case which could be changed neither by the Circuit Court directly, nor indirectly by the reversal of a decree properly entered in pursuance of the mandate of the appellate court. *Aspen Mining & S. Co.* v. *Billings*, 150 U. S. 31, 37.

The case here is not like *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 361, where the judgment of the Circuit Court that the declaration was "insufficient in law" (130 Fed. Rep. 593), was reversed by the Circuit Court of Appeals and remanded "for further proceedings according to law" (140 Fed. Rep. 305, 315). At the trial there was a verdict for the plaintiff. But during that hearing the defendant moved that the action be dismissed because the court was without jurisdiction. It was held that from this decision an appeal could be taken under § 5 of the act of 1891.

The case is ruled by *Brown* v. *Alton Water Co.*, 222 U. S. 325, although the facts there were the converse of those shown by the present record. There the Circuit Court dismissed the bill for want of jurisdiction. That decree was reversed by the Court of Appeals. After the filing of the mandate in the Circuit Court, a final decree was entered in favor of the complainant. Thereupon the case was brought here, the judge certifying that the defendants had challenged the jurisdiction of the court as a Federal court to hear and determine the cause. That appeal was dismissed on the ground that the Circuit Court was bound to follow the decision of the Circuit Court of Appeals—it being said (p. 332) that "if error was committed, it is not for the Circuit Court to pass upon that question. The Circuit Court could not do otherwise than carry out the mandate of the Circuit Court of Appeals and could

not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court."

It is urged that the decision in the *Alton Case* does not apply, because in it there had been a final decree dismissing the bill for want of jurisdiction, while in the present case the ruling of the Circuit Court of Appeals was made on a review of an interlocutory order, from which, it is said, no writ of certiorari could issue. It is argued that the complainant was obliged to wait until a final decree was entered, and then, for the first time, its right of appeal became perfect, under § 5 of the act of 1891 (26 Stat. 827), permitting cases to be brought to this court on questions of jurisdiction.

We need not consider when a writ of certiorari may issue to review decisions on interlocutory orders by the Circuit Court of Appeals, for, in any event, its judgment in the present case must be treated as equivalent to a direction to enter a final decree against the complainant for want of jurisdiction. It is true that the mandate did not in terms make such an order, yet its direction that the Circuit Court "should proceed in accordance with the opinion" operated to make the opinion a part of the mandate as completely as though it had been set out at length. Under such a mandate nothing was left for the Circuit Court to do except to dismiss the bill. It was within the power of the Circuit Court of Appeals to make such an order on an appeal from an interlocutory order. For, while at one time there was some difference in the rulings on that subject, it was finally settled by *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, that on appeal from a mere interlocutory order the Circuit Court of Appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit. *In re Tampa Suburban R. Co.*, 168 U. S. 583; *Ex parte National Enameling Co.*, 201 U. S. 156, 162; *Bissell Co.* v. *Goshen Co.*, 72 Fed. Rep. 545, 556–560.

It follows, therefore, that the Circuit Court of Appeals had authority to make a ruling which finally disposed of the case; that the complainant then had the right to ask it to certify the question of jurisdiction, and if that was refused, might have applied to this court for a writ of certiorari. Having failed successfully to prosecute these remedies, the judgment of the Circuit Court of Appeals remained conclusive upon the parties and binding upon the Circuit Court and every other court to which the case could by any possibility be taken. For these reasons, the question as to whether there was a suit which was removable cannot be considered and the appeal must be

Dismissed.

UNITED STATES *v.* ELLICOTT.

APPEAL FROM THE COURT OF CLAIMS.

No. 85. Argued December 7, 8, 1911.—Decided February 26, 1912.

The general rule governing appeals is applicable to appeals from the Court of Claims.

A judgment is not generally treated as final until a motion for new trial or rehearing, which has been entertained by the court, has been disposed of; in such a case the time for appeal runs from the date of such disposition. *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675.

When there is an irreconcilable conflict between essential provisions of a contract for building and the specifications, and the latter cannot be ignored, the contract is void for uncertainty and unenforceable.

Where a bid has been accepted for government work after the advertisement necessary to give it validity, and the final contract contains specifications materially lessening the work and at variance with the terms of the contract as advertised, the contractor cannot recover damages because the Government abrogates the contract;

if the specifications are not binding on the Government, the contractor has no basis for recovery, and if they are binding the contract varies from the one advertised for and has no validity; and so held as to a bid for barges for the Panama Canal Commission.

44 Ct. Cl. 127, and 45 Ct. Cl. 469, reversed.

THE facts, which involve the construction of a contract for dredges for the Panama Canal and the liability of the United States for damages for abrogation of the same, are stated in the opinion.

The Solicitor General, with whom *Mr. Barton Corneau* was on the brief, for the United States:

This appeal was prayed in apt time.

The entry and entertainment of the motion for a new trial suspended the judgment itself, and not merely the running of the limitation as to appeals. The effect of the motion was to make the judgment a mere order *nisi*, not only from the time the motion was entered, but from the date of the judgment itself. The entertainment of such a motion relates back to the date of the rendition of the judgment.

In *Brockett* v. *Brockett*, 2 How. 238; *Memphis* v. *Brown*, 94 U. S. 715; *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31; *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135; *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675, 680, 681, a final judgment, and not merely a verdict, had been rendered, so that the appellee's suggestion that a special rule applies in the case of appeals from judgments of the Court of Claims, because the motion for a new trial is not made in such court until after final judgment, is without merit.

The writing executed by the parties expresses with seeming clearness an agreement for the construction of barges of the dimensions shown on the plan, but of materials of the size, weight, and character prescribed by the specifications; and the fact that such construction

would require barges of greater weight than was noted on the plan should not be permitted to alter the plain meaning of the language used. *Garrison* v. *United States*, 7 Wall. 688.

When the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received: such is the established rule at law, as well as in morals. *White* v. *Hoyt*, 73 N. Y. 505, 511.

The construction here urged is necessary to sustain the validity of the instrument, for either that construction or the one urged by appellee must be adopted if the instrument is to be given any meaning at all; and if the latter construction (that is, the one urged by appellee) should be adopted, the instrument would be void because the Commission would have had no power to make such a contract.

At most the impossibility of constructing a barge of the proposed dimensions and specified materials without exceeding the weight noted on the plan only renders the meaning of the writing ambiguous and imposes on the court the duty to ascertain by extrinsic evidence the true intent of the parties. Accordingly, the Court of Claims erred in holding as a matter of law that it was immaterial in this case whether or not the evidence showed that the minds of the parties never met. *Walker* v. *Tucker*, 70 Illinois, 527, 532; *C. & O. Canal Co.* v. *Hill*, 15 Wall. 94; *Moran* v. *Prather*, 23 Wall. 492; *Reed* v. *Insurance Co.*, 95 U. S. 23.

If the instrument must be construed as evidencing an agreement to construct the barges of lighter and smaller materials than those specified, it is absolutely void, because the Canal Commissioners had no authority to make a contract for the construction of a barge which did not conform, at least substantially, with the specifications as to the weight and size of materials. See § 3709, Rev. Stat.;

Act creating the Isthmian Canal Commission, § 7, 32 Stat. 481; Joint resolution approved June 25, 1906.

This case does not fall within the exceptions to any of the foregoing declarations of the rule requiring the letting of contracts of the present sort only after competitive bidding. *Dist. of Col.* v. *Bailey*, 171 U. S. 161; *McMullen* v. *Hoffman*, 174 U. S. 639; *Whitney* v. *Hudson*, 69 Michigan, 189; *Nash* v. *St. Paul*, 11 Minnesota, 174; *Overshiner* v. *Jones*, 66 Indiana, 452; *Wickwire* v. *Elkhart*, 144 Indiana, 305; *People* v. *Board of Improvement*, 43 N. Y. 227; *People* v. *Van Nort*, 65 Barb. 331.

Garfield v. *United States*, 93 U. S. 242, is not pertinent.

The Commission had no authority, without readvertising, to enter into a contract for barges of a radically different type from those originally specified. *Fones Hardware Co.* v. *Erb*, 54 Arkansas, 645; *Mazet* v. *Pittsburgh*, 137 Pa. St. 548; *Chippewa Bridge Co.* v. *Durand*, 122 Wisconsin, 85; *Packard* v. *Hayes*, 94 Maryland, 233; *Detroit Free Press Co.* v. *Auditors*, 47 Michigan, 135; *Littler* v. *Jayne*, 124 Illinois, 123.

Even if the writing in question constituted a valid contract to construct the barges of lighter and smaller material than those specified, yet under all the facts and circumstances of the case such contract was unconscionable. In no event, therefore, was appellee entitled to more than nominal damages. *Hume* v. *United States*, 132 U. S. 406, 412, citing *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164; *Baxter* v. *Wales*, 12 Massachusetts, 365.

Mr. James Piper, with whom *Mr. Francis K. Carey* and *Mr. A. A. Hoehling, Jr.*, were on the brief, for appellees:

An appeal in this case was not applied for by defendant within ninety days after the date of the judgment; and the appeal prayed for and allowed was not from the judg-

ment that was entered in the case, but was merely from the order overruling the motion for a new trial.

The only judgment from which appellant could properly appeal is the final judgment of the Court of Claims, and no appeal will lie to this court from a mere order of the Court of Claims overruling the motion for a new trial. *Kellogg* v. *United States*, 19 Ct. Cl. 73; Court of Claims, Rule 107.

Appellant could have filed at any time within ninety days thereafter an application for the allowance of an appeal, and such application would have temporarily suspended the further running of the time incident to the filing, consideration and disposition of a motion for a new trial. *United States* v. *Ayres*, 9 Wall. 609; *Roberts* v. *United States*, 15 Wall. 384; Rules relating to appeals from the Court of Claims.

To require an appellant to prosecute its rights within the statutory period would impose no hardship upon the losing party; whereas, to support the contention that, at its own pleasure, the defendant party may absolutely revive the entire statutory period of ninety days by the filing of successive motions, is contrary to the language of the statute and would impose a great wrong and an unnecessary hardship upon the rights of appellee, as so adjudicated by the court.

The judgment should be affirmed.

The Court of Claims found there was a valid contract that the United States breached, whereby appellee was entitled to recover damages; these findings of fact are conclusive, and the only question proper for review by this court is whether or not the conclusion of law thereon and the entry of judgment by the court in accordance therewith, is supported and justified by the facts as so found.

The record discloses that there were successive advertisements made by defendant for procuring these barges

because of the fact that the bids were in greater amount than defendant desired to pay therefor. The present contract, under a bid which was satisfactory in price to defendant, was entered into, but, while not in any way departing from or changing the subject-matter of the advertisement or specifications, did provide for a barge lighter in framing and plates.

The advertisement simply called for proposals for furnishing and delivering six steel dump barges; hence no contention can be made by defendant that there was any departure in the contract from the subject-matter of the advertisement.

So long as the subject-matter of the advertisement and specifications be not departed from, there can be modifications or changes in respect of mere detailed matters incident to such subject-matter. *International Co.* v. *United States*, 13 Ct. Cl. 209; *McKee* v. *United States*, 12 Ct. Cl. 504.

The Isthmian Canal Commission has authority in law to make a valid contract the terms of which modify the exact terms or specifications accompanying an advertised circular asking for proposals for work and materials.

As for the reasons for public advertisement and awarding the contract to the lowest bidder, see Dillon, Municipal Corp., 5th Ed., 1911, §§ 802, 809.

There was no statute requiring the Isthmian Canal Commission to advertise for bids and to award contracts to lowest responsible bidder. The requirement rests on a communication addressed to the Commission by the President on April 1, 1905, p. 483 Proceedings of the Isthmian Canal Commission, in response to which the Commission adopted a set of resolutions, p. 492 Proceedings, which embodied the same language in regard to letting contracts as contained in the President's communication.

Resolutions passed by the Commission could be altered

by the Commission. They have not the binding effect of a statute.

Granting that the appellees were charged with notice of the resolution, it is general in its terms. No time for advertising is mentioned nor what the advertisement should contain, which certainly indicates that the Commission did not intend to restrict itself. Section 3709, Rev. Stat., does not impose the limitations on the Commission required to support the Government's contention.

The members of the Isthmian Canal Commission are not "ministerial agents," comparable to agents acting for a city or State in carrying out a defined piece of work in a limited and defined manner.

There was a sufficient advertisement to promote economy and there was no fraud or collusion.

The modification was not so material that the barges contracted for were not advertised.

These questions are not now open for review.

Convenience requires that the government officials should be allowed some latitude to modify specifications annexed to advertisements when the contract is made and also to modify a contract after it is made.

The Government is contending for a decision which will make it impracticable to carry on its business. Modifications are the rule. The Government is pleading a technical disability contrary to what might be called the good business faith of the situation, and, like all pleas of this character, it is necessary that the disability complained of should be clearly established.

In *Harvey* v. *United States*, a case which was heard four times in the Court of Claims and twice in this court, 8 Ct. Cl. 501; 12 Ct. Cl. 141; 13 Ct. Cl. 322; 105 U. S. 671; 18 Ct. Cl. 470; 113 U. S. 243; under similar conditions to this the Supreme Court apparently adopted the lower court's theory that the contract was not invalid on account of a departure from bid and specifications, but held

on equitable grounds that it should be reformed on account of having been entered into by mutual mistake.

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

Whether or not the United States is responsible in damages because of a refusal to permit the carrying out of an alleged contract made with a co-partnership, the Ellicott Machine Company, who are appellees, for the construction for the Isthmian Canal Company of six steel dump barges is the issue here required to be decided. From a judgment for ten thousand dollars entered in the Court of Claims, in favor of the Ellicott Machine Company, because of the refusal referred to, the United States took this appeal.

It will conduce to a clear understanding of the controversy to fully summarize the facts found below, and we proceed to do so.

After two unsuccessful attempts to procure satisfactory proposals for the construction and delivery of the six steel dump barges, the Isthmian Canal Commission, by advertisement and specifications, dated May 29, 1906, invited the proposals which culminated in the making of the alleged contract. One of the clauses of the advertisement reads as follows:

"Preliminary inspection will be made at the point of manufacture or purchase to determine whether the material meets the requirements set forth in the specifications and final inspection will be made at the point of delivery as above."

* * * * * * * *

In the specifications, among other things, it was recited as follows:

"The following specifications and requirements are general only as indicating the class of construction desired.

"Barges of heavy construction for rough service, built in accordance with best modern marine practice, are desired.

"Bidders will be required to submit with their proposals plans in sufficient detail to show the proposed size of members and details of construction."

* * * * * * * *

"The breadth of the barges should not be less than 25 feet nor more than 32 feet. They should have sufficient depth and length to carry a full load of sand on a draft of not more than 8 feet, and with not less than 30" freeboard when loaded. They will be rectangular in plan, with rake at each end about 11" long. . . ."

As shown by an excerpt in the margin,[1] the weight and

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[1] FRAMING.

Floor beams forward and aft of the hoppers and in the rake should not be less than 10" deep and extend in one piece to the turn of the bilges. They will be spaced 24" center to center. Frames to be not less than 3 1/2" x 5 3/8" angles overlapping the floors not less than 18" and connected with them and to floor beams with proper gusset plates. Bilges to be of as short radius as it is practicable to bend the angles and plates.

In addition to the transverse bulkheads mentioned above there will be a watertight bulkhead at each end of each rake.

Transverse water-tight bulkheads will be made of 10.2 pound plate with double-riveted lap joints, stiffened with vertical angle bars 3" x 3" x 5 1/6" spaced 2" apart, except that the plates forming the ends of the hoppers will be of 21-pound plate, stiffened with 4" x 4" x 3/8" angle bars spaced 2' apart.

In the space forward and aft of the hoppers there should be a central longitudinal bulkhead of 10.2-pound plate, fastened at the top of the floor beams and deck beams by 4" x 4" x 3/8" angle; it will be stiffened by vertical 3" x 3" x 5/16" angles, spaced 2' apart. This bulkhead should extend from the hoppers to each end of the barges.

In addition to this bulkhead there will be 2 longitudinal lattice trusses, one on each side midway from the center bulkhead to the side of the hull. They will have top and bottom cords of 3" x 3" x 5/16" angles riveted to each floor and deck beam, lattice bars to be 3" x 3" x 5/16" angles made in double panels and joined top and bottom with

dimensions of the structural materials were prescribed with much detail under the head of "Framing." In reply to this advertisement appellee submitted a proposal to construct the desired barges, "subject to specifications of Circular 310–C, with such modifications as are here shown on drawing No. 2105, dated June 7, submitted herewith." The plan referred to, as so submitted, showed the outline of a barge 101 feet 4 inches long, 30 feet wide, and 10 feet 6 inches in height, and a note on it read as follows:

"Capacity of Bins—350 Cu. Yards. Maximum Loaded Draft When Carrying 350 Cu. Yds. Of Material Weighing 3240 Lbs. Per Cu. Yard, Not to Exceed 8′—0″."

After examination of the bids by F. B. Maltby, Division Engineer on the Canal Zone, that official returned the bids to the general purchasing officer of the Commis-

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proper gusset plates with not less than 3 rivets in each landing. These trusses will extend from the hoppers to the rake.

In the rake there should be a 3″ x 3″ x 3/8″ angle stanchion secured to each deck beam and floor timber on line with the said trusses.

Deck beams to be of 5″ x 3/8″ Z bars spaced one to each frame, each beam to be attached to its frame by 5/16″ gusset.

Gunwales to be not less than 4 1/2″ x 4 1/2″ x 7/16″ angle running inside the side plating and below the deck.

The hull plating should be 21-pound on the bottom; bilges should be 21-pound; the side plating may be of 18-pound plate and in not more than 2 streaks.

The deck should have a checkered stringer streak on each side 30″ wide and about 7/16″ thick; remaining deck may be of 15-pound plating.

All plating to be worked "in" and "out" on longitudinal streaks; longitudinal laps to be double-riveted. All girth seams to be double-riveted to butt straps.

There should be a nosing or fender streak of 8″ x 8″ yellow pine, supported by 4″ x 4″ x 3/8″ angles top and bottom. This nosing should extend entirely about the barge. On each side of the full length there should be a second fender streak of the same section about 3′ below the deck.

sion in Washington, accompanied by a letter dated June 26, 1906. Therein, among other things, Mr. Maltby said: "It is noted that the drawing submitted by the Ellicott Machine Works does not show any detail, as required by the specifications. It is assumed, however (and we should insist on it), that the framing will be in strict accordance with our specifications." A sketch was inclosed "showing the desired arrangement of the hinges on the hopper doors and the method of securing timber lining to hoppers," and various suggestions were made explanatory of the details shown on this sketch. Thereupon D. W. Ross, purchasing officer, prepared and transmitted to the Ellicott firm a draft of contract for the construction and delivery of the barges, but it was returned with the suggestion that article 1 thereof be rewritten, so as to provide for the construction of—

"six steel dump barges in accordance with specifications contained in Circular No. 310–C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges, hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

In the letter returning said draft of contract, it was stated that—

"our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacements, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require."

Claimant also, at the request of said Ross, addressed

a letter, dated July 27, 1906, to Maltby, in which it submitted—

"print # 2105 revised July 27th, specifying details as called for in your letter June 26th, 1906, of hinges, hoisting gear and method of securing timber lining to hoppers."

In said letter, this statement also was made:

"We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire."

The alleged contract, the subject of this controversy, was then executed, F. P. Shonts, chairman of the Commission, signing for the party of the first part. Following a recital that "the Isthmian Canal Commission, for and on behalf of the United States of America and the said Ellicott Machine Company, had covenanted and agreed, to and with each other, as follows." The first article of the contract was inserted, reading as follows:

"Article 1. That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310–C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract."

It was provided in article 3 as follows:

"Article 3. That the party of the first part, by its duly authorized agent, shall have the right to inspect at any time during the process of construction of these barges, any and all material and workmanship used, or to be used, in said construction, and such inspection of said barges, and of the material used, or to be used, in the construction thereof, and of the workmanship thereon, may be made by the party of the first part, or its duly authorized agent, at any place where said materials may be found, and at the places of construction of said barges. In addition to the above, when said barges, or either of them, are pronounced by the party of the second part to be completed and ready for final inspection, such inspection may be made by the party of the first part, by its duly authorized agent, at the place or places where such barges, or either of them, have been constructed, such inspection being for the purpose of determining whether the same, or either of them, meet the requirements set forth in the letters, specifications, and blue print mentioned in article 1 hereof and all of said inspections, whether preliminary or final, the party of the first part, by its duly authorized agent, shall have the right to reject any and all material used, or to be used, in the construction of said barges, or either of them, or in the workmanship thereon, when, in the judgment of the party of the first part, by its duly authorized agent, the same or any part thereof, does not conform to the requirements above mentioned."

In article 8, among other things it was provided as follows:

"The barges herein contracted for shall be completed in accordance with the specifications, letter, and blue print annexed hereto and made a part hereof, . . ."

By article 9 it was agreed that payment would be made of the stipulated price for the six barges "upon their construction and delivery in accordance with the terms of this contract and the papers attached hereto."

It was provided in the last article of the contract as follows:

"Article 12. If, at any time, during the prosecution of this work, it shall be found advantageous or necessary to make any change or modification in said barges, or either of them, and this change or modification should involve such alteration in the specifications as to character, quantity, and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices both of material and labor thus substituted for those specified in the original contract, and before taking effect must be approved by the chairman of the Isthmian Canal Commission: Provided, That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligations arising from such modification was incurred."

Two days after the execution of the contract claimants presented to the Government inspector of dredges a list of materials intended to be used by them in the construction of said barges, but upon examination of said list it was found by said inspector of dredges that the dredges which the claimants proposed to construct were different from those described in circular letter and specifications 310–C, set forth in the petition, the principal component parts or members being reduced in weight, size and power of resistance, and thereupon the same was disapproved by the officers of the Government. Demand was thereupon made that the claimants should adhere to the original specifications, which they refused to do, and as a result, the United States abrogated the contract.

Soon afterwards this suit was commenced. By the petition judgment for thirty thousand dollars was de-

manded as the "gains and profits, which claimants would have made had they constructed the barges in accordance with the contract as the terms of that instrument were construed by the contracting firm." The Court of Claims, as already stated, gave judgment against the United States for the sum of ten thousand dollars. There is no statement in the findings as to the loss sustained by the claimants. Evidently, however, the conclusion to award the sum stated was based upon the hypothesis mentioned in the closing paragraph of the opinion of the court below, reading as follows:

"In consideration of all of the facts in the case, and in view of the difference between the cost of doing certain work and what claimants were to receive for it, making reasonable deduction of the less time engaged and release from the care, cost, risk, and responsibility attending a full execution of the contract, the court decides that claimants are entitled to recover as profits the sum of $10,000, and accordingly judgment against the defendants for said amount is hereby ordered."

A motion to dismiss the appeal first requires attention. The facts are as follows:

The judgment against the United States was entered on May 18, 1908. Eighty-four days afterwards, on August 10, 1908, defendant filed a motion for a new trial. This motion was argued and submitted on November 23, 1908, and was overruled on January 4, 1909, in the term which began on December 7, 1908. Seventeen days afterwards, on January 21, 1909, the United States filed a motion to amend the findings of fact; on February 8, 1909, the motion was argued and submitted; and on February 15, 1909, the motion was overruled in part and allowed in part. Ten days afterwards, on February 25, 1909, the United States made application for and gave notice of an appeal "from the judgment rendered in the above entitled cause on the fourth day of January, 1909."

The grounds for the motion to dismiss are these: (*a*) that the appeal was not taken within ninety days after judgment, (Rev. Stat., § 708), and (*b*) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, "but was merely from the order overruling the motion for a new trial."

The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the Court of Claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition. *Kingman* v. *Western Manufacturing Company*, 170 U. S. 675, 680, 681. It is, we think, also manifest that the appeal was taken upon the hypothesis just stated that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of. *Texas & Pacific Railway Company* v. *Murphy*, 111 U. S. 488.

Coming to the merits. The claimant in effect reiterates in the argument at bar the position taken by the court below in the opinions by it rendered, reported in 45 Ct. Cl. 469 and 44 Ct. Cl. 127. We shall, therefore, dispose of the case by reviewing the opinions of the court below.

In the opinion delivered upon the original hearing it was observed that "the litigation in this case resulted from what seems to have been an apparent misunderstanding by the agents of the defendants, as to certain changes in the terms of an original advertisement for bids for the construction of the said six steel dump barges of a specified size, strength, and weight," etc. It was, however, held that the contract was clear and unambiguous in terms, and that the evidence revealed " a degree of negli-

gence on the part of the agents of the defendants from which they cannot be allowed to extricate themselves by the abrogation of a duly executed contract in order to shield themselves from responsibility." The claimants, it was said, in their second bid, made part of the contract, had in detail specifically set forth the strength, weight and measurement of the barges, and that "the only difference in the barges which the claimant proposed in its contract to construct under its bid was a difference in weight of framing and plates from those contained in the advertisement of the defendant's circular No. 310–C." The claimants, however, it was further observed, had called the attention of the defendant to the great difference between its then bid and the prior bid, and before the execution of the contract had noted on the blue print submitted by them and attached to the contract "the net weight of the barges," and stated that "this weight was to be distributed in such manner as the defendants might instruct." The printed specifications, it was held, although made part of the contract, could not govern, since the letter of claimants of July 27 and the blue print would have to be entirely ignored. It was also said that the materials proposed to be used by the claimants in the construction of the barges, although "reduced in weight, size, and power of resistance" from those prescribed by the specifications, did not constitute "a substitution of different strength and material for those provided in the specifications of the defendant as to the manner of constructing the barges," but was "rather a modification thereof."

We have, however, reached the conclusion, as well from the fact that the specifications were expressly made part of the contract as from various provisions of the contract which we have excerpted that it cannot in reason be held that the specifications must be ignored, and as they cannot, therefore, be treated as having been abro-

gated, it inevitably follows that the alleged contract should have been held void for uncertainty.

It is, we think, in reason, impossible to construe the "modifications" referred to in the first article of the contract as having relation to the dimensions, etc., of the material so specifically described in the portions of the specifications embraced under the heading "Framing," since in that event a clear inconsistency would arise between the terms of that article and the terms of the specifications, also constituting part of the contract. And although this conclusion is, we think, so certain as to require no additional demonstration than the mere consideration of the terms of the two provisions, its conclusiveness is in addition convincingly shown by an analysis of the contract as a whole. The provision of article 3 in regard to the right of the Government at any time during the progress of the work on the barges to inspect all the material furnished clearly imports that the contract had precisely settled the character of such material. So also does the provision in the same article in regard to final inspection, wherein it is provided "such inspection being for the purpose of determining whether the same, or either of them, meet the requirements set forth in the letters, specifications, and blue prints mentioned in article 1 hereof, and all of said inspections, whether preliminary or final, the party of the first part, by its duly authorized agent, shall have the right to reject any and all material used, or to be used, in the construction of said barges, or either of them, or in the workmanship thereon, when, in the judgment of the party of the first part, by its duly authorized agent, the same or any part thereof, does not conform to the requirements above mentioned. Again, prominence is given in article 8 to the fact that, in the construction of the barges, the specifications are to be given effect, the provision being that "the barges herein contracted for shall be completed in accordance with the speci-

fications, letter and blue print annexed hereto and made a part hereof. . . ." So, also, in article 9, payment is to be made only when the barges have been constructed and delivered "in accordance with the terms of this contract and the papers attached hereto," of which papers the specifications formed a part. Article 12 also clearly negates the conception that it could have been intended by the parties that material parts of the specifications should be treated as not forming a portion of the contract, although declared by its terms to be a part thereof, since the binding efficacy of the specifications as to material is therein emphasized. The article, in substance, provided that no change or modification "involving an alteration in the specifications as to character, quantity and quality, whether of labor or material, as would either increase or diminish the cost of the work" should be made unless "agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, *and giving clearly the quantities and price both of material and labor thus substituted for those specified in the original contract,*" *etc.* Manifestly, this article was drawn upon the conception, not that the contract did not, but that it did, specifically provide as to what material should be furnished for the work, and no other source could be resorted to for light as to the material contracted to be supplied than the specifications which it is now urged ought by construction to be removed from the contract.

Thus viewing the contract as a whole and determining that the specifications so far as the "Framing" schedule is concerned should have been treated as unaffected by the provisions of article 1, it is evident that there was a conflict so irreconcilable between essential provisions of the assumed contract as to render it impossible to enforce it as an agreement between the parties. This result of the absolutely antagonistic and destructive character of essential provisions of the contract, one upon the other, can

only be escaped by indulging in one of two hypotheses, either that the terms of the advertisement and specifications as incorporated in the assumed contract overshadowed and virtually destroyed the proposals resulting from the bid of the claimant, which also was incorporated in the contract, or conversely that the proposals which the bid embraced had the effect of setting at naught the provisions of the specifications. But if the first assumption were indulged in, it would clearly result that there was no right to recover, since that right is based upon the theory that the specifications are not binding and need not be complied with; and if the second were indulged, the same result would follow, since it would then come to pass that the contract was so irresponsive to and destructive of the advertised proposals as to nullify them, and therefore cause it to result that the contract was one made without the competitive bidding which was necessary to give it validity.

Under the circumstances, therefore, the court erred in treating the contract as a valid agreement and in awarding judgment against the United States.

Judgment reversed.

ONTARIO LAND COMPANY *v.* WILFONG.

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

No. 160. Argued January 24, 1912.—Decided February 26, 1912.

Where the bill attacks the constitutionality of the state law as applied by the state court, and the application of a case heretofore decided by this court runs to the merits, the motion to dismiss will be denied.

The refusal of the courts of the State to consider as essential to proceedings to foreclose tax liens certain ministerial duties, the omis-

sion of which can in no way affect the rights of the property holder, does not amount to denial of due process of law.

The tax laws of the State of Washington involved in this case are clear and simple in their requirements; and the judgment of the Supreme Court of that State attacked in this suit did not deprive plaintiff in error of his property without due process of law, either because of lack of compliance with the statute or of sufficiency of notice to the owner or description of the property. *Ontario Land Co.* v. *Yordy*, 212 U. S. 152.

Where a decision is based on two grounds either of which is sufficient to sustain it, neither is *obiter*. *Union Pacific R. R. Co.* v. *Mason City R. R. Co.*, 222 U. S. 237.

171 Fed. Rep. 51, affirmed.

THE facts, which involve the validity under the Fourteenth Amendment of certain tax proceedings in the State of Washington, are stated in the opinion.

Mr. Arcadius L. Agatin, with whom *Mr. William W. Billson* was on the brief, for appellant:

Lack of adequate description renders tax titles void and the question is not foreclosed by former decisions. *The Ontario Land Co.* v. *Yordy*, 212 U. S. 152; 44 Washington, 239, does not control this case.

The question in the *Yordy Case* did not depend upon the sufficiency of description at all, and that question was not involved, except as an abstract question. In this case the question of description is vital, as a question of jurisdiction and not as a question of due process.

The Washington tax proceeding is purely *in rem*. The divestment of title through such a proceeding is manifestly impossible without a description of the property affected.

The tax summons, notice, judgment and tax deeds are absolutely void for want of description.

Jurisdictional and other defects render tax judgment and deeds null and void. The judgment is void because of failure to file application.

By § 4878, Bal. Code, under which service was at-

tempted to be made in the tax proceedings here involved, the requirement for filing the complaint before publication is jurisdictional. *Barber* v. *Morris*, 37 Minnesota, 194; *Murphy* v. *Lyons*, 19 Nebraska, 689; 28 N. W. Rep. 328; *Anderson* v. *Coburn*, 27 Wisconsin, 558; *Witt* v. *Meyer*, 69 Wisconsin, 595; 17 Ency. Pl. & Pr. 51–56; Kelber, Void Judicial Sales, § 122; 35 N. W. Rep. 25; 61 Wisconsin, 185; 99 Missouri, 638; *McManus* v. *Morgan*, 80 Pac. Rep. 786; *Klenk* v. *Byrne*, 143 Fed. Rep. 1008.

Failure to file certificate of delinquency was fatal to jurisdiction. *Barber* v. *Morris*, 37 Minnesota, 194; 33 N. W. Rep. 559; *Galpin* v. *Page*, 18 Wall. 350.

The tax judgment is void for want of jurisdiction, because the tax summons is not in conformity to law. The summons does not inform the defendants that any complaint was filed in court, or that it was filed at all. In tax foreclosure proceedings, the form of summons and its contents must conform to § 4878, Bal. Code. *Williams* v. *Pittock*, 35 Washington, 271; *Woodham* v. *Anderson*, 32 Washington, 500; *McManus* v. *Morgan*, 80 Pac. Rep. 786; *Bartels* v. *Christianson*, 90 Pac. Rep. 658.

The failure in the summons to state that the complaint has been filed is a substantial departure from the statutory requirements for a summons, and, therefore, the court acquired no jurisdiction to enter judgment and the judgment entered thereon is wholly void. Brown on Jurisdiction, § 41; Wade's Law of Notice, 2d ed., § 1030; 26 Am. & E. Ency. Law, p. 692; Sutherland on Statutory Const. 454–455; Maxwell on Interpretation of Statutes, 333–337; Blackwell on Tax Titles, 287, 288; *Odell* v. *Campbell*, 9 Oregon, 298, 305; *Lynam* v. *Milton*, 44 California, 630; *Hayes* v. *Lewis*, 21 Wisconsin, 663; *Kendell* v. *Washburn*, 14 How. Pr. 380; *Durham* v. *Betterton*, 79 Texas, 223; *Fernekes* v. *Case*, 75 Iowa, 152; *Black* v. *Clendinin*, 3 Montana, 44; *Caulkins* v. *Miller*, 55 Nebraska, 601; *Delaware* v. *Bank*, 77 S. W. Rep. 628 (Tex.); 20 Ency.

Pl. & Pr. 1115; *Cleffern* v. *Tomlinson*, 62 Minnesota, 197.

The judgment is void because the summons required answer "within 60 days after first publication" instead of "within 60 days after the date of the first publication." *Woodham* v. *Anderson*, 32 Washington, 500; *Thompson* v. *Robbins*, 32 Washington, 149; *Bailey* v. *Hood*, 80 Pac. Rep. 559; *Dolan* v. *Jones*, 79 Pac. Rep. 640; *Young* v. *Droz*, 80 Pac. Rep. 810.

The tax deeds are void because no notice of sale was posted or otherwise given as required by statute under which the deeds were executed. Bal. Code, § 1756. This requirement is mandatory, and the failure to observe it makes the sale void. *Martin* v. *Barbour*, 140 U. S. 634; *McCord* v. *Sullivan*, 80 N. W. Rep. 989; *Olson* v. *Bagley*, 37 Pac. Rep. 37; *Sweigle* v. *Gates*, 84 N. W. Rep. 481; *Blackwell* v. *First National Bank*, 63 Pac. Rep. 43; *Baumgardner* v. *Fowler*, 34 Atl. Rep. 537; *Olson* v. *Phillips*, 80 Minnesota, 339; *Rustin* v. *Merchants, &c.*, 47 Pac. Rep. 300; *Alexander* v. *Gordon*, 101 Fed. Rep. 91, 96; Black on Tax Titles, 205; 2 Cooley on Taxation, 928–930 (3d ed.).

The record in the case at bar is entirely silent as to notice of the sale being posted. This being so, the fact should be deemed established that there was no such notice, because the burden is on the tax purchaser to show that the notice was posted, and objection to their introduction in evidence on that ground should be sustained. *Williams* v. *Peyton*, 4 Wheat. 77; *Ransom* v. *Williams*, 2 Wall. 313; *State* v. *Inhabitants*, 52 Atl. Rep. 238; Black on Tax Titles, 2d ed., §§ 346, 443; 2 Cooley on Taxation, 915, 916.

The burden of proof as to notice of sale is not changed by Bal. Code, § 1767, *supra*.

This statute only makes the tax deed evidence of the proceedings at the sale; such as, that the sale was on Saturday, that it was at public auction and to the person offer-

ing to pay the amount for the least quantity of land, that it was between the hours of 9 a. m. and 4 p. m., etc. The rule of evidence provided by the statute quoted does not relate to any proceedings prior to the sale. 2 Cooley on Taxation, 3d ed., 1006; *Wilson* v. *Lemon*, 23 Indiana, 433; *Breewman* v. *Bingham*, 5 N. Y. 366; *Westbrook* v. *Willey*, 47 N. Y. 458; *Carpenter* v. *Shinners*, 41 Pac. Rep. 473 (Cal.); *Kepley* v. *Fouke*, 58 N. E. Rep. 303 (Ill.); *King* v. *Cooper*, 38 S. E. Rep. 924 (N. Car.); *Johnson* v. *Harper*, 18 So. Rep. 198 (Ala.); *Carnham* v. *Sieber*, 82 Pac. Rep. 592 (Colo.); *Pelham* v. *Beggs*, 72 Pac. Rep. 1077 (Colo.); *Ayer* v. *Dillard*, 33 So. Rep. 714 (Fla.).

Mr. Benjamin S. Grosscup, with whom *Mr. Ira P. Englehart* was on the brief, for appellees.

Mr. Justice McKenna delivered the opinion of the court.

Suit to quiet title to certain real estate situate in North Yakima, State of Washington, against certain tax deeds issued to appellees by the county treasurer of Yakima County.

It was brought in the Circuit Court for the Eastern District of Washington, Southern Division. A decree was entered in favor of appellant. 162 Fed. Rep. 999. It was reversed by the Circuit Court of Appeals. 171 Fed. Rep. 51.

The case depends upon the sufficiency of the tax deeds which appellant assails in its bill, after averments of diversity of citizenship, alleging the following: The land is part of Capitol Addition to North Yakima and is designated on a plat thereof as "Reserved." It appears from the plat which is attached to the bill that the tract is surrounded by blocks, the lines of which and of the streets, if extended over the tract, would constitute it

blocks 352, 372, 353 and 373. The "Reserved" was platted as Herman's Addition and a plat duly recorded in the office of the county recorder of Yakima County on the eighth of December, 1904, and since the execution and recording of the plat the "Reserved" has not been otherwise known or designated than by lots and blocks, according to the recorded plat. Before the recording of the plat the "Reserved" tract was not known or designated by any other than that name, and as a matter of fact there were not upon the map blocks or lots designated as blocks 352, 372, 353 and 373, nor any block or parcel of land to which such description could be made to apply, and, it is averred that, therefore, the description in the tax proceedings were utterly void on its face for the reason that it does not describe any land.

In 1901 Yakima County commenced proceedings in the Superior Court of Yakima County, the county being plaintiff and Edward Whitson and a large number of other persons were named as defendants, which included, among other lands, blocks 352, 353, 372 and 373, Capitol Addition to North Yakima. The proceedings purported to be under the laws of Washington for the foreclosure of tax liens and culminated in a judgment and tax deeds. A pretended summons and notice were issued and published, but neither appellant nor any person was ever made or named a party defendant in the proceedings, either in the application for judgment or in the tax summons or notice as filed or published nor in the tax judgment, and the owners of the blocks were designated as "unknown." The judgment was entered by default, and neither appellant nor any other person ever appeared or answered in the proceeding.

Appellees' claim of title rests exclusively on the tax judgment and deeds and is based upon a certain decision of the Supreme Court of the State in a case in which appellant was plaintiff and one Jay Yordy et al. were

defendants, which case involved lands within the tract designated "Reserved" herein, the decision of which was based "upon pretended principles of law which the court in that case applied in palpable violation of the provisions of the Fourteenth Amendment of the Constitution of the United States."

It is alleged that by the 'law of the land' in order to constitute a proper and legal notice under the Fourteenth Amendment it is necessary that in a tax proceeding *in rem* the description of the property sought to be sold must be so full and clear as to disclose to persons of ordinary intelligence, without resort to inferences, what property is thus intended to be taken. It is further alleged that the notice in the tax proceedings had not that sufficiency and that, hence, to hold the judgment and deeds valid would deprive appellant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. The protection of the Amendment is claimed "and that because of the aforesaid unconstitutional decision of the State Supreme Court, the principles of which, if applied here, may deprive your orator of its property in violation of the said Fourteenth Amendment, your orator invokes the protection of said article in this case, and hereby claims protection thereunder against the pretended claims of said defendants" (appellees).

There are other allegations, to the following effect: The judgment and tax deeds are void, because the court was without jurisdiction of the proceedings because the notice of summons does not contain the specification of process, notice or summons as required by the laws of Washington, either in form or substance; that the summons was never served except by a pretended publication, and that neither it nor the application for judgment or complaint for the foreclosure of the tax liens was ever filed in the office of the clerk of the Superior Court; that

no certificate of delinquency upon which the proceedings were based was ever filed in that court as required by the laws of Washington, and that no complaint or application for judgment was ever filed in the office of the clerk of the court until the day of the entry of judgment.

That no notice of sale was ever given or posted as required by law, and that the sale by the county treasurer of block 373 for $76.77 and block 353 for $76.77 was wholly unauthorized by the judgment and in excess of his authority; that appellant is willing and has offered to pay into court the amount of taxes assessed against the property which may be found to be justly due. A copy of the decision of the State Supreme Court in the *Yordy Case* is attached to the bill.

The answer of appellees denied the allegations of the bill, and set up title under the tax proceedings and the sale and deed thereunder.

They alleged that the land, by the description of blocks, was taxed for state, county and municipal purposes for several years prior to September, 1902, and that the taxes being delinquent on said blocks, the county of Yakima filed in the office of the clerk of the county its summons, notice and petition to foreclose the tax lien of the county, the case being entitled, *Yakima County, State of Washington, Plaintiff*, v. *Edward Whitson et al., Defendants*, and duly published the same "by law made and provided." That thereafter, such proceedings being had, a judgment and decree was entered foreclosing the tax lien, the court adjudging the land subject to taxation, and that the taxes due upon it were delinquent, and directed the land to be sold.

It is alleged that the judgment was duly filed for record in the office of the clerk and recorded, and that the county treasurer gave notice of sale and sold the property, as required by law, to appellees, and executed a deed therefor to them.

It is further alleged that appellant had not paid taxes on the land for many years, knew that taxes thereon were delinquent, knew of the fact of assessment, and all the subsequent proceedings and sale, "and permitted the same to be conducted without making any objection whatsoever," and is therefore estopped to claim any interest against appellees.

A motion is made to dismiss, on the ground that the bill is based on diversity of citizenship, that the decision of the Circuit Court of Appeals decided the case on questions of state and general law, and that the only question of a Federal nature has been decided by this court adversely to appellant in *Ontario Land Co.* v. *Yordy*, 212 U. S. 152, "thereby removing from the consideration of the Circuit Court of Appeals any substantial Federal question."

The motion is denied. The bill attacks the constitutionality of the state law as applied by the Supreme Court of the State, and whether the *Yordy Case* applies runs into the merits.

It will be observed that as grounds of suit the following propositions are presented by the bill: (1) The insufficiency of the description of the land, it never having been known as lots and blocks but designated or marked on the plat of Capitol Addition as "Reserved," and always known and designated as such. (2) The court acquired no jurisdiction of the property because the notice of summons was void on its face, for the reason that it did not contain the specifications of process, notice or summons in such cases required by the laws of Washington, and did not comply with the statute either in form or substance. (3) There was no service of summons except by publication, but that prior to the publication neither the summons nor the application for judgment nor the complaint was ever filed in the office of the clerk of the Superior Court. (4) No certificate of delinquency was filed in the office of the clerk of the

court as required by the laws of Washington, and no complaint or application for judgment until the day of entry of the judgment. (5) No notice of sale under the judgment was ever given or posted as required by law, and that the sale was in excess of the authority of the county treasurer.

All these propositions but the first rest upon the contention that the laws of Washington were not complied with in the particulars mentioned. For instance, it is contended that the certificate of deliquency was not filed in the office of the clerk of the court and no complaint or application for judgment until the day of the entry of judgment. This is the most important of the contentions, and we will first dispose of it.

The laws of Washington provide that any day after taxes are delinquent the treasurer of the county shall have the right and it is his duty upon demand and payment of the taxes and interest to issue a certificate of delinquency against such property, the holder of which may at any time after the expiration of three years give notice to the owner of the property that he will apply to the Superior Court of the county in which the property is situated for a judgment foreclosing a lien against the property. The contents of the notice and the time for appearance are prescribed, and the county attorney is directed to furnish forms to the certificate-holder.

After the expiration of five years from the date of delinquency if no certificate has been issued the county treasurer is required to issue certificates of delinquency to the county and file the certificates with the clerk of the court, and the treasurer shall thereupon, with the assistance of the county prosecuting attorney, proceed to foreclose in the name of the county the tax liens embraced in such certificates, and the same proceedings shall be had as when the certificates are held by individuals.

Summons may be served and notice given exclusively

by publication in one general notice describing the property as the same is described in the tax rolls. The certificates of delinquency may be general, including all property, the proceedings to foreclose may be brought in one action, and unknown owners, described as such, and all persons owning or claiming the property are required to take notice of the proceedings and of all steps thereunder. And it is provided that the court shall examine each application for judgment for foreclosing the tax lien, hear and determine the matter in a summary manner without other pleading and pronounce judgment as the right of the case may be, for the taxes, penalties, interest and costs, "and such judgment shall be a several judgment against each tract." Ballinger's Code, §§1749 *et seq.*

The certificate of delinquency was not filed. It was issued as required by law, and a summons was published and notice given that judgment would be applied for. The application was subsequently made and judgment rendered. This is shown by the judgment roll in the tax proceedings which was introduced in evidence. The application for judgment, after the title of the court and parties, set forth the following:

"Yakima County, plaintiff in the foregoing entitled action, by Wm. B. Dudley, its treasurer and legal representative, respectfully relates as follows:

"That it is the holder of Certificate of Delinquency issued on the 31st day of January, A. D. 1898, by Yakima County, State of Washington, the same being for taxes then due and delinquent, together with penalty, interest and costs thereon, upon real property situate in said county, assessed to the defendants herein for the years and in the amount hereinafter stated.

"That no redemption of said property has been made, and there is now due plaintiff herein on said certificate of delinquency the amounts set forth below, following each description, marked 'total.'"

In the description is the property in suit, assessed to unknown owners.

Foreclosure of the lien was prayed, and that judgment be given against each piece of property.

It also appears from the judgment roll that summons for publication was issued which recited that the county held certificate of delinquency; that the taxes were delinquent, time for appearance designated to defend the action or pay the amount due, and it was stated that in case of "failure so to do," judgment would be rendered foreclosing the lien. Judgment was subsequently entered and the property ordered to be sold. The judgment states as follows:

"This cause having this 2d day of September, 1902, been brought to be heard upon the application for judgment foreclosing tax lien filed herein, and the defendants and each of them having been duly served with notice as by law required, and no appearance having been made by said defendants, or either of them, and upon the proofs adduced, it appearing to the Court that the statements and allegations set forth in said application are true, the Court finds as follows:

"That the plaintiff herein is the owner and holder of Certificate of Delinquency issued on the 31st day of January, 1898, by the County of Yakima, State of Washington, the same being for taxes then due and delinquent, together with penalty interest and costs thereon, upon real property situate in said County, assessed to the defendants herein for the years and in the amount hereinafter stated. That more than five years have elapsed since the original date of delinquency of the taxes for the year 1895, which are included in said certificate of delinquency."

But it is objected that it does not appear that the certificate of delinquency was filed by the county treasurer with the clerk of the court, and that the omission is fatal to the validity of the proceedings.

To the contention the Court of Appeals answered that the filing of the certificate was directory, not mandatory, and, therefore, not jurisdictional, and to sustain this position cited *Washington Timber & Loan Co.* v. *Smith*, 34 Washington, 625. In that case the validity of foreclosure proceedings was attacked on the ground, among others, that the certificate of delinquency was not filed in the clerk's office before publication of summons, and it was hence argued that the court had not acquired jurisdiction of the property. The court, in the foreclosure proceedings, made a *nunc pro tunc* order declaring that the certificates were, in fact, filed before the first publication of summons and not at the time the file mark upon the certificate showed. The Supreme Court decided that the issue of the certificate was the essential thing and gave the court jurisdiction of the cause, and, having jurisdiction, and it appearing by the record that the certificates were filed in time, it followed that the point now raised related to a mere irregularity, which should have been raised in the foreclosure case. The court also ruled that the correction was one that could be made during the progress of the action, and that, therefore, the appellant in the case was estopped to raise the objection in the Appellate Court. The court finally observed: "The summons and its publication, we think, complied with the law. The property owner was, therefore, within the jurisdiction of the court, and was required to take notice of the action. The summons was by publication, it is true, but under § 3, pp. 385, 386, Laws of 1901, 'all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of said proceedings, and of any and all steps thereunder.'"

The language of the court, it must be admitted, is not as precise in distinguishing the elements of its decision as one would like, but we think the ground of its ruling is that jurisdiction having been obtained by the issue

of the certificate and the publication of the summons, the omission to file the certificate in the clerk's office is a defect or irregularity to which objection must be made in the case. In other words, the filing is not jurisdictional, for the court expressed the view that the "delinquency thought to be fatal" (the omission to file the certificate) ". . . could in no manner affect the rights of the appellants" in the action. The conclusion is reasonable. It would yield too much to technicality to give to the omission to file the certificate the controlling effect contended for by appellant. We have seen that the certificate was exhibited to the court and constituted one of the grounds of judgment.

As remarked by Judge Gilbert, speaking for the Court of Appeals: "The revenue and taxation law of Washington is exceptionally lenient to the delinquent taxpayer, and offers him unusual protection in providing that his property may not be sold for delinquent taxes except upon foreclosure proceedings and after a long period of delinquency; three years in the case of foreclosure by an individual certificate holder . . . and five years in the case of foreclosure by the county." In both cases there is public notice given and proceedings in court, time and opportunity enough, we think, even to an accidental or negligent omission to pay taxes, and more than enough to the calculated and culpable delinquency charged against appellants in this case.

The courts of the State have refused to consider as essential to the proceedings in court to foreclose the lien for the taxes the omission of some merely ministerial duty of an officer which in no way could affect the rights of the property owner. *Miller* v. *Henderson*, *supra*, and *Smith* v. *Newell*, 32 Washington, 369.

In this connection we may observe that the proceedings in this case are the same as those passed on in *Ontario Land Co.* v. *Yordy*, 44 Washington, 239; 212 U. S. 152. It was

contended there, as here, that the proceedings were void because of the failure to file the certificate of delinquency. The Supreme Court of the State declined to consider the contention, holding that it was not open, as the land company had not tendered the delinquent taxes as required by the laws of the State. In this court it was not explicitly urged except in a petition for rehearing. The rehearing was not granted.

The other objections to the validity of the tax proceedings are presented in the briefs of appellant under two heads as to the judgment and one as to the deeds, as follows: (1) The judgment is void because of failure to file the application until the day of the entry of the judgment. (2) The judgment is void for want of jurisdiction because the summons did not inform the defendants in the proceedings "that any complaint was filed in court, or that it was filed at all." (3) The tax deeds are void because no notice of sale was posted or otherwise given.

These grounds of objection are untenable. The laws of Washington are as clear as they are simple in their requirements. They do not require a complaint to be filed before the publication of summons, but provide for an application for judgment after the publication of summons, and the court is explicitly directed to examine the application and to "hear and determine the matter without other pleading." There is a careful avoidance of complexity and expense. The property is proceeded against, and the procedure is made simple. The certificates of delinquency may be issued in one general certificate in book form and unknown owners may be proceeded against as such. And it is provided that all persons owning or claiming to have an interest in the property are "required to take notice of the said proceedings and of any and all steps thereunder." See *Williams* v. *Pittock*, 35 Washington, 271.

It is, however, contended that the Supreme Court of Washington has decided that § 4878 of Ballinger's Code is

applicable to tax proceedings and that it requires "that publication of summons shall not be had until after the filing of the complaint." And it is hence contended that the filing of the complaint before publication is jurisdictional.

The Supreme Court of the State has not decided as contended. It has decided exactly the other way. Indeed, it has held that if there were a total omission to file a complaint the judgment would not be void. *Snohomish Land Co.* v. *Blood*, 40 Washington, 626. *McManus* v. *Morgan*, 38 Washington, 528, 80 Pac. Rep. 786, and *Bartels* v. *Christensen*, 46 Washington, 478, 90 Pac. Rep. 658, are not apposite, being constructions of the statute before its amendment in 1901.

In this connection is urged the very technical objection that "the summons required answer 'within 60 days after the first publication' instead of 'within 60 days after the date of the first publication.'" To sustain this objection *Williams* v. *Pittock*, *supra*, is cited. It does not sustain the objection. It would be surprising if it did.

The objection to the validity of the deeds is also without merit. Under the laws of the State a tax deed is *prima facie* evidence, not only of the validity of the deed and order under which the sale was made, but also of the regularity of the prior proceedings. *Warren et ux.* v. *Oregon & W. R. R. Co.* (C. C. A. Ninth Circuit), 176 Fed. Rep. 336, and cases cited.

This brings us to the first proposition of appellant, that is, the insufficiency of the description of the land in the certificate of delinquency and in the summons, judgment and order of sale, and that therefore they were inadequate for notice and due process of law. This contention, however, was considered in *Ontario Land Company* v. *Yordy*, *supra*, and decided adversely to appellant.

As we have seen, the proceedings in that case were those involved in this. It was held that the company was

charged with notice of the platting and the condition shown by the plat of the Capitol Addition to North Yakima, that he had notice from the records of the listing and assessment for taxation of the blocks 352, 353, 372 and 373, and that they would occupy the place marked upon the official plat as "Reserved." The company also "had notice," it was said, "that the track marked 'Reserved' was not otherwise listed or assessed for taxation," and that the blocks "were used by the authorities for describing the 'Reserved' tract." The presumption of knowledge thus arising was fortified, it was said, by actual knowledge "that the authorities were attempting to assess and tax this 'Reserved' tract under the description of blocks 352, &c." Both were grounds of decision. In other words, the decision was not based alone on actual knowledge of what property was intended to be taxed, but upon the sufficiency of the description to identify the land in connection with the notice given to appellant by the record. And this was not *obiter*. *Union Pacific R. R. Co.* v. *Mason City R. R. Co.*, 222 U. S. 237.

A like presumption exists in the case at bar, and there is testimony of like actual knowledge.

Judgment affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

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

No. 121. Argued January 26, 1912.—Decided February 26, 1912.

The Southern Pacific Railroad Company is not entitled under the Branch Line Land Grant Act of March 3, 1871, c. 122, § 23, 16 Stat. 573, 579, to select as lieu lands within the indemnity limits specified in that act, any lands within the granted or indemnity limits of the grant made to Atlantic & Pacific Railroad Company by the act of July 27, 1866, 14 Stat. 292, c. 278, and forfeited by that road under the act of July 6, 1886, 24 Stat. 123, c. 637. *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, followed, and *Ryan* v. *Railroad Co.*, 99 U. S. 382, distinguished.

152 Fed. Rep. 314, and 167 Fed. Rep. 574, affirmed.

THE facts, which involve rights of the Southern Pacific Railroad Company under its branch line grant to lands within the overlap of the Atlantic and Pacific Railroad Company grant, are stated in the opinion.

Mr. Maxwell Evarts for appellants:

The Southern Pacific Railroad Company under its branch line grant of March 3, 1871, was entitled to select the lands in question in lieu of lands lost within the place limits of its grant.

A railroad is entitled to select indemnity lands from any lands within the indemnity limits of its grant which at the time of selection are public lands. In *Ryan* v. *Railroad Co.*, 99 U. S. 382, it was decided that whereas the rights of the company under such a grant in respect to lands within primary limits depend upon the status of the lands as public lands or otherwise at the date of the act,

and the time of definite location, the right to lands within indemnity limits does not depend upon the status of such lands at the date of the granting act, but upon their status as public lands or otherwise at the time of selection.

The question is: What is the land now when selection is sought to be made? Is it now public land or not? If it is now public land, then it is of no importance whatever what parties in the past may have had claims or rights thereto. See also *Alabama & Chattanooga R. R. Co.*, 20 L. D. 408; *Southern Pacific R. R. Co.*, 26 L. D. 452.

The status of lands within indemnity limits at the time of selection determines entirely the right of the railroad thereto. *Allers* v. *Northern Pacific R. R. Co.*, 9 L. D. 452; *Northern Pacific R. R. Co.* v. *Halvorson*, 10 L. D. 15; *Missouri, K. & T. Ry. Co.* v. *Beal*, 10 L. D. 504; *Northern Pacific R. R. Co.* v. *Moling*, 11 L. D. 138; *Hensley* v. *Missouri, K. & T. Ry. Co.*, 12 L. D. 19; *Northern Pacific R. R. Co.* v. *Bass*, 13 L. D. 201; *Hastings & Dakota Ry. Co.* v. *St. Paul, M. & M. Ry. Co.*, 13 L. D. 535; *St. Paul, M. & M. R. Co.* v. *Munz*, 17 L. D. 288; *South & North Alabama R. R. Co.* v. *Hall*, 22 L. D. 273; *Southern Pacific R. R. Co.* v. *McKinley*, 22 L. D. 493.

The *Ryan Case* has since its decision always been referred to with approval by this court. The decisions of the Interior Department since the *Ryan Case* have been in accord therewith. It is inconceivable that the doctrine of the *Ryan Case*, so important in land grant law and so long established, should be overturned by a decision of this court in which there was no discussion of, or reference to, the *Ryan Case*. The Southern Pacific Railroad is now entitled to select from within the indemnity limits of its branch line grant lands granted to the Atlantic and Pacific Railroad which were restored to the public domain by the Forfeiture Act of 1886, and were public lands of the United States, at the date of selection by the Southern Pacific and the issue of the patents therefor.

There is no pretense on the part of the Government that the railroad company is not entitled to indemnity lands to take the place of losses within its primary limits.

The ground alleged for the cancellation of the patents issued in this case is that this court has already decided that the Southern Pacific Railroad Company is not entitled to any indemnity land under its branch line grant within the limits of the forfeited Atlantic and Pacific grant, and the whole discussion centers upon the decision in *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1.

The lands in controversy in this suit were not within the limits which were involved in the suit in 168 U. S. 1.

The cases in 146 U. S. 570; 146 U. S. 615, and 168 U. S. 1, determined one thing and one thing only, to wit, that the Southern Pacific Railroad Company took no place lands under its grant of March 3, 1871, which were in conflict with the Atlantic and Pacific grant.

This court, in 183 U. S. 519, was careful to point out that the only lands involved in 168 U. S. 1, were "granted" or place lands.

In no decision of this court has it been held that the Southern Pacific Railroad has not the right to select its indemnity lands from the forfeited limits of the Atlantic and Pacific grant.

No reason is suggested and never has been suggested or passed upon by this court as to why this particular grant should be deemed an exception to the general rule. This proposition has never been discussed or decided by this court.

The Solicitor General for the United States:

The Southern Pacific is not now entitled under the indemnity provisions of its branch line grant of March 3, 1871, § 23, to select lands which at the time of that grant and of the filing and acceptance of its map and the withdrawals in pursuance thereof were subject to either the

primary or indemnity provisions of the Atlantic and Pacific grant of July 27, 1866, but which subsequently, by the act of July 6, 1886, were forfeited for breach of condition by the Atlantic and Pacific and restored to the public domain.

The question is *res judicata* because of the decision of this court in *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1.

Still further confirmation is had by reference to another case between the same parties: *Southern Pacific Railroad Co.* v. *United States*, 189 U. S. 447, 451, 452, notwithstanding the case of *Ryan* v. *Railroad Co.*, 99 U. S. 382.

The same situation as in 168 U. S. 1, was before the court in the cases of *United States* v. *Southern Pacific Railroad Co.*, 184 U. S. 49, 53, and *Southern Pacific Railroad Co.* v. *United States*, 200 U. S. 341. Those cases in effect constitute a reaffirmance of the 168 U. S. case.

The proviso in § 23 of the branch line grant renders it quite unnecessary to consider here any distinction that might be based on the fact that cases Nos. 128 and 129 (*post*, p. 565) are concerned only with Atlantic and Pacific primary lands. See *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 615. Moreover, the Forfeiture Act of 1886 hits lands of the Atlantic and Pacific embraced within both the granted and indemnity limits.

No question is presented by the presence of the other parties, the mortgagees stand in the same rights as the Southern Pacific.

The defendant purchaser has not appealed. In any event his joinder injects no other question into the case, for his position as not being a *bona fide* purchaser is settled by the case in 184 U. S. 49.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the United States to annul

patents for lands lying within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the act of March 3, 1871, c. 122, § 23, 16 Stat. 573, 579, known as the branch line grant, and within the grant made to the Atlantic and Pacific Railroad Company by the act of July 27, 1866, c. 278, 14 Stat. 292. The Atlantic and Pacific road forfeited its grant, (act of July 6, 1886, c. 637, 24 Stat. 123), and thereafter the Southern Pacific selected the two parcels in question, as indemnity under its branch line grant, one of them lying within the granted, and the other within the indemnity limits of the Atlantic and Pacific. It relies on the general principle that whether lands are subject to selection as indemnity depends upon the state of the lands at the time the selection is made. *Ryan* v. *Railroad Co.*, 99 U. S. 382. The Circuit Court, however, held that the right in this particular case had been decided not to exist, 152 Fed. Rep. 314, and the Circuit Court of Appeals affirmed the decree. 167 Fed. Rep. 514. 93 C. C. A. 150.

We are of opinion that the decision was right. In *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, the lands in controversy embraced among others, as stated by Mr. Justice Harlan, "lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; [and] lands within the common indemnity limits of both grants"—*ibid.* 47. It was held that the forfeiture to the United States did not enlarge the right of the Southern Pacific to select the lands in question and the decree was for the United States. The proposition laid down in *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570, and *United States* v. *Colton Marble & Lime Co.*, 146 U. S. 615, was applied to Southern Pacific branch line indemnity lands. Whatever may be thought of the grounds for making an exception to the principle of *Ryan* v. *Railroad Co.*, *supra*, the exception was established for this case. An elaborate argument was

made on petition for rehearing that the decision could not be extended to indemnity lands, but the petition was denied. In *Southern Pacific Railroad Co.* v. *United States*, 183 U. S. 519, the dismissal of the bill without prejudice to claims that by interpretation are said to include indemnity claims, imports no limitation of the previously established law, and on the other hand in *Southern Pacific Railroad Co.* v. *United States*, 189 U. S. 447, 451, 452, the case in 168 U. S. 1, was followed and the practice of the Land Department in accordance with that decision was mentioned as a further ground. There may be distinctions between the latest decision and this, but in view of the rightly established understanding it is too late to set them up now.

Decree affirmed.

UNITED STATES *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 128, 129. Argued January 26, 1912.—Decided February 26, 1912.

An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future, and what the party entitled may elect to select depends upon the state of the lands at the time of selection. *Ryan* v. *Railroad Company*, 99 U. S. 382.

Under the main line grant made to the Southern Pacific Railroad Company by the act of July 27, 1866, c. 278, § 18, 14 Stat. 292, the company can select lieu lands within the primary limits of the grant made to the Atlantic & Pacific Railroad Company by § 3 of

the same act and forfeited under the act of July 6, 1886, c. 637, 24 Stat. 123. *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, distinguished.

Where selections are made after a decision of this court, the selections will not be declared illegal at the instance of the Government if its claim is inconsistent with the position taken by it in the earlier case.

THE facts, which involve rights of the Southern Pacific Railroad Company under its Main Line Grant to lands within the overlap of the primary limits of the Atlantic and Pacific Railroad Company land grant, are stated in the opinion.

The Solicitor General for the United States:

As to No. 128, the Southern Pacific is not entitled to select, as being within the indemnity provisions of its Main Line Grant made by the act of July 27, 1866, any lands which were subject to the primary provisions of the Atlantic and Pacific grant (made by the same act).

This question is really *res judicata*. See 168 U. S. 1, 61.

Other cases clearly sustain the principle underlying this decision. *Bardon* v. *Northern Pacific R. R. Co.*, 145 U. S. 535, 545; *Sioux City & St. P. R. R. Co.* v. *United States*, 159 U. S. 349, 364; *Chicago &c. Ry. Co.* v. *United States*, 159 U. S. 372, 374; *St. Paul Railroad Co.* v. *Winona Railroad Co.*, 112 U. S. 720, 732; *Clark* v. *Herington*, 186 U. S. 206.

Selections for the lands in Exhibit B to the bill are now pending in the Interior Department, but the Land Department has no power, jurisdiction, or discretion which it can exercise in approving them, and therefore this suit to quiet title and remove the cloud will lie. *Mullan* v. *United States*, 118 U. S. 271, 278; *Burfenning* v. *Chicago &c. Ry.*, 163 U. S. 321, 323; *Doolan* v. *Carr*, 125 U. S. 618, 624; *Weeks* v. *Bridgman*, 159 U. S. 541, 547.

The Government is entitled to a decree for the price

(at the rate of $1.25 per acre) of such of the patented lands as have been sold to *bona fide* purchasers. *Southern Pacific Railroad Co.* v. *United States*, 200 U. S. 341; *Oregon Railroad Co.* v. *United States*, 189 U. S. 103, 115.

It appears by stipulation that within the indemnity limits there still remains a large body of lands from which the company can select in lieu of those here involved. *Southern Pacific* v. *United States* (No. 1), 200 U. S. 341, 353.

As to No. 129, the former case is a conclusive adjudication against the defendants as to lands there and here involved. *Southern Pacific* v. *United States*, 183 U. S. 519; *United States* v. *Southern Pacific*, 184 U. S. 49.

The title to such of the lands in Exhibit B of the bill as were included in the former case is *res judicata*. It is immaterial that the right now asserted was not asserted then. The bill was to quiet title and the right now relied on should have been put forward at the time, as it could have been. The object of the rule is to end litigation. See *United States* v. *California &c. Land Company*, 192 U. S. 355; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 216; *Dowell* v. *Applegate*, 152 U. S. 327, 341.

The defendant company cannot contend that this effect of the decision is avoided for the reason that by the subsequent selection under the act of 1866, which was not in question in the case, it acquired a new title. Selection may be necessary to perfect title, but the right, of course, always comes from the granting act. That right could have been urged then as well as now.

Mr. Maxwell Evarts for appellees in No. 128 and appellants in No. 129:

The filing of a suit by the Government to quiet the title to lands in so far as any claim is made thereto by the railroad company under the branch line grant of 1871, does not bar the selection of such lands by the railroad

company under the grant of 1866, simply because the indemnity limits of the two grants overlapped to a slight extent, and, unknown to either side at the time of the trial, land physically within the indemnity limits of the grant of 1866 was in its character of indemnity land under the grant of 1871 included in such suit. See *Southern Pacific Railroad Co.* v. *United States*, 183 U. S. 519, 532, stating what was decided by the court in 146 U. S. 570, 146 U. S. 615, and 168 U. S. 1.

The doctrine that the title to indemnity lands remains in the United States until selection and approval has always been recognized by this court. *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42, 57; *United States* v. *Missouri &c. Ry.*, 141 U. S. 358, 374; *Wisconsin Railroad* v. *Price County*, 133 U. S. 496, 512; *Barney* v. *Winona &c. R. R.*, 117 U. S. 228, 232; *Clark* v. *Herington*, 186 U. S. 206, 209.

The whole question in this case is whether such general principles of law are applicable to the facts in the case at bar. They are not for two reasons.

First: Because at the time the suit, in 168 U. S. 1, was brought and until it was finally disposed of in this court, there was no claim of title in the Southern Pacific to the lands involved here under the Main Line Grant of 1866, and no claim of title thereto was obtained until 1903. *Barrow* v. *Kindred*, 4 Wall. 399, 404.

Second: For the reason that in a suit brought by the Government to quiet its title to lands claimed by the defendants under a particular grant of Congress it is not open to such defendants to assert any claim to the land under another grant, especially when a contemporary suit is brought to quiet its title to the same lands with regard to any claims under such other grant. The Government, therefore, by reason of the position taken by it in 168 U. S. 1, with reference to the Main Line Grant of 1866 and because of the fact that it had brought a suit to quiet

title to these very same lands with regard to claims thereto of the railroad company under the Main Line Grant of 1866, is certainly now estopped and barred from making the claim that the case in 168 U. S. 1, is a sufficient ground for holding that the railroad company cannot claim these lands under its indemnity grant under the Main Line Grant of 1866.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the United States to quiet title and cancel patents, and for an accounting, as to lands lying within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the act of July 27, 1866, c. 278, § 18, 14 Stat. 292, known as the Main Line Grant, and within the primary limits of the grant made to the Atlantic and Pacific Railroad Company by § 3 of the same act. The Atlantic and Pacific road forfeited its grant, (act of July 6, 1886, c. 637, 24 Stat. 123), and thereafter the Southern Pacific selected the parcels in question as indemnity under its Main Line Grant. The rights of the Southern Pacific under this grant were not subordinated to those of the Atlantic and Pacific under the same statute, as they were by its branch line grant of 1871, considered in our last decision, but in case of conflict each road took half within the conflicting place limits. *Southern Pacific Railroad Co.* v. *United States*, 183 U. S. 519. The special grounds for the decision between the same parties in 168 U. S. 1, followed in the case preceding this, do not exist here. Therefore the Circuit Court and the Circuit Court of Appeals held that the state of the lands at the time of selection determined the right, with an accidental exception that we shall explain. 152 Fed. Rep. 303. 167 Fed. Rep. 510. 93 C. C. A. 146. Both parties appeal; the United States from the

decision on the main point, the Southern Pacific from what concerns the excepted lands.

The Government argues that as the lands selected lay within the primary limits of the Atlantic and Pacific they cannot have been contemplated as possibly falling into the indemnity lands of the other road. It refers to an intimation in *Southern Pacific Railroad Company* v. *United States*, 189 U. S. 447, 452, made with regard to the branch line grant and to lands within the place limits of the Southern Pacific but for the paramount right of the Texas Pacific, that as the indemnity grant was 'not including the reserved numbers' 'it might be argued' that those words excluded the secondary claim to the same lands by way of indemnity after a forfeiture of the Texas Pacific grant. It suggests that *Ryan* v. *Railroad Company*, 99 U. S. 382, relied on for the ground of decision below, concerned land which the United States was claiming at the time of the indemnity grant and which it ultimately acquired, and that its authority should be limited to such a case. But we are of opinion that these arguments ought not to prevail.

An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the Government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply

because in a different event they would have been subject to a paramount claim. It seems to us, in short, that *Ryan* v. *Railroad Company, supra,* should be taken to establish a general principle and should not be limited to its special facts. As to the suggestion in 189 U. S. 447, 452, the words 'not including the reserved numbers' refer primarily at least to the numbers reserved from any part of the grant by the terms of the act, and the suggestion was made only as to a claim of indemnity from lands in and adjoining a strip to which the title under the primary grant failed. Whether there was anything in it in any aspect we need not consider now. It certainly cannot affect this case.

A more delicate question is presented by the appeal of the Southern Pacific. It is this: A part of the lands in controversy were not only within the main line indemnity limits of the Southern Pacific and the primary limits of the Atlantic and Pacific, but also within the indemnity limits of the Southern Pacific branch line grant. It is agreed that they were embraced in the decree against the right of the Southern Pacific under its branch line grant in 168 U. S. 1, and the argument is that the matter is *res judicata,* on the ground that a decree or judgment is binding as to all *media concludendi,* and that the former decree established the right of the United States to this land. *Dowell* v. *Applegate,* 152 U. S. 327; *United States* v. *California and Oregon Land Co.,* 192 U. S. 355, 358. But the selections in this case were made after the decree in 168 U. S. 1, and if the matter were at large it would seem a strong thing to hold an adjudication conclusive not only as to existing titles under the grant in controversy, but as to merely possible sources of title in the future under a different and distinct grant. We shall not discuss that question, however, or consider just how far the decisions have gone. The Solicitor General candidly agreed that the Government should not and would not rely upon this

ground, if it had taken a position inconsistent with it in the earlier case, and it seems to us plain that it did so and expressly deprecated any reference in that case to the rights under the Main Line Grant.

It appears that the bill in 168 U. S. 1, was brought or at least tried as a bill to quiet title against claims of the Southern Pacific under the branch line grant, and that during the litigation on that question there was pending another bill to quiet title under the Main Line Grant, being the one before this court in 183 U. S. 519. It is said, and we do not understand it to be disputed, that in oral argument and printed brief before the Circuit Court of Appeals the counsel for the Government repeated that title under the Main Line Grant was not involved, and that if that question ever arose there would be pleadings and proof upon it. The court in its decision, 168 U. S. 1, 29, stated the claim of the Southern Pacific to be under the act of 1871 (the branch line grant). Again, in the case between the same parties in 183 U. S. 519, 533, the court said that it was not adjudged in the former cases that the Southern Pacific had no title to any real estate by virtue of the act of 1866; and although it also said that of course the decrees were conclusive as to the title to the property involved in them, still in view of the conduct and disposition of the cause as to the branch line grant, if for no other reason, we think that it would be inequitable for the United States now to rely upon the decree in that cause as conclusive upon the parties in this. It follows that as the present decision was in favor of the United States with regard to the last-mentioned lands it must be reversed, (No. 129), and that otherwise (No. 128) it stands affirmed.

Decree reversed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* C. H. ALBERS COMMISSION CO.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 18. Argued October 26, 1911.—Decided February 26, 1912.

The insistence in the state court by an interstate carrier that a shipper cannot recover excess collected over a special contract rate because the rate collected conformed to the applicable provisions of the Interstate Commerce Act is an adequate assertion of a right or immunity under that act, and this court can review judgment in favor of the shipper.

On writ of error to the state court this court may examine the entire record, including the evidence, to determine whether what purports to be a finding of fact is not so involved with, and dependent upon, questions of Federal law, as to be really a decision thereof.

In this case the finding of the state court as to a rate charged by an interstate carrier necessarily involved the interpretation and construction of the Interstate Commerce Act, and this court can examine the evidence and ascertain for itself the validity of the rate under the statute.

Posting the schedules of rates of interstate carriers as required by § 6 of the Interstate Commerce Act is a means of affording special facilities to the public for ascertaining the rates actually in force but is not essential to make the rates legally operative.

The sanction by connecting carriers of through rates published by another carrier is only essential as to their application to the haul from common points; rates from other points are individual and not joint.

Where a schedule of joint rates is not restricted to particular lines designated, it will be presumed, where there is testimony to that effect, as applying to shipments received from any connecting line of goods originating at the designated points.

Although the testimony offered may not be the best evidence, it cannot be disregarded if offered and admitted without objection. *Diaz v. United States*, *ante*, p. 442.

Where there is no applicable through rate established, shipments,

even if moving on through bills of lading, must take the local rates unless displaced by a lawful special agreement.

A special rate agreement which departs from the established local rate for the benefit of a single shipper, no schedule of which is filed with the Interstate Commerce Commission, violates § 6 of the Interstate Commerce Act.

A carrier is not liable to action to refund the excess over an illegal special rate if the rate actually collected is the applicable legal published rate.

79 Kansas, 59, reversed.

THE facts, which involve the right of recovery from an interstate carrier of difference between contract rates and rates actually charged, and the validity, under the Interstate Commerce Laws, of the rates contracted for and collected, are stated in the opinion.

Mr. Cyrus Crane, with whom *Mr. Samuel W. Moore* was on the brief, for plaintiff in error:

The right claimed by the plaintiff in error under the Federal statute is dependent upon the existence and the application of the tariffs filed pursuant to law. This right cannot be defeated by a finding of fact by the state court, either against the existence of the tariff or that it did not apply to the shipments in question. This court has the right to exercise its own judgment, as to whether a tariff was lawfully filed fixing rates controlling all shipments, and whether such rates applied to and controlled the charges upon the particular shipments. *Nor. Pac. Ry. Co.* v. *Minnesota*, 208 U. S. 583; *Chic., B. & Q. Ry. Co.* v. *Nebraska*, 170 U. S. 57; *Stearn* v. *Minnesota*, 179 U. S. 223; *Mobile & Ohio Ry. Co.* v. *Tennessee*, 153 U. S. 486; *Huntington* v. *Attrill*, 146 U. S. 657.

Neither the findings nor the rulings of the state court in such matters as these can prevent the determination of the right asserted under the constitution and laws of the United States. *St. Louis Ry. Co.* v. *Arkansas*, 217 U.S. 136.

The state court was without jurisdiction of this cause.

The lawfully established tariff rates applying on the shipments in question over the line of the garnishee were charged and collected in all cases.

Plaintiff's claim depends upon a departure from the published rates. The inflexibility of published rates must be maintained in every court until the Commission shall, by its order, level the rate for the benefit of every one. *Texas Ry. Co.* v. *Abilene*, 204 U. S. 426; *Mo. Ry. Co.* v. *Milling Co.*, 80 Kansas, 141; *Coal Co.* v. *Lumber Co.*, 159 Fed. Rep. 278; *Van Patten* v. *Railroad*, 81 Fed. Rep. 545; *State* v. *Railway Co.*, 176 Missouri, 687; *Carlisle* v. *Railway Company*, 168 Missouri, 652; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 183 Fed. Rep. 929.

The plaintiff's entire claim is illegal and non-enforceable for the reason that it is based upon an arrangement whereby the carrier was to serve Forrester Brothers for less than the established rate.

As to the meaning of the proportional rate and how the same is applied, see *Bascom Co.* v. *Railway Co.*, 17 I. C. C. Rep. 356.

A clear explanation of proportional rates is given by "The Matter of Form and Contents of Rate Schedules," 4 I. C. C. Rep. 701; Moore on Interstate Commerce, § 48; Barnes on Interstate Transportation, § 80 D.

Proportional rates are recognized as proper. *Serry* v. *Southern Pacific Ry. Co.*, 18 I. C. C. 556; *North Brothers* v. *Railway Company*, 13 I. C. C. 153; *Kansas City Transportation Bureau* v. *Railway Company*, 16 I. C. C. 195; *Lindsay Brothers* v. *R. R. Co.*, 16 I. C. C. 6, and *In re Through Routes and Through Rates*, 12 I. C. C. 164, 172; and see *Armour Packing Company Case*, 153 Fed. Rep. 1; *S. C.*, 209 U. S. 56; *Chicago, B. & Q. Ry. Co.* v. *United States*, 157 Fed. Rep. 830.

The presumption, in the absence of proof, is that rates between these points had been duly and legally established. *Mecker* v. *R. R.*, 162 Fed. Rep. 354; *Texas &*

Pacific v. *Abilene Co.*, 204 U. S. 426; *Int. Com. Comm.* v. *Railway Co.*, 209 U. S. 108, 121; *Clement* v. *Railway Co.*, 153 Fed. Rep. 979; *American Union Coal Co.* v. *Railway Co.*, 159 Fed. Rep. 278.

This proportional rate is fixed and inflexible, by reason of its being established in accordance with law, as though it had been fixed by an act of Congress. No contract or other device could vary or depart from it. Any contract undertaking to vary from the published rate would be void. This is conclusively established by the following decisions of this court. *Gulf, Colorado & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *Texas & Pac. R. R. Co.* v. *Mugg*, 202 U. S. 242; *Armour Packing Co.* v. *United States*, 209 U. S. 256.

Other decisions are to the same effect: *Hawley* v. *Coal Company*, 48 Kansas, 593; *Railroad Co.* v. *Hubbell*, 54 Kansas, 232; *Kizer* v. *Railway Co.*, 66 Arkansas, 348; *Armour Packing Co.* v. *United States*, 153 Fed. Rep. 1; *Railway Co.* v. *Standard Lumber Co.*, 174 Fed. Rep. 107; *Railroad Co.* v. *Harrison*, 119 Alabama, 539; *Railroad Co.* v. *Ostrander*, 66 Arkansas, 567; *Bullard* v. *Railroad Co.*, 10 Montana, 168; *Railroad Co.* v. *Swanson*, 102 Georgia, 754; *Southern Wire Co.* v. *Railway Co.*, 38 Mo. App. 191; *Messenger* v. *Railway Co.*, 36 N. J. Law, 407; *Scofield* v. *Railway Co.*, 43 Oh. St. 571; *Fitzgerald* v. *Railway Co.*, 63 Vermont, 169; *Railway* Co. v. *Burdick*, 94 Georgia, 775; *Railroad Co.* v. *Erwin*, 118 Illinois, 250; *Railway Co.* v. *Bowles*, 1 Ind. Terr. 250; *Gerber* v. *Railway Co.*, 63 Mo. App. 145; *Railway Co.* v. *Holmes*, 18 Oklahoma, 92; *Railway Co.* v. *Stoner*, 5 Tex. Civ. App. 50; *Railway Co.* v. *Clements* (Tex. Civ. App.), 49 S. W. Rep. 913; *Railway Co.* v. *Wilcox*, 99 Virginia, 394; *Railway Co.* v. *Creety*, 5 Ga. App. 424; *Chicago, B. & Q. Ry. Co.* v. *United States*, 157 Fed. Rep. 830.

There is no pretense that this joint rate was ever published as required by law.

A shipper is not entitled to avail himself of a division of a through rate.

As to a shipper a joint rate is an indivisible unit. The law does not require divisions of joint rates to be published. They are purely a matter of private contract between the carriers. Such private contracts are not for the benefit of shippers and cannot be availed of by them. *Second Natl. Bank* v. *Grand Lodge*, 98 U. S. 123; *Keller* v. *Ashford*, 136 U. S. 610; *Sayward* v. *Dexter*, 72 Fed. Rep. 758; *American Bank* v. *Railway Co.*, 76 Fed. Rep. 130; *Metropolitan Trust Co.* v. *Topeka Water Co.*, 132 Fed. Rep. 702; *German Insurance Co.* v. *Water Co.*, 174 Fed. Rep. 768.

Mr. John M. Wayde and *Mr. Philip Pitt Campbell* for defendant in error:

State courts have jurisdiction at common law.

This is not an action to in any way regulate commerce among the States, but simply an action to recover on a contract. The common-law right of a state court to hear and determine actions of this kind has never been questioned. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *West Virginia Transportation Co.* v. *Sweetzer*, 25 W. Va. 434; *Peters* v. *Railroad Co.*, 42 Oh. St. 275; 51 Am. Rep. 814; *Railroad Co.* v. *Lockwood*, 17 Wall. 379; *McGregor* v. *Erie Railway Co.*, 35 N. J. Law, 89, 113.

This jurisdiction of state courts has not been abrogated by Interstate Commerce Act. In fact that act says that its provisions are in addition to the remedies at common law.

This action is independent of the Interstate Commerce Act, and is not an action to recover damages by reason of the violation of any of the provisions of that act. *Ratican* v. *Terminal R. R. Assn.*, 114 Fed. Rep. 671.

That statute is a highly penal one, conferring certain rights upon the party aggrieved, recoverable by him in a civil action, and also subjecting the party offending to its

pains and penalties. *Parsons* v. *Railroad Co.*, 167 U. S. 447.

The statute does not say that the Federal courts shall be the forum when the liability arises independent of the Interstate Commerce Act. Under substantially similar circumstances as the case at bar, the state courts have retained jurisdiction. *Mo. Pac. Ry. Co.* v. *Relf*, 78 Kansas, 463; *Wabash R. R. Co.* v. *Sloop*, 98 S. W. Rep. 607; *Southern Kansas R. Co.* v. *Burgess*, 90 S. W. Rep. 189; *Gulf R. R. Co.* v. *Leatherwood*, 69 S. W. Rep. 119; *Ry. Co.* v. *Horne*, 59 S. W. Rep. 134.

On the facts found by the state court the judgment rendered was not inconsistent with the Interstate Commerce Law.

All that can possibly be claimed on the part of plaintiff in error is that it had a different proportional rate between certain other railroad companies at the time that this grain was shipped to what it had under its joint traffic arrangement with the northern connecting lines, and to its rate specified in its contract with Forrester Brothers.

A railway company can accept a certain rate per hundred pounds as its proportion of a through haul from one railway company and a different rate per hundred pounds as its proportion of a through haul from another railway company.

A railway company cannot relieve itself from the obligations of its contract by failing to comply with the Interstate Commerce Law with reference to filing and publishing its rates, and a contract is not illegal when made with the shipper when it is not shown that the contract rate is in violation of any through rate established by the railroads or is not in conflict with any published rate of the railroads over which the grain is shipped and which is applicable to the shipment. *Little Rock & Memphis Ry. Co.* v. *St. Louis & Southwestern Ry. Co.*, 63 Fed. Rep. 775; *S. C.* 26 L. R. A. 195.

Arrangements or agreements by interstate carriers with each other for the through billing of freight, and for joint through rates depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation. *Little Rock & M. R. Co.* v. *East Tenn., V. & G. R. Co.*, 4 I. C. C. 261; 47 Fed. Rep. 771; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep. 559; 2 I. C. C. 763; *Oregon Short Line* v. *Northern Pac. R. Co.*, 51 Fed. Rep. 465, 474; 4 I. C. C. 249.

The Interstate Commerce Act does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating either as to passenger or freight traffic. *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. Rep. 567, 630, 631; 2 I. C. C. 351; 2d Ann. Rep., 2 I. C. C. 510.

If the public interest requires that interstate carriers be compelled to put in force arrangements for through billing and rating, and for the establishment of joint through lines, the statute should be more explicit, and the commission should be empowered to prescribe the terms of such arrangements upon a comprehensive view of the circumstances of each particular case. *Chicago & N. W. Ry. Co.* v. *Osborne*, 52 Fed. Rep. 915; *Express Cases*, 117 U. S. 1; *Tozer* v. *United States*, 52 Fed. Rep. 919.

Through rates are matters of agreement between carriers. *L. R. & M. R. R. Co.* v. *Tenn., Va. & Ga. R. R.*, 3 I. C. C. 1; *Copehart* v. *L. & N. R. R. Co.*, 4 I. C. C. 3 I. C. C. 278; *In re Clark, Agent*, 3 I. C. C. 649.

Through rates are not necessarily illegal, which, when divided between carriers, give them less than their local rates, provided that the through rate itself is not less than some one of the locals, or unjustly discriminating against individuals or localities, or so low as to burden other business with part of the cost of the business upon which it is imposed. *Lippman* v. *Ill. Cent. R. R. Co.*, 2 I. C. C.

584; *C., R. I. & P. Ry. Co.* v. *C. & A. R. R. Co.*, 3 I. C. C. 450; *N. O. Cotton Exch.* v. *Ill. Cent. R. R. Co.*, 3 I. C. C. 534; *Hamilton* v. *C. R. & O. R. R. Co.*, 4 I. C. C. 3 I. C. C. 482; *Detroit Board* v. *G. T. Ry. Co.*, 2 I. C. C. 315; *Poughkeepsie Iron Co.* v. *N. Y. C. & H. R. R. R. Co.*, 4 I. C. C. 3 I. C. C. 248.

The apportionment of rates of different parts of a through line does not determine the charge to the public, but may be significant on the question of reasonable rates for the whole distance. *Brady* v. *Penn. R. R. Co.*, 2 I. C. C. 131.

A railroad company is under special obligations to give reasonable rates for its local business, but there are many influences, which may affect through rates, while not bearing upon local rates at all, or, if at all, in less degree. *McMorran* v. *Grand Trunk Ry. Co.*, 3 I. C. C. 252; and see also *Martin* v. *C., B. & Q. R. R. Co.*, 2 I. C. C. 25; *Brady* v. *Penn. R. R. Co.*, 2 I. C. C. 131; *In re Investn. of G. T. R. R. Co.*, 3 I. C. C. 89; *United States* v. *Mellen*, 53 Fed. Rep. 229.

Through rates are not required to be made on a mileage basis, nor local rates to correspond with the divisions, citing *Martin* v. *Sou. Pac.*, 2 I. C. C. 1; *Railway Co.* v. *Osborne*, 52 Fed. Rep. 912. See Wentworth on Interstate Commerce, pp. 18, 24, 54; Judson on Interstate Commerce, p. 190, § 150, citing *Chicago &c. R. R. Co.* v. *Tompkins*, 176 U. S. 167; *Allen & Lewis* v. *Oregon R. Nav. Co.*, 98 Fed. Rep. 16.

No power existed at common law, and none is given by the act to court or commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff. *Express Cases*, 117 U. S. 1; *Kentucky Bridge Co.* v. *Louisville & N. R. Co.*, 2 I. C. C. 351; 37 Fed. Rep. 567; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 2 I. C. C. 763; 41 Fed. Rep. 559; *Int. Com. Comm.* v. *Baltimore &*

O. R. R. Co., 145 U. S. 284; *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 Fed. Rep. 415.

A scheme for establishing compulsory through rates should be surrounded by proper safeguards, and its operation limited by proper restrictions. Cases *supra;* and see *Cincinnati, N. O. & T. R. Ry. Co.* v. *Int. Com. Comm.*, 162 U. S. 184; *Texas & P. Ry. Co.* v. *Int. Com. Comm.*, 162 U. S. 197; *Railroad Co.* v. *Platt* (decided by the Interstate Commerce Commission June 26, 1907); *Sou. Pac. Co.* v. *Int. Com. Comm.*, 200 U. S. 554; *Int. Com. Comm.* v. *Baltimore & O. R. Co.*, 3 I. C. C. 192; 43 Fed. Rep. 37; *Cincinnati, N. O. & T. P. R. Co.* v. *Int. Com. Comm.*, 162 U. S. 184, 197.

Section 6 cannot be construed to prohibit such condition. *Delaware, L. & W. R. Co.* v. *Kutter*, 147 Fed. Rep. 53.

While contracts which are prohibited by law are invalid and cannot be enforced, there are five exceptions in which the contracts are upheld. Where public policy requires the intervention of the court; where the parties are not *in pari delicto;* where the law which makes the agreement unlawful was intended for the special protection of the party seeking relief; where the illegal purpose has not been consummated; where the party complaining can exhibit his case without relying on the illegal transaction. 9 Cyc. Law & Proc., p. 550; *Packard* v. *Byrd*, 73 So. Car. 1; *Fox* v. *Rogers*, 171 Massachusetts, 546; *Eastern Expanded Metal Co.* v. *Webb Granite Co.* (Mass.), 81 N. E. Rep. 251; *Tootle* v. *Taylor*, 64 Iowa, 629; *Bemis* v. *Beecher*, 1 Kansas, 226; *Mason* v. *McLeod*, 57 Kansas, 105.

To invalidate a contract for illegality, the illegality must be inherent. It is not enough that it be associated even closely. It must be a part of the contract. *Armstrong* v. *Toler*, 11 Wheat. 258; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621; *Merchants' Cotton Co.* v. *Insurance Co.*, 151 U. S. 368; *Larned* v. *Andrews*, 106 Massachusetts, 435.

The laches of the railroad company in failing to file and publish its joint through rate after it was made should not enable it to defeat its contract or relieve it from liability under its contract. *Railroad Co.* v. *Hefley*, 158 U. S. 98, distinguished; and see *Virginia Coal & Iron Co.* v. *Louisville & N. R. Co.*, 37 S. E. Rep. 315; *Cherry* v. *Chicago & Alton Ry. Co.*, 191 Missouri, 489; Judson on Interstate Commerce on p. 276, § 235; Chapter on Enforcibility of Unpublished Rate against the Carrier, citing *Pond-Decker Lumber Co.* v. *Spencer*, 86 Fed. Rep. 846, reversing 81 Fed. Rep. 277.

The state court did not find that any preference or advantage was given Forrester Brothers, under its contract over that which was given to any other shipper between the same points.

The findings of the state court are conclusive in this court, and while there is no finding of the state court that even the proportional rate with the other roads was filed and published as the Interstate Commerce Law required, yet as the court specifically finds that this grain was not shipped over the same roads or between the same points specified in the proportional tariff offered in evidence in connection with the other roads; and in the amendments to such tariff it is apparent under the authorities already cited in this brief that the proportional rates with other roads, even if filed and published, did not preclude the Kansas City Southern Railway Company from making a different proportional rate with the northern connecting lines.

When the northern connecting lines united on a through rate this new line thus formed was wholly independent of the line formed by the proportional rate between Leavensworth and Atchison and St. Joseph with other roads. *C. & A. Ry. Co.* v. *United States*, 156 Fed. Rep. 558; *United States* v. *Standard Oil Co.*, 155 Fed. Rep. 305; *Armour Packing Co.* v. *United States*, 153 Fed. Rep. 1, were all brought under the Elkins Act, which act did not

take effect until February 19, 1903; the contract of Forrester Brothers was made in 1901, and the shipments were made in 1901 and 1902. These cases do not apply, nor does *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242.

This court will not review a decision of the state court on a writ of error when the decision of the state court is based on a question of state practice or procedure. *In re Spies*, 123 U. S. 131; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648.

No decision, state or Federal, holds that a contract based on an unpublished rate applicable to the rate of shipment in question can be enforced, as between the carrier and shipper, when the rate is not shown to be unjust and unreasonable or does not discriminate either in favor of or against other shippers on same haul, or does not conflict with a lawfully established rate which is applicable. The validity of such contracts has been upheld in the following cases: *Mo. Pacif. R. R. Co.* v. *Relf*, 78 Kansas, 463; *Wabash R. R. Co.* v. *Sloop* (Mo.), 98 S. W. Rep. 607; *Southern Kan. R. R. Co.* v. *Burgess* (Tex.), 90 S. W. Rep. 189; *Gulf R. R. Co.* v. *Leatherwood*, 69 S. W. Rep. 119; *Railway Company* v. *Horn* (Tenn.), 59 S. W. Rep. 134; *Laurel Cotton Mills Co.* v. *G. & S. I. R. Co.*, 37 So. Rep. 134; *Southern Pacif. R. R. Co.* v. *Redding*, 43 S. W. Rep. 1061; *Va. Coal & Iron Co.* v. *Louisville N. R. Co.*, 74 S. E. Rep. 315; *Cherry* v. *Chicago & Alton R. Co.*, 191 Missouri, 489; 2 L. R. A. (N. S.) 695; 90 S. W. Rep. 381.

The principle involved in this case comes clearly within the right to contract which has always been recognized by this court. *Southern Pacific R. R. Co.* v. *Inter. Com. Comm.*, 200 U. S. 555; *Inter. Com. Comm.* v. *Baltimore R. R. Co.*, 3 I. C. C. 192; *Cincinnati, N. O. & T. P. R. Co.* v. *Inter. Com. Comm.*, 162 U. S. 184, 197; 5 I. C. C. 391.

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

This was a proceeding in garnishment under the laws of the State of Kansas. The C. H. Albers Commission Company had recovered a judgment in the District Court of Crawford County, in that State, against Robert L. Forrester and Joseph M. Forrester, doing business as Forrester Brothers, in the sum of $10,333.72, with interest, and had brought the Kansas City Southern Railway Company into the case, as a garnishee, upon a general allegation that it was indebted to Forrester Brothers. The railway company, which will be spoken of as the garnishee, appeared and denied that allegation. Under the practice in that State the issue so framed was, without other pleadings, brought on for trial as a civil action. The trial was begun before the court and a jury, but later the jury was discharged, with the consent of the parties, and the trial proceeded before the court alone. The case made by the evidence was this:

The garnishee was operating a railroad extending from Kansas City, Missouri, to Texarkana, Texas. Another railroad, which will be spoken of as the northern line, connected with it at Kansas City and extended northward to Omaha, Nebraska. Forrester Brothers were buyers and sellers of grain, with offices at St. Louis, Missouri. In the late summer or early fall of 1901 the two roads, at the solicitation of Forrester Brothers, entered into an oral agreement with the latter whereby they were granted a special rate on corn and oats to be shipped in carload lots from Omaha via Kansas City to Texarkana. The evidence was conflicting as to whether the rate agreed upon for the through haul was 12½ or 16½ cents per hundred pounds, but it was one or the other, and the garnishee was to charge and receive 8 cents for the haul over its road and the remainder was to go to the northern line. The evi-

dence was also conflicting as to whether the agreement was to terminate on the thirty-first of October, or was to continue until all the shipments then contemplated by Forrester Brothers were completed. After the agreement was made, and in reliance thereon, Forrester Brothers made large purchases of corn and oats at Omaha for shipment to and sale at Texarkana, as they had contemplated doing when soliciting the special rate. The agreement was observed by the garnishee until and including the thirty-first of October, and during that time the shipments were carried on through bills of lading. Thereafter the garnishee disregarded the agreement, required that the shipments be rebilled at Kansas City, and collected a 10-cent rate for the haul over its road until November 10, and thereafter a 14-cent rate. The payment of the larger rates was made by an agent of Forrester Brothers at Kansas City, who did not know of the agreement. By exacting the larger rates the garnishee received $10,527.55 more than it would have received under the 8-cent rate. No schedule embodying the 12½ or 16½-cent rate, whichever it was, for the through haul, or the 8-cent rate for the haul over the garnishee's road, was filed with the Interstate Commerce Commission; and neither was any memorandum or statement of the oral agreement so filed. Apart from the agreement there was no joint through rate applicable to these shipments.

When the agreement was made there was in force on the garnishee's road a "proportional rate" of 10 cents per hundred pounds on corn and oats moving from Kansas City to Texarkana. This rate was not applicable to shipments originating at Kansas City, but only to such as originated elsewhere on connecting lines. Nor was it invariably confined to the movement from Kansas City to Texarkana, for it included also the haul, when there was such, to Kansas City from certain common points, such as St. Joseph, Atchison and Leavenworth, which usually

enjoyed the Kansas City rates and were not reached by the garnishee's road, but by other roads. Thus, shipments originating on lines connecting at the common points with the roads leading to Kansas City took this rate from the common points to Texarkana. As applied to such shipments the rate was joint as well as proportional, and as applied to others it was a proportional rate of the garnishee alone. It was embodied in a schedule duly filed with the Interstate Commerce Commission, and remained in force until November 10, when it was superseded by a like rate of 14 cents, shown in an amendatory schedule so filed. These schedules bore a heading indicating that they were adopted by the garnishee "in connection with" other designated railroads, they being the roads over which the haul, when there was such, from the common points to the garnishee's road would be made. The northern line was not one of them, nor was Omaha one of the common points. There was a like provision for the haul, when there was such, from Texarkana to common points therewith, and also a designation of the railroads over which that haul would be made; but as that feature of the schedules is immaterial here, it may be eliminated from consideration.

As explaining a proportional rate and indicating the correct application of the one just named, F. M. King, an experienced station agent of the garnishee, testified: "Q. I will ask if you know whether or not the words 'proportional rates' have a well-defined and understood meaning in railroad business and on the Kansas City Southern. A. They have; yes, sir. Q. Now, just tell briefly what those terms mean, those words 'proportional rates,' if you know. A. A proportional rate is a rate put in to cover business . . . coming to our lines from other points, applying to commodities where we have no through rates. It is put in in order to protect a shipper on a long haul. For instance, a shipment coming from . . . points

out in Kansas, where there is no through rate published, . . . we accept it from the connecting line and bill it out then on a proportional rate, which is less than the local tariff rate. Q. Now, you spoke there of a local tariff rate; if those words have a well-defined meaning, I wish you would state what those are. A. A local rate is a rate applying locally from one station to another on the same road. Q. In that term 'local rate' as distinguished from 'proportional rate,' how about the origin of the shipment? A. That is where it originates and terminates on the same line." And E. E. Smythe, the general freight agent of the garnishee, under whose direction the schedules embracing this proportional rate were prepared and filed, testified: "Q. Mr. Smythe, what is meant in railroading by 'common points'? A. Common points are points which take the same rate. . . . Q. Common points are comparatively close together, taking the same rates? A. Yes, sir. Q. How far north is Omaha from Kansas City? A. 220 or 226 miles. . . . Q. How far north from Kansas City is Atchison and Leavenworth? A. Between 30 and 40 miles. Q. And St. Joe about 60 miles north of Kansas City? A. Yes, sir, 60. Q. Is Omaha a common point with Leavenworth, Atchison, St. Joe and Kansas City? A. No, sir. . . . Q. Now, Mr. Smythe, I will ask you to state what is known in railroading as 'proportional rates,' what does that expression mean, if it has any fixed or definite meaning? A. Proportional rates are rates established in a great many centers—grain centers, if you please—on grain coming from any territory which may be shipped there for reshipment. . . . Q. I will ask you if the words 'proportional rates' have a fixed and definite meaning among railroad men, especially among traffic men? A. Yes, sir. . . . Q. Can you give us an illustration so we will understand it more definitely? Give your own illustration of shipments coming into Kansas City and

going out again. A. We will take Wichita, Kansas. Some Kansas City firm will buy hay and grain there from a Wichita dealer, or some point in that territory, and ship that hay to Kansas City to John Jones Commission Co. Mr. Jones pays the freight on that car, and in the meantime . . . he may have sold that car of hay or grain to go to New Orleans, . . . and he accordingly comes to you, or presents to the general agent the expense bill covering the freight in, and when that is checked to see that the correct rate is applied it goes out on a proportional rate from Kansas City or any other point where the proportional rate applies, at the proportional rate named in the tariff. . . . Q. Explain in your own way. A. You want me to explain what that tariff [the proportional one now under consideration] means? What it would apply on? Q. Yes, sir, just explain the meaning of this expression 'in connection with the Chicago Great Western' and the other roads. A. That tariff would apply on grain coming into Kansas City on any railroad in America [and bound] to Texarkana. . . . Q. You say it would apply on grain coming into Kansas City from any point in the world? Yes, sir, any place in America." This testimony, bearing upon the meaning of the proportional rate schedules, was not in any way contradicted.

It was not shown whether those schedules were sanctioned by the other railroads over which the haul, when there was such, from the common points to the garnishee's road was to be made; and while it was shown that those schedules were regularly printed and that copies thereof were sent to the freight offices of the garnishee at Kansas City and other points and were there kept open to public inspection, it was not shown that copies were posted in public and conspicuous places in those offices.

Respecting the existence of an applicable local rate on the northern line from Omaha to Kansas City, the witness Smythe testified: "Q. I will ask you to state if you know

what the rate was in 1901 on grain between Omaha and Kansas City? A. Yes, sir. Q. I will ask you to state what it was. A. The rate was 9 cents. Q. Is that what you call a legal rate? A. It was the legal rate; yes, sir. Q. That is, between Omaha and Kansas City? A. Yes, sir. Q. On what roads was that in effect? A. In effect over the Burlington, Missouri Pacific and all lines reaching Omaha running into Kansas City." This testimony was offered and admitted without objection, and its effect was in no way impaired or qualified, save as the same witness, as also others, testified to the existence of a rate of 6½ cents, called the "Missouri arbitrary," on grain carried from Omaha to Kansas City when destined to points beyond. If this latter was an individual rate of the northern line, and not a conventional division of some joint through rate, as to which the testimony was somewhat uncertain, it was applicable to the shipments in question; otherwise the 9-cent rate was applicable. In either event there was a lawful local rate covering the haul over the northern line.

At the trial the plaintiff took the position, not that the proportional rate was unreasonable, preferential, discriminatory or otherwise objectionable under the Interstate Commerce Act, but that the special agreement was valid and the garnishee consequently was under a common law liability to Forrester Brothers for all that it had collected in excess of the stipulated 8-cent rate for the haul over its road. And the garnishee's position, insisted upon throughout the trial, is reflected by the following declarations of law which it tendered and the court rejected:

"Where an interstate shipment of merchandise passes from the point of origin to the point of destination over the lines of two separate carriers, and such carriers have not, by agreement, established a joint rate over their said lines and filed and published the same in the manner required by the Interstate Commerce Act, then the only lawful charge for transportation to be applied to such

shipment is the published tariff rate of the first carrier from the point of origin of the shipment to the point of connection with the second carrier, plus the published tariff charge of the second carrier from the point of connection with the first carrier to the point of destination.

"On interstate shipments of merchandise the only lawful rates applicable thereto are such rates as have been filed and published in the manner required by the Interstate Commerce Act."

And, applying those declarations to the evidence, the garnishee insisted that during the time of the shipments in question lawfully established local rates, applicable thereto, were in force upon the two roads, and that those rates were not superseded or displaced by the special agreement with the shipper; that the rates agreed upon, that is, the joint through rate and the 8-cent rate, never became legally operative, because never embraced in any schedule filed with the Interstate Commerce Commission; and, finally, that the charges exacted for the haul over its road conformed to the lawfully established rate, and were the only charges which lawfully could have been accepted.

The trial court sustained the plaintiff's position, made a general finding in its favor, and entered judgment thereon against the garnishee. The Supreme Court of the State affirmed the finding and judgment (79 Kansas, 59), and this writ of error was then allowed.

Consideration must first be given to a motion to dismiss, advanced upon two grounds: (1) That no right or immunity under a statute of the United States was "specially set up or claimed," within the meaning of Rev. Stat., § 709, in the state courts, and (2) that in those courts the facts were found generally against the garnishee, that the finding is conclusive upon this court, and that the errors assigned, when rightly considered, but challenge the finding, and therefore present nothing which is open to review.

The first ground obviously is not tenable. The garnishee insisted throughout the proceedings that no recovery could be had against it consistently with the Interstate Commerce Act, because in disregarding the agreement for the special rate and in exacting the proportional rate, first of 10 and later of 14 cents, it but conformed to the provisions of that act governing the rates to be applied to interstate shipments. This was an adequate assertion of a right or immunity under that act, for it named the act, indicated wherein it was claimed to be applicable, and invoked its protection. *Nutt* v. *Knut*, 200 U. S. 12; *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The second ground has more color, but is also untenable. While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings. Thus, in *Mackay* v. *Dillon*, 4 How. 421, 447, where the state courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress, it was held that their decision "on the effect of such evidence may be fully considered here." In *Dower* v. *Richards*, 151 U. S. 658, 667, where the conclusiveness of findings of fact by a state court was elaborately considered, it was recognized that where the question is "of the competency and legal effect of the evidence as bearing upon a question of Federal law the decision may be reviewed by this court." In *Stanley* v. *Schwalby*, 162 U. S. 255, 274, 277–279, which was an action of eject-

ment, the validity of an authority exercised under the United States was drawn in question and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United States, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the state court found that he had such knowledge. In this court it was insisted, on the one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said (p. 278): "But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence." And, upon examining the evidence, this court held it to be "wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan," and accordingly reversed the judgment of the state court. And in *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, a case arising under the Federal Safety Appliance Law, wherein the state court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery, this court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal stat-

ute. Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a State to pass any law impairing the obligation of a contract, the existence of the contract in such cases being a mixed question of law and fact. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697, a leading case upon the subject, contains this statement of the settled rule: "Whether an alleged contract arises from state legislation, or by agreement with the agents of a State, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States." A like exercise of this power is shown in cases arising under the clause of the Constitution requiring full faith and credit to be given in each State to the judicial proceedings of every other State. *Huntington* v. *Attrill*, 146 U. S. 657, 684, was such a case. It was a suit in Maryland upon a judgment obtained in New York under a statute of the latter State imposing a liability for the debts of a corporation upon a director making a false certificate respecting its condition. The Court of Appeals of Maryland held that the judgment was for a strictly penal liability and therefore not within the protection of the full faith and credit clause. But when the case came here it was held that "if the state court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability." And upon reaching the conclusion that in that instance the original liability was not strictly penal this court reversed the judgment of the Court of Appeals of Maryland.

When due regard is had for the rule before indicated, and so often applied in other cases, it does not admit of doubt that in the present case we may examine the evidence, which has been properly incorporated in the record, to determine whether the general finding necessarily involved the decision of questions of law bearing upon the Federal right set up by the garnishee. And when this is done it is manifest, as is amply illustrated by the résumé which we have given of the evidence and contentions of the parties, that the finding necessarily involved the decision of questions of the interpretation and application of the Interstate Commerce Act (24 Stat. 379, c. 104; 25 Stat. 855, c. 382), and also of other questions of law bearing upon the Federal right, such as the legal effect of evidence.

Coming then to the questions arising upon the case made by the evidence, we have seen that when the agreement for the special rate was made, and during the time of the shipments in question, there was in force on the garnishee's road a lawful proportional rate, at first of 10 and later of 14 cents, applicable to these shipments, unless it was objectionable in some of the following particulars:

(*a*) Although it was shown that the schedules embodying this rate were regularly printed, duly filed with the Interstate Commerce Commission, and kept open to public inspection at the freight offices of the garnishee at Kansas City and other points, it was not shown that copies were posted in public and conspicuous places in those offices as required by § 6 of the Interstate Commerce Act. Posting, however, was not essential to make rates legally operative, and was required only as a means of affording special facilities to the public for ascertaining the rates *actually in force*. *Texas and Pacific Railway Co.* v. *Cisco Oil Mill*, 204 U. S. 449.

(*b*) It was not shown that these schedules were sanctioned by the other railroads designated therein, they

being the roads over which the haul to the garnishee's road from the common points was to be made when the shipments were received from connecting lines at those points. Such a showing, however, was not necessary here. The other roads had no interest in the rate as applied to shipments received by the garnishee from the northern line at Kansas City, as were the shipments in question. As applied to them the rate was not joint, but an individual rate of the garnishee. The sanction of the other roads was essential only to its application to the haul from the common points, when there was such.

(*c*) As before stated, the heading of these schedules indicated that they were adopted by the garnishee "in connection with" other designated railroads, they being the ones just mentioned as interested in the rate when applied to shipments received from connecting lines at the common points. This, it is contended, meant that the rate was applicable only to shipments received by the garnishee from those roads. But an examination of the schedules satisfies us that they had no such meaning. The heading merely reflected the fact that the rate, in some of its applications, was to be a joint one as between the garnishee and the designated roads. The schedules themselves did not restrict the rate to shipments received from those roads, but, on the contrary, indicated that it was applicable to shipments received by the garnishee at Kansas City from any connecting line. This view of it was fortified, unnecessarily, as we think, by the uncontradicted testimony of expert witnesses, who declared that the rate was applicable to shipments originating on any connecting line, whether received by the garnishee at Kansas City or by one of the designated roads at a common point.

The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate on the northern line from Omaha to

Kansas City. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded. *Diaz* v. *United States*, 222 U. S. 574; *Schlemmer* v. *Buffalo, Rochester & Pittsburg Railway Co.*, 205 U. S. 1, 9; *United States* v. *McCoy*, 193 U. S. 593, 598. And while it may have been left somewhat uncertain as to which of two such rates, one of 6½ and the other of 9 cents, was the applicable one, it was disclosed with certainty that it was one or the other.

Such being the state of the evidence, the necessary conclusion, as matter of law, is that an applicable and lawfully established local rate was in force on each road. And as it was conceded that there was no established joint through rate, it likewise is a necessary conclusion that the shipments, even if moving on through bills of lading, should have taken these local rates, unless the latter were superseded or displaced by the special agreement.

We are thus brought to the question of the validity of that agreement. Not only did it contemplate a departure from the established local rates for the benefit of a single shipper, but no schedule embracing the rates agreed upon was filed with the Interstate Commerce Commission. Section 6 of the Interstate Commerce Act, as it existed at the time, laid upon every carrier subject to the provisions of the act the duty of filing with the Commission and publishing schedules of the rates to be charged for the transportation of property over its road, provided for changing and superseding such rates by new schedules so filed and published, and made it unlawful for such a carrier to depart from any rate so established and in force at the time. That section also required connecting carriers, agreeing upon joint through rates, to file schedules thereof with the Commission, made similar provision for changing and superseding rates so established, and like-

wise prohibited any deviation from an established joint rate while remaining in force. Other sections contained provisions against unreasonable rates, unjust discriminations, undue preferences and the like. The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. In every substantial sense local rates and joint through rates were placed on the same level. Both were required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the act. The true effect of the statute in this regard—we speak of the statute as it existed in 1901—is clearly stated in the opinion of the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, Burlington & Quincy Railway Co.* v. *United States*, 157 Fed. Rep. 830, 833, as follows:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transporta-

tion, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end is taken they in effect adhere to the rates established, published, and filed by them as applying not only to local but to through traffic."

We conclude, as matter of law, that the special agreement was void, that the established local rates were unaffected by it, that the rate collected by the garnishee was the applicable legal rate, and that the finding and judgment should have been in favor of, and not against, the garnishee.

To avoid any misapprehension in respect to the character of the liability sought to be enforced in this case, we deem it well to repeat that there was no claim of any right to reparation or damages under the Interstate Commerce Act, and no claim that the rate collected was unreasonable, preferential, discriminatory or otherwise violative of that act, but only an attempt to enforce a supposed liability for a breach of the special agreement. See *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Robinson* v. *Baltimore and Ohio Railroad Co.*, 222 U. S. 506.

For the reasons given the judgment of the Supreme Court of Kansas is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

UNITED STATES *v.* MILLER.

SAME *v.* SAME.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Nos. 607, 608. Argued January 9, 1912.—Decided February 26, 1912.

Posting of rates as required by § 6 of the Interstate Commerce Act is not a condition of making the tariff legally operative or keeping it in operation.

The non-posting of rates by an interstate carrier will not relieve a shipper from the penalty for violating the Interstate Commerce Act by accepting rebates.

Publication and posting, in the sense in which those terms are used in the Interstate Commerce Act, are essentially different.

One provision of an act will not be so construed as to defeat the object of the act; and the non-posting, or removal of, schedules of rates, will not disestablish a published rate.

Congress will not be presumed to have intended that the mere non-posting of schedules of rates in the depots of carriers, or the removal thereof after posting, should disestablish or suspend a rate, which the act provides shall only be changed in the mode prescribed. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, *ante*, p. 573.

THE facts, which involve the construction of certain provisions of the Interstate Commerce Law as amended by the Hepburn Act of 1906 to regulate commerce, are stated in the opinion.

The Solicitor General for the United States:

Where the carriers have done everything prescribed by the statute with regard to a through joint rate for transportation over a through route under a common arrangement, except posting the schedules in the depots, a shipper who knows what the established rate is, is guilty of a vio-

lation of § 1 of the Elkins Act as amended by the Hepburn Act if he knowingly solicits, accepts, and receives a concession from that rate.

Proof of a violation of the act by a shipper would be rendered practically impossible, and certainly senselessly difficult, laborious, and expensive, if in every prosecution primary evidence of posting the schedules and keeping them posted in every depot were required. The shipper indeed might secure immunity by himself removing the schedule from some depot before applying for and getting his concession, as the established rate would then no longer be in existence.

Every purpose of the law would be defeated if rates existed by so precarious a tenure.

The question has in effect been determined in *Texas and Pacific Ry. Co.* v. *Cisco Oil Mill*, 204 U. S. 449. Although that case concerns the construction of the section in a civil cause, that affords no reason for saying that the authoritative construction of the statute is not to be applied in a criminal case. *United States* v. *Keitel*, 211 U. S. 370, 392.

As early as 1892, in *United States* v. *Howell*, 56 Fed. Rep. 21, 29, it was held as against shippers that the posting of rates in the depots was not essential to their establishment.

In no Federal case, other than the one at bar, has the posting in depots been held essential to the establishment of the rate.

The amendments made to the law since the *Cisco Case* was decided were not designed to weaken it, but to guard it more carefully than before against rebates, concessions, and discriminations.

In this case there is charged in the indictment a rate established by the carrier, knowledge by the defendants of what the rate was, and the solicitation and acceptance of a lesser rate.

The requirements of the statute have been fulfilled, and the indictment should be sustained.

Mr. Alexander A. Lawrence, with whom *Mr. M. Hampton Todd* and *Mr. William W. Osborne* were on the brief, for defendant in error:

An indictment of a shipper for accepting a concession from a freight rate is properly quashed when there is no averment therein that the rate in question had been posted in the freight station where the freight was received or elsewhere.

As a condition of criminality, the statute prescribes that the shipper must violate a tariff rate published as prescribed by the act. The act prescribes as a part of the publication that the tariffs should be posted in two conspicuous places where freight is received. It is admitted that the rates alleged to be violated were not so posted. Where the statute prescribes a method of publication the Government may not in order to secure a conviction allege and show that it had been published only in part. *Texas Railway Co.* v. *Cisco Oil Mill*, 204 U. S. 449; *Armour Packing Co.* v. *United States*, 209 U. S. 72.

Neither the *Cisco Case*, *supra*, nor the *Abilene Cotton Co. Case*, 204 U. S. 437, construed the penal provisions. While neither the filing nor publication of the rate is a condition precedent to its establishment, validity, or effectiveness from a civil standpoint, both filing and publishing are, under the Hepburn Act, conditions precedent to the penal operation of the statute with respect to the shipper.

The distinction between an established and a published rate and the consequences of a departure therefrom by a shipper are clear. See *Hardaway* v. *State*, 1 Ga. App. 150.

The omission of an essential allegation is fatal to the indictment. *United States* v. *Cook*, 17 Wall. 174; *United States* v. *Wood*, 145 Fed. Rep. 409; *Camden Iron Works* v. *United States*, 158 Fed. Rep. 564.

Counsel for the Government cited *United States* v. *Howell*, 56 Fed. Rep. 21; *Chicago R. R.* v. *United States*, 162 Fed. Rep. 838; *The Cisco Case*, 204 U. S. 449, 452, and

United States v. *N. Y. Cent. & Hudson R. R. R.*, 212 U. S. 509, 515, and 157 Fed. Rep. 293, but neither of these cases involves the construction of the act in reference to posting. It is established by them that a carrier which participates in a rate filed or published by another carrier is by virtue of the act made liable to the penal provisions of the statute for any concession granted.

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

These were indictments under that provision of the act to regulate commerce, June 29, 1906, 34 Stat. 584, c. 3591, which makes it a misdemeanor for a shipper knowingly to solicit, accept or receive, from any common carrier subject to the act, a rebate or concession whereby property is transported in interstate commerce "at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act;" and the question presented for decision is, whether compliance with the requirement in respect of the posting of tariffs in the depots, stations or offices of the carrier is essential to bring a tariff within the descriptive terms of that provision. We say this is the question for decision, because it appears from the record that the Circuit Court, in sustaining demurrers to the indictments, placed its decision solely upon the ground that they did "not allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law," and because upon these direct writs of error we must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision. *United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Kissell*, 218 U. S. 601, 606.

That the act imposes upon common carriers subject to its provisions the duty of establishing in a prescribed mode the rates, whether individual or joint, to be charged for

the transportation in interstate commerce of property over their lines, and that the rates so established are obligatory alike upon carrier and shipper, and must be strictly observed by both until changed in the mode prescribed, are propositions which are not only plainly stated in the act, but settled by repeated decisions of this court. In speaking of the rates which must be thus observed, the act variously designates them as the rates "named in the tariffs published and filed," the "charges which have been filed and published," the "charges which are specified in the tariff filed and in effect at the time," the "regular charges . . . as fixed by the schedules of rates provided for in this act," and the "regular rates then established and in force," but in none of these expressions is there any suggestion that posting is a necessary step in establishing rates, that is, in making them legally operative. Of course, these expressions, although differing in words, are identical in meaning, and to ascertain that meaning recourse must be had to § 6 of the act, which, at the time of the offenses charged in these indictments (1907–8), declared:

"SEC. 6. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established [meaning adopted]. . . . Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently in-

spected. . . . *Provided*, That the Commission may, in its discretion and for good cause shown, . . . modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions. . . . No carrier, unless otherwise provided by this Act, 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 the contention of the defendants that a tariff is not published in the sense in which the act uses that term unless printed copies are "kept posted in two public and conspicuous places in every depot," etc., and it was this contention that prevailed in the Circuit Court. But, in our opinion, it is not sound. Publication and posting in the sense of the act are essentially distinct. This is the import of the provision that the requirements relating to "publishing, posting and filing" may be modified by the commission in special circumstances, for if publishing included posting, mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or

removal of one of the posted copies from a depot would disestablish or suspend the rates, a result which evidently is not intended by the act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed.

Like views of the posting clause were expressed in *Texas and Pacific Railway Co.* v. *Cisco Oil Mill*, 204 U. S. 449, and upon further consideration we perceive no reason for departing from them. See also *Kansas City Southern Railway Co.* v. *Albers Commission Co.*, *ante*, p. 573.

Whether, by failure to comply with that clause, a carrier becomes subject to a penalty is apart from the present case and need not now be considered.

The judgments are reversed, and the cases are remanded for further proceedings in conformity with this opinion.

Reversed.

PHILADELPHIA COMPANY *v.* STIMSON, SECRETARY OF WAR.[1]

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

No. 70. Argued November 16, 1911.—Decided March 4, 1912.

Exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.

In case of injury threatened by illegal action, an officer of the United States cannot claim immunity from injunctive process.

Where complainant does not ask the court to interfere with an officer

[1] This case was originally commenced against William H. Taft as Secretary of War; by subsequent orders of the court the successive incumbents of that office, Luke E. Wright, Jacob M. Dickinson and Henry L. Stimson, were substituted as defendants and appellees.

of the United States acting within his official discretion, but challenges his authority to do the act complained of, the suit is not against the United States.

While the general rule is that equity has no jurisdiction over the prosecution of crimes, it may, when it is essential to the protection of property rights, as to which the protection of a court of equity has already been invoked, enjoin the institution of criminal actions involving the same legal questions.

An officer transcending the limits of his authority under a constitutional statute may inflict similar injuries on property or individuals as though he were proceeding under an unconstitutional statute, and in either event, equity may intervene to restrain unfounded prosecutions.

A court of equity having control of the person of defendant has jurisdiction of an action to restrain him from violating the rights of the complainant in regard to property not within its jurisdiction and may compel obedience to its decree. *Phelps* v. *McDonald*, 99 U. S. 298.

While the establishment of a general system of harbor lines for the protection of navigation is not of itself an injury to property and cannot be restrained, equity may enjoin an officer from taking measures to maintain the limits against an individual proprietor and so prevent him from enjoying what he asserts to be a lawful use of his own property.

A riparian proprietor of land bounded by a stream continues to hold to the stream as a boundary where the banks are changed by accretion or erosion, but if the banks are changed by avulsion, the title is not changed but remains at the former line. This rule applies alike to all streams and rivers no matter how strong and swift they may be.

To bring a sudden change of channel within the rule that it will not affect the boundary line, it must be perceptible when it takes place. *Nebraska* v. *Iowa*, 143 U. S. 359.

In this case, *held*, that the changes in the line of complainant's property were due to gradual erosion and not to sudden change of channel, and that the stream remained the boundary line.

The title to the soil under navigable waters within their territorial limits, and the extent of riparian rights, are governed by the law of the several States subject to the paramount authority of Congress; and under the authority of Congress, the Secretary of War may fix harbor lines superseding those fixed by the State.

Commerce includes navigation; *Gilman* v. *Philadelphia*, 3 Wall. 713;

and the power of Congress over navigation has no limits except those prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196.

The authority of Congress is not limited to water as it flowed at any preceding time. Alterations in the course of a stream do not affect the power of Congress.

The public right of navigation follows the course of the stream.

It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction to navigation. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421.

Authority given by Congress to the Secretary of War to establish harbor lines is not exhausted in laying the lines once; the Secretary may change them at subsequent times in order to protect navigation from obstruction.

33 App. D. C. 338, affirmed.

THE facts, which involve the construction and constitutionality of acts of Congress giving the Secretary of War power to establish harbor lines in navigable waters of the United States, and the validity and effect of the action of the Secretary of War thereunder in regard to harbor lines established by him in the harbor of Pittsburgh, Pennsylvania, are stated in the opinion.

Mr. William L. Marbury, with whom *Mr. Morgan H. Beach*, *Mr. W. Graham Bowdoin* and *Mr. Samuel McClay* were on the brief, for appellant:

It was manifestly in the interest of navigation, as well as for the protection of riparian owners, that the legislature of Pennsylvania enacted Chapter 363 of the Acts of 1858, to establish high and low water lines in the Allegheny, Monongahela and Ohio rivers, in the vicinity of Pittsburgh, in Allegheny County.

The effect of this act and of the proceedings so taken thereunder was to secure to the owners of land along these rivers complete protection against any loss of their land or right to build upon the same because of any subsequent encroachment of the waters. *Bridge Co.* v. *Pfeil*, 42 Pitts. Leg. Jour. 18.

Rights of riparian owners on navigable waters, including the question of how far, if at all, their title to land shall be deemed to be affected by the action of the water, are determined and governed by the laws of the respective States. *Shively* v. *Bowlby*, 152 U. S. 1; *Barney* v. *Keokuk*, 94 U. S. 324; *St. Louis* v. *Meyers*, 113 U. S. 566; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349; *Packer* v. *Bird*, 137 U. S. 661.

In Pennsylvania the soil up to low-water mark in a navigable stream is the property of the Commonwealth. *Monongahela Bridge Co.* v. *Kirk*, 46 Pa. St. 112, 120.

Even if the overflowing of the complainant's property caused by the construction by the Government in improving the harbor might be *damnum absque injuria*, the owner of the property has the right to protect himself against such injury, if he can, at his own expense, either by excluding or expelling the water. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336.

But, even though the Pennsylvania act of 1858 had never been passed, upon the facts appearing in this case the title of the plaintiff as the owner of Brunot's Island to the submerged land lying inside islandward of the commissioners' line of 1865 remains absolute.

If the waters of the river had encroached gradually and by imperceptible degrees upon the island, as it existed in 1865, so that the land now in dispute gradually became part of the bed of the river covered with navigable water, in the absence of any such statute as the act of 1858 above quoted, the owner of Brunot's Island would have lost title to the land thus submerged and the same would have become the property of the State or of the municipality.

But, when as here, instead of the submergence or loss of land being caused by the gradual and imperceptible encroachment of the water, it is caused by sudden floods and freshets, the title of the owner of the island is not affected and he may at any time exclude the water or occupy

the land itself submerged in any way he pleases. *Rex* v. *Lord Yarborough*, 3 Barn. & C. 15; Angell, Tidewaters, 1st ed., 71; *Emans* v. *Turnbull*, 2 Johns. 314; *S. C.*, 3 Am. Dec. 427; 2 Bl. Com. 261; Hargrave's Law Tracts, 28; Gould on Waters, § 158 and cases cited; *Mulry* v. *Norton*, 100 N. Y. 424, citing Hargrave's Law Tracts (Matthew Hale's De Jure Maris, 36–37); Cooke & Foster, M. 7 Jac. C. B.; *Morris* v. *Brooks*, decided by the Court of Common Pleas of Delaware; *Wallace* v. *Driver*, 31 L. R. A. (Ark.) 319; Hunt on Boundaries, &c. 29.

So that the washing away by freshets of the surface of the soil of Brunot's Island inside of the commissioners' line of 1865, which is admitted to be located upon what was the actual high-water mark at that time, has made no alteration in the boundary of the island. That boundary still remains where it was at that time, to wit, on the commissioners' line of 1865. *St. Louis* v. *Rutz*, 138 U. S. 226, 245. See also *Nebraska* v. *Iowa*, 145 U. S. 519; *Widdecombe* v. *Rosemiller*, 118 Fed. Rep. 295.

This proceeding is "not virtually a suit against the United States," but a suit to restrain the defendant, an executive officer of the Federal Government, from exceeding his authority to the impairment of the property rights of the claimant. *United States* v. *Lee*, 106 U. S. 218, 219; *Noble* v. *Union River Logging Railroad*, 147 U. S. 171; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 108; *Scott* v. *Donald*, 165 U. S. 112; *In re Tyler*, 149 U. S. 164; *Osborn* v. *Bank of the United States*, 9 Wheat. 842; *New Orleans* v. *Paine*, 147 U. S. 264; *Louisiana State Lottery Co.* v. *Fitzpatrick*, 15 Fed. Cas. 986.

A court of equity will entertain a bill to restrain the institution and prosecution of criminal proceedings, as threatened in this case, for the reason that such prosecution would interfere with, and, in effect destroy, the property rights of the complainant in the land in question. Because in fact the prosecution of such proceedings would

entirely deprive plaintiff of the use of its property and constitute such a taking of private property for public uses as a court of equity will always enjoin. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Central Trust Co.* v. *Citizens' Street Railway Co.*, 80 Fed. Rep. 225; *Louisiana State Lottery Co.* v. *Fitzpatrick*, 15 Fed. Cases, 986; *Dobbins* v. *Los Angeles*, 195 U. S. 241; *City of Hutchinson* v. *Beckham*, 118 Fed. Rep. 401; *Greenwich Ins. Co.* v. *Carroll*, 125 Fed. Rep. 126; *Frewin* v. *Lewis*, 4 Mylne & Craig, 249; *Baltimore* v. *Radeke*, 48 Maryland, 217; *Georgia R. R. Co.* v. *Atlanta*, 118 Georgia, 490; Lewis on Eminent Domain, par. 56; *Osborne* v. *Missouri Pac. Ry. Co.*, 147 U. S. 258, 259; *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 511–512.

Complainant does not contend that the mere establishing of the harbor lines complained of, and the requiring of the plat in the office of the Secretary of War, unaccompanied by the taking of any active measures on the part of the defendant to actually interfere with the complainant in the use of its property, would have furnished sufficient ground for the interference of a court of equity, as by injunction, as the mere establishing of harbor lines unaccompanied by any such action does not constitute such a cloud upon the complainant's title to his land or such invasion of his rights as would justify such relief. But the facts of this case at bar are exactly the reverse of the facts of *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646, 656, and *Prosser* v. *N. P. Ry. Co.*, 152 U. S. 59.

The fact that the land of the plaintiff of which the defendant is depriving the plaintiff the possession by threatening it with criminal prosecution if it uses said land—which in other words the defendant is attempting to take without compensation—is not located in the District of Columbia, does not deprive the Supreme Court of the District of jurisdiction. *Stone* v. *United States*, 167 U. S.

169; *Cole* v. *Cunningham*, 133 U. S. 107; *Phelps* v. *McDonald*, 99 U. S. 298.

Mr. Assistant Attorney General Knaebel for appellee:

The harbor line was lawfully established.

As riparian owner with or without the fee of the river bed, the appellant is in no position to complain of the new harbor line. No "taking" of property is involved in the incidental losses which result to such an owner from the exercise by Congress of its paramount power to improve and protect navigation. The navigable waters are the public property of the nation, and subject to all the requisite legislation by Congress. *Gilman* v. *Philadelphia*, 3 Wall. 725; *South Carolina* v. *Georgia*, 93 U. S. 4, 11; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 57 Fed. Rep. 803; *S. C.*, 179 U. S. 141; *Hawkins Point Light-House Case*, 39 Fed. Rep. 77; *United States* v. *Rio Grande Dam &c. Co.*, 174 U. S. 690, 708; *Union Bridge Company* v. *United States*, 204 U. S. 364, 400. A permission granted by the State years ago, but not acted on, cannot survive in the face of a sweeping policy of Congress.

The bill does not exhibit facts sufficient to show that the change in this instance was one of avulsion or submergence.

There is no allegation that the change occurred perceptibly. *Jefferis Case*, 134 U. S. 178. The rapidity with which floods and freshets wore away the bank, if they wore it at all, would depend upon a variety of physical conditions. They might wear rapidly, or gradually, or not at all; they might well add to instead of subtracting from the soil. The law is concerned only with the degree of speed with which the diminution takes place, but as to this the bill is wholly silent.

The difference between the processes is found in the fact that the operation of the one is sudden and its results

perceptible in their progress, while the other operates so gradually that the eye does not observe the inward movement of the water. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 47; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; *Nebraska* v. *Iowa*, 143 U. S. 359, 361.

Admitting that the change was by a process akin to avulsion, and conceding freely the power of the State to do away with the common law of accretion and erosion entirely, and establish a permanent boundary for the plaintiff's land, that has nothing to do with the matter of protecting navigation. So far as the General Government is concerned, appellant is simply in the position of a riparian proprietor, owning the fee as far out as the Commissioners' line, subject to have his use of it regulated in the interest of commerce under the authority of Congress.

The court was without jurisdiction. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 639; *Dredging Co.* v. *Morton*, 28 App. D. C. 288. The suit cannot possibly be other than a suit against the United States. *Prosser* v. *Northern Pacific Railroad*, 152 U. S. 59; *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646; *S. C., sub nom. Board of Harbor Line Commissioners* v. *State*, 2 Washington, 530; 27 Pac. Rep. 550; *Harkrader* v. *Wadley*, 172 U. S. 148, 169; *Ex parte Young*, 209 U. S. 203, distinguished; and see *Fitts* v. *McGhee*, 172 U. S. 516.

The suit, therefore, is in effect a suit against the United States. *Minnesota* v. *Hitchcock*, 185 U. S. 386; *Board* v. *McComb*, 92 U. S. 531; *Oregon* v. *Hitchcock*, 202 U. S. 60. It is a palpable attempt to prejudge the merits of a criminal prosecution which the Attorney General would have a perfect right, and, indeed, would be under a duty, to institute if, in his best judgment, he should conclude that the harbor line was lawfully established.

The case is also clearly not such a suit as ought to be entertained by the court as a court of equity. It is objectionable from this standpoint in the first place as a

pure attempt to enjoin valid criminal proceedings. *In re Sawyer*, 124 U. S. 200, 209, 210; *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee, supra.*

Furthermore, only one punishment would be involved under the act of 1899 by the construction of the wharf beyond the harbor line. In that respect also the case differs greatly from the *Young Case.* There could be no multiplicity of prosecutions or cumulation of drastic penalties. Neither does it appear that great and irreparable loss will result from delaying the construction of the proposed wharf.

The harbor line produces no cloud upon the title and does not for any other reason afford a ground of equitable interference, as was fully determined by this court in *Prosser* v. *Northern Pacific Railroad Company, supra.*

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought in the Supreme Court of the District of Columbia to set aside certain harbor lines in the harbor of Pittsburgh, Pennsylvania, so far as they encroached upon land owned by the complainant, and to restrain the Secretary of War from causing criminal proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits. The Court of Appeals of the District affirmed a decree sustaining a demurrer to the bill, and the complainant appeals.

The allegations of the bill, in substance, are as follows:

The complainant, a corporation of the Commonwealth of Pennsylvania, is the owner in fee of "Brunot's Island," formerly Chartier's or Hamilton's Island, in the Ohio River, in Allegheny County, Pennsylvania. In 1858, a statute was enacted in Pennsylvania providing for the appointment of commissioners to ascertain and mark the

lines of ordinary high and low water in the Allegheny, Monongahela and Ohio rivers in the vicinity of Pittsburgh. The act recited that the lines of land along the shores of the rivers had not been clearly ascertained, and it was important to all persons interested that their several rights and privileges should be defined. After the Commissioners' surveys had been completed and the lines located, opportunity was to be afforded in the court, by which they were appointed, for any needed corrections; and the map or plan finally determined upon was to be recorded. The statute declared that "the lines so approved shall forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid." Proceedings were had accordingly and the high and low-water lines along the shore of Brunot's Island were definitely fixed. In consequence the bill asserts that all the land, whether or not under water, inside of the Commissioners' lines became the property of the owners of Brunot's Island; and that by virtue of the statute, and the action of the Commissioners under it in fixing the high-water line as a permanent boundary, the right of the owners of the island to accretions beyond that line was taken away, while at the same time they were no longer subject to loss or diminution of their land by reason of its submergence "through the avulsion of floods or freshets or through gradual erosion."

Subsequent to the establishment, in 1865, of the State Commissioners' line, a considerable portion of the shore of the island, "on the so-called back channel, within the said high water mark," was washed away from time to time by heavy floods and freshets, so that a large part of the upland was slightly submerged, but not to an extent sufficient to permit of navigation. Some years ago, the United States Government, in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio River a short distance below Brunot's Island, known as the Davis Island Dam. And

the effect of this dam, says the bill, by the increase of the depth of water in the channel, was to submerge Brunot's Island to a far greater extent and to make the water over the complainant's land navigable "at certain times, and for certain purposes," where it was not navigable before.

In 1895, the Secretary of War, claiming to act under the authority of § 12 of the act of Congress of September 19, 1890, and knowing that the shore of Brunot's Island had been washed away by floods and freshets, established a harbor line which ran across the complainant's land within the line of the State Commissioners. It is further alleged that although the submerged land was generally covered by water, "it was not ordinarily navigable water," and "has never constituted, nor does it now constitute a part of the public navigable waters of the United States;" that no authority was conferred by the act of Congress upon the Secretary of War to regulate or interfere with the use of the complainant's land by the establishment of harbor lines upon the same; and that even if the water over this land was in fact part of the public navigable waters of the United States, without being rendered thus navigable by the construction of the dam, still the Secretary of War had no right so to run the harbor line over the land in question as to deprive the complainant of its use and enjoyment. It was the right of the complainant, the bill avers, to repair the damage caused by floods and freshets and to reclaim the submerged portion by filling in or wharfing, "keeping at all times within the lines of the part that had been torn away by the violence of the waters."

In 1907, the Secretary of War, claiming authority under § 11 of the act of Congress of March 3, 1899, against the complainant's protest, changed the harbor line. The report of the United State engineer at Pittsburgh stated that the conditions of high and low water had not changed since 1895, but as along a part of the shore of the island,

the harbor line of 1895 ran several hundred feet outside high-water mark as it then existed, it seemed advisable to change it so as to coincide with the actual high-water mark. A copy of the report with the order of the Secretary of War, dated February 23, 1907, was annexed to the bill and made a part of it. In this it is stated that the location of the proposed harbor lines was within the bed of the stream as it existed as a physical fact.

The bill further shows that to facilitate the delivery of coal for the operation of its power house on the island, the complainant desired to reclaim a part of it which had been submerged by establishing a coal wharf on the back channel, where both the harbor line of 1895 and that of 1907 "ran some distance landward of the said State commissioners' high water line." According to the proposed plans, the wharf or pier was to extend over the complainant's land and to cross both of the harbor lines to the State commissioners' line. While these plans were being perfected, the Secretary of War, through his representative, the United States engineer officer at Pittsburgh, declared to the complainant that it had no right to build upon its land across either of the harbor lines, and he refused to permit the complainant to reclaim its land or to build its wharf thereon outside the harbor line of 1907. He threatened that if it undertook to do so, he would prevent it and cause the complainant and its employés "to be prosecuted and fined by the authorities of the Federal Government" for violations of the acts of Congress of September 19, 1890 (26 Stat. 426, c. 907), and March 3, 1899 (30 Stat. 1151, c. 425). It was further charged that if the Secretary of War had authority to fix the original harbor line of 1895, that his power was exhausted by what was then done, and that the harbor line of 1907 was wholly unauthorized.

In consequence of the severe penalties prescribed by the acts of Congress for the construction of buildings,

piers or wharves outside any harbor line established by the Secretary of War and by reason of the defendant's threats of prosecution in case the complainant carried out its plan of reclamation and the construction of its wharf, the bill avers that the complainant is prevented from making use of its property; that the defendant's action constitutes a taking of its property for public use without just compensation; that it is subjected in its endeavor, so long as the harbor line remains unmodified, to a multiplicity of criminal prosecutions; and that the harbor line is a cloud upon its title.

The provisions of the acts of Congress, referred to in the bill, are set forth in the margin.[1]

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[1] Section 12 of the act of September 19, 1890; (Chap. 907, 26 Stat. 426, 455), provided:

"SEC. 12. That section twelve of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulk-heads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense."

Sections 11, 12 and 17 of the act of March 3, 1899, (Chap. 425, 30 Stat. 1121, 1151–1153), are as follows:

"SEC. 11. That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: *Provided*, That whenever the Secretary of War grants to any person or

In demurring to the bill the defendant asserted that it was bad in substance, and also specially assigned the following grounds,

"1. This proceeding is virtually a suit against the United States.

"2. This Court has no jurisdiction to restrain the enforcement of a penalty or prosecution for violation of law.

"3. This Court has no jurisdiction to restrain the defendant from instituting criminal proceedings against complainant.

"4. This Court has no jurisdicion to declare or define harbor lines or boundary lines of land outside the District of Columbia and in the State of Pennsylvania.

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persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tide water displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tide-water channels between high and low water mark, to such an extent as to create a basin for as much tide water as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.

"SEC. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.

"SEC. 17. That the Department of Justice shall conduct the legal

"5. There is no jurisdiction in this Court to pass any decree removing cloud upon an alleged title of complainant in realty in the State of Pennsylvania, nor to accomplish the same by declaring the harbor lines referred to in the bill null and void."

First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully

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proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this Act, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever any arrest is made under the provisions of this Act, the persons so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States."

invaded. *Little* v. *Barreme*, 2 Cranch, 170; *United States* v. *Lee*, 106 U. S. 196, 220, 221; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Tindal* v. *Wesley*, 167 U. S. 204; *Scranton* v. *Wheeler*, 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 843, 868; *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Scott* v. *Donald*, 165 U. S. 107, 112; *Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Herndon* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643–645. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.

Second. The second and third grounds of demurrer, specially stated, raise the question as to the jurisdiction of the court to restrain the defendant from instituting criminal proceedings.

A court of equity, said this court in *In re Sawyer*, 124 U. S. 200, 210, "has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors. . . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade

the domain of the courts of common law, or of the executive and administrative department of the government." *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee*, 172 U. S. 516, 531; 2 Story's Eq. Jur., § 893. But a distinction obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217, 218; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 161, 162; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165. In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands.

It is urged that the statute authorizing the Secretary of War to prevent encroachments upon navigable streams is a valid one, and that the decisions cited do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte Young*, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus un-

lawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property.

By § 12 of the act of March 3, 1899 (30 Stat. 1151, c. 425), it was provided that every person and every corporation which should violate any provision of § 11, relating to the observance of harbor lines, or any rule or regulation made by the Secretary of War in pursuance of that section, should be guilty of a misdemeanor and punished by fine or imprisonment. By § 17 it was made the duty of district attorneys of the United States to prosecute all offenders whenever requested by the Secretary of War. If the complainant's rights, as against the defendant, were as claimed, it was entitled to adequate protection. And, in such case, the remedy might properly embrace the restraining of unfounded prosecutions.

Third. The fourth and fifth special grounds of demurrer assert that the Supreme Court of the District of Columbia had no jurisdiction to define boundaries in the State of Pennsylvania, or to remove a cloud upon title to land in that State.

In dealing with these objections, it is important to observe the precise nature of the suit. It was not to determine a controversy as between conflicting claimants under the local law. It was not to restrain trespass. *Northern Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105. It was not brought to try the naked question of the title to the land. *Massie* v. *Watts*, 6 Cranch, 148, 158. While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still if its title to the land under water were established or admitted to be as alleged, the question would remain whether the defendant in imposing restrictions upon the use of the property was acting by virtue of authority validly conferred by a general act of

Congress. This was the principal question which the complainant sought to have determined. The defendant is within the District, amenable to the process of the court. There is no ground upon which it may be denied jurisdiction to decide whether he should be restrained from continuing his opposition to the complainant's plan of improvement. Rather should it be said that the case falls within the general rule sustaining the jurisdiction of a court of equity which has control of the person of the defendant and may compel obedience to its decree. *Phelps* v. *McDonald*, 99 U. S. 298, 308.

Fourth. Assuming that the court had jurisdiction, we are brought to a consideration of the equity of the bill.

It has been held that the establishment of a general system of harbor lines, for the protection of commerce and navigation, is not of itself an injury to property and cannot be restrained. *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646, 656; *Prosser* v. *Northern Pacific R. R. Co.*, 152 U. S. 59, 64, 65. But it has also been recognized that a different question arises when active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights and thus to prevent him from enjoying what is asserted to be the lawful use of his property. *Prosser* v. *Northern Pacific R. R. Co.*, *supra.*

The complainant starts with the lines as laid down, in 1865, by the State Commissioners. These lines are averred to be "exactly in accordance with the then existing actual ordinary high and low water marks." The argument is (1) that, independently of the effect of the statute of Pennsylvania, the washing away of the banks, and the submergence of a portion of the island, during the subsequent years worked no loss of title, but that it remained absolute, including the right of reclamation and improvement of the submerged land inside the former line of high water; and (2) that, by virtue of the statute, the

boundary was permanently fixed by the State Commissioners' high-water line and no subsequent encroachment of the water could affect the rights of the owner.

(1) It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased he is not accountable for the gain, and if it is diminished he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected and the boundary remains at the former line. *Rex* v. *Yarborough*, 3 B. & C. 91; *S. C.*, 2 Bligh, N. S. 147; *Gifford* v. *Yarborough*, 5 Bing. 163; *New Orleans* v. *United States*, 10 Pet. 662, 717; *Banks* v. *Ogden*, 2 Wall. 57; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 67, 68; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 190–193; *St. Louis* v. *Rutz*, 138 U. S. 226, 245; *Nebraska* v. *Iowa*, 143 U. S. 359; *Shively* v. *Bowlby*, 152 U. S. 1, 35; Hale, *De Jure Maris*, Ch. 1, 4, 6, Hargrave's Law Tracts; *Mulry* v. *Norton*, 100 N. Y. 424. The doctrine that the owner takes the risk of the increase or diminution of his land by the action of the water applies as well to rivers that are strong and swift, to those that overflow their banks, and whether or not dykes and other defenses are necessary to keep the water within its proper limits. It is when the change in the stream is sudden, or violent, and visible, that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *County of St. Clair* v. *Lovingston*, *supra* (p. 68).

We are confined to the allegations of the bill. We have

not the advantage of proof and findings, or even of a particularized description in the bill itself, as to the precise character of the alterations in the banks of Brunot's Island which took place during the long period to which the bill refers. It is alleged "that subsequent to the establishment in 1865 by said Commissioners of the line of high water mark, as aforesaid, a considerable amount of the soil of the shore of said Brunot's Island on the so-called back channel, within the said high water mark was washed away from time to time by heavy floods and freshets, so that a large part of the upland of the island, that is the land above high water mark, became and was overflowed and slightly submerged by water, but said land was not submerged to an extent sufficient to permit of navigation of any kind thereover." There is no other statement on the point save that the bill asserts that the complainant was entitled to reclaim "keeping at all times within the lines of the part that had been torn away by the violence of the waters."

It is manifest that these allegations are inadequate to support the complainant's contention. The determining words are that the land was "washed away from time to time by heavy floods and freshets," and the reference is to what occurred in many years. This is far from a statement that at any particular time there was such a sudden, violent, and visible change as to justify a departure from the ordinary rule which governs accretion and diminution albeit the stream suffer wide fluctuations in volume, the current be swift, and the banks afford slight resistance to encroachment.

For example, the general principle of accretion, which has that of diminution as its correlative, applies to such rivers as the Mississippi and the Missouri, notwithstanding the extent and rapidity of the changes constantly effected. *Jefferis* v. *East Omaha Land Co.*, *supra*; *Jones* v. *Soulard*, 24 How. 41; *Saulet* v. *Shepherd*, 4 Wall. 502;

County of St. Clair v. *Lovingston, supra; St. Louis* v. *Rutz, supra.* In *Nebraska* v. *Iowa, supra,* the question concerned the boundary between the two States, which, by the acts of admission, was the middle of the main channel of the Missouri River. Between 1851 and 1877, in the vicinity of Omaha, there were marked changes in the course of this channel so that in the latter year it occupied a very different bed from that through which it flowed in the former year. The opinion of the court describes in detail the physical conditions along the river. The court said (pp. 368–370): "The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. . . . The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto. Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual landowners, but also in respect to the boundary lines between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream." And, in the same case, the decision clearly points the distinction between the losses and gains thus described, and an abrupt, visible change where at one place, at a particular time, the river having "pursued a course in the nature of an ox-bow, suddenly

cut through the neck of the bow and made for itself a new channel" (p. 370).

The present case falls within the category first mentioned, and according to general principles of law the owner would bear the losses caused by the washings of the river.

The bill also alleges that "some years ago the United States Government, in the interest of navigation and in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio River a short distance below said Brunot's Island known as the Davis Island Dam. The effect of this dam was to very decidedly increase the depth of the water in the channel back of Brunot's Island, and to cause the water of the river to flow higher upon the land of your orator, and to submerge same to a far greater extent and in fact to make said water which submerged your orator's land navigable at certain times, and for certain purposes, which was not navigable before the construction of said dam."

It will be observed that it is said that the United States caused the erection of the dam in the interest of navigation. The complainant purchased the island subsequently, in the year 1896. And we are not concerned here with the question whether there was any appropriation of land of the former owner by the United States and a cause of action arose to recover its value. *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Lynah*, 188 U. S. 445; *Bedford* v. *United States*, 192 U. S. 217; *Manigault* v. *Springs*, 199 U. S. 473; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 583, 584. So far as the bill shows the dam was lawfully built, and the allegations with respect to it wholly fail to state any case entitling the complainant to relief by reason of its construction.

(2) The complainant, however, insists that the effect of the Pennsylvania statute was to fix the boundary of the island permanently at the State Commissioners' high-

water line, and hence that within that line it was entitled to make the desired reclamation and improvement.

This statute (act of sixteenth April, 1858), provided that the Commissioners' lines approved by the court should "forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid." The Supreme Court of Pennsylvania has held that the purpose of the act was to regulate the rights of the public in respect to navigation and to prevent private rights from being exercised to the prejudice of the public interest. *Wainwright* v. *McCullough*, 63 Pa. St. 66; *Zug* v. *Commonwealth*, 70 Pa. St. 138, 142; *Poor* v. *McClure*, 77 Pa. St. 214, 219; *Allegheny City* v. *Moorehead*, 80 Pa. St. 118, 139, 140. In *Wainwright* v. *McCullough* (1869), *supra*, that court, holding that the statute was not applicable to disputed boundaries between private owners, considered the navigable character of the rivers to which it related, the extent of riparian rights under the law of the State, and the meaning of the act in the light of the mischief which it was intended to correct. The court said (p. 73):

"In order to arrive at the legal effect of the lines established by the commissioners under that act, we must ascertain its true purpose; and to reach this, it becomes necessary to examine the navigable character of the rivers Allegheny, Monongahela and Ohio, and the rights of the riparian proprietors upon their banks. These rivers are among the largest in the state; larger than the Schuylkill and Lehigh, recognized as navigable in the early history of the province, and have been repeatedly held by name to be rivers naturally navigable, and therefore classed with the Delaware and Susquehanna: *Carson* v. *Blazer*, 2 Binney, 478; *Shrunk* v. *Schuylkill Nav. Co.*, 14 S. & R. 79, 80; *Hunter* v. *Howard*, 10 S. & R. 244. Many acts have been passed declaring tributaries of these rivers navigable. But an act perhaps most pertinent to this controversy is that of 8th April, 1785, 2 Sm. Laws, 317,

regulating the taking up of lands within the new purchase, of which the 13th section expressly excepts *islands* in the Ohio, *Allegheny* and Delaware.

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"This being the navigable character of the stream, the rights of the riparian owners are settled by numerous decisions, a few of which may be referred to: *Carson* v. *Blazer, supra; Shrunk* v. *Schuylkill Nav. Co., supra; Ball* v. *Slack,* 2 Whart. 508; *Zimmerman* v. *Union Canal Co.,* 1 W. & S. 346; *Bailey* v. *Miltenberger,* 7 Casey, 37; *McKeen* v. *Delaware Div. Canal Co.,* 13 Wright, 424; *Tinicum Fishing Co.* v. *Carter,* 11 P. F. Smith, 21, opinion by Sharswood, J., decided last winter at Philadelphia. From these and other cases, it will appear that the absolute title of the riparian proprietor extends to high-water mark only, and that between ordinary high and ordinary low water-mark, his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway. He cannot occupy to the prejudice of navigation or cause obstructions to be placed upon the shore between these lines, without express authority of the state.

"The case of *Bailey* v. *Miltenberger,* 7 Casey, 37, decided in 1856, doubtless had something to do in turning public attention to the shores of the streams surrounding the city of Pittsburg, which led to the passage of the Act of 1858, for the purpose of defining the low and high water-lines. It referred to the mistaken idea entertained by some proprietors of making ground for their mills, by depositing cinders on the shore between low and high water marks. 'The Allegheny and many other navigable rivers' (says the opinion) 'do not, at the time of low water, occupy over one-third of their bed; and it would be most disastrous to allow every owner to fill out his land to low water-mark.' This state of affairs, for these rivers had been seriously encroached upon at and opposite Pittsburg,

no doubt led to the Act of 16th April, 1858, Pamph. L. 326. It begins by a recital, 'Whereas, The lines of lands on and along the shores at the rivers at and near the city of Pittsburg, in the county of Allegheny, have never yet been clearly ascertained, and as it is important to the owners of such lands, the persons navigating the waters of, and the corporations adjacent to, such rivers, and to all parties interested, to know and to have their several rights and privileges in extension and limitation ascertained and defined; therefore,' &c. The first impression arising from this language might seem to be that the law was intended to ascertain and fix these high and low water lines to end all controversies, *private* as well as public. But a careful consideration of its purpose and provisions shows that it is not applicable to disputed boundaries between private owners, but was intended to regulate the respective rights of the public and the landowners, over whose property the right of navigation extends between high and low water lines.

* * * * * * * *

"The effect of the lines as established is thus stated: 'the lines so approved shall for ever after be deemed, adjudged and taken, firm and stable for the purposes aforesaid.' If we seek for the 'aforesaid' purposes, the act discloses none but those relating to the public interest and that of the riparian owner. Then if we advert to the power of the state over navigable streams, as stated in the authorities cited, we discover that it is plenary over the subject of navigation and the improvement of these natural channels of commerce, while the ownership of the riparian proprietor is qualified between the lines of low and high water. The legislature may, therefore, with great propriety define the bounds of high and low water, by means of a suitable commission, for the purpose of regulating the public right, so as not to conflict with private interests, and to prevent private rights from being exercised

to the prejudice of public interests; for example, to prevent the shores from being filled up with great banks of cinders."

In *Allegheny City* v. *Moorehead* (1875), *supra*, the question was presented whether by the fixing of water lines under the act of 1858, title had been vested in the city of Allegheny or lot owners, so as to defeat the claim of the plaintiff Moorehead under a subsequent patent from the State. The court said (p. 139): "Nor can the operation of the Act of 1858 be extended by the act of the commissioners in running out the low-water line of the northern shore of the river to include a part of what was Killbuck island. It was not the purpose of the commissioners to transfer titles, but to mark the boundaries of *riparian* rights, so as to make them certain and permanent in their extent. So it was not the intention of the framers of the Act of 1858 to pass titles to lands, or to ascertain boundaries between individuals; but it was their purpose to regulate the right of navigation along the shores of these rivers by establishing high- and low-water lines, which would definitely ascertain and fix the extent to which the right could be exercised; and the extent to which the owners of the land could exercise their own rights under the law of the state."

It is contended for the complainant that the effect of the statute was to secure to riparian owners complete protection against any loss of their land, or of the right to build upon it, by reason of the gradual washing away of the banks of the river; that the State chose to resign to the riparian proprietors its right to such additions from the moving landward of the low-water mark, and required the owner at the same time to surrender in the interest of navigation his right to alluvion. In support, the complainant cites the opinion of the Court of Common Pleas No. 2 of Allegheny County in *Briggs* v. *Pheil* (1894), 42 Pittsburgh Legal Journal, p. 18, in which it is said with respect to the same statute: "At the passage of this act

the riparian owner owned absolutely to high water mark, and had a qualified property to low water mark, and outside of the low water mark the title to the soil was in the State. It seems to us there can be no doubt that the State had power to enact that thereafter the legal limits of the property should remain unchanged, either by gradual accretions or by gradual cutting away. This in our opinion was intended to be done and was done by the Act of Assembly and the proceedings thereunder. . . . It seems to us that the establishing of these lines, at least, as between the State and riparian owners, fixed the lines for the future. If the river washes in beyond the high water line the owner may fill up and reclaim the lost land, and on the other hand accretions belong to the State or the municipalities."

The established doctrine is invoked that the title to the soil under navigable waters within their territorial limits, and the extent of riparian rights, are governed by the laws of the several States, subject to the authority of Congress under the Constitution of the United States. *Martin* v. *Waddell*, 16 Pet. 367; *Pollard* v. *Hagan*, 3 How. 212; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Packer* v. *Bird*, 137 U. S. 661, 669; *St. Louis* v. *Rutz*, 138 U. S. 226, 242; *Hardin* v. *Jordan*, 140 U. S. 371, 382, 402; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 435, 452; *Shively* v. *Bowlby*, 152 U. S. 1, 40–47; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 365. Let it be assumed that the Pennsylvania statute in its regulation of rights, established the Commissioners' high-water line as the permanent boundary of the island and conferred upon the riparian owner, so far as it was within the competency of the State to confer it, the right to fill in and to erect structures to the limit of this line, regardless of subsequent changes in the actual high-water line caused by the washing away of the banks of the river. What, then, was the power of Congress with

respect to the river and what was the extent of the authority conferred upon the Secretary of War?

When the Secretary of War, in 1895, fixed harbor lines he dealt with the stream as it then existed. Whatever right the owner of the island may have had under the state law to reclaim the submerged land within the former line of high water, had not been exercised. The bill, in alleging that the new harbor line ran across the complainant's land, must be taken to refer to the submerged land already described. This is the import of its allegations and is shown by the record of the War Department annexed to the bill. In establishing this line, the Secretary of War followed quite closely the actual line of high water as it existed in 1895, except in the back channel of Brunot's Island where it ran several hundred feet outside the then high-water mark. The change of the harbor line at this point, in 1907, was for the purpose of making the line coincide with the actual high-water mark and in the report of the United States engineer who advised the change it was said that the lines as previously established had "not been filled out to, and the river bed on the Brunot Island side, and in the bend referred to" was in "essentially the same condition" as at the time the harbor lines of 1895 were fixed. He added:

"Pittsburgh suffers annually from floods and in my opinion any material contraction of the channel immediately below the city would result in general injury and would produce conditions detrimental to navigation and to harborage, and it is respectfully recommended that the changes in the established harbor lines shown and described on the map inclosed herewith be made, such changes being necessary in preserving and protecting the harbor of Pittsburgh.

"The location of the proposed harbor lines recommended in this communication is within the bed of the stream as it exists as a physical fact."

To this stream, as a highway of commerce, the power of Congress extended; a power which "acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. The exercise of this power could not be fettered by any grant made by the State of the soil which formed the bed of the river, or by any authority conferred by the State for the creation of obstructions to its navigation. "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from obstructions to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." *Gilman* v. *Philadelphia*, 3 Wall. 713, 725.

Nor is the authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of Federal control in the regulation of commerce. Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, and this control may not be defeated by the action of the State in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream (Rolle's Abr. 390; *Carlisle* v. *Graham*, L. R. 4 Ex.

361, 367, 368) and the authority of Congress goes with it. When the State of Pennsylvania established harbor lines and thus undertook to regulate the rights of navigation, its action, however effective as between the State and the riparian proprietors, was necessarily subject to the paramount power of Congress. The state lines can be conceded no permanent force, as against the will of Congress, without substituting for its constitutional authority the supremacy of the State with respect to navigable waters.

It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421. And in its regulation of commerce it may establish harbor lines or limits beyond which deposits shall not be made or structures built in the navigable waters. The principles applicable to this case have been repeatedly stated in recent decisions of this court. *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *West Chicago R. R.* v. *Chicago*, 201 U. S. 506; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge* v. *United States*, 216 U. S. 177; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194.

In *Gibson* v. *United States, supra*, the construction of a dyke in the Ohio River under the authority of the Secretary of War had substantially destroyed the landing on and in front of a farm owned by Mrs. Gibson "by preventing the free egress and ingress to and from said landing" to "the main or navigable channel" of the river. The court said (pp. 271, 272, 275): "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.

South Carolina v. *Georgia*, 93 U. S. 4; *Shively* v. *Bowlby*, 152 U. S. 1; *Eldridge* v. *Trezevant*, 160 U. S. 452. . . . The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."

Again, in *Scranton* v. *Wheeler*, *supra*, the question arose with respect to the riparian owner whose access from his land to navigability was permanently lost by reason of the construction by the United States of a pier resting on submerged lands in front of his upland. The court said in its opinion (p. 163): "The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

In *Union Bridge Co.* v. *United States*, *supra*, the Secretary of War found a bridge to be an unreasonable obstruction to the free navigation of the Allegheny River and required the Bridge Company to make certain changes which it was insisted it could not be compelled to make without compensation. The court, after reviewing the

authorities, said (pp. 400, 401): "Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the Bridge Company contends would seriously impair the exercise of the beneficent power of the Government to secure the free and unobstructed navigation of the waterways of the United States. We cannot give our

assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made."

It must be concluded, therefore, that it was competent for Congress to provide for the establishment of the harbor lines in question for the protection of the harbor of Pittsburgh. It acted within its constitutional power in authorizing the Secretary of War to fix the lines. *Union Bridge Co.* v. *United States*, *supra* (pp. 385–388); *Monongahela Bridge* v. *United States*, *supra* (p. 192). That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And, in none of the acts complained of, did he exceed the power which had been conferred.

The bill failed to show any ground upon which the complainant was entitled to relief and it was properly dismissed.

Decree affirmed.

IN RE MERCHANTS' STOCK AND GRAIN COMPANY ET AL., PETITIONERS.

PETITION FOR WRIT OF MANDAMUS.

No. 10, Original. Submitted December 11, 1911.—Decided March 4, 1912.

Where the Circuit Court enters an order requiring a party violating an injunction order to pay a fine of which three-fourths is to go to the complainant as compensation for expenses incurred in prosecuting the contempt proceedings, and one-fourth to the United States, the punitive feature of the order is dominant and fixes its character for purposes of review.

An order adjudging a party in contempt for violating an injunction is remedial when its purpose is to indemnify the injured suitor, or coercively to secure obedience to a mandate in his behalf, and is punitive when its purpose is to vindicate the authority of the court. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418.

Whether contempt proceedings at the instance of the injured party, resulting in the offending party being adjudged to pay a fine, a part of which goes to the injured suitor and a part to the United States, is erroneous in its entirety or only as to the portion of the fine going to the United States, will not be determined on an application for mandamus to compel the Circuit Court of Appeals to take jurisdiction of an appeal; the court will only determine whether the order is reviewable.

If an order of the Circuit Court, adjudging defendant in contempt and to pay a fine, is remedial, it is interlocutory, and only reviewable upon appeal from the final decree; if, however, the order is punitive, it is final and reviewable on writ of error and the Circuit Court of Appeals should take jurisdiction. *Matter of Christensen Engineering Co.*, 194 U. S. 458.

If the Circuit Court of Appeals refuses to take jurisdiction of a writ of error to review an order of contempt made by the Circuit Court, the punitive feature of which is dominant, the remedy is by writ of mandamus from this court to compel the Circuit Court of Appeals to take jurisdiction.

THE facts are stated in the opinion.

Mr. Chester H. Krum and *Mr. Henry S. Priest* for petitioners.

Mr. Henry S. Robbins for respondents.

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

This is a petition for a writ of mandamus commanding the Circuit Court of Appeals for the Eighth Circuit to reinstate and take jurisdiction of a writ of error dismissed by it. The facts are these: During the pendency, in a Circuit Court of the United States, of a suit in equity to which the petitioners were parties defendant, they were charged by the complainant with having wilfully violated an interlocutory injunction theretofore granted in the suit at the instance and for the benefit of the complainant, and at the hearing upon that complaint were by the court adjudged guilty of contempt of its authority and ordered unconditionally to pay into its registry, within five days, fines of $1,000, $2,000 and $500, respectively, each fine, when paid, to go three-fourths to the complainant, "as compensation in part for the expenses incurred in prosecuting these contempt proceedings," and one-fourth to the United States. With the purpose of securing a review of the order the petitioners sued out a writ of error from the Circuit Court of Appeals, and when the writ came on for hearing that court dismissed it, upon the ground that the order, rightly considered, was remedial, not punitive, and was merely interlocutory and reviewable only upon an appeal from the final decree. 187 Fed. Rep. 398.

We are not now concerned with whether the proceedings resulting in the order were such as to admit of the imposition of punitive, as distinguished from compensatory, fines, or whether, if the proceedings were not of that character, the order was erroneous in its entirety or only

as to so much of the fines as was to go to the United States; and therefore we pass what is said in that connection in the briefs and come at once to the only question presented for decision, which is, whether the order was open to review upon a writ of error. The answer turns upon the character of the order. If it was remedial, it was merely interlocutory and reviewable only upon an appeal from the final decree; but, if it was punitive, it was a final judgment, criminal in its nature, and reviewable upon a writ of error, without awaiting the final decree. Such an order against an offending suitor is deemed remedial when its purpose is to indemnify the injured suitor or coercively to secure obedience to a mandate in his behalf, and is deemed punitive when its purpose is to vindicate the authority of the court by punishing the act of disobedience as a public wrong. As was said in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441: "It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases." And again, p. 448: "The classification then depends upon the question as to whether the punishment is punitive, in vindication of the court's authority, or whether it is remedial by way of a coercive imprisonment, or a compensatory fine payable to the complainant."

Applications of this test are shown in several adjudged cases in this court, among them being *Worden* v. *Searls*, 121 U. S. 14; *Doyle* v. *London Guarantee Co.*, 204 U. S. 599; *Ex parte Heller*, 214 U. S. 501; *Gompers* v. *Bucks Stove & Range Co.*, *supra*, and *Matter of Christensen Engineering Co.*, 194 U. S. 458. In the last case the defendant in a suit in equity in a Circuit Court was found guilty of contempt in disobeying an interlocutory injunction and ordered to pay a fine of $1,000, one-half to go to the complainant and the other half to the United States. A writ of error, whereby it was sought to have the order reviewed in the Circuit Court of Appeals for the Second Circuit,

was dismissed by that court for the same reason that was assigned for the dismissal in the present case. A petition for a writ of mandamus, commanding the reinstatement of the writ of error, was then presented to this court and, upon full consideration of the prior cases, was held to be well grounded. In that connection it was said (p. 460):

"These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree. In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such it dominates the proceeding and fixes its character. Considered in that aspect, the writ of error was justified, and the Circuit Court of Appeals should have taken jurisdiction."

That case differs from this only in that the portion of the fine made punitive was there one-half, while here it is one-fourth; but this, in our opinion, does not take this case out of the principle applied in that, which is, that the punitive feature of the order is dominant and fixes its character for purposes of review.

We accordingly hold that the writ of error should be reinstated, and, as it is evident from the return that this will be done on the expression of our opinion, our order will be,

Petitioners entitled to mandamus.

GRAHAM *v.* GILL.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 173. Submitted February 29, 1912.—Decided March 11, 1912.

Overruling objections to admission of evidence other than field notes of surveys is in effect passing on effect of the requirements of § 2396, Rev. Stat., and, in regard to surveys of public lands, involves a Federal question reviewable by this court under § 709, Rev. Stat.

Evidence other than field notes of a survey of public lands may be admissible if it has a legitimate tendency to precisely locate the land, even though it may tend to show an error in the field notes, and, under the circumstances of this case, such evidence was proper. *French-Glenn Live Stock Co.* v. *Stringer*, 185 U. S. 47.

56 Florida, 316, affirmed.

THE facts, which involve the admissibility under § 2396, Rev. Stat., of evidence other than field notes in regard to location of a tract of public land, are stated in the opinion.

Mr. Hilary A. Herbert, Mr. Benjamin Micou, Mr. Richard P. Whiteley and *Mr. Hilton S. Hampton* for plaintiff in error.

Mr. John W. Burton for defendant in error.

Memorandum opinion by direction of the court. By MR. CHIEF JUSTICE WHITE.

Plaintiffs in error were plaintiffs below. The action was in ejectment. In brief, the controversy was this: An island in Charlotte Harbor, Florida, described on the plat of survey as lot 1, section 8, of a specified township and range, was certified in 1899 by the United States to the State of Florida as school indemnity lands, and on

October 23, 1900, was conveyed by the state board of education to the plaintiffs in error. The claim in the action was that the defendant wrongfully withheld possession of this tract. On the other hand the defendant averred that the land of which he was in possession was lot 2, section 17, of the same township and range, and that he made a homestead entry thereon in 1896 and received a patent therefor in 1901. A portion of the plat of survey showing the location of the respective tracts is contained in an opinion of the Supreme Court of the State of Florida, reversing a judgment for the plaintiffs entered on the first trial of the case, reported in 54 Florida, 259.

The tract sold to the plaintiffs in error was surveyed by continuing a survey made from land lying east of the tract. That of the defendant was surveyed by continuing a survey made from lands lying to west of the tract. By using the field notes of the respective surveys it would seem that the tract in possession of the defendant was the tract which had been conveyed to both parties.

On the second trial the defendant was allowed to introduce evidence of the physical location of his tract with reference to other land in the vicinity shown on the plat of survey, and such testimony in the opinion of the court below conclusively established that the tract in the possession of the defendant was in fact lot 2 of section 17 as delineated on the plat, according to which the land was patented to the defendant. There was a verdict and judgment on the second trial for the defendant, which was affirmed by the Supreme Court of the State. 56 Florida, 316.

It is insisted that the writ of error should be dismissed because no Federal question is involved. The contention, however, is without merit, since repeatedly during the trial the plaintiffs objected to the admission of all evidence bearing upon the location of the tract in controversy other than the field notes of the survey under which the

plaintiffs claimed, which it was contended were the best and only evidence. In passing adversely on these objections the trial court did not merely determine the weight or sufficiency of the evidence to prove a fact, but passed on the competency and legal effect of the evidence as bearing upon the question of Federal law, viz., the effect of the requirements of § 2396, Rev. Stat., as to the mode of surveying public lands. Thus a Federal question was presented and decided. *Dower* v. *Richards*, 151 U. S. 658. See, also, *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 54.

Although, however, the Federal question was necessarily involved and decided, we are of opinion that under the circumstances of this case it comes directly within the rule announced in *French-Glenn Live Stock Co.* v. *Springer*, *supra*, and therefore the state court was right in holding that the defendant was not debarred from introducing evidence other than the field notes which had a legitimate tendency to identify the precise location of the tract occupied by him, although such evidence might tend to show a mistake in the field notes of the survey of the tract which the plaintiffs claimed. Indeed, considering the peculiar nature of the controversy we think it is true to say that the effect of the extrinsic evidence was in substance to support and not to contradict the plat with reference to which the tract was patented to the defendant.

The only Federal question presented by the record having been correctly adjudicated, it results that the judgment must be and it is

Affirmed.

CLASON *v.* MATKO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 178. Submitted February 26, 1912.—Decided March 11, 1912.

Where the statute provides for an agreed statement on which the case can be submitted, a stipulation between the parties as to certain facts will not be considered as an agreed statement superseding the pleadings but only as an agreement relating to the facts enumerated in the stipulation.

This court is not disposed to reverse a lower court on its construction of a stipulation in the conduct of a case, even if the stipulation be ambiguous.

While there may be a distinction between abandonment and forfeiture of mining claims, there is no distinction as those terms are used in § 3241, Rev. Stat., of the Territory of Arizona.

That which is taken subject to a right cannot be a burden upon that right.

Section 3241, Rev. Stat., Arizona, was enacted pursuant to the power given by § 2324, Rev. Stat. of the United States, and is not in conflict either with that section or with § 1857, Rev. Stat. of the United States.

10 Arizona, 175, affirmed.

THE facts, which involve the construction and constitutionality of the mining laws of Arizona and the validity of a mining location thereunder, are stated in the opinion.

Mr. Edw. M. Cleary and *Mr. Edw. J. Flanigan* for appellant.

Mr. A. R. Serven and *Mr. John McGowan* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action to quiet title to a mining claim called the "Bangor." The action was brought in the District Court of the First Judicial District, County of Pima, Arizona, by appellees as plaintiffs against August Daley, Clason, appellant here, subsequently being made a party. It will be convenient to refer to appellees as plaintiffs and, except where necessary to expressly distinguish appellant, to include him with Daley under the designation of defendants.

The amended complaint alleged the location of the claim by one Scott Turner and the recording of the notice thereof, a copy of which was annexed to the complaint. There was an allegation of a claim of interest in the defendants, and a prayer for judgment "establishing plaintiffs' estate in and exclusive possession" of the claim and "debarring and forever estopping defendants, and each of them, from claiming any right or title" thereto.

The fourth amended answer of the defendants denied the allegations of the complaint, except that Scott Turner filed a notice of location, and alleged that the claim of the plaintiffs had become forfeited on account of their failure to do the necessary assessment work and that August Daley entered upon and relocated the claim.

As a further defense it was alleged that the action had been originally commenced against Daley as the sole defendant, and that in the first trial of the action a stipulation was entered into as follows:

"That all parties plaintiff and defendant are now and at all the times mentioned in the pleadings have been each citizens of the United States of America.

"That the respective locations, upon which, as shown by the pleadings herein, the parties plaintiff and defendant, base their rights to the 'Bangor' Mining Claim, were

each duly made, and that all acts required by the laws of the United States, and the laws of the Territory of Arizona, necessary to vest in the parties so locating good and valid titles so far as valid location could vest the same, such as mineral discovery, monumenting of claim, and recording of location notices, etc., were each duly done and performed at the time of said locations, except that plaintiffs do not admit that at the time of said location of defendant Daley the ground was open to such location by reason of failure to do assessment work for the years 1901 and 1902, or to resume work prior to the date of said location."

The case went to trial, it is alleged, on the single issue whether the claim was open to location, and resulted in a judgment against Daley. A new trial was granted, which took place, and the agreement was recognized by counsel and the parties to be still in force and effect, and the same issue was submitted to a jury as in the first trial to the court, and a verdict and judgment went for defendant Daley. The judgment was reversed by the Supreme Court and the cause remanded for a new trial (10 Arizona, 175, 85 Pac. Rep. 721), the court saying (10 Arizona, 179): " . . . Under the allegations in the defendant's cross-complaint with respect to the relocation by the defendant of the claim as a forfeited claim, the location notice of the defendant would seem to be void, in failing to state that the claim was located as forfeited or abandoned property, as required by the statute, and would seem to afford the defendant no ground for the relief claimed. *Cunningham* v. *Pirrung*, 9 Arizona, 288, 80 Pac. 329."

The defendants ever since the making and filing of the agreement have relied on it as establishing the doing of assessment work on the claims and the validity of the claims by reason thereof, the agreement never having been rescinded or withdrawn.

As a further defense it was urged that the decision of the Supreme Court of the Territory in *Cunningham* v.

Pirrung, in so far as it holds or construes paragraph 3241 of the Revised Statutes of Arizona (Revision of 1901), as it existed prior to the amendment of 1907, to provide that the relocation of a forfeited mining claim shall be void or voidable when the relocation notice does not state that the "whole or any part of the ground covered by such relocation is relocated or located as forfeited ground," and that said statute, in so far as it justifies such interpretation, is contrary to the provisions of § 2324 of the Revised Statutes of the United States in its general terms and specifically to that portion thereof which provides that upon failure to do assessment work therein required such claim "shall be open to relocation in the same manner as if no location of the same had ever been made," and also contravenes the provisions of § 1851 of the Revised Statutes of the United States, and the defendants specially rely upon said provisions of the laws of the United States.

The defendants also filed a cross-complaint, which asserted title in them derived from a location of the claim, a notice of which was attached.

The cross-complaint further alleged that the title of the plaintiffs was derived from Scott Turner, but that plaintiffs had no title by reason of the fact that the annual assessment work had not been performed, that the ground was open to relocation, that before work was resumed Daley entered upon the land and duly located it as a mining claim and performed all acts required to perfect the location prior to any attempt of the plaintiffs to resume work thereon. All of the separate defenses pleaded were made part of the cross-complaint.

The location notice attached to the cross-complaint did not state that the claim was located as forfeited or abandoned property.

There was attached to the cross-complaint an amended location notice signed by August Daley and Charles Clason. It refers to the location by Daley and states

that such location was made as a relocation of forfeited ground for the failure to do assessment work. It further states that the amended notice of location was made, without waiving any previous rights, to secure all of the benefits of paragraph 3238 of the Revised Statutes of Arizona (1901), and without waiving, but especially relying upon, the rights conferred upon Daley by his original location by the laws of the United States. It also states that Charles Clason was the owner of an undivided one-half interest under Daley.

A demurrer was sustained to the cross-complaint, and, defendants declining to amend, judgment was entered for plaintiffs in accordance with the prayer of their complaint upon the stipulation of facts which has been set out above. The case was taken by Clason to the Supreme Court of the Territory, where the judgment was affirmed.

The first question in the case is the effect of the stipulation. Appellant contends that all questions were "formally and expressly" admitted by it "pertaining to the validity of the respective locations except the single question, which was: Was the ground open to relocation on May 1, 1903, for plaintiffs' [appellees'] default in performing the work required by law? It covered, therefore, it is further contended, all acts necessary to be done under the laws of Arizona; that is, to come to the specific controversy in the case, the stipulation contained an admission that the location notice complied with the laws of Arizona, which necessarily includes compliance, it is contended, "with section 3241 in any construction thereof."

The enumeration, it is urged, in the stipulation of certain acts cannot be considered "to have been intended to be exhaustive, but merely illustrative of what the parties considered necessary to make a valid location or relocation," and there was left open only the failure of plaintiffs to do the assessment work. And this, it is insisted further, was the construction of the parties through two trials,

and that its insufficiency is now urged in the face of that fact and that defendants have expended money upon the faith of the waiver of the defect in the location notice.

The trial court and the Supreme Court took a different view of the stipulation and considered it as but a substitute for evidence, not waiving or supplying the defects of the pleadings, and that, therefore, as the cross-complaint contained no allegation of compliance with law, it was insufficient. And both courts held further that the stipulation, as evidence, did not establish such compliance.

The Supreme Court explicitly, and the trial court impliedly, from its action in sustaining the demurrer to the cross-complaint, took a different view of the stipulation as indicated by the conduct of the parties. The "obvious purpose of the parties in filing the stipulation," the Supreme Court said, "was manifestly to have it take the place of testimony or other evidence upon the trial, and not to supplant the pleadings in the case." The court recognized that the parties could under the laws of the Territory have agreed upon a statement of the case which would have a substitute for formal pleadings, but, said the court, "such was not the attempt in this case, as appears from the stipulation itself and the conduct of the parties in the proceedings subsequent to the entry of the stipulation," both parties amending their pleadings after the filing of the stipulation. The court concluded, therefore, that it was not an agreed case under paragraph 1390 of the Revised Statutes of the Territory, "but a stipulation appertaining merely to the matter of evidence upon the trial."

The record seems to support this view. It is true that it appears from the answer of the defendants that the stipulation was filed before the trial of the action and that the case was submitted and decided against defendants on the single issue as to whether the claim was open to relocation by Daley.

A new trial was granted, upon what ground does not appear. It does appear, however, that the case was again submitted on the same issue, a judgment resulting for Daley. It was reversed by the Supreme Court, the court intimating that the defect in the cross-complaint in not stating that the relocation by Daley was upon forfeited or abandoned property, as required by the statute, would seem to make the relocation void, and the intimation was made to control or have effect in the new trial which was ordered. It was after this decision that the fourth amended answer and cross-complaint were filed and the demurrer which attacked the cross-complaint.

But if it be granted that the stipulation is ambiguous, we should not be disposed to reverse the lower court on its construction. It pertained simply to the conduct of the trial and a dispute between counsel as to the effect of an agreement between them, and its decision deprived the defendants in the action of no right which they possessed. We do not consider it necessary to review the cases cited by appellant in which stipulations have been sustained and the power of the parties recognized to waive legal or even constitutional rights.

The construction of the Supreme Court of § 3241 of the Revised Statutes of the Territory is attacked. That section required, before its amendment in 1907, that in case of a relocation of a claim the location notice should state if the whole or any part of the new location was located as abandoned property, else it should be void. The section is inserted in the margin.[1]

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[1] 3241. (SEC. 11.) Such affidavit, when so recorded, shall be *prima facie* evidence of the performance of such labor or the making of such improvements, and said original affidavit, after it has been recorded, or a certified copy of record of same, or the record of same shall be received as evidence accordingly by the courts of this territory. The relocation of forfeited or abandoned lode claims shall only be made by sinking a new discovery shaft and fixing the boundary in the same manner and to

The contention is that this section, properly considered, applied only to "abandoned property" and did not apply to forfeited property, and it is insisted that the distinction between forfeited and abandoned property is well recognized and is "obliterated," by the court's construction.

Of course, there may be a distinction between the abandonment of a claim and its forfeiture, but the question does not turn upon that distinction only, but upon what the statute means, considering all of its words; and, considering them all, we think they show quite clearly that no distinction was intended. Section 3241 provides for "the relocation of forfeited or abandoned lode claims" —in other words, claims which have once been located— and "the new locator's right is based upon the loss of the possessory right acquired by the former locator," to quote from *Cunningham* v. *Pirrung*, 9 Arizona, 288 (80 Pac. Rep. 329), where the rule is announced. The same rule is repeated in subsequent cases, including that at bar. *Score* v. *Griffin*, 9 Arizona, 295; *Kinney* v. *Lundy*, 11 Arizona, 75; 89 Pac. Rep. 496.

Even if we should concede that the statute is ambiguous, we should certainly lean to agreement with the Supreme Court of the Territory. *Fox* v. *Haarstick*, 156 U. S. 674; *Armijo* v. *Armijo*, 181 U. S. 558; *English* v. *Arizona*, 214 U. S. 359; *Santa Fe County* v. *Coler*, 215 U. S. 296, 305; *Albright* v. *Sandoval*, 216 U. S. 331.

The next contention of appellant is that if the statute admits of the construction put upon it by the Supreme

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the same extent as is required in making an original location; or the relocator may sink the original discovery shaft ten feet deeper than it was at the date of the commencement of such location, and shall erect new or make the old monuments the same as originally required. In either case a new location monument shall be erected, and the location notice shall state if the whole or any part of the new location is located as abandoned property, else it shall be void. (Rev. Stat. Ariz., 1901, Tit. 47, p. 839.)

Court of the Territory it is unconstitutional and in conflict with §§ 1857 and 2324 of the Revised Statutes of the United States.

Upon what ground the statute is unconstitutional is not stated, and we can put that objection aside and pass to the asserted conflict with the Revised Statutes of the United States. It is only necessary to consider § 2324. Section 1857 expresses a general limitation of the powers of the Territory by the Constitution and laws of the United States. The other section directly concerns locations of mining ground.

The section permits the miners to make regulations in regard to mining locations not in conflict with the laws of the United States or of the State or Territory in which the mining district is situated, "governing the location, . . . subject to the following requirements: On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of work shall be performed or improvements made during each year, . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."

Appellant contends "that the spirit and intention of this enactment" is that upon the failure of the original locator to comply with the provisions of the law "the ground is open to relocation in the same manner as if no location had ever been made," and that, therefore, neither a State nor a Territory can impose conditions or burdens upon the exercise of the right.

That cannot be said to be a burden upon a right to which the right when taken is subject. The section gives to the miners of a mining district and the State or Territory in which the district is situated the power to make regulations "governing the location" of a mining claim,

subject to certain requirements. Those requirements may not be dispensed with, but they may be supplemented, certainly to the extent (and we need go no farther in this case) prescribed by the Arizona statute. It is a provision strictly "governing the location," and is not repugnant either to the spirit or the letter of the mining laws of the United States. *Butte City Water Co.* v. *Baker,* 196 U. S. 119.

Judgment affirmed.

CEDAR RAPIDS GAS LIGHT COMPANY *v.* CITY OF CEDAR RAPIDS.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 163. Argued February 29, 1912.—Decided March 11, 1912.

Where the general power reserved to regulate rates is only limited by the Fourteenth Amendment, no franchise contract will be presumed to imply that the municipality under its reserved right to regulate rates must only reduce them to such a point that there will be a margin to allow a discount for prompt payment.

A municipal ordinance drawn in form of a contract to be accepted by the franchisee, when accepted becomes a contract and is subject to the reserved powers of the municipality as limited by the laws of the State.

The practice and decisions of this court are that § 709 Rev. Stat. does not give to a writ of error to the state court in a chancery case the effect of an appeal from a judgment in such a case in the Federal courts and open the evidence for reëxamination in this court.

Findings of the state court in cases either at law or in equity may depend upon questions that are reëxaminable in this court, which, if properly saved, must be answered; and this court may examine the evidence in so far as necessary to do so in respect to rulings within the appellate jurisdiction of this court. *Kansas City Southern Railway* v. *Albers Commission Co., ante,* p. 573.

Quære: Whether a legislative rate, not in itself too low, is confiscatory

because it is too low to permit a further reduction in the way of discount for cash payment.

The state court having treated a public utility corporation fairly as to value of plant depreciation, and found that the net returns would exceed six per cent, and given it leave to try the case again after the legislative rate had been in effect, this court does not feel warranted in reversing on the ground that the rate is confiscatory because in some details this court might have treated the corporation differently.

144 Iowa, 426, affirmed.

THE facts, which involve the validity, under the contract and due process provisions of the Constitution of the United States, of an ordinance of the City of Cedar Rapids, Iowa, fixing the price of gas at ninety cents per thousand cubic feet, are stated in the opinion.

Mr. James H. Trewin, with whom *Mr. John N. Hughes* and *Mr. John M. Grim* were on the brief, for plaintiff in error:

There is no conflict in the evidence as to the value and efficiency of the discount provision of the franchise. The ordinance granting the plaintiff in error a franchise is a contract. *Water Co.* v. *Cedar Rapids, Iowa*, 118 Iowa, 234; *Dartmouth College Case*, 4 Wheat. 518.

An unconditional grant by a State constitutes a contract, which is entitled to protection under the Constitution just as fully as a grant made by an individual. *Fletcher* v. *Peck*, 6 Cr. 87; *Sinking Fund Cases*, 99 U. S. 700, 719; *New Orleans Water Co.* v. *Rivers*, 115 U. S. 674, 681; *People* v. *O'Brien*, 111 N. Y. 1; 18 N. E. Rep. 692.

Plaintiff in error cannot provide for a discount below ninety cents and earn any return on its property whatever. It is, therefore, deprived by the ordinance of the discount provision contained in its franchise. The company cannot impose a penalty for the violation of one of its regulations, nor refuse to furnish gas on the failure of the consumer to pay the penalty. *Shepard* v. *Milwaukee*

Gas Co., 70 Am. Dec. 479; 6 Wisconsin, 539; *Williams* v. *Mutual Gas Co.*, 18 N. W. Rep. 236; *Harbison* v. *Knoxville Water Co.*, 53 S. W. Rep. (Tenn.) 933; *Gas Light Co.* v. *Colliday*, 25 Maryland, 1; *Webster* v. *Nebraska Tel. Co.*, 22 N. W. Rep. 239; *Tacoma Hotel Co.* v. *Light & Water Co.*, 28 Pac. Rep. 517; *Shires* v. *Ewing*, 29 Pac. Rep. 320; *Railroad Tax Cases*, 13 Fed. Rep. 756; *Detroit* v. *Plank Road Co.*, 43 Michigan, 140; *Commonwealth* v. *Essex Co.*, 13 Gray, 239; *Railroad Co.* v. *Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 U. S. 700.

Whatever is plainly granted cannot be taken from the parties entitled thereto by such legislative enactments. *Minneapolis* v. *Street Ry. Co.*, 215 U. S. 417; *Detroit* v. *Citizens' Street Ry. Co.*, 184 U. S. 368.

The city had no reserved power to abrogate the discount provision. *Sioux City St. Ry. Co.* v. *Sioux City*, 78 Iowa, 747; *Burlington Street Ry. Co.*, 49 Iowa, 144; *Des Moines* v. *C., R. I. & P. Ry. Co.*, 41 Iowa, 569; *Burlington & Henderson County Ferry Co.* v. *Davis*, 40 Iowa, 133; *Des Moines St. Ry. Co.* v. *Des Moines B. G. St. Ry. Co.*, 73 Iowa, 513; *City Ry. Co.* v. *Citizens' St. Ry. Co.*, 166 U. S. 557; *New Orleans* v. *New Orleans Water Co.*, 142 U. S. 79; *C., B. & Q. Ry. Co.* v. *Cutts*, 94 U. S. 155.

The discount provision, which is the language of the city, grants a valuable right of which plaintiff in error cannot be deprived. *Knoxville* v. *Water Co.*, 189 U. S. 434, distinguished.

Implied obligations of contracts come within the protection of § 10 of Art. I of the Constitution. *Stewart* v. *Jefferson Police Jury*, 116 U. S. 135; *Burton* v. *Koshkonong*, 4 Fed. Rep. 377; *Carey Library* v. *Bliss*, 151 Massachusetts, 364.

The State can no more impair the obligation of its own contracts, than it can impair the contracts of individuals. *Woodruff* v. *Trapnall*, 10 How. 207; *Providence Bank* v. *Billings*, 4 Pet. 560; *Green* v. *Biddle*, 8 Wheat.

92; *Fletcher* v. *Peck*, 6 Cranch, 127; *Shinn* v. *Cunningham*, 120 Iowa, 383; *People* v. *Hall*, 8 Colorado, 485; *Erie* v. *Griswold*, 184 Pa. St. 435; *Atkins* v. *Randolph*, 31 S. W. Rep. 226; *United States* v. *Mayor of New Orleans*, 103 U. S. 358; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Greenwood* v. *Freight Co.*, 105 U. S. 20; *New Jersey* v. *Yard*, 95 U. S. 113.

The granting of a franchise to a corporation is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it. *Birmingham* v. *Birmingham*, 3 Wall. 51. See also *West River Bridge Co.* v. *Dix*, 6 How. 507.

The ninety cent rate ordinance abrogates the sliding scale of prices for gas. It is lawful and proper to make lower rates to large consumers based on a sliding scale available to all. *Skillman* v. *Board*, 152 N. Y. 327; *Wagoner* v. *Rock Island*, 146 Illinois, 139; *Brunswick Elec.* v. *Maine Water Co.* (Me.), 59 Atl. Rep. 537; *Robbins* v. *Bangor, &c.*, 1 L. R. A. (N. S.) 962; *Wilson* v. *Tallahassee Water Co.* (Fla.), 36 So. Rep. 63.

The ordinance takes plaintiff's property without just compensation and due process of law. The evidence shows that the ninety cent rate would not enable plaintiff to earn fair and reasonable compensation upon its property.

The basis of all calculations as to the reasonableness of the rates to be charged by a corporation furnishing gas to the public is the fair value of the property being so used at the time of fixing the rate. *Willcox* v. *Gas Co. of New York*, 212 U. S. 19; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Atlantic Coast Line* v. *Nor. Car. Corp. Com.*, 206 U. S. 1; *Stanislaus County* v. *Irrigation Co.*, 192 U. S. 201; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Minneapolis & St. Louis Rd. Co.* v. *Minnesota*, 186 U. S. 257; *Vicksburg Water Co.* v. *Vicksburg*, 185 U. S. 82; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Smyth* v. *Ames*, 169 U. S. 547; *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Cotting*

v. *Kansas City Stock Yards*, 183 U. S. 79; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 363; *Spring Valley Waterworks* v. *San Francisco*, 124 Fed. Rep. 574; *Southern Pac. Rd.* v. *R. R. Commissioners*, 78 Fed. Rep. 261; *Memphis Gas & Lt. Co.* v. *Memphis*, 72 Fed. Rep. 952; *Brunswick Water Dist.* v. *Maine Water Co.*, 99 Maine, 371; *Water Co.* v. *Cedar Rapids*, 118 Iowa, 234; Lewis on Eminent Domain, §§ 462, 477; *Metropolitan Trust Co.* v. *Houston*, 90 Fed. Rep. 683.

It is the market value that is to be ascertained and considered as the fair value of the property. *Henry* v. *Dubuque & Pac. Ry.*, 2 Iowa, 300; *Steenerson* v. *Great Northern Ry.* (Wis.), 72 N. W. Rep. 715; Beale & Wyman, R. R. Rate Reg., § 355.

The owner of property devoted to a public use is entitled to the benefit of any appreciation in value above the original cost, and cost of improvements, which is due to good management, or any natural causes. Cases *supra; Detroit* v. *Detroit H. & P. Co.*, 43 Michigan, 140.

The value of the plant is the fair value for which it might be sold to any other corporation or investor and its original cost or cost of reproduction. *Smyth* v. *Ames*, 169 U. S. 524; *San Diego* v. *Jasper*, 189 U. S. 439; *Ames* v. *Union Pacific*, 64 Fed. Rep. 165; Beale and Wyman, R. R. Rates, § 255; *Steenerson* v. *Great Northern Ry.*, 72 N. W. Rep. 715.

It is immaterial in what way the property was lawfully acquired, whether by labor, gift or by making profitable use of a franchise previously granted, it is enough if it has become private property. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Spring Valley Waterworks* v. *San Francisco*, 124 Fed. Rep. 574; *Metropolitan Trust Co.* v. *Houston &c.*, 90 Fed. Rep. 683; *Detroit* v. *Detroit H. & P. Co.*, 43 Michigan, 140; *Brunswick Water Dist.* v. *Maine Water Co.*, 59 Atl. Rep. 540.

Good will or going value should be considered in arriv-

ing at the value of plaintiff's property, upon which it is entitled to earn dividends. Cases *supra* and *National Water Works* v. *Kansas City*, 62 Fed. Rep. 853; *People* v. *O'Brien*, 111 N. Y. 41; *Smyth* v. *Ames*, 169 U. S. 544; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 410; *Ames* v. *U. P. Ry. Co.*, 64 Fed. Rep. 165; *San Diego Water Co.* v. *San Diego*, 118 California, 556; *Fairbank* v. *United States*, 181 U. S. 300; *United States* v. *Gettysburg Elec. R. Co.*, 160 U. S. 668; *Kennebec Water Dist.* v. *Waterville*, 97 Maine, 185; *Water Co.* v. *Newburyport*, 168 Massachusetts, 541; *Water Supply Co.* v. *Gloucester*, 179 Massachusetts, 365; *Bristol* v. *Water Works*, 23 R. I. 274; *Ames* v. *P. R. R. Co.*, 64 Fed. Rep. 178; *Omaha* v. *Water Co.*, 218 U. S. 180.

"Going Value" or "Franchise" should not be discarded because of difficulty in ascertaining its value. *Howe Machine Co.* v. *Bryson*, 44 Iowa, 166; *Richmond* v. *D. & S.*, 40 Iowa, 272; *Chicago Ry. Co.* v. *Tompkins*, 176 U. S. 167, 172.

The franchise is an easement or right of way in the streets, and hence is real property. Cases *supra* and *Milhau* v. *Sharp*, 27 N. Y. 620; *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510; *Metropolitan Street R. Co.* v. *State Tax Comrs.*, 174 N. Y. 435; *Water Comrs.* v. *Westchester Waterworks Co.*, 176 N. Y. 239; *Kronbein* v. *Rochester*, 76 App. Div. 494; *Re East River Gas Co.*, 122 App. Div. 890; *Bowman* v. *Wathen*, 2 McLean, 376; *Citizens' St. R. Co.* v. *Detroit*, 64 Fed. Rep. 643; *West River Bridge Co.* v. *Dix*, 6 How. 507; *Gue* v. *Tide Water Canal Co.*, 24 How. 257; *East Alabama R. Co.* v. *Doe*, 114 U. S. 340; *Chicago* v. *Baer*, 41 Illinois, 306; *Stockton Gas & Electric Co.* v. *San Joaquin County*, 148 California, 313. As to the rule in England since the early days of gas lighting see *Railroad* v. *Brighton Gaslight Co.*, 5 Barn. & C. 466.

A corporation cannot be deprived of its franchises except under the power of eminent domain and upon payment of their full value. *Sixth Ave. R. Co.* v. *Kerr* and *Water Comrs.*

v. *Westchester County Waterworks*, 176 N. Y. 239; *Coney Island, Ft. H. & B. R. Co.* v. *Kennedy*, 15 App. Div. 588; *Spring Valley Waterworks* v. *San Francisco*, 124 Fed. Rep. 574; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312.

The power of the Federal Government to regulate commerce does not authorize it to destroy a franchise of this kind without making just compensation for it. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312.

Plaintiff's franchise is entitled to the same protection as any other property. *Parker* v. *Elmira C. & N. R. Co.*, 165 N. Y. 274; 59 N. E. Rep. 81; *Railroad Cases*, 116 U. S. 307, 331.

The action of the state court in excluding many items of value was arbitrary and without foundation in the evidence. It is the present value of the plant that should be taken into consideration. Cases *supra*.

Working capital should not have been eliminated in fixing value.

The elements entering into a fair rate to be charged for gas are the actual cost of all labor, materials and immediate repairs necessary to manufacture the gas and place it at the disposal of the consumer. Cases *supra; Reagan* v. *Farmers' Land T. Co.*, 154 U. S. 362; *U. P. Ry.* v. *United States*, 99 U. S. 700; *Southern Pac. Ry.* v. *Board of Com.*, 78 Fed. Rep. 265; *Gas Co.* v. *Memphis*, 72 Fed. Rep. 952; *Clyde* v. *Richmond Elec. Co.*, 57 Fed. Rep. 436.

A reasonable amount must be allowed for depreciation of the plant. *Willcox* v. *Gas Co., supra; Knoxville* v. *Water Co., supra; San Diego Land Co.* v. *National City*, 174 U. S. 739; *Milwaukee E. R. & L. Co.* v. *City*, 87 Fed. Rep. 577; *Brymer* v. *Butler Water Co.*, 179 Pa. St. 231.

Depreciation is due to three general factors. Inadequacy; where by reason of increased demand the machinery or mains, or some parts of them, become too small.

Obsolescence; where by reason of new invention and advancement in the art, the machinery in use can no longer be economically operated; and physical decay.

No ordinance fixing prices charged for a public service is reasonable which, in addition to the foregoing elements, does not allow to the investors a fair return on the money invested in the enterprise, with due regard to the nature and hazards of the business. Cases *supra*.

The earlier leaning of the courts toward the doctrine that the legislative power to fix rates stops only at confiscation has been supplanted by the rule that rates must be reasonable, that is, such as to earn a fair, just and adequate income on the investment. Cases *supra* and *Atlantic Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1; *C., B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226; *Covington & L. Turnpike Rd. Co.* v. *Sandford*, 164 U. S. 578; *C., M. & St. P. Ry.* v. *Minnesota*, 134 U. S. 418; *Munn* v. *Illinois*, 94 U. S. 141; *Central R. Co.* v. *Railroad Commission*, 161 Fed. Rep. 995; *Southern Pac.* v. *Board*, 78 Fed. Rep. 265; *Allnutt* v. *Inglis*, 12 East, 527; *Des Moines* v. *Water Works Co.*, 95 Iowa, 348; *Water Co.* v. *Cedar Rapids*, 118 Iowa, 234.

The rule that the fair return must not be less than the legal rate of interest is justified on reason and authority. Cases *supra* and *Pennsylvania R. R. Co.* v. *Philadelphia County*, 220 Pa. St. 115; *Chicago Traction Co.* v. *Equalization Board*, 114 Fed. Rep. 561; *Louisville & N. R. Co.* v. *Brown*, 123 Fed. Rep. 951; *Milwaukee Elec. R. & L. Co.* v. *Milwaukee*, 87 Fed. Rep. 585; *Southern P. Co.* v. *Railroad Comrs.*, 78 Fed. Rep. 261; *Jamaica Water Supply Co.* v. *Tax Comrs.*, 128 App. Div. 13; *International Bridge Co.* v. *Canada Sou. R. Co.*, 7 Ont. App. Rep. 226, aff'd L. R. 8 App. Cas. 723.

It is not enough that something is earned for the stockholders. They are entitled to fair compensation. Cases *supra*.

To deprive the plaintiff of a fair and reasonable earning capacity, such as the citizen enjoys, as to his money and as to all types of his property, is to deprive it of the equal protection of the laws. *C., M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418.

The State may be said to have appropriated the gas plant to public use. For the appropriation it is bound to make a just, fair and reasonable compensation. *Water Co.* v. *San Diego,* 62 Am. St. Rep. 261.

The question as to rate of income is what rate of dividends would induce prudent men to invest in stock of the company representing the real value of the property as a going business. *Willcox* v. *C. Gas Co.,* 212 U. S. 19.

It is proper to apply the prescribed rate to the past experience of the company, taking into consideration the increased cost of operation after the time when the new rate is applied. *Seaboard Air Line Ry. Co.* v. *R. R. Com.,* 155 Fed. Rep. 792.

Annual income of 4.41 on value of property or 3.30 per cent on stock after deducting fixed charges is unreasonably low. The compensation should be for the real substantial value employed, and no legislation can diminish by one jot the rotund expression of the Constitution. *Railroad Co.* v. *Henry,* 8 Nebraska, 170; *Spring Valley Water Co.* v. *San Francisco,* 124 Fed. Rep. 574.

The power to regulate is not the power to destroy, and limitation is not equivalent to confiscation. *C., M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418; *S. Pac. Ry. Co.* v. *Bd. of Com.,* 78 Fed. Rep. 236.

Whatever the State may do, even with the creation of its own will, it must be in subordination to the inhibition of the Federal Constitution. *Vicksburg* v. *Vicksburg Water Works Co.,* 202 U. S. 453; *Water Co.* v. *Omaha,* 147 Fed. Rep. 7; *S. C.,* 218 U. S. 180; *Railroad Tax Cases,* 13 Fed. Rep. 754.

The state court erred in reducing depreciation to five

cents per M., and in refusing to allow as part of operating expenses the items of interest on bonds and interest on loans. In effect the state court assumed the future earnings of the company would be largely in excess of the amount justified by the evidence and practically held that any return on plaintiff's property is sufficient.

The question as to the competency and legal effect of evidence as bearing upon a question of Federal law is a Federal question. *Dower* v. *Rogers*, 151 U. S. 658; *Mackay* v. *Dillon*, 4 How. 421; *Gelston* v. *Hoyt*, 3 Wheat. 246.

The refusal of the state court to consider a Federal question which is controlling in a case, is equivalent to a decision against the Federal right involved therein. *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552.

It is not necessary that the express language of the opinion should recite that a Federal question has been decided, but it is sufficient for the purpose of the jurisdiction of this court, that the state court by its decisions necessarily adjudicates the defense under the Federal Constitution. *El Paso & N. E. R. Co.* v. *Gutierrez*, 215 U. S. 90; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 44; *Atchison, T. & S. F. R. Co.* v. *Sowers*, 213 U. S. 15; *Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 179; *Fire Asso. of Philadelphia* v. *New York*, 119 U. S. 110, 120; *Murdock* v. *Memphis*, 20 Wall. 590; *Mallett* v. *North Carolina*, 181 U. S. 589.

The witness was not competent to testify as to cost, depreciation of the plant, or income plaintiff was entitled to earn. *Eastern Tran. Co.* v. *Hope*, 95 U. S. 297; *C., M. & St. P. Ry.* v. *Kellogg*, 94 U. S. 469; *N. Y. E. L. Co.* v. *Blair*, 79 Fed. Rep. 896; *U. P. Ry.* v. *Yates*, 79 Fed. Rep. 584; *Burg* v. *C., R. I. & P. Ry.*, 90 Iowa, 114; *Muldowney* v. *Illinois Central*, 36 Iowa, 473; *Boyle* v. *State*, 57 Wisconsin, 472; 15 N. W. Rep. 827; *Bixby* v. *Ry. Co.*, 105 Iowa, 293; *Dale* v. *Johnson*, 50 N. H. 452; *Mo. Pac.* v. *Finley*, 38 Kansas, 550.

Opinions are never received if the facts can be ascertained and made intelligible to the jury, or if they are such as men in general are capable of comprehending and understanding. Ordinary affairs of life cannot be the subject of expert testimony. Am. & Eng. Encyc. of Law, 2d Ed., Vol. 7, 493; *Graham* v. *Penna. Company*, 12 L. R. A. 293; *Boyle* v. *State*, 57 Wisconsin, 472; 15 N. W. Rep. 827; *N. Y. Elec. Equip. Co.* v. *Blair*, 79 Fed. Rep. 896; *Muldowney* v. *Ill. Cent. Rd. Co.*, 36 Iowa, 473; *C., M. & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469; *Kelley* v. *Richardson*, 37 N. W. Rep. 514. See also *Bixby* v. *Railway & Bridge Co.*, 105 Iowa, 293; *Union Pacific Ry. Co.* v. *Yates*, 79 Fed. Rep. 584; *Missouri Pacific* v. *Findley*, 38 Kansas, 550; *Burg* v. *C., R. I. & P. Ry. Co.*, 90 Iowa, 114; *Dale* v. *Johnson*, 50 N. H. 452; *Eastern Transportation Co.* v. *Hope*, 95 U. S. 297.

This court has jurisdiction of the questions raised under the writ of error.

The questions under both constitutional provisions were necessarily involved in the case, and decided adversely to the plaintiff, and it is not necessary that the record should show what errors were relied upon in the Supreme Court of Iowa. *California Powder Works* v. *Davis*, 151 U. S. 389; *Armstrong* v. *Athens Co.*, 16 Pet. 281.

A decision of the Federal question in terms is not essential. If a decision of such question was necessarily involved in the judgment rendered it is not a matter of importance that the state court avoided all reference to the question. *Chapman* v. *Goodnow*, 123 U. S. 540; *Chicago Ins. Co.* v. *Needles*, 113 U. S. 574; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226; *St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203.

The record in this case not only discloses that the rights of the plaintiff in error under the Constitution were set up and were expressly denied, but such was the necessary

effect in law of the judgment of the Supreme Court of Iowa. *Appleby* v. *City of Buffalo*, 221 U. S. 524; *Sayward* v. *Denny*, 158 U. S. 180, 183; *Harding* v. *Illinois*, 196 U. S. 78; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 97.

This court in an action at law has no jurisdiction to review the decision of the highest court of the State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided. *Lewis* v. *Campau*, 3 Wall. 106; *Hall* v. *Jordan*, 15 Wall. 393; *Boggs* v. *Merced Min. Co.*, 3 Wall. 304; *Carpenter* v. *Williams*, 9 Wall. 785; *Crary* v. *Devlin*, 154 U. S. 619; *Republican River Bridge Co.* v. *Kansas Pac. Rd. Co.*, 92 U. S. 315; *Martin* v. *Marks*, 97 U. S. 345; *Quimby* v. *Boyd*, 128 U. S. 488; *Dower* v. *Richards*, 151 U. S. 558.

But in a suit in equity in which a trial was had *de novo* in the state Supreme Court, the facts will be reviewed by this court. *Mackay* v. *Dillon*, 4 How. 421; *Almonster* v. *Kenton*, 9 How. 1, 7; *Morland* v. *Page*, 20 How. 522; *Dower* v. *Richards*, 151 U. S. 658; *Pennsylvania Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Republican River Bridge Co.* v. *Kansas Pac. Rd. Co.*, 92 U. S. 318.

Mr. James W. Jamison and *Mr. William Chamberlain*, with whom *Mr. John M. Redmond* was on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill brought by the plaintiff in error to restrain the enforcement of an ordinance fixing ninety cents per thousand cubic feet as the highest price to be charged in Cedar Rapids for gas. As the ordinance was passed in 1906 and had not yet been enforced, the Supreme Court of the State dismissed the bill without prejudice to a later suit after it should have been given a fair test. 144 Iowa,

426. The plaintiff, having specially set up that the ordinance violated the contract clause of the Constitution, (Art. I, § 10), and the Fourteenth Amendment, brings the case here. There is a motion to dismiss, but the constitutional questions appear upon the record and are not so frivolous as to warrant that summary course.

The supposed contract arises from a term in the ordinance under which the plaintiff was granted a renewal of its franchise in 1896. By § 3, "in consideration of the privileges herein granted to said company, it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed $1.80 per thousand feet and 20 cents per thousand cubic feet discount if consumers pay on or before the 10th of each month after consumption," &c. It is admitted that under the laws of Iowa the rate could be changed by the city, but it is argued that the quoted words import a contract that it shall not be changed to such an extent as to make impossible the offer of a discount for prompt payment; that being the cheapest and most efficient way of collecting the price of the gas. The state court assumed that there was no contract in the case, and in discussing what it treated as the sole question, whether the plaintiff would be deprived of a fair compensation for its services, pointed out that the company could secure payment by requiring a deposit in advance or by making other reasonable rules.

We are of opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. The general power reserved to regulate rates was limited only by the Fourteenth Amendment. The words relied upon by the plaintiff express its promise in consideration of the privileges granted, not a promise by the city. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437. It is true that the contract was in the form of an ordinance, but the ordinance was drawn as a contract to be accepted and it was ac-

cepted by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff, as we have said; and it was subject to the power retained by the city to regulate rates. That power, it was expressly provided by the Iowa statute, was not to be abridged by ordinance, resolution or contract. Code of 1897, § 725, 22 G. A. (1888) ch. 16.

Upon the issue under the Fourteenth Amendment, the plaintiff argues on the strength of Rev. Stat., § 709, that the facts are open to reëxamination here. By that section it is provided that a writ of error to a state court "shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States." It is argued that as the decree of a state court can be reviewed only by writ of error the foregoing words give to a writ of error in a chancery case the effect of an appeal and open the evidence to reëxamination to the same extent as upon an appeal. A suggestion to that effect was made in *Republican River Bridge Co.* v. *Kansas Pacific Ry. Co.*, 92 U. S. 315, 317, but the practice and decisions from an early date have been the other way. *Egan* v. *Hart*, 165 U. S. 188, 189. *Almonester* v. *Kenton*, 9 How. 1, 7. *Dower* v. *Richards*, 151 U. S. 658, 663. *Gardner* v. *Bonestell*, 180 U. S. 362, 365, 370. *Thayer* v. *Spratt*, 189 U. S. 346, 353. *German Savings & Loan Society* v. *Dormitzer*, 192 U. S. 125, 129. *Adams* v. *Church*, 193 U. S. 510, 513.

But of course findings either at law or in equity may depend upon questions that are reëxaminable here. The admissibility of evidence or its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court. Such questions properly saved must be answered, and, so far as it is necessary to examine

the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined. *Kansas City Southern Railway Co.* v. *Albers Commission Co.*, decided February 26, 1912, *ante*, p. 573. For instance in this case the finding of the court that it was not prepared to say that a ninety cent rate was confiscatory may perhaps be taken to have been made subject to the admission that the rate was too low to permit a discount for prompt payment, and if so opens the question whether it was not confiscatory on that account, as matter of law. The plaintiff presents a number of such objections to the decision of the court below, although confused with arguments on pure matter of fact.

It would require a very clear case to warrant the reversal of the decree of a state court which though final in form merely postpones a decision upon the merits for further experience. The present one is far from being such a case. To refer in the first instance to the point just mentioned, we cannot say as matter of law that at ninety cents a thousand feet the company will be unable to collect payment without losses that will amount to a taking of its property. Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 52. An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the prop-

erty is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit.

In this case the court fixed a value on the plant that considerably exceeded its cost and estimated that under the ordinance the return would be over 6 per cent. Its attitude was fair and we do not feel called upon to follow the plaintiff into a nice discussion of details. We perhaps should have adopted a rule as to depreciation somewhat more favorable to the plaintiff, or, it may be, might have allowed this or that item that the state court struck out, but there is nothing of which we can take notice in the case that could warrant us in changing the result or in saying that the plaintiff did not get as much as it could expect when leave was reserved for it to try again.

Decree affirmed.

WINGERT *v.* FIRST NATIONAL BANK OF HAGERSTOWN.

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

No. 176. Argued February 29, 1912.—Decided March 11, 1912.

After filing of a bill for injunction, defendants proceed at their peril, and even if no preliminary injunction is issued, if they inflict actionable wrong upon the plaintiff, the bill can be retained for assessment of damages; but if the only ground left for further prosecution is costs, the appeal will be dismissed.

Where pending trial below and hearing of appeal the object unsuccessfully sought to be enjoined has been accomplished—in this case the erection of a building by a bank—the only ground left for further prosecution is costs, and the appeal will be dismissed.

An action by a stockholder for injunction against a national bank and its directors to restrain them from materially altering the bank building will not be transmuted into an action for damages against the directors for so doing; such an action will not lie.

Appeal from 175 Fed. Rep. 739; 99 C. C. A. 315, dismissed.

THE facts, which involve the power of directors of a national bank to alter its building against the protest of a minority of its shareholders, are stated in the opinion.

Mr. Henry F. Wingert, with whom *Mr. Miller Wingert* was on the brief, for appellant.

Mr. Charles A. Little and *Mr. George R. Gaither* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to restrain the defendants, a national bank, its directors and a contractor employed by them, from pulling down the bank building and erecting a six story building in its place—the first floor to be used for banking purposes, the other floors to be let for offices. The plaintiff is a holder of stock in the bank and alleges that the intended construction is *ultra vires*, and commercially unwise. The Circuit Court dismissed the bill on the ground that in the absence of bad faith it would not revise the judgment of the majority of the directors on the question of policy and that a national bank lawfully might turn its building to the best account by adding upper stories for offices to let. The Circuit Court of Appeals affirmed the decree on the opinion below. 175 Fed. Rep. 739. 99 C. C. A. 315. Pending the litigation the new structure has been built.

Objections are interposed on both sides—on the part of the defendant, to the right of a stockholder to prevent by injunction acts beyond the power of the corporation, on

that of the plaintiff, to the reception of the bank's answer, because it was adopted at a meeting of which the plaintiff's brother, a protesting director, was not notified. Without giving the slightest countenance to either it is enough to say that the whole case is disposed of by the erection of the new bank. No doubt after the filing of a bill for an injunction defendants proceed at their peril even though no injunction is issued, and, if they go on to inflict an actionable wrong upon the plaintiff, will not be allowed to defeat the jurisdiction of the court by their own act. In such a case the bill will be retained for the assessment of damages. *Milkman* v. *Ordway*, 106 Massachusetts, 232, 253. *Lewis* v. *North Kingstown*, 16 R. I. 15. But in the present matter the only ground for further prosecution of the case is costs. There are no damages for which the plaintiff could make any claim against the corporation for doing as it saw fit with its own, lawfully or unlawfully. Furthermore a recovery would be futile. It would cost the plaintiff as much as it brought in. To transmute the cause of action into a demand for damages against the directors alone would be an essential change, and probably would do the plaintiff no good, as it has been held in well considered cases that that action also would not lie. *Smith* v. *Hurd*, 12 Met. 371. *Allen* v. *Curtis*, 26 Connecticut, 456. As the appeal really is prosecuted only for costs it must be dismissed. *Union Paper-Bag Machine Co.* v. *Nixon*, 105 U. S. 766. See *Richardson* v. *McChesney*, 218 U. S. 487. But we are far from intimating that the plaintiff loses anything by this disposition of the case. *Brown* v. *Schleier*, 118 Fed. Rep. 981.

Appeal dismissed.

TANG TUN *v.* EDSELL, CHINESE INSPECTOR.

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

No. 45. Argued November 7, 1911.—Decided March 11, 1912.

Under the acts of August 18, 1894, c. 301, 28 Stat. 372, 390, and of February 14, 1903, c. 552, 32 Stat. 825, the decision of the question of citizenship of a Chinese person seeking to enter the United States is final unless reversed on appeal by the Secretary of Commerce and Labor; and unless it affirmatively appears that the executive officers acted unlawfully or improperly, or abused their discretion, their finding is conclusive and not subject to review by the courts.

In this case it appears that the requirements of the law were satisfied and there is no ground for judicial intervention.

The decision of an appeal is none the less that of the Secretary of Commerce and Labor because communicated by the Assistant Secretary, *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, by telegram, and later verified by letter.

The fact that a case is quickly decided, in this case two days after its submission, is not a basis for attack on ground of abuse of discretion or denial of due process.

Where the District Court takes jurisdiction and proceeds to determine the merits in a *habeas corpus* proceeding, the respondent can carry the case to the Circuit Court of Appeals.

168 Fed. Rep. 488; 93 C. C. A. 644, affirmed.

THE facts, which involve the right of a Chinese person to enter the United States, and whether the inquiry to determine whether such person should enter was properly conducted, are stated in the opinion.

Mr. James A. Kerr, for petitioners, submitted.

Mr. Assistant Attorney General Harr for the United States.

MR. JUSTICE HUGHES delivered the opinion of the court.

On June 22, 1906, Tang Tun and Leung Kum Wui, his wife, Chinese persons, sought entry to the United States at the port of Sumas, State of Washington, and were denied admission by the inspector in charge, whose order was affirmed by the Secretary of Commerce and Labor. Application was then made to the District Court of the United States for a writ of *habeas corpus*.

It was alleged in the petition that Tang Tun was a citizen of the United States, born in 1879, at Seattle, of parents there domiciled; that, in 1884, he went to China, where he remained thirteen years; that, in 1897, he returned to the United States, was admitted by the collector of customs after examination, entered the employ of Wa Chong & Co., in Seattle, and continued with that firm until 1905, when he returned to China for the purpose of marrying; that he was married to Leung Kum Wui in accordance with the laws of China and the consular requirements of the United States; that the officers concerned had improperly conducted the inquiry and had abused their discretion in refusing admission; and that the petitioners were restrained of their liberty without due process of law.

The writ was granted, and the case having been submitted to the District Court upon the record of the proceedings on the application for entry and the appeal to the Secretary of Commerce and Labor, it was held that the petitioners had been denied the hearing for which the act of Congress provided, that Tang Tun had established his citizenship, and that he and his wife were entitled to remain in this country. Accordingly, both were discharged from custody. 161 Fed. Rep. 618. This decision was reversed by the Circuit Court of Appeals, which reached the conclusion that the requirements of the law had been satisfied and that there was no ground for

judicial intervention. 93 C. C. A. 644; 168 Fed. Rep. 488. This court issued a writ of certiorari.

The acts of August 18, 1894, c. 301 (28 Stat. 372, 390), and of February 14, 1903, c. 552 (32 Stat. 825, 828), make the decision of the appropriate immigration officer final unless reversed on appeal to the Secretary of Commerce and Labor. And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the court. *United States* v. *Ju Toy*, 198 U. S. 253; *Chin Yow* v. *United States*, 208 U. S. 8.

It appears from the record that on his arrival, Tang Tun was promptly examined by the inspector at Sumas. The examination was careful and fair. He testified on June 23, 1906, again on June 27, 1906, and still further on July 5, 1906. He had presented, in support of his application, affidavits which he had taken with him for the purpose of identification when he left the United States in 1905. These affidavits described his parentage, his place of birth and his residence in this country substantially as set forth in his petition; and they bore the endorsement of the inspector under date of October 1, 1905. The two white witnesses who had joined in one of the affidavits were examined at Seattle on July 2, 1906, and in the report of the inspector at that place, it is stated that the Chinese witness who made the remaining affidavit of identification had been notified to appear and had informed the inspector that he did not care to testify.

As already noted, the applicant asserted that he had been admitted to the United States in 1897, after examination, by the collector of customs, and a copy of the identification papers he then had was produced, bearing what purported to be the endorsement of the collector as to the fact of admission. The inspector found, however,

that in the records of the customs office at Port Townsend, Washington, the port at which he had arrived in 1897, it was stated that he had been rejected. On his reëxamination, Tang Tun was questioned as to the discrepancy. He was also told that the witnesses who had made the identification affidavits in 1905 had been examined and that their testimony was not satisfactory; and he was asked whether he could furnish any additional testimony as to his nativity. Apparently he had nothing further to submit and the inspector made an order on July 5, 1906, rejecting his application.

On the same day Tang Tun was informed of the inspector's decision and of his right to appeal to the Secretary of Commerce and Labor. An appeal was taken and on July 7, 1906, the applicant's attorney notified the inspector that he intended to take additional testimony. An extension of time was granted for this purpose. Several affidavits were presented on behalf of the applicants, and these were forwarded to the office at Seattle where the witnesses as to disputed points were examined by the inspector. On August 28, 1906, the record of the proceedings, with the exhibits to which we shall presently refer, was forwarded to the Secretary of Commerce and Labor and a brief discussing the evidence and the course of the proceedings was also submitted on behalf of the applicants under date of August 25, 1906. The record was received by the Secretary of Commerce and Labor on the morning of September 5, 1906, and on the afternoon of the following day a telegram was sent from the Department to the inspector at Sumas as follows: "Appeal Tang Tun and Leung Gum Wui dismissed. Murray;" and this was confirmed by a letter from the Department. Then followed the *habeas corpus* proceedings.

It is clear that the applicants had full opportunity to present their evidence and to produce witnesses on their behalf. But it is charged that the inspector who con-

ducted the inquiry was biased, and that his unfairness is shown by the manner in which he dealt with the question whether Tang Tun had been admitted by the collector in 1897. We do not find this charge to be justified. When it was ascertained that Tang Tun had papers bearing, apparently, the endorsement of the collector, and showing that he had been admitted on his former arrival, it was certainly permissible for the inspector, if indeed it was not his duty, to examine the official records of the customs office to ascertain whatever they might disclose as to the disposition of the case. On finding that these records contained the statement, over what appeared to be the signature of the same collector, that Tang Tun had been rejected, the inspector properly brought this fact to the latter's attention, and asked whether he had any explanation to give. No right of the applicants was violated by the inspector, either in his own action preliminary to the order of rejection or in his subsequent communication with the Seattle officers to the end that the matter should be sifted and the witnesses who had made affidavits in support of the appeal should be carefully examined.

It is urged, however, that, without the knowledge of the petitioners and to their serious prejudice, incompetent statements were injected into the record which was submitted to the Secretary of Commerce and Labor. The statements, to which objection was made, had relation to the evidence presented by Tang Tun to support his assertion that the collector had permitted him to enter in 1897. From Tang Tun's identification papers it appeared that he had arrived at Tacoma on April 10, 1897, on the steamer "Tacoma," and had been admitted April 20, 1897. In the customs records it was noted that he had been held at Vancouver, B. C., and rejected on May 25, 1897. In his additional evidence he presented affidavits of a special deputy and an inspector of customs under the collector at the time, in which it was stated by both that it was the

practise not to permit Chinese persons to leave the steamer in which they had arrived until after a decision had been made allowing them to enter the United States, and that if the decision was adverse they were returned to China on the same steamer; and that at no time did they recall any steamer remaining in port from April 10 to May 25. In transmitting the record to the Secretary of Commerce and Labor, the inspector reviewed the case; and, referring to the affidavits submitted for the applicants and the impeachment of the office records, he stated that he had "made a careful examination of the customs records showing the arrivals and clearings of vessels in the district of Puget Sound in April and May, 1897," that "the steamer 'Tacoma' was shown to have arrived at Tacoma on April 10, 1897, and to have cleared for the Orient on April 16," and that furthermore "the said records showed that no other vessel of the same company was in the harbor at the time of the 'Tacoma's' departure, nor until five days" thereafter. The inspector added that in his examination of the Port Townsend customs records "in order to verify or refute the statements" of the witnesses, he had learned that there were two plans, as a rule, for disposing of the cases of Chinese persons; that is, they were either held on the ship until admitted or rejected, or if their cases were not disposed of while the ships were in port they were landed at Victoria, B. C., on the outward trips of the vessels, and remained there until notified of the decision. If this were favorable they would be forwarded on local steamers and admitted, and if adverse, they would be informed accordingly and entries would be made to that effect in the record. He added that his information on this point being at first somewhat uncertain he had verified it by conversations with the members of a Chinese firm who for many years were agents for all oriental steamship lines touching at Seattle, by an investigation conducted at Tacoma, and finally by the testimony (which appeared in the record) of

the witnesses for the applicants, that is, the testimony taken by the inspector after their affidavits had been submitted. In addition, "he found further verification" in the fact that "the Chinese passenger manifests of the Port Townsend office showed that Chinese whose names appeared on arriving manifests of oriental steamers subsequently appear on manifests of local vessels arriving from Victoria and Vancouver," and that a careful examination "of all such local steamer manifests from April 10 to May 25, 1897, fail to reveal the name of Tang Tun on any of them." The inspector also directed the attention of the Secretary to a typewritten list (presented as an exhibit) of the Chinese who had arrived on the steamer "Tacoma" on April 10, 1897, which had been prepared according to the custom prevailing in the office of the collector at that time and had been found in the Port Townsend records. On this list was the name of Tang Tun, identified by reference to his father, with the word "rejected."

Neither the nature of these statements, nor the manner of their introduction, affords ground for invalidating the proceeding. On the examination of the applicants' witnesses—the former customs officials—reference was made in the questions of the examiner to the date of the departure of the steamer "Tacoma" and the inquiry was explicitly directed to the practice of holding Chinese persons at Victoria whose right to enter had not been determined. The point of the inquiry was clearly understood, and not only was there no denial of the practice of detention at Victoria, but the statements of the inspector as to its existence found confirmation in the testimony of the special deputy collector. The list of passengers arriving on the "Tacoma" on April 10, 1897 (being the exhibit to which the inspector referred in his report), was shown to this witness, and he identified the word "rejected" after the name Tang Tun on this list, as being in the collector's handwriting. Both the special deputy and the customs

inspector stated that the signature of the collector on the original identification papers below the endorsement "Rejected May 25/97" was genuine, as they had also testified that the signature was genuine upon the copy which Tang Tun had, purporting to show his admission.

And it will be observed that it is not shown that the statements of the inspector, of which complaint is made, were false or that there was any attempt to deceive the Secretary. The writ of *habeas corpus* was granted in September, 1906. For some reason which the record does not disclose the case was not brought on for hearing until January 20, 1908, when an order was made for the taking of testimony. Then, instead of adducing evidence to show that these statements of the inspector were false or misleading, it was stipulated (on February 26, 1908) that the matter should be heard upon the record, including the papers which were submitted to the Secretary, and that the writ should be dismissed if the court, upon this record, should find that there had been no abuse of discretion. Had there been ground for saying that the inspector had misled the Secretary by misrepresenting the records to which he referred, or by false assertions as to the matters of fact disclosed by his inquiries, it cannot be doubted that this would have been shown, as there was abundant time for full consideration and inquiry. In these circumstances, it cannot be said that the inspector in stating the result of his investigations, in commenting upon the practice which had obtained in dealing with Chinese applicants for admission, and in referring to the entries in the official records, was guilty of unfair or improper conduct.

Complaint is also made of the action of the inspector in forwarding to the Secretary the papers in the cases of other Chinese persons who arrived on the steamer "Tacoma" with Tang Tun on April 10, 1897, some of whom had identification papers similar to those of Tang Tun with the endorsement of the collector, purporting to show their ad-

mission, in conflict with the office records. The inspector called attention to the fact that in certain cases, after inquiry before the United States Commissioner, and despite the possession of such identification papers, deportation had been ordered, and also that it appeared that all the applicants described in the papers forwarded to the Secretary had been held in British Columbia pending decision. The contents of these papers are not printed in the transcript of record, but we must assume from the description that they were from the official files. Of these the Secretary might at all times take cognizance, and it would be extraordinary indeed to impute bad faith or improper conduct to the executive officers because they examined the records or acquainted themselves with former official action.

But it is said that the evidence for the applicants was of such an indisputable character that their rejection argues the denial of the fair hearing and consideration of their case to which they were entitled. This contention is not supported. It was proved that Tang Tun had lived at Seattle for several years before he left for China in 1905. The question, however, was whether he was born in the United States. Of the witnesses who professed to testify on this point—other than Tang Tun himself—all save one were shown by their examination to be unworthy of credit; and the knowledge of the one trustworthy witness—a police officer of Seattle—was plainly insufficient to make his testimony controlling. This witness relied upon his identification of the youth of about eighteen years of age, who arrived in 1897, as the same person whom he had last seen as a child some thirteen years before. There remained the testimony of Tang Tun himself, but this, with all the other evidence in the case, was for the consideration of the officers to whom Congress had confided the matter for final decision. The record fails to show that their authority was not fairly exercised, that is, consistently with

the fundamental principles of justice embraced within the conception of due process of law. And, this being so, the merits of the case were not open to judicial examination.

The decision of the appeal was not the less that of the Secretary of Commerce and Labor, because communicated by the telegram of Mr. Murray, the assistant secretary (*Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 206), later verified by letter from the department. The statement of the dismissal of the appeal described the decision against the applicants upon the merits in accordance with the department's usage. Nor does the fact that the case was held under consideration by the department less than two days affect the finality of its determination. Although the proceeding had been long pending the issue was a narrow one and permitted of speedy disposition; and the circumstance that it received immediate attention and the decision was promptly announced is not a basis for attack.

As the District Court took jurisdiction and then proceeded to determine the merits, sustaining Tang Tun's claim of citizenship, the respondent was entitled to carry the entire case to the Circuit Court of Appeals. *United States* v. *Jahn*, 155 U. S. 109; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407; *United States* v. *Ju Toy*, 198 U. S. 253, 259. And the judgment of that court, reversing the decision of the District Court and directing the dismissal of the proceedings, was right.

Judgment affirmed.

UNITED STATES EX REL. NESS *v.* FISHER, SECRETARY [1] OF THE INTERIOR.

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

No. 66. Argued November 15, 1911.—Decided March 11, 1912.

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with *quasi* judicial functions, to which is confided the execution of the laws regulating the disposal of the public lands.

A decision of an executive officer, made in the discharge of a duty imposed by such a law, and involving the exercise of judgment and discretion, may not be reviewed by mandamus, nor can he be compelled by that means to retract his decision so made and to give effect to another not his own and having his approval.

The Secretary of the Interior made a decision that under § 2 of the Timber and Stone Act of June 3, 1878, 20 Stat., 89, c. 151, the statement that the land is unfit for cultivation, valuable chiefly for its timber, uninhabited, and contains no mining or other improvements, must be made upon the personal knowledge of the applicant, and not upon information and belief, and the Court of Appeals held that this decision was right, and on that ground refused mandamus to review it; this court affirms the judgment, but without examining the merits of the question, and solely on the ground that the decision of the Secretary is one involving the exercise of judgment and discretion of an executive officer which cannot be reviewed by mandamus.

That no writ of error or appeal lies in such a case by which the decision of the Secretary of the Interior can be reviewed, furnishes no ground for awarding mandamus.

33 App. D. C. 302, affirmed.

THE facts, which involve a claim under the Timber and Stone Act of 1878, and the power of the court to control the decision of the Secretary of the Interior in regard thereto by mandamus, are stated in the opinion.

[1] Originally brought against James R. Garfield, Secretary of the Interior, and by successive orders continued against his successors, Richard A. Ballinger and Walter L. Fisher.

Mr. Samuel Herrick, with whom *Mr. S. P. Ness* was on the brief, for plaintiff in error:

The timber and stone law does not require, either directly or indirectly, that an applicant thereunder shall have personally inspected the land. *Adams* v. *Church*, 193 U. S. 509; *Williamson* v. *United States*, 207 U. S. 425, 462; *Hoover* v. *Salling*, 110 Fed. Rep. 43.

The departmental regulation operates to destroy rights conferred by an act of Congress, at least to the extent of a large portion of the population. *Hoover* v. *Salling*, 110 Fed. Rep. 43.

The regulation is especially unwise and unjust as applied to the facts in the present case.

The Interior Department has not been uniform in its construction of the law, notwithstanding the finding made by the District of Columbia Court of Appeals. Although the Interior Department has contended in the present case, and the court below has found, that this construction of the timber and stone law has been uniformly followed for a number of years, the reported decisions of that department show the contrary. See cases *Gardner*, 16 L. D. 560; *McManus*, 29 L. D. 653; *Lewis* v. *Shaw*, 70 Fed. Rep. 289.

The Interior Department has deliberately refused to follow the opinion of a Federal court upon the point involved. *Hoover* v. *Salling*, *supra; Featherstone Case*, 32 L. D. 632; *United States* v. *Wood*, 70 Fed. Rep. 485; *Robnett* v. *United States*, 169 Fed. Rep. 778.

Thus two United States Circuit Courts of Appeal have ruled contrary to the opinion of the District of Columbia Court in the *Wood Case*, and in one of these instances the question at issue was precisely the same as in the *Wood Case*.

The departmental construction of the law would have no effect upon indictments for perjury.

The argument advanced by the Interior Department

to the effect that the construction of the law contended for by appellant would result in making it exceedingly difficult to secure conviction for perjury on the ground of false statements in the preliminary application is untenable.

There would be no object in committing perjury with respect to the declaratory statement, since such statement confers no title to the land nor even an equitable claim. *Campbell* v. *Weyerhauser*, 161 Fed. Rep. 333; *Board of Control* v. *Torrence*, 32 L. D. 472; *Charles O. Deland*, 36 L. D. 18.

There would be no advantage gained by filing such an application, because publication of notice must be made immediately thereafter and failure to submit proof on the day advertised results in the loss of all right and claim whatsoever. *Curtis*, 33 L. D. 265; *White*, 33 L. D. 285.

This case should not be decided as one involving the difficulty or facility of proving a crime, but rather as one involving a departmental regulation changing the terms of a law and depriving many citizens of rights granted them by statute.

The preliminary statement is analogous to the initial proceedings in a court of chancery rather than to those under special statutory proceedings. *Williamson* v. *United States*, 207 U. S. 459.

The District Court of Appeals cites six decisions of the state courts. In all cases it was held that the affidavit might be made not only by the party himself, but by his attorney or agent, so that in reality they support contentions of defendant in error.

The court below has evidently overlooked entirely the fact that in her affidavit relator set forth the source of her information and belief, and likewise accompanied it by the affidavit of her agent, an expert woodsman, executed upon personal knowledge. *O'Neill* v. *Glover*, 5 Gray, 144, 156.

Any requirement is inconsistent with the act which imposes upon the applicant a condition not required by the law, and not necessary in order to hold the applicant to a compliance with the law.

Such requirements as this have caused considerable dissatisfaction with the Government throughout the public land States, and have often resulted in retarding the development of unsettled portions of the country.

The Interior Department is not vested with jurisdiction to change or to add to positive statutes in order to further its own policy; on the contrary, it should merely administer the laws as enacted by Congress.

Mr. Assistant Attorney General Knaebel for defendant in error:

The relator did not comply with the statute.

By express provision of § 2 it is the "person desiring to avail himself of the provisions of this act" who is required to file the written statement. All of the matters of proof specified in § 2 are in clearest terms required to be set forth in the statement itself. No additional witness is mentioned. No substitution by agent is allowed. It is entirely manifest that all of the statements of fact for which this statement calls must come from the applicant and be vouched for by his own oath.

As the mere filing of the statement at once results not only in the withdrawal of the land from possible acquisition by others, but also in the acquisition by the applicant of an alienable right, *Williamson* v. *United States*, 207 U. S. 425, 450; *United States* v. *Biggs*, 211 U. S. 507, 520, it was but ordinary prudence for Congress to require beforehand definite and reliable assurance of the existence of these material matters upon which the applicability of the statute is made to depend. *United States* v. *Wood*, 70 Fed. Rep. 485.

The same view was taken in the Circuit Court for the

Western District of Wisconsin. *Hoover* v. *Salling*, 102 Fed. Rep. 716.

The Land Department has always construed the act as requiring the facts concerning the physical character and condition of the land to be set forth in the statement directly and not upon the mere information and belief of the applicant, conceding, of course, as the statute expressly permits, that no more than his belief need be averred on the subject of minerals. See Circular of Instructions of Aug. 13, 1878, Copp's Public Land Laws of 1875–1882, p. 1456; General Circular of Oct. 1, 1880, Copp, *ibid*, p. 277, regulations, p. 302, form of affidavit; Circular of July 16, 1887, and form of affidavit, 6 L. D. 114, 117; General Circular of Jan. 25, 1904, p. 41; see also 14 L. D. 436; 29 L. D. 653.

Concerning the force to be attributed to a continuous administrative construction like this, there can be no possible question after the numerous decisions of this court dealing directly with the subject. Unless the construction be clearly erroneous, it should be adopted, even though in its absence the courts might be disposed to construe the statute differently. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings, &c., R. Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Hammers*, 221 U. S. 220, 228. *Hoover* v. *Salling*, 110 Fed. Rep. 43, is the only instance in which the correctness of the departmental construction has ever been seriously questioned.

Robnett v. *United States*, 196 Fed. Rep. 778, follows *Hoover* v. *Salling* to the extent of holding that the express statements that the applicant has personally examined the land and has personal knowledge concerning it, which the statute does not in terms require, cannot be made the basis of a perjury prosecution under § 2. It does not decide that a statement made on mere information and belief would be a compliance with that section.

Mandamus does not lie in this case, and the case should

have been dismissed below for lack of jurisdiction. *Roberts* v. *Valentine*, 13 App. D. C. 38, 46; *Roberts* v. *United States*, 176 U. S. 221, 231, do not apply, but see *United States* v. *Black*, 128 U. S. 40, by which this case is controlled.

Mandamus will not issue unless the duty sought to be enforced be plain and positive; it must be clearly prescribed and enjoined by the law. Merrill on Mandamus, § 57; *International Contracting Co.* v. *Lamont*, 155 U. S. 303, 308; *Ex parte Cutting*, 94 U. S. 14, 19; *Redfield* v. *Windom*, 137 U. S. 636, 644.

The Land Department is a special tribunal constituted by law for the express purpose of administering the statutes relating to the disposition of the lands and therein of deciding all questions and controversies arising under them. *Knight* v. *Land Association*, 142 U. S. 161, 181; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324.

The responsibility as well as the power rests with the Secretary, uncontrolled by the courts. *Kimberlin* v. *Commission*, 104 Fed. Rep. 653; *Brown* v. *Hitchcock*, 173 U. S. 473, 476; *Oregon* v. *Hitchcock*, 202 U. S. 60, 68.

The case of *Garfield* v. *Goldsby*, 211 U. S. 249; *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, and *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, have no possible application here. In each of those cases the action complained of was *ultra vires*—entirely beyond the scope of the authority of the official performing it, and tended, in addition, to destroy or injure vested property rights.

This case approaches closely, if indeed it be not clearly in principle, an action against the United States. *Oregon* v. *Hitchcock, supra; Louisiana* v. *Garfield*, 211 U. S. 70; *Conley* v. *Ballinger*, 216 U. S. 84.

Mr. Justice Van Devanter delivered the opinion of the court.

This was a petition, in the Supreme Court of the District

of Columbia, for a writ of mandamus to compel the Secretary of the Interior to accept, as conforming to the Timber and Stone Act of June 3, 1878, 20 Stat. 89, c. 151, an application to purchase under that act 160 acres of public land in the Roseberg, Oregon, land district. The respondent answered, but the answer was held insufficient upon demurrer, and judgment was entered awarding the writ as prayed. An appeal to the Court of Appeals resulted in a reversal of the judgment, with a direction that the petition be dismissed, 33 App. D. C. 302, and that ruling is now here for review. Briefly stated, the material facts are these: Being desirous of purchasing the land under the Timber and Stone Act, the relator, Mary S. Ness, filed in the proper local land office a written application, which fully conformed to the statutory requirements, unless it was objectionable in that it disclosed that she had not personally examined the land and that her statement that it was unfit for cultivation, valuable chiefly for its timber, uninhabited and contained no mining or other improvements was made upon information and belief and not upon personal knowledge. The register and receiver ruled that the application was objectionable in that regard and therefore rejected it, subject to her right to appeal. Successive appeals by her to the Commissioner of the General Land Office and the Secretary of the Interior resulted in an affirmance of the ruling of the local officers, the decision of the Secretary being adhered to upon a motion for review. Soon after the act was passed it was construed by the Land Department as requiring that in applications thereunder the statement respecting the character and condition of the land be made upon the personal knowledge of the applicant, save in the particulars which the act declares may be stated upon belief, and it was because of this construction, disclosed in repeated decisions of the Secretary of the Interior and in the regulations issued under the act (see 6 Land Dec. 114; 11 Land

Dec. 599; 32 Land Dec. 631), that this application was rejected. After its final rejection, that is, after the decision of the Secretary on the motion for review, one William A. Taylor made application at the local land office to purchase the land under the same act, and his application, which appeared to be in conformity with the statutory requirements, was accepted by the local officers and was being carried to final entry when this petition and the answer were filed.

The answer concluded by alleging, in substance, that the respondent was the head of the Land Department, to which the law committed the administration of the Timber and Stone Act and other public land laws; that the duty of determining whether the relator's application conformed to the statutory requirements was not merely ministerial, but involved the exercise of judgment and discretion; that to compel him to accept that application would be to control his judgment and discretion, and to require him to disregard his own decision, in a matter falling within his lawful authority, and that a writ of mandamus could not be used to that end.

Section 2 of the act reads as follows:

"That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district *a written statement* in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, *setting forth* that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, *as deponent verily believes*, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation,

but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified *by the oath of the applicant* before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

The Secretary's decision, rejecting the relator's application, was not arbitrary or capricious, but was based upon a construction of § 2 which was at least a possible one, had long prevailed in the Land Department, had been approved in *United States* v. *Wood*, 70 Fed. Rep. 485, and *Hoover* v. *Salling*, 102 Fed. Rep. 716, and has since been sustained by the Court of Appeals in the present case. True, a different construction had been adopted in *Hoover* v. *Salling*, 110 Fed. Rep. 43, and has since been followed in *Robnett* v. *United States*, 169 Fed. Rep. 778, but this, instead of indicating that the Secretary's decision was arbitrary or capricious, illustrates that there was room for difference of opinion as to the true construction of the section, and that to determine whether the relator's application conformed thereto necessarily involved the exercise of judgment and discretion.

So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the

exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. *Decatur* v. *Paulding*, 14 Pet. 497, 515; *United States ex rel. Tucker* v. *Seaman*, 17 How. 225, 230; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *United States ex rel. McBride* v. *Schurz*, 102 U. S. 378; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324. Original discussion being foreclosed by these cases, we will merely quote from two of them to illustrate the reasoning upon which they proceed. In the *Decatur Case* it was held that mandamus could not be awarded to compel the head of one of the executive departments to allow a claim, under one construction of a resolution of Congress, which he had disallowed under another construction, the court saying: "The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is from time to time required to act. . . . If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in

which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. . . . The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." And in the *Riverside Oil Co. Case*, where it was sought by mandamus to compel the Secretary of the Interior to depart from a decision of his, to the effect that a forest reserve lieu-land selection must be accompanied by an affidavit that the selected land was non-mineral in character and unoccupied, it was held that his judgment and discretion could not be thus controlled, it being said (p. 324): "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. . . . Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to

repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts."

The relator seems to believe that *Roberts* v. *United States,* 176 U. S. 221, and *Garfield* v. *Goldsby,* 211 U. S. 249, in some way qualify the rule so stated; but this is a mistaken belief. Both cases expressly recognize that rule and neither discloses any purpose to qualify it. In the former the duty directed to be performed was declared to be "at once plain, imperative, and entirely ministerial." And in the latter the writ was awarded to compel the respondent to erase and disregard a notation which he arbitrarily and unwarrantably had caused to be made upon a public record, and which beclouded the relator's right to an Indian allotment.

We conclude that the decision of the respondent in the present case was not arbitrary or merely ministerial, but made in the exercise of judgment and discretion conferred by law and not controllable by mandamus, and therefore that the Court of Appeals rightly directed that the petition be dismissed.

Judgment affirmed.

RIPLEY *v.* UNITED STATES.
UNITED STATES *v.* RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 498, 499. Submitted December 22, 1911.—Decided March 11, 1912.

Where the power of the Government over the contract is complete and its agent's decision is conclusive, a corresponding duty exists that the agent's judgment should be exercised reasonably, and with due regard to the rights of both contracting parties; and in this case, as the Court of Claims has found that the agent's decision was a gross mistake and in bad faith, the contractor is entitled to recover the damages actually sustained by him by reason thereof.

Where there is no provision in the contract for an appeal from the decision of the agent in charge, the contractor does not have to appeal to a higher officer from the decision of the agent whose judgment and decision is expressly made final by the contract.

For the contractor to recover damages caused by an improper decision of the Government's agent in charge, the burden is on him, and this court must base its decision on the record.

Where the contract provides that the decisions of the engineer in charge are final, they are so in the absence of fraud or gross mistake implying fraud; and, in the absence of a finding to the effect that there was fraud, the contractor cannot recover damages on the ground that such decisions were erroneous.

45 Ct. Cl. 621, modified and affirmed.

APPEAL and cross appeal from a judgment by the Court of Claims for $14,732.05 in favor of Henry C. Ripley against the United States, in a suit for the recovery of damages of a public work consequent upon the action of the agent in charge.

By the act of June 13, 1902, 32 Stat. 340, Congress appropriated $250,000 for the completion of the work of improving the harbor of Aransas Pass, Texas. The contract was awarded to Henry C. Ripley. It provided for

the completion of a jetty, having a brush foundation, to be covered with a layer of stone, on which was to be built a superstructure, with sloping sides and a top width of ten feet. This superstructure was to be formed of a core or mound of riprap, "and when in the judgment of the United States agent in charge, this mound has become sufficiently consolidated, its gaps shall be filled and its crest levelled; . . . large blocks shall then be bedded in the crest of the mound."

It was provided that—

"Where the contract contemplates the placing of the materials in the work, the material shall be placed securely and carefully where directed by the U. S. Agent in charge. . . .

"All material furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the Engineer Officer in charge as to quality and quantity shall be final."

The contract also provided that the work should be executed under the supervision of the engineer officer in charge or his duly authorized agent. The United States was to employ one or more inspectors, and the contractor, without additional compensation, was bound to furnish facilities for the inspection of work and material. The contractor was to furnish extra labor at cost prices, as determined by the engineer, and should furnish board and lodging to Government employés at reasonable rates satisfactory to the engineer. If the work was not diligently prosecuted the contract might be annulled, or the engineer in charge, "with the prior sanction of the Chief of Engineers, may waive for a reasonable period the limit originally set for the completion of the work and remit the charges for the expenses of superintendence and inspec-

tion for so much time as in the judgment of the engineer officer in charge may actually have been lost on account of . . . violence of the elements, or by epidemic, or local or State quarantine restrictions, or other unforeseeable causes of delay arising from no fault of the contractor, and which actually prevented him from commencing or completing the work within the period required by the contract."

Claimant entered upon the performance of the contract August 18, 1903, and completed 2,100 feet of jetty when operations ceased about September 17, 1904, owing to the exhaustion of the appropriation.

About the time work began, without fault on the part of the contractor or of the United States, there was a delay of about thirty days, due to the fact that contractor's tug, while in charge of a licensed pilot, was grounded on a sand bar. The Government apparently incurred expenses for inspection during this period and deducted that amount from Ripley's account.

Owing to an epidemic of yellow fever the force of the contractor was disorganized, and work was necessarily suspended for thirty days. The Government did not charge him with inspection expenses during the fifteen days the quarantine was in force, in a city through which the cars hauling the material were prevented from passing. And the court held also that Ripley was not chargeable with the inspection expenses for the other fifteen days, during which his force was scattered as a result of the epidemic.

During the progress of the work, a large number of blocks were rejected by the inspector as not conforming to specifications. "Many of those so rejected were afterwards accepted, but ninety of the stones offered as crest blocks were rejected as such, and were accepted and used as riprap and paid for as such. The difference in the amount paid claimant for said stones used as riprap and

the amount he would have received if they had been used as crest blocks" was allowed him by the Court of Claims. It found that "he was compelled to furnish other crest blocks to take the place of those rejected, which caused a delay of ten days to claimant in the completion of the work."

It appears that the rejection of these blocks was due to a difference in the method of measurement, the inspector insisting that the blocks should be measured at the narrowest, thinnest and shortest points. The contractor contended that mean or average measurements should be taken, claiming that this was the understanding of himself and the officer who drew the specifications. The engineer at Galveston thereupon suggested that the matter should be referred to the Chief of Engineers in Washington; and later a supplementary agreement was drawn, which permitted the use of blocks "which would make the work as stable, or more stable, than if the dimensions conformed strictly to the letter of the specifications. In consideration of which change the contractor agrees to accept $5.00 per ton for all blocks received under the supplementary agreement which would have been rejected under the original specification."

The plaintiff's claim for additional compensation for extra labor furnished the Government and for board and lodging furnished its employés was rejected by the court, as also his claim for damages for double handling caused by the inspector's refusal to permit him to unload certain material on the jetty.

The contractor's principal claim, however, was for damage caused by the delay resulting from the refusal of the inspector in charge to permit crest blocks to be laid after the core had fully consolidated. As long as the jetty was uncovered by these blocks it was subject to the rough action of the waves, and the plaintiff's employés were deprived of the advantage of working in still water on the

lee side of the jetty. The work began August 18, 1903, and the court found as a fact "that in December, when plaintiff had completed 200 feet of the core, he requested permission to lay the blocks. This was refused, on the ground that the core had not been consolidated. By the end of December he had completed 500 feet, and again requested permission to lay the blocks. The inspector refused and continued to refuse permission to lay the blocks until May 1, 1904, at which time 1,500 feet of the core had been repaired and completed."

"Commencing in October, 1903, the contractor began to lay the slope stones, and from December, 1903, until May, 1904, it was manifest that large parts of the work done by him were fully settled and consolidated. If the claimant had been permitted to lay the crest blocks from the time on, as the work progressed, there would have resulted an additional protection, which would have enabled him to work sixty days more within the period between that time and May 7, 1904, when the first crest block was laid."

"The total cost to claimant of performing the contract, exclusive of the cost of the granite and the cost of transport and fitting up and repairs to barges, was $63,780. The total number of days from the beginning to the completion of said work was 392, making an average daily cost to the contractor of $162.70. The work was completed on September 17, 1904. The number of days of actual work performed was 131, of which 58 was subsequent to the 30th day of April, 1904." "Claimant, under the requirements of the specification, personally superintended the work for the whole time. The value of his personal services while so doing was $750 per month, but it does not appear that at this particular time he had any other enterprise under way or any other employment."

The court entered judgment for plaintiff for $14,832.05 —made up of damage for difference between price of

large blocks and riprap, delay caused by such rejection, value of ten days' services of plaintiff during the delay, remission of expenses for additional fifteen days during yellow fever epidemic, remission of expenses while tug was grounded on a sand bar, value of contractor's time during 60 days' delay occasioned by refusal to permit crest blocks to be laid, $1,500, and average daily expense $162.70, and remission of inspection charges during the 60 days' delay.

After the case was argued here it was twice remanded (220 U. S. 491; 222 U. S. 144), and the Court of Claims made the following additional findings of fact:

"When denying permission to the claimant to lay the crest blocks, as stated in finding 7, the assistant engineer, who was an experienced officer of the Government in such work, and who was acting as inspector in immediate charge of the work, knew 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 assistant engineer, as inspector in immediate charge of the work, to allow crest blocks to be laid when he knew that parts of the core had settled and consolidated as aforesaid, was gross error and an act of bad faith on his part.

"3. There was no protest made to the engineer in charge, whose office was in Galveston, or to the Chief of Engineers, whose office was in Washington, respecting the refusal of said assistant engineer to permit the laying of crest blocks as aforesaid. The claimant made frequent complaints to said assistant engineer about the delays so caused by his refusal to permit the laying of crest blocks.

"Claimant visited the office of the engineer in charge at Galveston about once a month, and while there complained generally that said assistant engineer, as inspector in immediate charge of the work, was too strict with him in construing the specifications and contract. No appeal,

either written or otherwise, was taken or asked by the claimant to either the engineer in charge or to the Chief of Engineers, because of the said refusal to permit the laying of crest blocks."

Mr. William H. Robeson, Mr. Benjamin Carter and *Mr. F. Carter Pope* for appellant.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Philip M. Ashford* for the United States.

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

The plaintiff sued the United States in the Court of Claims for damages sustained by him while carrying out a contract to build a jetty in the harbor of Aransas Pass, Texas. There were nine items in his claim which aggregated $45,950. The court rendered judgment in his favor for $14,732.05. Both parties appealed—the contractor on the ground that he was awarded too little, and the United States on the ground that he was not entitled to recover anything whatever. The principal contention related to the right of the plaintiff to recover damages occasioned by the refusal of the inspector to permit blocks to be laid on the jetty as the work progressed. The contract provided that these blocks should be put in place when "in the judgment of the United States agent in charge" the core or mound had sufficiently consolidated. Until the agent determined that the core had settled, the contractor had no right to do this part of the work. No matter how long the delay or how great the damage, he was entitled to no relief unless it appeared that the refusal was the result of "fraud or of such gross mistake as would imply a fraud." *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549; *United States* v. *Mueller*, 113 U. S. 153.

But the very extent of the power and the conclusive character of his decision raised a corresponding duty that

the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties. The finding by the court that the inspector's refusal was a gross mistake and an act of bad faith necessarily, therefore, leads to the conclusion that the contractor was entitled to recover the damages caused thereby.

The defendant claims that the plaintiff lost his right to recover because he failed to appeal to the Engineer in Charge, at Galveston, or to the Chief of Engineers, in Washington. But there was no requirement or provision for appeal in the contract. The clause relied on by the Government relates to the duty of inspection and acceptance, making the decision of the Engineer in Charge conclusive as to the quality and quantity of work and material. That part of the agreement had no reference to the settlement of the core. Whether it had sufficiently consolidated involved the determination of a matter of fact, varying from day to day. The contractor had to act or refrain from acting when the decision was made. That matter was expressly left to "the judgment of the United States agent in charge." The contractor in submitting to his decision did not lose his right to recover damages occasioned by the refusal to permit the crest blocks to be laid, when, as found by the court, this refusal was gross error and an act of bad faith.

The court, therefore, declared in plaintiff's favor on this issue. He appeals, however, on the ground that the court only allowed him $11,908.90, being for expenses and loss of time for sixty days, insisting that he was entitled to recover $28,953 as damages directly caused by this delay.

This claim is based on the fact that there were 392 days between the beginning and the completion of the work. But on account of Sundays, holidays and storms, there were only 131 working days. Of these, 58 were after April 30, 1904—when, for the first time, the inspector permitted

the crest blocks to be laid. The contractor contends that as it only took him 58 days after May 1, when the permission was given, to complete the work, and, as the court finds, that he was delayed for 60 days before the permission was given, it is evident that he could have finished the work before May 1, and is therefore entitled to recover the value of his own time and all the expenses for inspection and labor which were incurred after that date.

The findings of fact do not require any such conclusion. Prior to May 1 the contractor worked 73 days out of 247. But it does not appear how many of these workings days there were between August 18, 1903, when he began construction, and December, 1903, when he first applied for permission to lay the crest blocks. Neither is it shown how many workings day there were between the date of the first refusal and the first permission to lay the blocks; nor on how many of such working days the contractor was able to do labor of another character on the jetty. In the absence of such data it is impossible to verify plaintiff's calculations. The burden was on the contractor. If the evidence would have sustained his present claim he was bound to have applied, in due season, for additional findings of fact by the court. Our decision must be predicated on what appears in the present record. Inasmuch as the court found that $162.70 was the average daily expense, and assessed plaintiff's damage at 60 times that amount, it is evident that it considered that the contractor had been delayed for 60 average days, and not for 60 working days. He is, therefore, entitled to judgment for $9,762 expenses, $646.92 inspection charges, and $1,500 found to have been the value of his own time for that period of sixty days.

The other findings in his favor for items aggregating $2,822 must be reversed, and the cross appeal of the Government sustained.

The greater part of this sum was for loss and delay arising from the inspector's rejection of 90 large blocks

as not complying with the specifications. The fact that the court gave judgment in Ripley's favor indicates that it was of opinion that the agent had made an improper decision. But so far as appears his only error was in construing the contract strictly, according to its terms, instead of adopting a method of mean or average measurement for which the contractor contended. The supplemental agreement was not retroactive so as to give the plaintiff a cause of action for the prior rejection, even though thereafter a different method of measurement was permitted.

The balance of the amount allowed the plaintiff was by way of returning the expenses of inspection which had been charged against him, during the suspension of the work while the tug was grounded on the bar and the contractor's force disorganized on account of the yellow fever epidemic. The contract provided that the expenses of inspection might in some cases be remitted but this could only be with the prior consent of the Chief of Engineers. There is no finding that such consent was given.

But the error in entering judgment in Ripley's favor as to any of these items, and the propriety of disallowing the others for which he sued arises from the fact that the officer's decision was binding. All these claims relate to matters which under the contract were submitted to the engineer. There is no finding that he acted in bad faith. Indeed, it is not even found that the decisions were erroneous, though that is implied. But the contract did not contemplate that the opinion of the court should be substituted for that of the engineer. In the absence of fraud, or gross mistake implying fraud, his decision on all these matters was conclusive.

On the findings of fact the plaintiff is entitled to recover $11,908.90, with interest as provided in Rev. Stat., § 1090. The judgment of the Court of Claims must be so modified and *Affirmed.*[1]

[1] See order on p. 750, *post.*

OPINIONS PER CURIAM, ETC., FROM OCTOBER 9, 1911, TO MARCH 31, 1912.

No. 497. QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* ORA T. SHOHONEY. In error to the Supreme Court of the State of Missouri. Motion to dismiss or affirm submitted May 29, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 116, 117; *Leathe* v. *Thomas*, 207 U. S. 93; *Giles* v. *Teasley*, 193 U. S. 146; *Eustis* v. *Bolles*, 150 U. S. 361. *Mr. John A. Eaton* for the plaintiff in error. *Mr. I. N. Watson* for the defendant in error.

No. 524. YEUNG HOW, SOMETIMES KNOWN AS YEUNG CHOW, APPELLANT, *v.* HART H. NORTH, UNITED STATES COMMISSIONER OF IMMIGRATION, ETC., ET AL. Appeal from the Circuit Court of the United States for the Northern District of California. Motion to dismiss or affirm submitted October 9, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 716; § 14 of act of May 6, 1882, 22 Stat. 61. *Mr. Carroll Cook*, *Mr. Arthur A. Birney* and *Mr. Henry F. Woodard* for the appellant. *The Attorney General*, *The Solicitor General*, and *Mr. Assistant Attorney General Harr* for the appellees.

No. 635. W. S. BRYAN, APPELLANT, *v.* BLISS-COOK OAK COMPANY ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion

to dismiss or affirm submitted October 9, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Louisville & Nashville R. R. Co.* v. *Mottley,* 211 U. S. 149; *Macfadden* v. *United States,* 213 U. S. 288. *Mr. Julian Laughlin* for the appellant. *Mr. John B. Jones* and *Mr. George B. Rose* for the appellees.

No. 636. W. S. Bryan, Appellant, *v.* Edwin S. Layman. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 9, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Louisville & Nashville R. R. Co.* v. *Mottley,* 211 U. S. 149; *Macfadden* v. *United States,* 213 U. S. 288. *Mr. Julian Laughlin* for the appellant. *Mr. U. M. Rose, Mr. G. B. Rose, Mr. W. E. Hemingway, Mr. E. H. Adams* and *Mr. J. F. Loughborough* for the appellee.

No. 637. W. S. Bryan, Appellant, *v.* William Bagnell. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 9, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Louisville & Nashville R. R. Co.* v. *Mottley,* 211 U. S. 149; *Macfadden* v. *United States,* 213 U. S. 288. *Mr. Julian Laughlin* for the appellant. *Mr. U. M. Rose, Mr. G. B. Rose, Mr. W. E. Hemingway* and *Mr. J. F. Loughborough* for the appellee.

No. 638. Marcus G. Rider, Appellant, *v.* Bliss-Cook Oak Company et al. Appeal from the United States

Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 9, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Louisville & Nashville R. R. Co.* v. *Mottley*, 211 U. S. 149; *Macfadden* v. *United States*, 213 U. S. 288. *Mr. Julian Laughlin* for the appellant. *Mr. John B. Jones* and *Mr. G. B. Rose* for the appellees.

No. 639. S. L. Moser, Appellant, *v.* Edwin S. Layman. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 9, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Louisville & Nashville R. R. Co.* v. *Mottley*, 211 U. S. 149; *Macfadden* v. *United States*, 213 U. S. 288. *Mr. Julian Laughlin* for the appellant. *Mr. U. M. Rose, Mr. G. B. Rose, Mr. W. E. Hemingway, Mr. E. H. Adams* and *Mr. J. F. Loughborough* for the appellee.

No. 713. Elizabeth Cassidy et al., Plaintiffs in Error, *v.* The People of the State of Colorado, on the Relation of the Attorney General of Colorado. In error to the Supreme Court of the State of Colorado. Motion to dismiss or affirm submitted October 9, 1911. Decided October 13, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Elder* v. *Colorado*, 204 U. S. 85. *Mr. Henry J. Hersey* for the plaintiffs in error. *Mr. George Q. Richmond, Mr. Benjamin Griffith, Mr. Henry A. Lindsley* and *Mr. Frederic D. McKenney* for the defendant in error.

No. 299. J. A. SCRIVEN COMPANY, APPELLANT, *v.* RICE-STIX DRY GOODS COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted October 18, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; § 6 of act of March 3, 1891, chap. 517, 26 Stat. 828. And see *Hutchinson, Pierce & Co.* v. *Loewy*, 217 U. S. 457. *Mr. Arthur v. Briesen* and *Mr. Hans v. Briesen* for the appellant. *Mr. F. W. Lehmann* and *Mr. S. L. Swarts* for the appellee.

No. 413. MIKE BEECHAM, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. Submitted October 19, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197; *Rassmussen* v. *United States*, 197 U. S. 520; *Dorr* v. *United States*, 195 U. S. 138; *Trono* v. *United States*, 199 U. S. 521; *Grafton* v. *United States*, 206 U. S. 333. *Mr William J. Rohde* for the plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the defendant in error.

No. 414. MIKE BEECHAM, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. Submitted October 19, 1911. Decided October 23, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*,

190 U. S. 197; *Rassmussen* v. *United States*, 197 U. S. 520; *Dorr* v. *United States*, 195 U. S. 138; *Trono* v. *United States*, 199 U. S. 521; *Grafton* v. *United States*, 206 U. S. 333. *Mr. William J. Rohde* for the plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the defendant in error.

No. 361. Robert Gilland, Plaintiff in Error, *v.* The United States. In error to the Circuit Court of the United States for the District of South Dakota. Argued October 12, 1911. Decided October 24, 1911. *Per Curiam.* Judgment reversed, upon confession of error by counsel for the defendant in error, and cause remanded for further proceedings in conformity to law. *Mr. Louis W. Crofoot* for the plaintiff in error. *The Attorney General* and *The Solicitor General* for the defendant in error.

No. —. Original. *Ex parte:* In the Matter of J. Wesley Glasgow, Petitioner. Motion for leave to file a petition for a writ of *habeas corpus*. Submitted October 23, 1911. Decided October 30, 1911. *Per Curiam.* Denied. *Ex parte Mirzan*, 119 U. S. 584; *Riggins* v. *United States*, 199 U. S. 547; *In re Lincoln*, 202 U. S. 178. *Mr. John C. Fay* for the petitioner.

No. 14. Joseph R. Moore et al., Plaintiffs in Error, *v.* The State of New Jersey. In error to the Court of Errors and Appeals of the State of New Jersey. Argued for the plaintiff in error and submitted for the

defendant in error October 26, 1911. Decided October 30, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *David Kaufman & Sons Company* v. *Smith*, 216 U. S. 610; *Simon* v. *Craft*, 182 U. S. 427; *Twining* v. *New Jersey*, 211 U. S. 111; *Felts* v. *Murphy*, 201 U. S. 123. *Mr. Thomas P. Fay* for the plaintiffs in error. *Mr. Edmund Wilson* for the defendant in error.

No. 571. DAVID A. COLLIER ET AL., PLAINTIFFS IN ERROR, *v.* J. G. SMALTZ AND IOWA RAILROAD LAND COMPANY. In error to the Supreme Court of the State of Iowa. Motions to dismiss or affirm submitted October 23, 1911. Decided October 30, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285, 288, and cases cited; *Turner* v. *New York*, 168 U. S. 90; *Terry* v. *Anderson*, 95 U. S. 628. *Mr. F. T. Hughes* for the plaintiffs in error. *Mr. T. M. Zink* for J. G. Smaltz, and *Mr. Charles A. Clark* for the Iowa Railroad Land Company.

No. 12. THE MERCANTILE TRUST COMPANY ET AL., APPELLANTS, *v.* THE TEXAS & PACIFIC RAILWAY CO. ET AL. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Submitted October 23, 1911. Decided October 30, 1911. *Per Curiam.* Decree affirmed with costs. *Herndon* v. *Chicago, Rock Island & Pacific Railway*, 218 U. S. 135, 158, and cases cited. *Mr. Murphy J. Foster* and *Mr. William W. Green* for the appellants. *Mr. John F. Dillon, Mr. Chas. E. Fenner, Mr. W. B. Spencer* and *Mr. Chas. Payne Fenner* for the appellees. *Mr. Walter Guion* filed a brief as *amicus curiæ.*

No. 23. ROGER SHERMAN, SUCCESSOR IN TRUST, AND D. H. PINNEY, PLAINTIFFS IN ERROR, *v.* LIBBIE GOODWIN. In error to the Supreme Court of the Territory of Arizona. Submitted October 26, 1911. Decided November 6, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Idaho & O. Land Improvement Co.* v. *Bradbury*, 132 U. S. 509, 513; *Garzot* v. *Rios de Rubio*, 209 U. S. 284. *Mr. Walter Bennett* and *Mr. D. H. Pinney* for the plaintiffs in error. *Mr. J. F. Wilson* for the defendant in error.

No. 762. W. H. TOLLIVER ET UX., APPELLANTS, *v.* THE GREAT NORTHERN RAILWAY COMPANY. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss submitted October 30, 1911. Decided November 6, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Weir* v. *Rountree*, 216 U. S. 607, and cases cited. *Mr. Miles Poindexter* and *Mr. O. C. Moore* for the appellants. *Mr. E. C. Lindley* for the appellee.

No. 555. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* C. W. BRADBURY. In error to the Supreme Court of the State of Iowa. Motions to dismiss or affirm and for damages submitted November 6, 1911. Decided November 13, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308; *Farrell* v. *O'Brien*, 199 U. S. 100; *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1; and 220 U. S. 590. *Mr. Carroll Wright* for the plaintiff in error. *Mr. Horatio F. Dale* and *Mr. John G. Myerly* for the defendant in error.

No. 57. CONRAD T. STRUCKMANN AND ERNST C. H. W. WAEGE, APPELLANTS, *v.* THE UNITED STATES. Appeal from the Court of Claims. Argued November 13, 1911. Decided December 4, 1911. *Per Curiam.* Judgment affirmed. *United States* v. *Heinszen*, 206 U. S. 370. *Mr. Edward S. Hatch*, *Mr. Vincent P. Donihee* and *Mr. Walter F. Welch* for the appellants. *The Attorney General* and *The Solicitor General* for the appellee.

No. 148. WILLIAM BAIRD, PLAINTIFF IN ERROR, *v.* ALLEN P. HOWISON ET AL. In error to the Supreme Court of the State of Alabama. Motion to dismiss submitted December 4, 1911. Decided December 11, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Dewey* v. *Des Moines*, 173 U. S. 193, 198, and cases cited; *Haire* v. *Rice*, 204 U. S. 291, 301; *Thomas* v. *Iowa*, 209 U. S. 258; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 118; *Goodrich* v. *Ferris*, 214 U. S. 71, 79. *Mr. Alexander M. Garber* for the plaintiff in error. *Mr. John P. Tillman* for the defendant in error.

No. 306. C. L. VAN SICE, APPELLANT, *v.* THE IBEX MINING COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted December 11, 1911. Decided December 18, 1911. *Per Curiam.* Dismissed for the want of jurisdiction. *Bagley* v. *General Fire Extinguisher Company*, 212 U. S. 477; *Macfadden* v. *United States*, 213 U. S. 288, 293; *Pope* v. *Louisville, New Albany &c. Railway Company*, 173 U. S. 573, 577, and cases cited. *Mr. Edwin H. Park* for the appellant. *Mr. Charles Cavender* and *Mr. Gerald Hughes* for the appellee.

No. 106. WILSON-MOLINE BUGGY COMPANY, PLAINTIFF IN ERROR, *v.* C. B. E. HAWKINS. In error to the Supreme Court of the State of Kansas. Submitted for the plaintiff in error December 11, 1911. Decided December 18, 1911. *Per Curiam.* Judgment reversed. *International Textbook Company* v. *Pigg*, 217 U. S. 91. *Mr. Almon W. Bulkley* and *Mr. C. E. More* for the plaintiff in error. No appearance for the defendant in error.

No. 114. THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF INDIANA. In error to the Supreme Court of the State of Indiana. Argued and submitted December 15, 1911. Decided December 18, 1911. *Per Curiam.* Judgment affirmed with costs. *Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453. *Mr. Samuel O. Pickens* and *Mr. Lawrence Maxwell* for the plaintiff in error. *Mr. James Bingham, Mr. Martin M. Hugg* and *Mr. Thomas M. Honan* for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF LOUIS CELLA ET AL., PETITIONERS. Motion for leave to file submitted December 18, 1911. Decided January 9, 1912. Motion for leave to file petition for writ of prohibition denied. *Mr. Howard Taylor, Mr. A. S. Worthington* and *Mr. Charles L. Frailey* for the petitioners. *The Attorney General, The Solicitor General, Mr. Clarence R. Wilson* and *Mr. Henry S. Robbins* opposing.

No. 574. THE BORNN HAT COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Circuit

Court of the United States for the Southern District of New York. Motion to affirm submitted January 9, 1912. Decided January 15, 1912. *Per Curiam.* Judgment affirmed on the authority of *Wilson* v. *United States*, 221 U. S. 361; *Dreier* v. *United States*, 221 U. S. 394; *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, 302; *Hale* v. *Henkel*, 201 U. S. 43, and cause remanded to the District Court of the United States for the Southern District of New York. *Mr. Abram I. Elkus* for the plaintiff in error. *The Attorney General* and *The Solicitor General* for the defendant in error.

No. 803. WILLIAM ANDERSON AND ROBERT BARRY, PARTNERS, ETC., PLAINTIFFS IN ERROR, v. THE INHABITANTS OF THE CITY OF BORDENTOWN, N. J. In error to the Court of Errors and Appeals of the State of New Jersey. Motion to dismiss submitted January 9, 1912. Decided January 15, 1912. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *St. Paul &c. R. R. Co.* v. *County of Todd*, 142 U. S. 282; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 350, and cases cited; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Los Angeles Farming & Milling Co.* v. *Los Angeles*, 217 U. S. 217, 226. *Mr. E. A. Armstrong* for the plaintiffs in error. *Mr. Frederic D. McKenney, Mr. J. Spalding Flannery* and *Mr. William Hitz* for the defendant in error.

No. 65. EUGENE M. THAYER, PLAINTIFF IN ERROR, *v.* ELIZA M. SCHABEN ET AL. In error to the Supreme Court of the State of Kansas. Argued for the plaintiff in error January 19, 1912. Decided January 22, 1912. *Per*

Curiam. Writ of error dismissed for want of jurisdiction. *California National Bank* v. *Thomas*, 171 U. S. 441; *Appleby* v. *Buffalo*, 221 U. S. 524, 529. *Mr. Charles H. Pegler*, *Mr. Arthur J. Eddy* and *Mr. Emil C. Wetten* for the plaintiff in error. *Mr. Fred S. Jackson* for the defendants in error.

No. 554. HORACE CHASE, INDIVIDUALLY AND AS ADMINISTRATOR, ETC., PLAINTIFF IN ERROR, *v.* LEONARD H. PHILLIPS AND SAMUEL C. LAWRENCE, TRUSTEES. In error to the Supreme Judicial Court of the State of Massachusetts. Motion to dismiss or affirm submitted January 22, 1912. Decided February 19, 1912. *Per Curiam.* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *San Francisco* v. *Itsell*, 133 U. S. 65; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 235–236; *Chase* v. *Phillips*, 216 U. S. 616. *Mr. Richard Y. FitzGerald* for the plaintiff in error. *Mr. J. L. Thorndike* and *Mr. E. R. Thayer* for the defendants in error.

No. —. Original. *Ex parte:* IN THE MATTER OF MATTHIAS RADIN, PETITIONER. Submitted March 4, 1912. Decided March 11, 1912. Motion for leave to file a petition for a writ of *habeas corpus* denied. *Mr. Harry Levor* for the petitioner.

No. 198. WALTER E. MEYERS, TRUSTEE, ETC., PLAINTIFF IN ERROR, *v.* A. SAMUELS ET AL. In error to the Supreme Court of the State of Ohio. Argued March 8, 1912. Decided March 11, 1912. *Per Curiam.* Dismissed for want of jurisdiction. *The Missouri & Kansas Inter-*

urban Railway Company v. *The City of Olathe, Kansas*, 222 U. S. 185, 187, and cases cited. *Mr. John G. White*, *Mr. Amos Burt Thompson* and *Mr. W. B. Sanders* for the plaintiff in error. *Mr. Francis J. Wing* and *Mr. Nathan Loeser* for the defendants in error.

No. 185. BENJAMIN F. ROSELLE, PLAINTIFF IN ERROR, *v.* THE COMMONWEALTH OF VIRGINIA. In error to the Supreme Court of Appeals of the State of Virginia. Argued March 4, 1912. Decided March 18, 1912. Judgment affirmed with costs by a divided court. *Mr. Daniel Harmon*, *Mr. Homan W. Walsh* and *Mr. John T. Evans* for the plaintiff in error. *Mr. Samuel W. Williams* for the defendant in error.

No. 972. WARREN OZRO KYLE ET AL., ETC., APPELLANTS, *v.* JOHN C. HAMMOND ET AL. Appeal from the United States Circuit Court of Appeals for the First Circuit. Motion to dismiss or affirm submitted March 11, 1912. Decided March 18, 1912. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Warren Ozro Kyle* for the appellants. *Mr. Hollis R. Bailey* for the appellees.

Decisions on Petitions for Writs of Certiorari from October 9, 1911, to March 31, 1912.

No. 619. THE ÆTNA LIFE INSURANCE COMPANY, PETITIONER, *v.* JOHN T. MOORE, ADMINISTRATOR, ETC. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. George S. Jones* and *Mr. Malcolm D. Jones*

for the petitioner. *Mr. Minter Wimberly*, *Mr. Jesse C. Harris* and *Mr. Alexander Akerman* for the respondent.

No. 633. THE RUBBER TIRE WHEEL COMPANY ET AL., PETITIONERS, *v.* THE GOODYEAR TIRE & RUBBER COMPANY. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Lawrence Maxwell*, *Mr. Charles W. Stapleton*, *Mr. Frederick P. Fish*, *Mr. Paul A. Staley* and *Mr. Border Bowman*, for the petitioners. *Mr. H. A. Toulmin* for the respondent

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No. 670. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER, *v.* JOHN T. MOORE, ADMINISTRATOR, ETC. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Edward D. Duffield* for the petitioner. *Mr. Minter Wimberly*, *Mr. Jesse C. Harris* and *Mr. Alexander Akerman* for the respondent.

No. 802. THE GEORGE N. PIERCE COMPANY, PETITIONER, *v.* WELLS, FARGO & COMPANY. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. George E. Hamilton*, *Mr. John W. Yerkes* and *Mr. John J. Hamilton* for the petitioner. *Mr. Charles W. Pierson* and *Mr. William W. Green* for the respondent.

No. 603. HAW MOY, PETITIONER, *v.* HART H. NORTH, COMMISSIONER OF IMMIGRATION, ETC. October 23, 1911. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Ninth Circuit denied. *Mr. Corry M. Stadden* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 604. Hoo Choy, Petitioner, *v.* Hart H. North, Commissioner of Immigration, etc. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Corry M. Stadden* for the petitioner. *The Attorney General* for the respondent.

No. 605. Charles D. Henderson, Petitioner, *v.* Pennsylvania Railroad Company. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. James F. Campbell* for the petitioner. *Mr. Frederic D. McKenney, Mr. John Spalding Flannery* and *Mr. William Hitz* for the respondent.

No. 610. Jesse Watson, as Trustee, etc., Petitioner, *v.* European American Bank. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Clayton J. Heermance* for the petitioner. *Mr. Philip Ashton Rollins* and *Mr. Alfred Adams Wheat* for the respondent.

No. 620. Johnson Educator Food Company, Petitioner, *v.* Sylvanus Smith & Company (Incorporated).

October 23, 1911. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. William A. Macleod* and *Mr. Henry Calver* for the petitioner. No appearance for the respondent.

No. 621. FRANK C. MARRIN, PETITIONER, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Jackson H. Ralston, Mr. F. L. Siddons* and *Mr. William E. Richardson* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 622. JOHN I. MCDUFFEE, TRUSTEE, ET AL., PETITIONERS, *v.* HESTONVILLE, MANTUA & FAIRMONT PASSENGER RAILWAY COMPANY ET AL. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Thomas F. Sheridan, Mr. Clifton B. Edwards* and *Mr. Joseph C. Fraley* for the petitioners. *Mr. Charles Neave* and *Mr. Frederick P. Fish* for the respondents.

No. 629. EDWARD ENDERS, PETITIONER, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank R. Reid* and *Mr. John T. Evans* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 630. HENRY HINN, PETITIONER, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank R. Reid* and *Mr. John T. Evans* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 634. JAMES N. ALSOP, PETITIONER, *v.* JOHN CONWAY ET AL. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George W. Jolly* for the petitioner. *Mr. William T. Ellis* for the respondents.

No. 643. CHARLES E. HAMILTON, AS RECEIVER, ETC., PETITIONER, *v.* FERDINAND L. LOEB. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederick L. Siddons* for the petitioner. *Mr. John G. Johnson* and *Mr. Abraham Israel* for the respondent.

No. 663. THE TITLE GUARANTY & SECURITY COMPANY, PETITIONER, *v.* THE UNITED STATES, TO USE OF GENERAL ELECTRIC COMPANY. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. James Russell Soley* and *Mr. Russell H. Robbins* for the petitioner. *Mr. H. B. Gill* for the respondent.

No. 706. THE PEOPLE OF THE STATE OF NEW YORK, PETITIONERS, *v.* THE CENTRAL TRUST COMPANY OF NEW YORK ET AL. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William A. McQuaid* for the petitioner. *Mr. William D. Guthrie* and *Mr. John M. Bowers* for the respondents.

No. 709. EDWARD RIMMERMAN ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Nathan A. Gibson* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 717. PRESSED STEEL CAR COMPANY, PETITIONER, *v.* SIMPLEX RAILWAY APPLIANCE COMPANY. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Alfred W. Kiddle* and *Mr. Clarence P. Burns* for the petitioner. *Mr. Chas. C. Linthicum* and *Mr. J. Edgar Bull* for the respondent.

No. 752. WILLIAM J. HAGADORN ET AL., PETITIONERS, *v.* STREET GRADING DISTRICT NO. 60 OF LITTLE ROCK, ARK. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. U. M. Rose*, *Mr. W. E. Hemingway*, *Mr. G. B. Rose* and *Mr. J. F. Loughborough* for the petitioners. No appearance for the respondent.

No. 781. JACOB YUNGBLUTH, PETITIONER, *v.* JOHN H. SLIPPER ET AL. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. E. C. Million* for the petitioner. *Mr. Alfred L. Black* for the respondents.

No. 789. CITY OF NEW YORK, PETITIONER, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Terence Farley* and *Mr. William J. O'Sullivan* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 790. F. A. GARRAMONE ET AL., PETITIONERS, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Court of Customs Appeals denied. *Mr. James L. Gerry* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 792. HENRY HEIDE, PETITIONER, *v.* PANAYIOTIS PANOULIAS. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George Whitefield Betts, Jr.*, for the petitioner. *Mr. Ferdinand E. M. Bullowa* for the respondent.

No. 793. THE PENNSYLVANIA STEEL COMPANY, PETITIONER, *v.* HENRY M. SUSSWEIN. October 23, 1911. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Second Circuit denied. *Mr. H. Snowden Marshall* for the petitioner. *Mr. Roger Lewis* and *Mr. Bronson Winthrop* for the respondent.

No. 804. MARTHA BRION, PETITIONER, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Elijah N. Zoline* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 805. RAYMONDE CHOMEL, PETITIONER, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Elijah N. Zoline* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 808. OCEANIC STEAM NAVIGATION COMPANY, PETITIONER, *v.* EDITH WATKINS. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Chas. C. Burlingham* for the petitioner. No appearance for the respondent.

No. 810. JOHN M. STONE COTTON MILLS, PETITIONER, *v.* F. T. FLEITMANN ET AL., ETC. October 23, 1911. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Fifth Circuit denied. *Mr. Charlton H. Alexander* and *Mr. William W. Magruder* for the petitioner. *Mr. Marcellus Green* and *Mr. Arthur C. Rounds* for the respondents.

No. 811. THE RUBBER TIRE WHEEL COMPANY ET AL., PETITIONERS, *v.* THE GOODYEAR TIRE & RUBBER COMPANY ET AL. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lawrence Maxwell, Mr. Frederick P. Fish, Mr. Paul A. Staley, Mr. Border Bowman,* and *Mr. Chas. W. Stapleton* for the petitioners. *Mr. H. A. Toulmin* for the respondents.

No. 824. THE ATLANTIC TRANSPORT COMPANY, PETITIONER, *v.* THE UNITED STATES. October 23, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Montgomery* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 831. WASHINGTON, ALEXANDRIA & MOUNT VERNON RAILWAY COMPANY, PETITIONER, *v.* REAL ESTATE TRUST COMPANY OF PHILADELPHIA. October 30, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. R. Walton Moore, Mr. John S. Barbour, Mr. George W. Pepper* and *Mr. W. B. Bodine, Jr.*, for the petitioner. *Mr. Joseph de F. Junkin* and *Mr. John G. Johnson* for the respondent.

No. 834. ELKINS ELECTRIC RAILWAY COMPANY, PETITIONER, *v.* WESTERN MARYLAND RAILWAY COMPANY. October 30, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Fred Beall* and *Mr. W. B. Maxwell* for the petitioner. *Mr. George R. Gaither* and *Mr. Leon E. Greenbaum* for the respondent.

No. 812. WARNER-JENKINSON COMPANY, PETITIONER, *v.* THE UNITED STATES. November 6, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles Ray Dean* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Denison* for the respondent.

No. 842. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, OWNER, ETC., PETITIONER, *v.* PHILADELPHIA & READING RAILWAY COMPANY, CHARTERER, ETC. November 6, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. James J. Macklin* and *Mr. de Lagnel Berier* for the petitioner. *Mr. James F. Campbell* for the respondent.

No. 827. CHARLES L. SMITH, OWNER, ETC., PETITIONER, *v.* CORNELIUS A. DAVIS, CLAIMANT, ETC.; and No. 828. CHARLES L. SMITH ET AL., PETITIONERS, *v.* CORNELIUS A. DAVIS ET AL. November 13, 1911. Petition for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Edward E. Blodgett* and *Mr. F. M. Brown* for the petitioners. *Mr. Edward S. Dodge* for the respondents.

No. 839. ALLESANDRO BOLOGNESI ET AL., PETITIONERS, *v.* THE UNITED STATES. November 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. A. S. Gilbert* for the petitioners. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 840. WALTER BAKER & COMPANY, LIMITED, PETITIONER, *v.* NESTLE & ANGLO-SWISS CONDENSED MILK COMPANY. November 20, 1911. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George Putnam*, *Mr. Jas. L. Putnam*, and *Mr. Horace A. Dodge* for the petitioner. *Mr. James Hamilton* for the respondent.

No. 843. S. C. LILLIS, PETITIONER, *v.* THE UNITED STATES. November 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Chas. H. Bates* and *Mr. P. F. Dunne* for the petitioner. *The Attorney General*, *The Solicitor General* and *Mr. B. D. Townsend* for the respondent.

No. 845. COLTS PATENT FIRE ARMS MANUFACTURING COMPANY ET AL., PETITIONERS, *v.* NEW YORK SPORTING GOODS COMPANY. November 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. W. K. Richardson* for the petitioners. *Mr. Edmund Wetmore* and *Mr. Hervey S. Knight* for the respondent.

No. 848. THE PEROLIN COMPANY OF AMERICA, PETI-

TIONER, *v.* COTTO-WAXO CHEMICAL COMPANY. November 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hugh K. Wagner* and *Mr. John W. Hill* for the petitioner. *Mr. Paul Bakewell* for the respondent.

No. 861. AMERICAN TRUST COMPANY, TRUSTEE, PETITIONER, *v.* METROPOLITAN STEAMSHIP COMPANY ET AL. December 4, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. J. Markham Marshall* for the petitioner. *Mr. Clarence A. Hight* and *Mr. William Hall Best* for the respondents.

No. 862. EXCELSIOR SUPPLY COMPANY ET AL., PETITIONERS, *v.* WEED CHAIN TIRE GRIP COMPANY ET AL. December 4, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas F. Sheridan* for the petitioners. *Mr. Edward Rector* and *Mr. Frederick S. Duncan* for the respondents.

No. 873. THE SECOND POOL COAL COMPANY, PETITIONER, *v.* THE PEOPLE'S COAL COMPANY. December 11, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrie C. Barton* for the petitioner. *Mr. George E. Shaw* for the respondent.

No. 850. CITY BANK & TRUST COMPANY, TRUSTEE,

PETITIONER, *v.* F. W. WILLIAMS ET AL. December 18, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Watson B. Robinson* for the petitioner. *Mr. G. Q. Hall* for the respondents.

No. 886. JACOB MAKI, AS ADMINISTRATOR, ETC., PETITIONER, *v.* THE UNION PACIFIC COAL COMPANY. December 18, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wayne C. Williams* for the petitioner. *Mr. Maxwell Evarts, Mr. N. H. Loomis* and *Mr. C. C. Dorsey* for the respondent.

No. 756. THOMAS E. IRETON ET AL., PETITIONERS, *v.* PENNSYLVANIA COMPANY. January 9, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Orville S. Brumback* for the petitioner. No appearance for the respondent.

Nos. 891 and 892. LOUIS CELLA ET AL., PETITIONERS, *v.* THE UNITED STATES. January 9, 1912. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Howard Taylor, Mr. A. S. Worthington* and *Mr. Charles L. Frailey* for the petitioners. *The Attorney General, The Solicitor General, Mr. Clarence R. Wilson* and *Mr. Henry S. Robbins* for the respondent.

No. 901. FRIED. KRUPP AKTIEN GESELLSCHAFT, PETI-

TIONER, *v.* MIDVALE STEEL COMPANY. January 15, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. James R. Sheffield* for the petitioner. *Mr. A. H. Wintersteen* for the respondent.

No. 917. DIETRICH E. LOEWE ET AL., PETITIONERS, *v.* MARTIN LAWLOR ET AL. January 15, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Daniel Davenport* and *Mr. Walter Gordon Merritt* for the petitioners. *Mr. Alton B. Parker, Mr. John K. Beach* and *Mr. F. L. Mulholland* for the respondents.

No. 919. JACOB MEURER, PETITIONER, *v.* GEORGE STURGISS ET AL. January 15, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William Mason Smith* for the petitioner. *Mr. B. M. Ambler* for the respondent.

No. 932. OLCOTT C. COLT, PETITIONER, *v.* THE UNITED STATES. January 22, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward S. Duvall, Jr.*, for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 931. ALBERT B. CAMERON, PETITIONER, *v.* THE

UNITED STATES. January 29, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Howard S. Gans* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondents.

No. 938. THE MCCRUM-HOWELL COMPANY, PETITIONER, *v.* POPE AUTOMATIC MERCHANDISING COMPANY ET AL. January 29, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Hillary C. Messimer* for the petitioner. No appearance for the respondent.

No. 936. CHARLES R. HEIKE, PETITIONER, *v.* THE UNITED STATES. February 19, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. John B. Stanchfield* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 937. ERNEST W. GERBRACHT, PETITIONER, *v.* THE UNITED STATES. February 19, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George M. Mackellar* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 942. GOULD STORAGE BATTERY COMPANY, PETI-

TIONER, *v.* ELECTRIC STORAGE BATTERY COMPANY. February 19, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William Houston Kenyon* for the petitioner. *Mr. Augustus B. Stoughton* and *Mr. George S. Graham* for the respondent.

No. 945. HYMAN EPSTEIN, PETITIONER, *v.* THE UNITED STATES. February 19, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Benjamin C. Bachrach* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 948. FRANK N. THOMAS, PETITIONER, *v.* CONRAD H. MATTHIESSEN. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Alfred A. Wheat* and *Mr. Philip A. Rawlins* for the petitioner. *Mr. Arthur C. Rounds* for the respondent.

No. 867. BEN BLANCHARD ET AL., PETITIONERS, *v.* G. W. AMMONS ET AL. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Elias S. Clark* for the petitioners. *Mr. John W. Griggs* and *Mr. Martin Conboy* for the respondents.

No. 951. CHARLES BECKER, PETITIONER, *v.* D. T.

HUMPHREY ET AL. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John A. Schultz* for the petitioner. No appearance for the respondents.

No. 961. ALPHONSE DUFAUR AND EVA DUFAUR, PETITIONERS, *v.* THE UNITED STATES. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. B. Browne, Mr. Burton Hanson* and *Mr. Otis H. Waldo* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 963. WALTER BAKER & COMPANY, LIMITED, PETITIONER, *v.* SIDNEY C. GRAY ET AL. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank F. Reed* for the petitioner. *Mr. Dorr Raymond Cobb* for the respondents.

No. 975. THE MODEL BOTTLING MACHINERY COMPANY, PETITIONER, *v.* ANHEUSER-BUSCH BREWING ASSOCIATION. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hugh K. Wagner* for the petitioner. *Mr. Charles C. Linthicum* for the respondent.

No. 980. WILLIAM A. PIERCE, PETITIONER, *v.* THE UNITED STATES OF AMERICA. February 26, 1912. Peti-

tion for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. A. S. Worthington* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 981. WILLIAM ADLER, PETITIONER, *v.* THE UNITED STATES. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. D. Saunders, Mr. Charles Rosen, Mr. J. D. Rouse, Mr. William Grant* and *Mr. Gustave Lemle* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 985. MITCHELL COAL & COKE COMPANY, PETITIONER, *v.* PENNSYLVANIA RAILROAD COMPANY. February 26, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. George S. Graham* for the petitioner. No appearance for the respondent.

No. 969. THADDEUS DAVIDS COMPANY, PETITIONER, *v.* CORTLANDT I. DAVIDS ET AL., ETC. March 4, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. W. P. Preble* for the petitioner. No appearance for the respondents.

No. 772. FRED J. BLISS, PETITIONER, *v.* THE WASHOE COPPER COMPANY ET AL. March 4, 1912. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Robert E. Clinton*, *Mr. Caleb M. Sawyer* and *Mr. Hannis Taylor* for the petitioner. *Mr. John Garber*, *Mr. James M. Beck* and *Mr. L. O. Evans* for the respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 9, 1911, TO MARCH 31, 1912.

No. 819. THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *v.* AMERICAN DRUGGIST SYNDICATE. In error to the Circuit Court of the United States for the Eastern District of New York. October 9, 1911. Docketed and dismissed on motion of *Mr. Charles J. Murphy* for the defendant in error. No one opposing.

No. 94. THE ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the United States Circuit Court of Appeals for the Sixth Circuit. October 9, 1911. Dismissed, on motion of *Mr. Edmund F. Trabue* for the plaintiff in error. *Mr. Edmund F. Trabue*, *Mr. John C. Doolan* and *Mr. Attilla Cox, Jr.*, for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 16. CUDAHY PACKING COMPANY, PLAINTIFF IN ERROR, *v.* C. E. DENTON, AS SECRETARY OF STATE OF THE STATE OF KANSAS. In error to the Supreme Court of the State of Kansas. October 9, 1911. Dismissed per

stipulation of counsel. *Mr. Alexander New* and *Mr. Edwin A. Krauthoff* for the plaintiff in error. *Mr. Fred S. Jackson* for the defendant in error.

No. 55. GRANTS PASS LAND & WATER COMPANY, APPELLANT, *v.* THE CITY OF LOS ANGELES. Appeal from the Circuit Court of the United States for the Southern District of California. October 9, 1911. Dismissed per stipulation of counsel. *Mr. Oscar A. Trippet* for the appellant. *Mr. Leslie R. Hewitt* for the appellee.

No. 143. WILLIAM A. GUNTER, JR., PLAINTIFF IN ERROR, *v.* EVANS HINSON ET AL. In error to the Supreme Court of the State of Alabama. October 9, 1911. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. W. A. Gunter* for the plaintiff in error. No appearance for the defendants in error.

No. 270. HERBERT S. HADLEY ET AL., PETITIONERS, *v.* ARTHUR C. HUIDEKOPER. On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. October 9, 1911. Dismissed per stipulation of counsel. *Mr. Elliott W. Major* and *Mr. John M. Atkinson* for the petitioners. *Mr. John L. Thomas* and *Mr. Reginald S. Huidekoper* for the respondent.

No. 302. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* SUSAN M. MORGAN

ET AL., AS SURVIVING TRUSTEES, ETC. In error to the Supreme Court of the State of New York. October 9, 1911. Dismissed per stipulation of counsel. *Mr. Charles L. Frailey* for the plaintiff in error. *Mr. Norris Morey* for the defendants in error.

No. 358. JESSE L. CARLTON ET AL., PLAINTIFFS IN ERROR, *v.* FRANK W. RUSHING, JUDGE, ETC., ET AL. In error to the Supreme Court of the State of Oklahoma. October 9, 1911. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Amos L. Beaty* and *Mr. William H. H. Clayton* for the plaintiffs in error. *Mr. William A. Collier* for the defendants in error.

No. 365. WILLIAM LEWIN ET AL., AS THE LEWIN SCRAP IRON COMPANY, PLAINTIFFS IN ERROR, *v.* KATE CASPAR, ADMINISTRATRIX, ETC. In error to the Supreme Court of the State of Kansas. October 9, 1911. Dismissed per stipulation of counsel. *Mr. Jules C. Rosenberger* for the plaintiffs in error. *Mr. Henry L. Allen* for the defendant in error.

No. 522. C. A. TILLES, APPELLANT, *v.* E. F. REGENHARDT, UNITED STATES MARSHAL, ETC., ET AL. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. October 9, 1911. Dismissed with costs, on motion of counsel for the appellant. *Mr. Henry S. Priest* for the appellant. *The Attorney General* for the appellees.

No. 330. THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *v.* ST. LOUIS NATIONAL STOCK YARDS. In error to the United States Circuit Court of Appeals for the Seventh Circuit. October 18, 1911. Judgment affirmed per stipulation, on motion of *Mr. Solicitor General Lehmann* for the plaintiff in error. *The Attorney General* for the plaintiff in error. *Mr. Luther M. Walter* for the defendant in error.

No. 200. RUSSELL B. HERRIMAN, APPELLANT, *v.* C. T. ELLIOT, UNITED STATES MARSHAL, ETC. Appeal from the Circuit Court of the United States for the Northern District of California. October 19, 1911. Death of appellant suggested by *Mr. Henry F. Woodard*, counsel for appellant, and case abated. *Mr. A. A. Birney* and *Mr. Henry F. Woodard*, for the appellant. *The Attorney General* for the appellee.

No. 458. WARNER VALLEY STOCK COMPANY, PLAINTIFF IN ERROR, *v.* J. L. MORROW AND W. H. COOPER. In error to the Supreme Court of the State of Oregon. November 1, 1911. Dismissed without costs to either party, per stipulation, on motion of *Mr. A. M. Crawford* for the defendants in error. *Mr. James B. Kerr* for the plaintiff in error. *Mr. A. M. Crawford* for the defendants in error.

No. 35. BLAS AUSINA PI, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. November 1, 1911. Dismissed pursuant to the tenth rule. *Mr. A. B. Browne*, *Mr. Alex. Britton*, and *Mr. W. A. Kincaid* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 301. J. A. SCRIVEN COMPANY, APPELLANT, *v.* FERGUSON-McKINNEY DRY GOODS COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. November 6, 1911. Dismissed for the want of jurisdiction, per stipulation to abide decision in case No. 299, on motion of *Mr. George W. Winstead* for the appellee. *Mr. Arthur v. Briesen* for the appellant. *Mr. George W. Winstead* for the appellee.

No. 369. WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF MINNESOTA. In error to the Supreme Court of the State of Minnesota. November 7, 1911. Dismissed, per stipulation, clerk's costs to be paid by the plaintiff in error. *Mr. Rome G. Brown* and *Mr. Chas. S. Albert* for the plaintiff in error. *Mr. George T. Simpson* for the defendant in error.

No. 82. BANKS LAW PUBLISHING CO., APPELLANT, *v.* THE LAWYERS' COÖPERATIVE PUBLISHING COMPANY. Appeal from the United States Circuit Court of Appeals for the Second Circuit. November 9, 1911. Dismissed, per stipulation, each party to pay its own costs in this court. *Mr. William Hepburn Russell* for the appellant. *Mr. Frank F. Reed, Mr. Edmund S. Rogers* and *Mr. Frederick F. Church* for the appellee.

No. 59. JOHN C. HAMILTON, PLAINTIFF IN ERROR, *v.* JOHN A. ROEBLING'S SONS COMPANY ET AL. In error to the Supreme Court of the State of Ohio. November 9, 1911. Dismissed with costs pursuant to the tenth rule.

Mr. George Hoadly for the plaintiff in error. No appearance for the defendants in error.

No. 62. DORSET CARTER ET AL., APPELLANTS, *v.* J. GEORGE WRIGHT, COMMISSIONER, ETC. Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma. November 10, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. Wm. H. Robeson* for the appellants. No appearance for the appellee.

No. 58. AMERICAN RAILROAD COMPANY OF PORTO RICO, APPELLANT, *v.* CENTRAL SAN CHRISTOBAL. Appeal from the District Court of the United States for Porto Rico. November 13, 1911. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Henry P. Blair* for the appellee. *Mr. Francis H. Dexter* for the appellant. *Mr. Henry P. Blair* for the appellee.

No. 592. CATHERINE LEHMAN ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF INDIANA ON THE RELATION OF CHARLES W. MILLER, ATTORNEY GENERAL. In error to the Appellate Court of the State of Indiana. November 4, 1911. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Ferdinand Winter* for the plaintiffs in error. *Mr. Thomas M. Honan*, for the defendant in error.

No. 67. H. L. DENOON ET AL., PLAINTIFFS IN ERROR, *v.* THE TAX TITLE COMPANY OF RICHMOND. In error to the

Supreme Court of Appeals of the State of Virginia. November 14, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. S. S. P. Patteson* for the plaintiffs in error. No appearance for the defendant in error.

No. 78. THE UNITED STATES EX REL. LOUIS F. ALLARDT, APPELLANT, *v.* MATTHEW J. LONG, CRIMINAL SHERIFF, ETC. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. November 16, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. William Grant* for the appellant. *Mr. St. Clair Adams* and *Mr. Albert D. Henriquez, Jr.*, for the appellee.

No. 135. THE TERRITORY OF NEW MEXICO EX REL. ORA BUTLER MEECE, APPELLANT, *v.* IRA A. ABBOTT, ASSOCIATE JUSTICE, ETC. Appeal from the Supreme Court of the Territory of New Mexico. December 4, 1911. Dismissed with costs, on motion of counsel for the appellant. *Mr. Neill B. Field* for the appellant. No appearance for the appellee.

No. 459. FRANK A. MCCUMBER ET AL., APPELLANTS, *v.* ALVA A. NICHOLSON ET AL. Appeal from the Circuit Court of the United States for the Southern District of Iowa. December 4, 1911. Dismissed with costs, on motion of counsel for the appellants. *Mr. Benjamin I. Salinger* for the appellants. *Mr. George Cosson* for the appellees.

No. 768. THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

v. DAISY B. CALDER. In error to the Supreme Court of the State of South Carolina. December 4, 1911. Dismissed with costs, per stipulation. *Mr. W. Huger Fitz-Simons* for the plaintiff in error. *Mr. J. P. Kennedy Bryan* for the defendant in error.

No. 91. THE MUNICIPAL COUNCIL OF SAN JUAN ET AL., APPELLANTS, *v.* JOSE E. SALDANA ET AL. Appeal from the Supreme Court of Porto Rico. December 7, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. C. M. Boerman* for the appellants. No appearance for the appellees.

No. 142. THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* HENRY GIBBS. In error to the Circuit Court of Nelson County, State of Virginia. December 12, 1911. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Henry D. Estabrook*, *Mr. George H. Fearons* and *Mr. Francis Raymond Stark* for the plaintiff in error. No appearance for the defendant in error.

No. 101. BETTIE LIGON ET AL., APPELLANTS, *v.* DOUGLAS H. JOHNSTON ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. December 12, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. Webster Ballinger* for the appellants. No appearance for the appellees.

No. 105. PAUL H. KATZ, APPELLANT, *v.* MATTHEW J.

LONG, CRIMINAL SHERIFF, ETC. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. December 13, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. James J. McLoughlin* for the appellant. *Mr. St. Clair Adams* and *Mr. Albert D. Henriquez, Jr.*, for the appellee.

No. 110. J. A. SCRIVEN COMPANY, APPELLANT, *v.* EDWARD MORRIS ET AL., TRADING AS MORRIS & COMPANY. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. December 14, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. Arthur v. Briesen* and *Mr. George W. Case, Jr.*, for the appellant. *Mr. Edgar H. Gans* and *Mr. W. Calvin Chesnut* for the appellees.

No. 116. JAMES VAUGHAN, PLAINTIFF IN ERROR, *v.* LYDIA STARR TABOR. In error to the Supreme Court of the State of Michigan. December 15, 1911. Dismissed without costs to either party, per stipulation. *Mr. William L. Carpenter* for the plaintiff in error. *Mr. Herschel H. Hatch* for the defendant in error.

No. 117. JAMES VAUGHAN, PLAINTIFF IN ERROR, *v.* LYDIA STARR TABOR. In error to the Supreme Court of the State of Michigan. December 15, 1911. Dismissed without costs to either party, per stipulation. *Mr. William L. Carpenter* for the plaintiff in error. *Mr. Herschel H. Hatch* for the defendant in error.

No. 229. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* CHARLES A. HAMILTON. In error to the Supreme Court of the State of Iowa. December 18, 1911. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Hale Holden* for the plaintiff in error. No appearance for the defendant in error.

No. 126. THE CIENEGUITA COPPER COMPANY, APPELLANT, *v.* THOMAS FARISH, JR., ET AL. Appeal from the Supreme Court of the Territory of Arizona. December 18, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. Eugene S. Ives* for the appellant. *Mr. John F. Wilson* and *Mr. Walter Bennett* for the appellees.

No. 144. THE BELT RAILWAY COMPANY OF CHICAGO, PETITIONER, *v.* THE UNITED STATES. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. December 19, 1911. Dismissed pursuant to the tenth rule. *Mr. William J. Henley* and *Mr. William L. Reed* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 275. THE AMERICAN SUGAR REFINING COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Circuit Court of the United States for the Southern District of New York. December 21, 1911. Dismissed, on motion of counsel for the plaintiff in error. *Mr. James M. Beck* for the plaintiff in error. *The Attorney General* and *The Solicitor General* for the defendant in error.

No. 587. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* ROBERT JAMIESON. In error to the Circuit Court of the United States for the Southern District of New York. January 9, 1912. Dismissed on motion of *Mr. Solicitor General Lehmann* for the plaintiff in error, and cause remanded to the District Court of the United States for the Southern District of New York. *The Attorney General* for the plaintiff in error. *Mr. George Whitefield Betts, Jr.*, for the defendant in error.

No. 829. W. J. MCNAUGHTON, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Supreme Court of the State of Georgia. January 9, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. William Wallace Lambdin* for the plaintiff in error. *Mr. Thomas S. Felder* for the defendant in error.

No. 943. JOHN CHEMGAS, PLAINTIFF IN ERROR, *v.* THOMAS J. TYNAN, WARDEN OF THE COLORADO STATE PENITENTIARY. In error to the Supreme Court of the State of Colorado. January 22, 1912. Docketed and dismissed with costs, on motion of *Mr. Archibald A. Lee* for the defendant in error. No one opposing.

No. 944. PETER HORONS, PLAINTIFF IN ERROR, *v.* THOMAS J. TYNAN, WARDEN OF THE COLORADO STATE PENITENTIARY. In error to the Supreme Court of the State of Colorado. January 22, 1912. Docketed and dismissed with costs, on motion of *Mr. Archibald A. Lee* for the defendant in error. No one opposing.

No. 278. Board of Chosen Freeholders of the County of Burlington et al., Appellants, *v.* The Provident Life & Trust Company of Philadelphia, Trustee. Appeal from the Circuit Court of the United States for the District of New Jersey. January 22, 1912. Dismissed without costs to either party, per stipulation, and cause remanded to the District Court of the United States for the District of New Jersey. *Mr. Alan H. Strong* for the appellants. *Mr. Samuel Dickson* and *Mr. Thomas E. French* for the appellee.

No. 158. St. Louis, Iron Mountain & Southern Railway Company, Plaintiff in Error, *v.* Grace Watson, Administratrix, etc. In error to the Circuit Court of the United States for the Eastern District of Arkansas. January 26, 1912. Judgment affirmed with costs, but without interest, per stipulation, and cause remanded to the District Court of the United States for the Eastern District of Arkansas. *Mr. Lewis Rhoton*, *Mr. James H. Stevenson*, *Mr. Joseph W. Canada* and *Mr. E. B. Kinsworthy* for the plaintiff in error. *Grace Watson*, (pp.) for defendant in error.

No. 167. Bud Brown, Plaintiff in Error, *v.* The State of Texas. In error to the Court of Criminal Appeals of the State of Texas. January 26, 1912. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. J. P. Lightfoot* for the defendant in error. *Mr. Charles K. Bell* and *Mr. George G. Clough* for the plaintiff in error. *Mr. Jewel P. Lightfoot* and *Mr. James D. Walthall* for the defendant in error.

No. 175. ROBERT P. STEWART ET AL., APPELLANTS, *v.* W. W. MITCHELL ET AL. Appeal from the Circuit Court of the United States for the Western District of Tennessee. January 29, 1912. Dismissed with costs, on motion of counsel for the appellants, and cause remanded to the District Court of the United States for the Western District of Tennessee. *Mr. Caruthers Ewing* for the appellants. *Mr. W. C. Caldwell* for the appellees.

No. 298. MARGARET KOPP ET AL., APPELLANTS, *v.* MARIA WATERS. Appeal from the Court of Appeals of the District of Columbia. February 19, 1912. Dismissed with costs on motion of counsel for the appellants. *Mr. Wilton J. Lambert* for the appellants. *Mr. Irving Williamson* for the appellee.

No. 959. E. E. TAENZER & COMPANY, PETITIONER, *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. February 19, 1912. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. Dismissed on motion of counsel for the petitioner. *Mr. Caruthers Ewing* for the petitioner. No appearance for the respondent.

No. 258. THE NORTHERN PACIFIC RAILWAY COMPANY ET AL., APPELLANTS, *v.* THE UNITED STATES. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. February 23, 1912. Dismissed, on motion of counsel for the appellants. *Mr. Charles W. Bunn* and *Mr. Charles Donnelly* for the appellants. *The Attorney General* for the appellee.

No. 319. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM H. LADD. In error to the Circuit Court of Rusk County, State of Wisconsin. February 23, 1912. Dismissed, without costs to either party, per stipulation. *Mr. John L. Erdall* for the plaintiff in error. *Mr. Samuel A. Anderson* for the defendant in error.

No. 995. MARY J. LEESNITZER ET AL., APPELLANTS, *v.* MARGARET E. TAYLOR IN HER OWN RIGHT AND AS EXECUTRIX OF THOMAS TAYLOR, DECEASED. Appeal from the Court of Appeals of the District of Columbia. February 26, 1912. Docketed and dismissed with costs, on motion of *Mr. J. J. Darlington* for the appellee. No one opposing.

No. 536. CHARLES W. MCCONNELL, APPELLANT, *v.* GEORGE H. BURR ET AL. Appeal from the Circuit Court of the United States for the District of Massachusetts. February 26, 1912. Dismissed with costs, on motion of counsel for appellant. *Mr. Robert C. Cooley* for the appellant. No appearance for the appellees.

No. 300. J. A. SCRIVEN COMPANY, APPELLANT, *v.* PREMIUM MANUFACTURING COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. February 28, 1912. Dismissed for want of jurisdiction, per stipulation, on motion of *Mr. F. W. Lehmann* for the appellee. *Mr. Arthur v. Briesen* for the appellant. *Mr. S. L. Swarts* for the appellee.

No. 182. HOMER WALT ET AL., PLAINTIFFS IN ERROR, *v.* THE PEOPLE OF THE STATE OF COLORADO. In error to the Supreme Court of the State of Colorado. February 29, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Robert W. Bonynge* for the plaintiffs in error. No appearance for the defendants in error.

No. 186. THE WASHINGTON WATER POWER COMPANY, PLAINTIFF IN ERROR, *v.* WALTER S. GASKILL. In error to the Supreme Court of the State of Idaho. March 1, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. F. T. Post* for the plaintiff in error. *Mr. John C. Gittings* and *Mr. Justin Morrill Chamberlin* for the defendant in error.

No. 189. ALEXANDER D. MCKNIGHT, PLAINTIFF IN ERROR, *v.* ROBERT T. HODGE, SHERIFF, ETC. In error to the Supreme Court of the State of Washington. March 5, 1912. Dismissed with costs, on motion of *Mr. Lawrence Maxwell* for the plaintiff in error. *Mr. Charles D. Fullen* and *Mr. Lawrence Maxwell* for the plaintiff in error. *Mr. J. H. Forney* for the defendant in error.

No. 205. CAROLINE LESLIE CARTER PAYNE, ALSO KNOWN AS MRS. LESLIE CARTER, PLAINTIFF IN ERROR, *v.* ANLISS E. HEERMAN. In error to the City Court of the City of New York, State of New York. March 7, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Nathaniel Levy* for the plaintiff in error. *Mr. Max D. Josephson* for the defendant in error.

No. 211. MONEYWEIGHT SCALE COMPANY, PLAINTIFF IN ERROR, *v.* FELIX C. MCBRIDE. In error to the Supreme Judicial Court of the State of Massachusetts. March 7, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Charles F. Morse* and *Mr. John M. Zane* for the plaintiff in error. *Mr. Edmund A. Whitman* and *Mr. Albert H. Meads* for the defendant in error.

No. 429. PERFECTO DIMAGUILA AND BUENAVENTURA DIMAGUILA, APPELLANTS, *v.* THE INTERNATIONAL BANKING CORPORATION ET AL. Appeal from the Supreme Court of the Philippine Islands. March 11, 1912. Dismissed with costs, on motion of counsel for the appellants. *Mr. William Henry White* for the appellants. No appearance for the appellees.

CASE DISPOSED OF IN VACATION.

No. 461. AGNES W. B. SHEPARD ET AL., PLAINTIFFS IN ERROR, *v.* THE CITY OF SEATTLE. In error to the Supreme Court of the State of Washington. July 31, 1911. Dismissed pursuant to the twenty-eighth rule. *Mr. Thomas R. Shepard* and *Mr. Alfred J. Daly* for the plaintiffs in error. *Mr. Harold Preston* for the defendant in error.

RIPLEY *v.* UNITED STATES.

UNITED STATES *v.* RIPLEY.

Nos. 498, 499. Motion to modify judgment, submitted March 18, 1912.—Decided April 1, 1912.[1]

Mr. William H. Robeson, Mr. Benjamin Carter and *Mr. F. Carter Pope* for Ripley.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Philip M. Ashford* for the United States.

April 1, 1912. PER CURIAM: motion to modify judgment denied.

SUPREME COURT OF THE UNITED STATES.

Monday, April 1, 1912.

The Chief Justice announced the following order of the court:

Order: It is ordered that rule 21[2] of the rules of practice of this court be amended by adding thereto the following section:

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 the cases are cited.

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[1] For opinion of the court in this case see *ante*, p. 701.

[2] For Rule 21 see 222 U. S. Appendix, p. 26.

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COMMERCE.

1. *Foreign; right to carry on; power of Congress over.*

The power of Congress over foreign commerce is complete; no one has a vested right to carry on foreign commerce with the United States. (*Buttfield* v. *Stranahan*, 192 U. S. 470.) *The Abby Dodge*, 166.

2. *Foreign; power of Congress to regulate.*

Congress can, by exertion of its power to regulate foreign commerce, forbid the importation of sponges gathered under conditions expressed in the act of June 20, 1906. *Ib.*

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COMMON LAW.

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A person has no property—no vested interest—in any rule of the common law. While rights of property created by the common law cannot be taken without due process, the law as a rule of conduct may, subject to constitutional limitations, be changed at will by the legislature. *Second Employers' Liability Cases*, 1.

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1. *Inaction of Congress; effect on power.*

The inaction of Congress on a subject within its power does not affect that power. *Second Employers' Liability Cases*, 1.

2. *Foreign commerce; burden of proving exemption from prohibition.*

When Congress, under its power to regulate foreign commerce, pro-

CONSTITUTIONAL LAW.

Commerce. See INTERSTATE COMMERCE, 19, 23, 25.

1. *Contract impairment; contract of sale; effect of subsequent statute making certain evidence prima facie.*

A contract of sale of state lands, on which periodic payments are to be made, with forfeiture in case of non-payment is not impaired by a subsequent state statute making the official entries in public records *prima facie*, but not conclusive, evidence, of the validity of proceedings for forfeiture. *Reitler* v. *Harris*, 437.

2. *Contract impairment; deprivation of property without due process of law; evidence; validity of Kansas law of 1907, ch. 373.*

The statute of Kansas of 1907, c. 373, making entries of default and proceedings for forfeiture made in usual course of business in the records of sales of school lands *prima facie*, but not conclusive, evidence of the validity of forfeiture proceedings, is not unconstitutional either as depriving one who had previously purchased lands under the act of 1879, c. 161, § 2, of his property without due process of law, or as impairing the obligation of the contract under the act of 1879. *Ib.*

3. *Contract impairment; validity of Ohio act of 1908, § 3283; eminent domain.*

The act of the Ohio legislature of 1908, § 3283, and the ordinance of the city of Cincinnati thereunder, condemning a right of way across the public landing at Cincinnati, are not unconstitutional as impairing the obligation of the contract dedicating the landing as a common for the use and benefit of the town forever. *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 390.

4. *Contract within protection of Constitution.*

A dedication of land as a common for use and benefits of the town forever as shown on a plan, and the acceptance by the town and the sale of lots under the plan constitutes a contract the obliga-

CONSTRUCTION OF STATUTES.

CONSTRUCTION OF TREATIES.

CONSULS.

CONTEMPT OF COURT.

CONTRACTS.

CONTRIBUTORY NEGLIGENCE.

COPYRIGHT.

1. *Publication; performance of play as; effect in England; territorial bounds of British statute.*

Under the law as it existed in 1894, after a play had been performed in England, the rights of the owner to protection against the unauthorized production in England is only that given by the statutes; but the deprivation of common-law rights by force of the statutes was limited by territorial bounds within which the statute was operative. *Ferris* v. *Frohman*, 424.

2. *Publication; performance of play as; effect on common-law right.*

Public representation in this, or in another, country of a dramatic composition, not printed and published, does not deprive the owner of his common-law right save by operation of statute. *Ib.*

3. *Publication; effect of performance of play at common law.*

At common law the public performance of a play is not an abandonment to public use. *Ib.*

4. *Production of unprinted and unpublished play; right of copyist and producer of such play.*

The purpose and effect of the copyright law is not to render fruits of piracy secure; and a copyright does not protect one producing a play which is substantially a copy of an unprinted and unpublished play, the common-law property right whereof is in another. *Ib.*

CORPORATIONS.

CRIMES.

CRIMINAL LAW.

CUSTOMS LAW.

EMPLOYER AND EMPLOYÉ.

EMPLOYERS' LIABILITY ACT.

ESTATES OF DECEDENTS.

EVIDENCE.

HOMICIDE.

See CRIMINAL LAW, 2, 3.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW, 1–4;
EMINENT DOMAIN, 5.

IMMIGRATION.

1. *Chinese; application to, of Alien Immigration act of 1907.*

The Alien Immigration Act of February 20, 1907, c. 1134, § 36, 34 Stat. 898, 908, applies to Chinese laborers illegally coming to this country notwithstanding the special acts relating to the exclusion of Chinese. *United States* v. *Wong You*, 67.

2. *Chinese; finality of decision of question of citizenship.*

Under the acts of August 18, 1894, c. 301, 28 Stat. 372, 390, and of February 14, 1903, c. 552, 32 Stat. 825, the decision of the question of citizenship of a Chinese person seeking to enter the United States is final unless reversed on appeal by the Secretary of Commerce and Labor; and unless it affirmatively appears that the executive officers acted unlawfully or improperly, or abused their discretion, their finding is conclusive and not subject to review by the courts. *Tang Tun* v. *Edsell*, 673.

3. *Chinese; when courts will not interfere with decision as to citizenship.*

In this case it appears that the requirements of the law were satisfied and there is no ground for judicial intervention. *Ib.*

4. *Return of aliens by vessels which bring them over; object of § 19 of act of 1907.*

The object of § 19 of the Immigration Act of 1907, prohibiting the owners of vessels from making any charge or receiving any security for return passage of aliens brought to this country, was to carry out a policy of preventing the transportation of aliens within the excluded class by rendering it unprofitable instead of profitable for the vessel-owner. *United States* v. *Nord Deutscher Lloyd*, 512.

5. *Criminal liability of vessel owner for acts done in pursuance of contract made in foreign country.*

While a statute has no extra-territorial force, and one cannot be indicted here for what he does in a foreign country, the making of a contract in a foreign country may, as in this case, create a condi-

its directors to restrain them from materially altering the bank building will not be transmuted into an action for damages against the directors for so doing; such an action will not lie. *Ib.*

See ADMIRALTY, 5; APPEAL AND ERROR, 7; CONTEMPT OF COURT; EQUITY, 2, 3, 4, 5; JURISDICTION, E 3; PUBLIC SERVICE CORPORATIONS, 6; TAXES AND TAXATION, 6; UNITED STATES, 4.

INSURANCE.

1. *Life insurance policy; law governing construction.*

A life insurance policy which by its terms does not become a completed contract until its delivery on payment of the first premium is to be construed as a contract made in the State where the first premium is paid and the policy delivered, notwithstanding a recital that it is to be construed as though made in another State. *Northwestern Mut. Life Ins. Co.* v. *McCue*, 234.

2. *Life insurance policy; law governing construction.*

In this case, *held*, that a policy issued by a Wisconsin life insurance company on the life of a resident of Virginia, to whom it was delivered in that State on payment of the first premium, is a Virginia contract. *Ib.*

3. *Life policies; death by hand of law not covered by.*

A policy of life insurance, silent on the point, does not cover death by the hand of the law. This is consonant with the rulings of the Virginia courts. *Ib.*

4. *Life; quære as to policy of State.*

Quære: What the public policy of the State of Wisconsin is on the liability of an insurance company for death of the insured by the hand of the law. *Ib.*

5. *Mutual companies; rights of policyholders.*

Even though a policy in a mutual life insurance company be a property right, it is the measure of rights of every one thereunder, and if the owner thereof cannot recover because it would be against public policy to permit a recovery, neither can the innocent heirs of that person recover. *Ib.*

INTEREST.

See NATIONAL BANKS.

INTERLOCUTORY ORDERS.

See APPEAL AND ERROR, 10.

INTERSTATE COMMERCE.

INTERSTATE COMMERCE COMMISSION.

JUDICIAL NOTICE.

JUDICIARY.

JURISDICTION.

A. Of This Court.

1. *Under § 709, Rev. Stat.; claim of copyright under Federal law.*

Although complainant may assert his own common-law copyright to his play, if he alleges that defendant has obtained a copyright for the play sought to be enjoined, and the defendant stands upon the copyright and is enjoined, a Federal right is set up and denied, and this court has jurisdiction to review the judgment, under § 709, Rev. Stat. *Ferris* v. *Frohman*, 424.

2. *Under § 709, Rev. Stat.; what constitutes Federal question for purpose of.*

Overruling objections to admission of evidence other than field notes of surveys is in effect passing on effect of the requirements of § 2396, Rev. Stat., and, in regard to surveys of public lands, involves a Federal question reviewable by this court under § 709, Rev. Stat. *Graham* v. *Gill*, 643.

3. *Of appeal from Circuit Court of Appeals.*

This court has jurisdiction of an appeal from the Circuit Court of Appeals in this case, as the jurisdiction of the Circuit Court did not depend only on diversity of citizenship, but the constitutionality of a state law and the construction of a Federal statute were also involved. *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 70.

4. *To review judgment in case where immunity claimed under Interstate Commerce Act.*

The insistence in the state court by an interstate carrier that a shipper cannot recover excess collected over a special contract rate because the rate collected conformed to the applicable provisions of the Interstate Commerce Act is an adequate assertion of a right or immunity under that act, and this court can review judgment in favor of the shipper. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 573.

5. *To consider Federal question where judgment of state court rests on matter of general law.*

Where the judgment of the state court rests on a matter of general law strong enough to sustain the judgment, this court cannot consider the Federal question involved; even if it were actually considered by the state court and determined adversely to plaintiff in error. (*Hale* v. *Akers*, 152 U. S. 554.) *Gaar, Scott & Co.* v. *Shannon*, 468.

JURY AND JURORS.

LIMITATION OF LIABILITY.

See ADMIRALTY, 3–9.

LIQUORS.

See INTERSTATE COMMERCE, 4, 5, 6, 18, 19.

LITTORAL RIGHTS.

See RIPARIAN RIGHTS, 4–7.

LOCAL LAW.

Argentine Republic. Right of consuls to administer estates of deceased nationals (see Consuls, 4). *Rocca* v. *Thompson*, 317.

Arizona. Abandonment and forfeiture of mining claims; § 3241, Rev. Stat. (see Mines and Mining, 1, 2). *Clason* v. *Matko*, 646.

California. Administration of estates of decedents (see Consuls, 6). *Rocca* v. *Thompson*, 317.

Code of Civil Procedure, relative to service by publication (see Constitutional Law, 9). *Jacob* v. *Roberts*, 261.

Kansas. Statutes of 1907, c. 273, relative to forfeiture of school lands (see Constitutional Law, 2). *Reitler* v. *Harris*, 437.

Kentucky. Statute of 1906, prohibiting transportation of intoxicating liquors (see Interstate Commerce, 19). *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 70.

Minnesota. Rev. Laws, 1905, Chapter 11, taxing express companies (see Interstate Commerce, 23). *United States Express Co.* v. *Minnesota*, 335.

Montana. Licensing of laundries (see Constitutional Law, 17); *Quong Wing* v. *Kirkendall*, 59.

Ohio. Power of eminent domain. After its admission into the Union, the legislative power of the State of Ohio was not restricted in any way by the provisions of Article 2 of the Northwest Ordinance of 1787, except as limited by its own constitution, and that State has every power of eminent domain which pertains to the other States. *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 390.

Act of 1908, § 3283, relative to condemnation of right of way (see Constitutional Law, 3). *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 390.

LOCUS PENITENTIÆ.

MANDAMUS.

MORTGAGES AND DEEDS OF TRUST.

See LOCAL LAW (PORTO RICO).

MUNICIPAL CORPORATIONS.

Ordinance as contract; to what subject.

A municipal ordinance drawn in form of a contract to be accepted by the franchisee, when accepted becomes a contract and is subject to the reserved powers of the municipality as limited by the laws of the State. *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 655.

See PUBLIC SERVICE CORPORATIONS, 7.

MUTUAL INSURANCE COMPANIES.

See INSURANCE, 5.

NATIONAL BANKS.

1. *Actions under Rev. Stat., § 5198, to recover usurious interest; when period of limitation begins to run.*

The two-year limitation in Rev. Stat., § 5198, within which an action must be commenced against a national bank to recover double the amount of payments of usurious interest, begins to run from the time of payment of the usurious interest, and not from the time of payment of the note. *McCarthy* v. *First National Bank*, 493.

2. *Usurious contracts prohibited; no statute of limitations to defense of usury.*

National banks are prohibited from making usurious contracts, and whenever the debtor is sued on such a contract, he may plead the usury and be relieved from payment; as to this defense there is no statute of limitations. *Ib.*

3. *Usurious interest exacted by; remedies and defenses of debtor.*

Where a national bank reserves or deducts usurious interest in advance, the debtor may plead usury, but may not recover double the amount paid under § 5198, Rev. Stat. *Ib.*

4. *Usurious contracts; actions on; when statute of limitations begins to run.*

When the debtor actually makes, and the national bank knowingly receives and appropriates, a payment of usurious interest, the cause of action arises and the statute begins to run. *Ib.*

5. *Locus penitentiæ; to whom privilege granted.*

There is no *locus penitentiæ*. That privilege is only granted to those

NAVIGABLE WATERS.

NAVIGATION.

PLEADING.

See ADMIRALTY, 1, 2; JUDGMENTS AND DECREES, 7; NATIONAL BANKS, 2, 3; STIPULATION OF PARTIES, 1.

POLICE POWER.

See CONSTITUTIONAL LAW, 10; STATES, 6.

POLITICAL QUESTIONS.

See CONSTITUTIONAL LAW, 21–25, 28.

PORTO RICO.

See JURISDICTION, C; LOCAL LAW.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF.

PRACTICE AND PROCEDURE.

1. *Affirmance where no error in single question brought up.*

Where a case is brought up on an appeal on a single question in regard to which there is no error, judgment below will be affirmed. *Ker & Company* v. *Couden*, 268.

2. *Reversals; when this court will not reverse although differing with lower court as to details of decree.*

The state court having treated a public utility corporation fairly as to value of plant depreciation, and found that the net returns would exceed six per cent., and given it leave to try the case again after the legislative rate had been in effect, this court does not feel warranted in reversing on the ground that the rate is confiscatory because in some details this court might have treated the corporation differently. *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 655.

3. *Motion to dismiss; denial of.*

Where the bill attacks the constitutionality of the state law as applied by the state court, and the application of a case heretofore decided by this court runs to the merits, the motion to dismiss will be denied. *Ontario Land Co.* v. *Wilfong*, 543.

4. *Effect of § 709, Rev. Stat., to open evidence for reëxamination.*

The practice and decisions of this court are that § 709, Rev. Stat., does not give to a writ of error to the state court in a chancery

PRESUMPTIONS.

PRINCIPAL AND AGENT.

PRINCIPAL AND SURETY.

1. *Payment by surety of amount of supersedeas bond held not voluntary.*

Payment by a surety company of the amount of a supersedeas bond after affirmance of the judgment by the Supreme Court of the Territory and notice by the Governor of the State of non-payment by the principals and that unless the judgment were paid forthwith, or excuse for non-payment shown, the company would forfeit its right to transact business in the Territory, is not a voluntary payment even if the Governor had no power to revoke the license, no ruling to such effect having been made prior to the payment. *United States Fidelity Co.* v. *Sandoval*, 227.

2. *Payment by surety of amount of supersedeas bond; effect of taking security from judgment creditor on liability of appealing debtor to reimburse.*

The fact that an appeal was subsequently taken by the judgment debtors to this court from the judgment, and that on payment thereof the surety company took security for repayment from the judgment creditor in the case of reversal, does not diminish the right of the surety company to collect from the principals the amount of the debt and all of its expenses as agreed in the application for the bond. *Ib.*

See COURTS, 5.

PRIVILEGES AND IMMUNITIES.

See EVIDENCE, 2, 3.
PHILIPPINE ISLANDS, 1–6.

PROBATE LAW.

See ESTATES OF DECEDENTS.

PROCESS.

See CONSTITUTIONAL LAW, 8, 9; JURY AND JURORS, 1; INJUNCTION; MANDAMUS.

PRO CONFESSO DECREES.

See JUDGMENTS AND DECREES, 5, 6, 7.

PROPERTY RIGHTS.

That which is taken subject to a right cannot be a burden upon that right. Clason v. *Matko*, 646.

See COMMON LAW;
EQUITY, 2–5;
INSURANCE, 5.

PUBLIC EXIGENCY.

See EMINENT DOMAIN, 8.

PUBLIC LANDS.

1. *Purchasers; who excluded from becoming.*

A prohibition against purchase of public lands by officers of the Land Department and employés is to prevent abuse and inspire confidence in administration of the land laws, and should be construed broadly to include officials and employés of subordinate offices and all methods of securing title to public lands under the general laws. *Waskey* v. *Hammer*, 85.

2. *Mineral lands; who may not make location.*

A United States mineral surveyor is disqualified under § 452, Rev. Stat., from making a mining location. *Ib.*

3. *Indemnity grants; lands open to selection.*

An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future, and what the party entitled may elect to select depends upon the state of the lands at the time of selection. (*Ryan* v. *Railroad Company*, 99 U. S. 382.) *United States* v. *Southern Pacific R. R. Co.*, 565.

4. *Railroad grants; right of Southern Pacific company to select lieu lands.*

The Southern Pacific Railroad Company is not entitled under the Branch Line Land Grant Act of March 3, 1871, c. 122, § 23, 16 Stat. 573, 579, to select as lieu lands within the indemnity limits specified in that act, any lands within the granted or indemnity limits of the grant made to Atlantic & Pacific Railroad Company by the act of July 27, 1866, 14 Stat. 292, c. 278, and forfeited by that road under the act of July 6, 1886, 24 Stat. 123, c. 637. *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, followed, and *Ryan* v. *Railroad Co.*, 99 U. S. 382, distinguished. *Southern Pacific R. R. Co.* v. *United States*, 560.

5. *Railroad grants; right of Southern Pacific company to select lieu lands.*

Under the main line grant made to the Southern Pacific Railroad Company by the act of July 27, 1866, c. 278, § 18, 14 Stat. 292, the company can select lieu lands within the primary limits of the grant made to the Atlantic & Pacific Railroad Company by § 3 of the same act and forfeited under the act of July 6, 1886, c. 637, 24 Stat. 123. *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, distinguished. *United States* v. *Southern Pacific R. R. Co.*, 565.

STATUTES.

A. CONSTRUCTION OF.

WORDS AND PHRASES.

WRIT AND PROCESS.